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# THE APPLICABILITY OF THE ECSC-CARTEL PROHIBITION (ARTICLE 65) DURING A "MANIFEST CRISIS"†

*Ernst-Joachim Mestmäcker\**

## I. THE ISSUE

The Commission and the Council have found that the steel industry of the Community is facing a "manifest crisis"<sup>1</sup> within the meaning of article 58 of the European Coal and Steel Community (ECSC) Treaty.<sup>2</sup> Factors that have led to this crisis include structural peculiarities of the steel industry, an increase in production costs, a decrease in demand for steel and steel products, and the resulting excess capacity in steel mills. A majority of the Member States have attempted to protect their national steel industries from the economically mandated cutback in production capacity through substantial subsidization. International competition has thus degenerated, in significant respects, into competition through subsidies. The anti-subsidy provisions of article 4 of the ECSC Treaty have done nothing to prevent this development, but the reasons for their ineffectiveness are not the subject of this Article.

The collapse in steel prices that has resulted from excess capacity and efforts by undertakings<sup>3</sup> to recover only a portion of their overhead costs, while abandoning any hope of full cost recovery, has induced the Community to accept certain measures aimed at combatting the structural crisis facing the steel industry. Among these measures are anticompetitive agreements among steel undertakings. The resort to concerted and voluntary action by undertakings has become a nearly routine component of the Community's steel policy. Price-fixing agreements, the focus of this Article, mark the high point in this development. The behavior of Community in-

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1. *S.p.A. Ferriera Valsabbia v. Commission of the Eur. Communities* (Case No. 154/78), 1980 E. Comm. Ct. J. Rep. 907, 996-97.

2. Treaty instituting the European Coal and Steel Community, Apr. 18, 1951, art. 58, 261 U.N.T.S. 140 (1957) *reprinted in* *Treaties Establishing the European Communities* #13 (1975) [hereinafter cited as ECSC Treaty].

3. In the official English translation of the ECSC Treaty, the term "undertaking" is employed to describe those entities subject to the provisions of the Treaty; such will be the usage of this term throughout this Article. The term is defined in article 80 of the ECSC Treaty as "any undertaking engaged in production in the coal or the steel industry" within the Common Market. ECSC Treaty, *supra* note 2, art. 80. For the purposes of articles 65 and 66, the definition is expanded to include "any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries." ECSC Treaty, *supra* note 2, art. 80. For a further discussion of the concept of "undertaking," see *Mannesmann AG v. High Authority of the ECSC* (Case No. 19/61), 1962 E. Comm. Ct. J. Rep. 357, 371-72.

stitutions permits the conclusion that, under the current conditions in the steel market, they do not feel obligated to apply the prohibition of article 65 of the ECSC Treaty, which bars certain anticompetitive agreements.<sup>4</sup> Instead, anticompetitive agreements have been required and officially employed as a means of combatting the crisis by Community institutions. Yet the legality of participation by undertakings in such agreements depends on whether such actions by Community institutions are legal.

4. Art. 65 of the ECSC Treaty, *supra* note 2, reads as follows:

1. All agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the common market shall be prohibited, and in particular those tending:

- (a) to fix or determine prices;
- (b) to restrict or control production, technical development or investment;
- (c) to share markets, products, customers or sources of supply.

2. However, the High Authority shall authorise specialisation agreements or joint-buying or joint-selling agreements in respect of particular products, if it finds that:

- (a) such specialisation or such joint-buying or -selling will make for a substantial improvement in the production or distribution of those products;
- (b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
- (c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the common market, or to shield them against effective competition from other undertakings within the common market.

If the High Authority finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings, it shall authorise them also when satisfied that they meet the same requirements.

Authorisations may be granted subject to specified conditions and for limited periods. In such cases the High Authority shall renew an authorisation once or several times if it finds that the requirements of subparagraphs (a) to (c) are still met at the time of renewal.

The High Authority shall revoke or amend an authorisation if it finds that as a result of a change in circumstances the agreement no longer meets these requirements, or that the actual results of the agreement or of the application thereof are contrary to the requirements for its authorisation.

Decisions granting, renewing, amending, refusing or revoking an authorisation shall be published together with the reasons therefor; the restrictions imposed by the second paragraph of Article 47 shall not apply thereto.

3. The High Authority may, as provided in Article 47, obtain any information needed for the application of this Article, either by making a special request to the parties concerned or by means of regulations stating the kinds of agreement, decision or practice which must be communicated to it.

4. Any agreement or decision prohibited by paragraph 1 of this Article shall be automatically void and may not be relied upon before any court or tribunal in the Member States.

The High Authority shall have sole jurisdiction, subject to the right to bring actions before the Court, to rule whether any such agreement or decision is compatible with this Article.

5. On any undertaking which has entered into an agreement which is automatically void, or has enforced or attempted to enforce, by arbitration, penalty, boycott or any other means, an agreement or decision which is automatically void or an agreement for which authorisation has been refused or revoked, or has obtained an authorisation by means of information which it knew to be false or misleading, or has engaged in practices prohibited by paragraph 1 of this Article, the High Authority 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 this Article; 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 per cent of the annual turnover of the undertakings in question in the case of fines, and 20 per cent of the daily turnover in the case of periodic penalty payments.

