

GUEST EDITORIAL

State subsidies for steel: a record of failure?

Most of the major steel companies from Britain, Denmark, Germany and the Netherlands have introduced actions against a decision by which the Commission, with the consent of the Council, has approved billions of state aid for the benefit of ILVA (Italy). There are complaints, also, about subsidies for the benefit of CSI (Spain). ILVA and CSI are State-owned. The fact that plaintiffs have overcome their hesitation and finally taken the matter to the Court, demonstrates to what extent dissatisfaction with European steel policy and mistrust towards the Commission and the Council have spread within the top undertakings of the steel industry. One may see in the actions a challenge by high-performing undertakings against the backward policy of the Union. The steel case is particularly important because it contributes to the opinion that the European Union may not yet be capable of controlling decisive problems of industrial policy in an adequate way.

Excess capacity has been a steel problem almost from the beginning of European cooperation. The fact that at present nobody is interested in buying Eko-Stahl in East Germany, indicates that there is no market for its products. The steel policy of the High Authority and the Commission has contributed to excess capacity. For too long, non-interference with or sluggish control of state aid has enabled many steel companies to receive billions of state aid¹ and, hereby, to survive. When

1. Figures available permit the conclusion that within the last 20 years at least 75 billion ECU has been awarded to steel undertakings. It is hard to say what the state-owned industry got indirectly.

the ECSC Treaty was drafted, German industrialists as well as French experts suggested that two thirds of the Italian steel industry should be closed. However, it was not the plants but these proposals which had to be abandoned. Remedies for excess capacity were sought elsewhere.

First: strict pricing rules, embodied mainly in Article 60 ECSC, aimed at protecting the industry against hard price competition. These rules, like many cartel agreements, did not work and could not be enforced.

Second: Article 58 ECSC provides for production quotas "in the event of a decline in demand". Under the paradigm of solidarity all European undertakings had to accept a more or less equal limitation of their output.² However, the quota regime introduced by the Community is so incompatible with sound economics and it worked so badly, that after a few years of experience nobody dared to go on with it.

Third: the ECSC Treaty opens another, most radical way to deal with excess capacity. It forbids major restraints of competition and in its Article 4 lit. (c) it strictly outlaws state subsidies and aid. Herewith, it tries to implement what was envisaged by those who drafted the ECSC Treaty: prohibition of state aid would allow the efficient steel producers to succeed, while the others would succumb. Excess capacity would be eliminated automatically. The official report of the French delegation said:³

"Pour que cette concurrence entre les fournisseurs aboutisse au développement des productions les plus économiques, il est nécessaire de supprimer les subventions qui permettent de masquer les désavantages de certains producteurs, sous réserve de celles qui peuvent être nécessaires à titre transitoire ou qui sont destinées à corriger certaines charges anormales."

This corresponds to Article 2(2) of the ECSC Treaty which aims at the "highest possible level of productivity". Problems of excess capacity and of state aid have, however, arisen, because neither the Commission

2. Wägenbaur, from the Commission's Legal service, has mentioned that political influences have contributed to quota rules which favoured some Member States, in *Festschrift Ernst Steindorff* (1990), p. 1503 at pp. 1506 et seq.

3. Ministère des Affaires Etrangères, Rapport de la Délégation Française sur le Traité instituant la Communauté Européenne du Charbon et de l'Acier (1951) p. 80.

nor all Member States wanted to abide by these principles. The German *Bundestag*, in a resolution of July 1994, has finally reacted by opposing further state aid and, thus, choosing the third way mentioned above. It must be discussed more openly where subsidies as well as other interventions may be helpful and where they have to be excluded.

The Commission – since the beginning of the European Coal and Steel Community – was confronted with violations of Article 4. At first, it obviously was unable or unwilling to apply Article 4 lit. (c) ECSC and to suppress state aid. For the steel industry it is only from 1980 on that it has enacted,⁴ on the basis of Article 95, first and second paragraphs ECSC,⁵ a number of so-called “steel codes” permitting specific state aid for steel. These codes deviate from Article 4 lit. (c), but step by step they came closer to its intention by continually restricting the range of permissible aid and subsidies. The last code, of 17 November 1991,⁶ explicitly explains that a strict discipline in the field of state aid forbids discrimination and that subsidies for operating an undertaking and for investment purposes are illegal. They cannot be reconciled with the Common Market. The most recent code mentions only a few specific kinds of aid which can be tolerated. And its Article 1(1), in conformity with Commission decision No. 322/89/ECSC of 1 February 1989,⁷ provides that subsidies can be reconciled with the Common Market only if they are covered by the articles of the decision. This practice should be welcomed.

But, less than three years after the last steel code, billions of subsidies for the benefit of ILVA and CSI are again authorized by the Commission though manifestly transgressing the code.⁸ They are to serve the restructuring of the recipient undertakings and their privatization, in order that they become competitive. The authorizations were again granted on the basis of Article 95, first and second paragraphs ECSC.