This evaluation becomes particularly necessary in light of the Commission's Communication of November 14, 1981, on the goals of its steel policy. In this Communication the Commission requested steel undertakings to increase prices by specific amounts.<sup>5</sup> The Commission pointed to article 3(c) as its rationale. This provision requires the Commission to work towards the establishment of the lowest possible prices, while preserving an undertaking's ability to take necessary amortization and its ability to earn normal rates of return on invested capital.<sup>6</sup> The legality of the Commission's action here must, however, be viewed in the light of other Treaty provisions as well.

Article 8 requires the Commission to work towards the objectives articulated in the Treaty. However, this duty can only be performed "in accordance with the provisions" of the Treaty.<sup>7</sup> Further, article 3 requires Community institutions to act only "within the limits of their respective powers."<sup>8</sup> Finally, article 5 requires the Community to employ all measures necessary "to ensure the observance of the rules laid down in this Treaty."<sup>9</sup> These provisions demonstrate that the Community objectives set forth in articles 2 and 3 are not in themselves sources of institutional authority.<sup>10</sup> They reflect the principle, applicable to every lawful action of public authorities, that the powers of Commission institutions are limited by their enabling provisions. This applies not only to the (pure) application of law as such, but also to the exercise of enumerated powers. Article 95(3) confirms this proposition, as it provides for modification of the rules governing the High Authority's exercise of its powers through amendments to the Treaty in the event of fundamental economic or technical changes in the market for coal and steel. Moreover, the Court of Justice has emphasized that, when the Commission is empowered to take extraordinary measures that interfere with the workings of a free market, "the provisions of the Treaty under which the measure is taken stipulate precisely which articles the Commission is obliged to take into account."<sup>11</sup>

It is upon this foundation that the implementation of the pricing policy

5. "The Commission invites the steel industry to raise its list of prices for bulk products. . . ." Communication from the Commission concerning the objectives of the steel price policy, 24 O.J. EUR. COMM. (No. C 294) 3 (Nov. 14, 1981).

6. Art. 3 of the ECSC Treaty, *supra* note 2, reads in part:

The institutions of the Community shall, within the limits of their respective powers, in the common interest:

(c) ensure the establishment of the lowest prices under such conditions that these prices do not result in higher prices charged by the same undertakings in other transactions or in a higher general price level at another time, while allowing necessary amortization and normal return on invested capital . . . .

7. ECSC Treaty, *supra* note 2, art. 8.

8. ECSC Treaty, *supra* note 2, art. 3.

9. ECSC Treaty, *supra* note 2, art. 5.

10. See Knöpfe, *Kartellrecht der Europäischen Gemeinschaft für Kohle und Stahl*, in H. MÜLLER-HENNEBERG, G. SCHWARTZ & W. BENISCH, *GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN UND EUROPÄISCHES KARTELLRECHT: GEMEINSCHAFTSKOMMENTAR* ¶ 1, at 2 (4th ed. 1981) [hereinafter cited as *GEMEINSCHAFTSKOMMENTAR*].

11. *S.p.A. Ferriera Valsabbia v. Commission of the Eur. Communities* (Case No. 154/78), 1980 E. Comm. Ct. J. Rep. 907, 1009.

of the Community institutions and individual undertakings must be judged. Part II of this article seeks to clarify the relationship between the objectives of the Community and the particular provisions of the Treaty. The influence of the current structural crisis on the protection of competition will be examined in Part III. Finally, Part IV will discuss the restrictions on the Treaty's goal of attaining "normal competitive conditions."

## II. ENDS AND MEANS WITHIN THE SYSTEM OF THE TREATY

Articles 2 and 3 of the Treaty establish the economic objectives of the Community. Article 2 requires the Community to work towards economic expansion, growth of employment, and a rising standard of living in the Member States "through the establishment of a common market as provided in Article 4." This foundation also applies to the other goal stated in article 2, to "progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity." From this provision it may properly be concluded that the Treaty intended competition to be not only a means of achieving the economic policies of the Community, but an end in itself.

However, competition, as a goal, is subject to the progressive development of the Common Market. Furthermore, unemployment is to be avoided and the Commission must endeavor not to provoke fundamental disturbances in the economies of the Member States. Article 4 specifies the principle of competition and the duties assigned by article 3 to the Community institutions. This provision lists those activities of the Member States and undertakings deemed incompatible with the Common Market. It provides that these practices are to be abolished through measures "provided in this Treaty."<sup>12</sup> This does not mean that article 4 provides only an unbinding statement of political intent. To the extent that specific provisions are absent, article 4 applies directly;<sup>13</sup> to the extent that the Treaty contains specific provisions, article 4 applies in conjunction with them. This is particularly true of article 4(d). Its prohibition against division or exploitation of the markets is given more concrete expression through article 65.<sup>14</sup>

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12. Art. 4 of the ECSC Treaty, *supra* note 2, reads as follows:

The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

- (a) import and export duties, or changes having equivalent effect, and quantitative restrictions on the movement of products;
- (b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms or transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier;
- (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;
- (d) restrictive practices which tend towards the sharing or exploiting of markets.

13. *Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority of the ECSC* (Nos. 7, 9/54), 1956 E. Comm. Ct. J. Rep. 175, 195; Jaeger, *Das Kartellverbot*, in *KARTELLVERBOT UND FUSIONS-KONTROLLE IN DER MONTANUNION* 9, 17 (G. Bernini, J. Jaeger & H. Matthies eds. 1972).

14. Proposed Amendment to Article 65 of the Treaty establishing the European Coal and Steel Community, Advisory Opinion No. 1/61, 1961 E. Comm. Ct. J. Rep. 243, 261-62.

Article 4 is particularly instructive on the relationship between goals and means within the system of the Treaty, because the provision, like the policy statements in article 3, may not be changed by the so-called "little revision" procedure of article 95(3). It therefore follows, *a maiore ad minus*, that the Community institutions may not disregard article 4 to achieve any of the Treaty's goals, absent a specific provision in the Treaty itself. According to the language of the Court of Justice concerning the little revision procedure, articles 65(2)(c) and 4(d) are consistent and should be considered as a whole.<sup>15</sup>

Agreements that violate article 65(2) are incompatible with the Common Market, regardless of any incidental positive effects they may produce. In this respect any differentiation between goals and means is eliminated. Thus, any restrictive agreement that permits the participating undertakings to agree on prices for a substantial part of the production of the Common Market, to control or restrict distribution or marketing, or to insulate their productive activities from competition from other firms is absolutely forbidden. "This prohibition is of strict application and distinguishes the system established by the Treaty."<sup>16</sup> Given this, it must be concluded that the Commission, if it encourages or tolerates pricing agreements between steel undertakings, is acting illegally. As the following discussion will demonstrate, the elements that comprise a violation of article 65(2)(c) by the Commission have, in fact, been established.

Noncompliance with article 4 is permissible only when allowed by the Treaty. Such noncompliance may be authorized either by the text of the Treaty or, in the case of the establishment of minimum prices, by judicial interpretation.<sup>17</sup> Noncompliance is not available in cases of the establishment of production quotas. In such cases, according to article 58, articles 2, 3 and 4 must be taken into account.<sup>18</sup> The Commission remains, in particular, obligated to comply with article 4(d).

The very first case before the Court of Justice concerning the ECSC Treaty dealt with the relationship between the goals of the Treaty and the particular provisions of article 60(2).<sup>19</sup> Article 60(2) requires that price lists and conditions of sale used by firms in transactions within the Common Market be made public for the purposes articulated in article 60(1), and "to the extent and in the manner prescribed by the High Authority after consulting the Consultative Committee."<sup>20</sup> For this purpose, article 60(1) refers to articles 2, 3 and 4.

In its decision interpreting the application of article 60(2), the High Au-

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15. 1961 E. Comm. Ct. J. Rep. at 261-62.

16. 1961 E. Comm. Ct. J. Rep. at 262.

17. Noncompliance with article 4 in the case of minimum prices may be authorized by judicial interpretation because article 61, which permits limited price fixing, requires only that such action be necessary to the objectives set out in article 3. By implication, the price-fixing may not be required to meet the standards of article 4.

18. ESCS Treaty, *supra* note 2, art. 58(2); see S.p.A. Ferriera Valsabbia v. Commission of the Eur. Communities (Case No. 154/78), 1980 E. Comm. Ct. J. Rep. 907, 1009.

19. France v. High Authority of the ECSC (Case No. 1/54), 1954 E. Comm. Ct. J. Rep. 1, 8-13.

20. ECSC Treaty, *supra* note 2, art. 60(2).

thority relaxed the universal requirement of the publication of price lists to permit a free and market-oriented setting of steel prices and in consideration of actual business practices and business relations.<sup>21</sup> The Court examined whether this weakening of the duty to adhere to published prices could be justified, and quickly reached the decision that the Treaty rules are mandatory. The Court held that article 60(2) did not permit a relaxation of the duty to sell at published prices only. If the High Authority could permit such a relaxation, it could also completely eliminate the entire scheme.

The Court then addressed the issues of whether this result was inconsistent with other objectives of the Treaty or whether it would weaken other powers. These questions were answered in the negative:

The state of the market, in particular the realization that there is a trend to lower prices, is likewise no ground for abolishing the rule that prices are to be published, since such publication is provided for by the Treaty. In the event of a crisis or disturbances on the market, the Treaty confers various powers on the High Authority — in particular under Article 60 (2) last line, Article 61, Article 63, Articles 58 and 59 — but nowhere the power to dispense with the compulsory publication of price-lists. Moreover, the rule as to compulsory publication, laid down by the Treaty, is of a general nature and in no wise depends on current market trends.<sup>22</sup>

The decision stated unequivocally that application of the mandatory provisions of the Treaty was not subject to the Community institutions' discretion. This applies even if such application produces a conflict with other goals of the Treaty. The prohibition against cartels and concerted activities is, as is article 60(2), one of the mandatory provisions of the Treaty. The Commission may not disregard its duty to apply these provisions in its pursuit of other Treaty objectives.

### III. THE PROTECTION OF COMPETITION UNDER CONDITIONS OF A STRUCTURAL CRISIS

#### A. *The Resolution of Crises within the System of the Treaty*

Article 65(1) prohibits all agreements and concerted activity that would directly or indirectly prevent normal competitive conditions within the Common Market. Particularly offensive are agreements concerning price.<sup>23</sup> Article 65(2) contains exceptions for agreements for specialization or for joint purchasing or selling, so long as these agreements contribute to an appreciable improvement in production or distribution and provided that the anticompetitive obligations of the agreement do not exceed those required for legitimate purposes. The previously mentioned article 65(2)(c) establishes an absolute boundary for the tolerance of cartels. Undertakings may not control prices over a significant portion of the Common Market.<sup>24</sup> The ECSC Treaty does not contain a provision, similar to that in section 4

21. High Authority of the ECSC Decision 54/2, on the publication of price lists and conditions of sale applied by undertakings in the steel industry, [Eng. Special Ed. 1952-1958] O.J. EUR. COMM. (No. 1/218) 15 (Jan. 13, 1954).

22. 1954 E. Comm. Ct. J. Rep. at 14.

23. See ECSC Treaty, *supra* note 2, art. 65(1) (quoted *supra* note 4).

24. See ECSC Treaty, *supra* note 2, art. 65(2)(c) (quoted *supra* note 4).

of the German Act against Restraints of Competition,<sup>25</sup> dealing with cartels during a structural crisis. It does not follow, however, that the ECSC Treaty disregarded the particular problems that could arise because of the special structure of the coal and steel industries. Such problems were thoroughly considered by the Member States at the time the Treaty was concluded, and concern for them underlies all the more important Treaty rules.

On both the national and international level, the coal and steel industry has been characterized by a high degree of concentration and cartelization. At the beginning of World War II, the steel market was organized into a system of related national and international cartels. The level of organization in the German steel industry was particularly high. The Unrefined Steel Export Community (Rohstahlexportgemeinschaft) was founded in 1933 and operated until World War II. This group controlled the market in continental Europe and was formed for the purpose of regulating prices and setting quotas on exports to third countries. The regulation of national markets was reserved for national cartels.<sup>26</sup>

The stark contrast between the historical market organizations and the new regime established by the ECSC Treaty was characterized in a political economic study:

The Treaty of the European Coal and Steel Community fundamentally seeks competition through *price*, a sharp contrast to the cartel accords of the time before and between the two World Wars, when price competition played no part in the market for raw materials. Nearly independent of cyclical developments and for practical purposes undisturbed by foreign sources of competition, the price for raw materials assumed the function of a fixed exchange rate — just as such rates force an adjustment in the domestic market (quantity regulation). In the export markets alone did price retain a certain role as a market supply regulator. Periods of official price fixing in the domestic markets further narrowed the policies of the undertakings. Determined without regard to the market situation, price attained the character of a fee rather than of compensation established by the marketplace.<sup>27</sup>

It is against this economic background that the competition rules of the Treaty and the resulting separation of functions between the Community institutions and cartels must be appreciated.

The steel industry has all the characteristics traditionally regarded as a complete justification for cartelization: homogeneous, transport-intensive goods; capital-intensive production and a resulting high proportion of fixed costs; oligopolistic market structure; and low elasticity of demand. Under such conditions, a persistent decline in demand creates a tendency to "ruinous competition," because every sale contributes to the recovery of fixed costs so long as the return exceeds average variable cost. Such effects can be brought about as easily by a decrease in demand, during a cyclical downswing, as from a persistent change in demand. The resulting competition is looked upon by the undertakings as ruinous and as justifying mea-

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25. Gesetz gegen Wettbewerbsbeschränkungen § 4, 1980 BGBl I 1761, 1762.

26. See H. JÜRGENSEN, DIE WESTEUROPÄISCHE MONTANINDUSTRIE UND IHR GEMEINSAMER MARKT 98-102 (1955).

27. *Id.* at 190. [Author's translation. — Ed.]

tures for self-preservation, such as restrictions in competition and the setting of production quotas. An oligopolistic market structure and homogeneous, transport-intensive goods facilitate the restriction of competition. These peculiarities of competition, in markets such as the steel market, have led economists and politicians to justify cartels as "children of distress," which, because of the fixed-cost structure of modern industry, are indispensable or harmless.<sup>28</sup>

The ECSC Treaty repudiates this school of thought. Instead, it establishes an economic order based upon the rule of law.<sup>29</sup> The Treaty does take into account the special characteristics of the coal and steel industry, but without leaving the resolution of the problems flowing therefrom to industrial self-government. The Treaty vests exclusive authority to combat crises, which may arise from severe fluctuations of supply and demand, in Community institutions. Presently there is a crisis created by a decline of demand. The resulting excess capacity may lead to a kind of price competition, which in turn may be regarded as endangering the achievement of Community goals. The instrumentality of the Treaty is tailored to these problems. Primarily, the general provisions in article 60 concerning price are intended to prevent a deterioration of price competition. The system of setting prices in article 60 takes into account the historical and economic peculiarities of the pricing system in the steel market, and should foster the development of an ordered and, in important respects, limited price competition.<sup>30</sup>

Should these provisions, in the event of a manifest crisis, prove insufficient to bring about the pricing structure intended by the Treaty, then the Commission is entitled to establish minimum prices under article 61. In so doing, however, it must consider the competitive capabilities of the relevant firms and the principles stated in article 3(c). If these measures likewise prove insufficient, article 58(1) obligates the Commission to establish a system of production quotas.<sup>31</sup>

Quantitative restrictions in production do not render minimum prices unnecessary. They may remain necessary to prevent prices from falling below the level defined by article 3(c). An economic analysis of this relationship provides confirmation:

The restriction of the output of unrefined steel erects barriers to a price collapse through the vehicle of a supply shortage, but whether it is possible to prevent prices from falling below a level where the proceeds per ton

28. See, e.g., E. SCHMALENBACH, *DER FREIEN WIRTSCHAFT ZUM GEDÄCHTNIS* (1949); J. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (5th ed. 1976).

29. See, e.g., Ophüls, *Juristische Grundgedanken des Schumanplans*, 4 NJW 289, 291 (1951).

30. See Mestmäcker, *Das Verbot von Preisdiskriminierungen im Recht der Europäischen Gemeinschaft für Kohle und Stahl*, in 1 KARTELLE UND MONOPOLE IM MODERNEN RECHT 309 (1961) (with English translation).

31. The Commission instituted production quotas in October, 1980, under a system by which it determines appropriate production levels for individual undertakings on a quarterly basis. The regulation includes all steel undertakings within the meaning of article 80, with the exception of small producers. Commission Decision 2794/80/ECSC, establishing a system of steel production quotas for undertakings in the iron and steel industry, 23 O.J. EUR. COMM. (No. L 291) 1 (Oct. 31, 1980).

cover more than mere variable costs, only the purchasers can decide. *What the steel industry needs is a minimum sales level at minimum prices. Because of the special characteristics of its cost structure, these minimum sales must permit a relatively high capacity utilization.*<sup>32</sup>

The rules of the Treaty leave no doubt that, during a manifest crisis, the Community institutions are not authorized to disregard application of the cartel prohibition if they do not avail themselves of the possibility of establishing minimum prices. This result is confirmed by the following decision of the Court of Justice.

### B. Article 95(3)

In 1961, the High Authority and the Council proposed a revision of the Treaty pursuant to article 95(3). The revision would have granted the High Authority the power to approve anticompetitive agreements within the meaning of article 65(1) whenever these agreements "are capable of achieving objectives of adaptation which the High Authority finds appropriate" and "are essential in order to attain those objectives and are not more restrictive than is necessary for that purpose."<sup>33</sup> This new authorization for cartels should have been accompanied by additional controls to prevent abuse. The proposal was based on the structural crisis, which, in the case of the coal market, was a result of the steady substitution of oil for coal. The Court of Justice, in an opinion required under article 95(4), held that any amendment must precisely describe the nature of those agreements which could be authorized and must clearly describe the goal to be achieved by them:

[O]therwise it would constitute not the adaptation of the exercise of a power already conferred upon the High Authority within the limits of the derogations allowed by Article 65 (2) but the grant of power without defined limits, and thus of such a vast and indefinite extension of its existing powers, as to amount to an alteration not only in the extent but in the nature of those powers, in other words, to a new power.<sup>34</sup>

The Court of Justice determined that the proposed amendment did not satisfy these requirements.

The Court held that the proposed amendment exceeded the mere adaptation of the High Authority's powers and, due to its vagueness, made it impossible to determine whether it interfered with the provisions of articles 2, 3 and 4.<sup>35</sup> The absolute limits of any amendment to the Treaty under article 95(3), which stem from article 4(d) in conjunction with article 65(2)(c), have been referred to previously. The Court of Justice equated the objective criterion of article 65(2)(c) with article 4(d): a violation of article 4(d) is always produced if a cartel controls a substantial part of the production of the Common Market.<sup>36</sup> Hence, through its encouragement of, and

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32. H. JÜRGENSEN, *supra* note 26, at 104 (emphasis in original). [Author's translation. — Ed.]

33. Proposed Amendment to Article 65 of the Treaty establishing the European Coal and Steel Community, Advisory Opinion No. 1/61, 1961 E. Comm. Ct. J. Rep. 243, 243.

34. 1961 E. Comm. Ct. J. Rep. at 258.

35. 1961 E. Comm. Ct. J. Rep. at 259.

36. 1961 E. Comm. Ct. J. Rep. at 262.

acquiescence in, price agreements among steel undertakings, the Commission had taken on an authority that could not be based upon revision of the Treaty under the provisions of article 95(3).

### C. *Price-fixing Agreements and Minimum Prices*

The manifest crisis, so declared by the Community institutions, justifies the establishment of minimum prices under article 61. The Commission has, however, recommended price increases. This recommendation has the discernible purpose of retroactively legitimizing price increases founded on agreements among steel undertakings.

This section of the present Article will examine whether the Community institutions were justified in foregoing the minimum price regulation called for by the Treaty in favor of tolerating and recommending price-fixing agreements. The Commission recommendations reflect an orientation towards the price level established by these price agreements. The explanation of Commission Member Graf Davignon appears to be based on this view of the law: The Commission had not left the steel undertakings a free hand in the establishment of prices; rather, the Commission decided on price increases only after discussion with undertakings and users.<sup>37</sup>

Price-fixing agreements, even those entered into with the cooperation of the Commission, are not an appropriate substitute for the minimum price regulation foreseen by the Treaty. Such "voluntary" measures by steel producers may not, within the system of the Treaty, be justified as being a less restrictive measure than official regulation. The previously discussed mandatory character of the powers of the Community institutions supports this.

Furthermore, such measures are not compatible with the procedural and substantive rules that, under the Treaty, apply to minimum price regulation. Article 61(1) lists, among the preconditions to the establishment of minimum prices, an investigation by the Commission with the participation of the undertakings and their associations, in accordance with the first paragraph of article 46, and the third paragraph of article 48.<sup>38</sup> The interests of users are to be taken into consideration in these investigations. Prior to

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37. Protocol of the Consultative Committee of the ECSC, Document no. 9394-81, Nov. 16, 1981, at 2 EN/ks.

38. Art. 46 of the ECSC Treaty, *supra* note 2, provides in part:

The High Authority may at any time consult Governments, the various parties concerned (undertakings, workers, consumers and dealers) and their associations, and any experts.

To provide guidance, in line with the tasks assigned to the Community, on the course of action to be followed by all concerned, and to determine its own course of action, in accordance with the provisions of this Treaty, the High Authority shall, in consultation as provided above:

1. conduct a continuous study of market and price trends . . . .

Art. 48 of the ECSC Treaty, *supra* note 2, provides in part:

To obtain information which it requires, or to facilitate the performance of the tasks entrusted to it, the High Authority shall normally call upon producers' associations on condition either that they provide for accredited representatives of workers and consumers to sit on their governing bodies or on advisory committees attached to them, or that they make satisfactory provision in some other way in their organisation for the interests of workers and consumers to be voiced.

instituting price measures, the advice of the Consultative Committee and the Council must be obtained. The hearings should deal with the necessity of the proposed measures and the price level to be established. The Commission may establish minimum prices on this basis for any part of production falling within its jurisdiction, if such action is required to achieve the goals of article 3.

Above all, in establishing prices, the Commission must ensure "that the coal and steel industries and the consumer industries remain competitive, in accordance with the principles laid down in Article 3(c)."<sup>39</sup> This reference does not merely repeat the goal of article 3, as discussed previously. Rather, the substantive principles applying to the pricing policy of the Community under article 3(c) are extended to the user industries. The prices established by the Community institutions must not, therefore, permit only steel undertakings to make the necessary amortization and earn a normal rate of return on invested capital. This same right also attaches to those consumer industries affected by the pricing system. Article 61(2), in conjunction with article 3(c), gives to the establishment of prices a function similar to that of the discrimination prohibition of article 3(b), namely to ensure equal production access to all similarly situated users.

The Commission recommendations to increase steel prices may not be justified on a procedural or substantive basis as an implied establishment of minimum prices. Price agreements entered into with the Commission's encouragement and supported by official Commission communications cannot guarantee for steel users the same level of protection as the scheme provided by the Treaty. In this regard, it is irrelevant whether the steel-user industries have standing to sue under the Treaty. The resort to price agreements deprives the steel users of the protection of the Treaty. In exercising its discretion to set prices, the Commission is limited by considerations of differing cost structures among steel undertakings. The Treaty gives affected undertakings the opportunity to protect their own interests through judicial review of the Commission's decisions. The final determining factor is that the detailed and fundamental decision of the ECSC Treaty against market regulation by cartels and in favor of judicially reviewable, governmental regulation would be rendered meaningless if the procedures laid down in the Treaty were not followed.

After the conclusion of the Treaty, critics of the partial integration of the coal and steel markets were met squarely with the argument that the Treaty created a governmentally controlled competition system, and not a super-cartel. In the words of one of the leading officials of the Coal and Steel Community:

[I]t is certainly incorrect to characterize this economic system as a super-cartel. The Coal and Steel Community is neither a voluntary nor an involuntary cartel. There are fundamental differences. Members of a cartel determine the activities of the market, as a rule not only for the duration of a crisis but indefinitely. Cartels may be called "children of distress" but as a rule they continue even after the crisis is over. On the other hand, in the Coal and Steel Community it is not the undertakings which influence the market through cartel-like ties. This power belongs to a supranational

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39. ECSC Treaty, *supra* note 2, art. 61(2).

authority which only interferes when this becomes necessary in light of an extraordinary occurrence (*crise manifeste* or *pénurie*). Its power to intervene is limited to a minimum when compared to the level of national economic interference which has until now existed.<sup>40</sup>

This legal interpretation is supported, nearly without exception, in the literature on the subject:

Only the institutions of the Community are authorized to interfere with economic activity, and they may, only temporarily and under exceptional circumstances, limit competition to a reduced or nonexistent role. Undertakings never have the right to restrict competition, not even in order to contribute to the achievement of Community goals. Only in cases approved of and controlled by the High Authority can cartels organize and operate. Even when competition is limited or eliminated through the interference of the Community institutions, undertakings are not exempted from the prohibition of Articles 4 and 65, and may not create illegal cartels.<sup>41</sup>

#### IV. RESTRICTIONS OF NORMAL COMPETITIVE CONDITIONS

##### A. *The Objective of the Treaty's "Normal Competitive Conditions"*

A goal of article 65(1), in conjunction with article 5, is to ensure "normal competitive conditions." Commentators have attempted to formulate the necessary preconditions for this concept to guide the application of the cartel prohibition. Some have argued that normal competitive conditions occur only when there is an approximate equilibrium of supply and demand.<sup>42</sup> Even disregarding the difficulties inherent in this concept of equilibrium, it is incompatible with the Treaty. The equilibrium of supply and demand is not a precondition to competition; rather, equilibrium is to be brought about by competition. The Treaty aims to facilitate this process through rules on competition.

Other commentators posit an analysis based on an inquiry into whether competition existed before the conclusion of the anticompetitive agreements and, if so, in what form. Under this view, "normal competitive conditions," or those conditions capable of being restricted, do not exist when important functions of the economy can be performed only through concerted activities of undertakings or when "the classic tool of competition, a free, market-determined pricing structure, cannot operate due to political or other reasons."<sup>43</sup> This opinion, likewise, cannot be accepted. To do so would leave the legality of price agreements to the discretion of the Community institutions or to that of the undertakings. It has already been argued that such an interpretation would be incompatible with the mandatory regulatory authority vested in the Community institutions.

40. R. KRAWIELICKI, *DAS MONOPOLVERBOT IM SCHUMANPLAN 5* (1952). [Author's translation. — Ed.]

41. Jaeger, *supra* note 13, at 15. [Author's translation. — Ed.]

42. E.g., Kronstein, *Die Bedeutung der Wettbewerbsregeln im Gesamtrahmen des Montanvertrages und des Vertrages über die Europäische Wirtschaftsgemeinschaft*, in *1 KARTELLE UND MONOPOLE IM MODERNEN RECHT* 111, 116 (1960).

43. Von Simson, *Nichtanwendung auf Montanunionsvertrag*, in *GEMEINSCHAFTSKOMMENTAR, supra* note 10, at § 101 Nr. 3, at ¶ 27 (2d ed. 1963). [Author's translation. — Ed.]

Under an appropriate interpretation, "normal competitive conditions" are those conditions that the application of, and compliance with, the provisions of the ECSC Treaty would produce.<sup>44</sup> This characterization of the concept of competition is necessary, because the Treaty takes into account peculiarities of the coal and steel industry that modify the free play of competition significantly. An initial indication of these peculiarities that flow from the concept of normal competitive conditions is that agreements intended to prevent unfair competition within the meaning of article 60(1) do not violate article 65. For a more specific definition of that competition which is "normal" within the meaning of the Treaty, economic and normative peculiarities must be considered.

### B. *Economic Peculiarities of Normal Competitive Conditions*

The market for unrefined and semi-finished steel products is characterized by the existence of a few large suppliers and a distinctive oligopolistic structure. In 1965, the fifteen largest steel producers of the ECSC produced 61.4 percent of the steel produced in the Community.<sup>45</sup> (German undertakings were responsible for about one-half of this production.<sup>46</sup>) A progressive consolidation of the oligopoly enjoyed by these fifteen firms produced, by 1976, a market share of 72.4 percent or, if affiliated concerns are taken into account, 87.4 percent.<sup>47</sup> The Commission did not fail to appreciate the dangers of this concentration. In spite of this market structure, however, the Commission considered price competition to be workable, so long as no undertaking commanded a production share greater than twelve to thirteen percent.<sup>48</sup>

On this basis, the Commission's industrial policy aimed at the compatibility of the oligopolistic supply structure, caused by technical and financial conditions, with the maintenance of effective competition. Competition, and above all *price* competition, was supposed to be the most important regulator in maintaining the pressure toward cost minimization. Although the previously cited policy statement recognizes the necessity of permitting mergers in the interest of the international competitiveness of the European steel industry, it endorses an anti-cartel policy:

Effective competition between these undertakings and groups of undertakings cannot fully develop to the extent that cartel agreements are entered into. Under these conditions it becomes essential to the maintenance of effective competition that a sufficient number of independent firms be preserved through the inhibition of the natural tendency towards the mutual coordination of market behavior and through the preservation of a certain unforeseeability regarding the respective reactions of producers to the ac-

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44. See Jaeger, *supra* note 13, at 59.

45. D. FOCK, DIE OLIGOPOLE DER STAHLINDUSTRIE IN DER MONTANUNION 41 (1967).

46. *Id.* at 40.

47. W. FEURING, ZUSAMMENSCHLUSSKONTROLLE IN DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL 75-76 (1980).

48. See Kommission, Grundzüge einer Wettbewerbspolitik hinsichtlich der Strukturen der Stahlindustrie, Amtsblatt C 12, 5, 7, Jan. 1, 1970. For details, see E. MESTMÄCKER, EUROPÄISCHES WETTBEWERBSRECHT 79-81.

tions of any one of them.<sup>49</sup>

This position did not change in the course of the following year, as the Community sought its way out of the crisis by financing industrial restructuring. Even recently, when the steel crisis had already grown to its present dimensions, the Commission levied civil penalties under article 65 against French and German producers of refined steel to inhibit price agreements, notwithstanding the difficult financial situation of the relevant firms.<sup>50</sup> The Commission argued that the Community institutions alone bear responsibility for the resolution of the crisis. The firms, opined the Commission, may not supplement Commission measures against the crisis by entering into agreements on their own or illegally regulating the market. This prohibition, according to the Commission, was particularly important to secure a fair degree of protection for users.

It appears that the Community institutions, until the consummation of the current price agreements, viewed the protection of competition as an important and integral part of their policy of working towards the Treaty's goals. The economic peculiarities of the steel market, in particular its oligopolistic structure, certainly facilitate the restriction of competition. However, these peculiarities do not preclude "normal competitive conditions" within the meaning of article 65.

### C. *Normative Peculiarities of Normal Competitive Conditions: Compulsory Price Lists and Prohibition Against Discrimination*

The discrimination prohibition of article 60, the duty of steel undertakings to publish a price list, and the requirement that the actual prices conform to the published list, modify competitive conditions in the steel market. The requirement of compliance with the published price affects competition, as do arrangements for open prices, and contributes to "conscious parallelism" in the behavior of undertakings. Competition is further modified by the requirement of choosing and adhering to a certain basing point.<sup>51</sup>

The Commission's decision of July 3, 1981, strengthened these effects by extending the provisions of price publication and nondiscrimination to steel distributors.<sup>52</sup> The system of price setting under article 60 is a part of the normal competitive conditions. However, the resulting reduction in price

49. Kommission, *supra* note 48, at 6. [Author's translation. — Ed.]

50. See BULL. EUR. COMM., No. 3, 1980, at 31; 10 BERICHT ÜBER DIE WETTBEWERBSPOLITIK DER KOMMISSION 1980, at 109-10 (1981). The undertakings had entered into quota agreements covering the majority of finished steel products during the years 1971 to 1975, and had entered into similar agreements governing price during the years 1973 to 1975.

51. See Kröpffe, *supra* note 10, at ¶ 16; see also E. ZIMMERMANN, DIE PREISDISKRIMINIERUNG IM RECHT DER EUROPÄISCHEN GEMEINSCHAFT FÜR KOHLE UND STAHL 122-41 (Schriften des Institutes für Ausländisches und Internationales Wirtschaftsrecht, Bd. 16, 1965); Börner, *Diskriminierungen und Subventionen*, in ZEHN JAHRE RECHTSPRECHUNG DES GERICHTSHOFS DER EUROPÄISCHEN GEMEINSCHAFTEN 216 (Kölner Schriften zum Europarecht, Bd. 1, 1965); Mestmäcker, *Diskriminierungen, Dirigismus und Wettbewerb* (pts. 1-2), 7 WuW 21, 92 (1957); Mestmäcker, *supra* note 30.

52. Commission Decision 81/1836/EEC, on the obligation of distributive undertakings to publish price-lists and conditions of sale and on practices prohibited for these undertakings, 24 O.J. EUR. COMM. (No. L 184) 13, 13-14 (July 4, 1981).

competition does not foreclose application of article 65. To the contrary, the cartel prohibition remains unaffected, along with the discrimination prohibition, and serves to protect the remaining competition.<sup>53</sup>

However, when viewed in connection with the official tolerance of price agreements, article 60 takes on an entirely different meaning, one inconsistent with its very purpose. The particularly strict application of article 60, announced by the Commission in its Communication of November 14, 1981,<sup>54</sup> and the sanctions to be imposed against violators, lead to the conclusion that the Commission is using its power to supervise an illegal cartel. If the participating undertakings have published their price lists in accordance with price agreements, then the application of article 60 leads to the preclusion of all price competition. This application of article 60 secures the compliance with price agreements more effectively than would cartel measures against "chiseling" members.

#### *D. Normative Peculiarities of Normal Competitive Conditions: Production Quotas*

The ECSC Treaty contains no provision that precludes the application of article 65 to the Commission's establishment of production quotas under article 58. This section will examine whether the policy basis for instituting the quota system precludes the application of the cartel prohibition, because normal competitive conditions, under a system of quotas, are no longer possible.

The imposition of quotas restricts the quantitative supply of the affected products. Quotas are established for individual undertakings to prevent increases in market share at the expense of competitors. The burdens of the resulting decrease in production are to be borne equally. In this manner, the tendency towards "ruinous competition" due to excess capacity is minimized. Price competition is thereby not precluded, but merely limited. The corresponding connection between quantitative restrictions and minimum prices has been referred to previously.<sup>55</sup>

In its Communication of November 14, 1981, the Commission posited that price competition remains possible despite the imposition of quotas.<sup>56</sup> The Court of Justice emphasized that the Treaty required the Commission to consider the objectives of articles 2, 3 and 4 in its imposition of quotas. These objectives include the protection of competition.<sup>57</sup>

It follows from the above that the imposition of quotas alone does not foreclose normal competitive conditions. The Court of Justice confirmed this result in its holdings on similar issues in the area of Community agri-

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53. See *Mining Undertakings of the Ruhr Basin (Geitling) v. High Authority of the ECSC* (Case No. 2/56), 1957 E. Comm. Ct. J. Rep. 3, 20; *France v. High Authority of the ECSC* (Case No. 1/54), 1954 E. Comm. Ct. J. Rep. 1, 9; *Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority of the ECSC* (Nos. 7, 9/54), 1956 E. Comm. Ct. J. Rep. 175, 198.

54. See 24 O.J. EUR. COMM. (No. C 294) 3 (Nov. 14, 1981).

55. See note 32 *supra* and accompanying text.

56. See 24 O.J. EUR. COMM. (No. C 294) 3 (Nov. 14, 1981).

57. See *S.p.A. Ferriera Valsabbia v. Commission of the Eur. Communities* (Case No. 154/78), 1980 E. Comm. Ct. J. Rep. 907, 1009.

cultural law.<sup>58</sup> In these cases, Member States exercised their authority to set minimum and maximum production quotas for individual sugar producers within their respective regions. The plaintiffs alleged that this concerted market organization entirely precluded effective competition. Consequently, they argued, all rules directed against the restriction of competition should be invalid. The Court of Justice did not accept this argument:

Whatever criticisms may be made of a system, which is designed to consolidate a partitioning of national markets by means of national quotas, the effects of which will be examined later, the fact remains that if it leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition.<sup>59</sup>

In conclusion, it becomes clear that the measures taken by the Community institutions against the "manifest crisis" do not preclude the applicability of article 65 to price agreements.

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58. *See* Maizena GmbH v. Council of the Eur. Communities (Case No. 139/79), 1980 E. Comm. Ct. J. Rep. 3393; Coöperatieve vereniging 'Suiker Unie' v. Commission of the Eur. Communities (Case No. 40/73), 1975 E. Comm. Ct. J. Rep. 1663.

59. Coöperatieve Vereniging 'Suiker Unie' v. Commission of the Eur. Communities (Case No. 40/73), 1975 E. Comm. Ct. J. Rep. 1663, 1915. In agreement is the language of the Court of Justice in the *Isoglucose* decision: "These measures [of production limitation] moreover permit some competition to continue in respect of price, terms of sale and quantity of isoglucose." Maizena GmbH v. Council of the Eur. Communities (Case No. 139/79), 1980 E. Comm. Ct. J. Rep. 3393, 3422.