4. Announcement in Bull. EC 12–1977 p. 8 and 4–1978 p. 46. Cf. also the Commission's 7th and 8th Report on competition policy.

5. It resembles Article 235 EC.

6. O.J. 1991, L 362/57.

7. O.J. 1989, L 38/8.

8. For ILVA see O.J. 1994, L 112/64. The CSI decision is roughly identical. The underlying Council decision has been reported in Press release 11392/93 (press 248).

Other subsidies, to the Italian Bresciani companies, are considered as permissible on the basis of an (over-) extensive interpretation of the latest code. They also can hardly be reconciled with that code, but they will not be discussed here. Two major objections could be made.

The problem for high-performing undertakings in other countries is that they have modernized and restructured their steel plants and have reduced capacity already, to a large extent without comparable state aid. Most of them had to rely on their own resources; they had to sacrifice important installations and to reduce their workforce considerably;⁹ they hereby relied on the last steel codes, from which they could conclude that competitors would not get state aid beyond the code. They now invoke a distortion of competition as well as a discrimination; they are all the more concerned, since they are also expected to contribute to new capacity cuts, whereas they maintain that Italian undertakings have used former subsidies to finance low prices and, hereby, to enlarge their share of the market. They claim that they are victims of discrimination, because they are deprived of what might be the reward for their past efforts.

The second objection focuses not on the discrimination against single undertakings but on the common interest as expressed in Articles 2–5 ECSC and, specifically for state aid, in Articles 92 and 93 EC.

A first question has to do with incentives to be given to undertakings. Should not the Common and Single market also mean that the successful participants have a right to prevail, at the expense of those which have been unwilling to modernize, to reduce costs? Or does solidarity in the sense of the Schuman Plan mean that each Member State is entitled to protect and keep some steel industry, at whatever costs and with whatever distortion of competition to the detriment of other undertakings? If one transfers the questions to other sensitive industries, for instance the air carriers or the shipyards,¹⁰ it becomes obvious that we

9. Germany and the Netherlands have had the biggest reductions of capacity. Italy is on the opposite side.

10. There are Danish complaints about German subsidies, as they have been authorized by Directive 92/68/EC (22nd Report on competition policy, No. 376). German pressure on the Danish government not to take these subsidies to the European Court, are a setback for Europe. The case of shipyards is extremely complicated because of its

face a fundamental problem, particularly because Article 130 EC opens the door for industrial policy and because Article 93(2)(3) of that Treaty could eventually be used in the same way as Article 95, first and second paragraphs ECSC.

The second question perhaps concerns the heart of the legal problem: Community action may contribute to making individual enterprises competitive. But must not the Commission, above all, ask itself whether the Community as a whole will remain or become competitive? This could – and probably should – have consequences where considerable surplus capacities are available. In such cases, it is a waste of resources if companies with modest productivity are helped to become competitive, while – for reasons for instance of solidarity – better performing undertakings are asked to reduce their installations. Not even social considerations are relevant here, because the only effect of subsidies for one or two enterprises would be that reductions of capacity and workforce must take place elsewhere.

The decisions on state aid for steel, on the basis of Article 95, first and second paragraphs ECSC, have been taken by the Commission with unanimous assent of the Council. Unanimity implies that each Member State can extort concessions from the other States and that, hereby, deviations from a sound policy are multiplied. Each State can, in perfect mercantilistic ways,¹¹ protect its own industry. That is the negation of a single market and of a Union. This deviation from fundamental principles of the single market is protracted where, contrary to the ECSC Treaty, undertakings cannot take decisions on subsidies to the Court and where Governments, in cases of majority or of Commission decisions, exercise their influence on other Governments to avoid legal action against subsidies from their side. Ehlermann recognized that, implicitly, in a lecture in early 1994 in which he dealt with the ILVA and

worldwide dimensions. The Commission's directives in this field resemble the steel codes. The one mentioned before demands irreversible reductions of capacity in East Germany. One of the questions is whether such reductions of capacity for either steel or shipyards will ever be implemented.

11. A new book on mercantilism in France has come out recently in Germany: Gömmel and Klump, *Merkantilisten und Physiokraten in Frankreich* (1994).

CSI cases.¹² Unanimity is the most inadequate precondition for sound decisions on public aid.

Majority decisions of the Council as well as Commission decisions under Articles 92 et seq. of the EC Treaty, are characterized by another shortcoming: they concentrate on the needs of undertakings which have failed to become competitive on their own, because state aid will be proposed only for their benefit. Their recovery will easily be identified with the common good. The interests of the well-performing competitors and a rational examination of Union interests will bother, at best, a minority. Since the Coal and Steel Community, like the whole Union, “possesses neither the institutions nor the procedures that would permit the centralizing potential inherent in majority voting to be tempered by a systematic attention to minority concerns”,¹³ these interests can be protected only if Commission and Council decisions are bound by strict and general rules of law. It must be added that the whole ECSC Treaty, contrary to the Rome Treaties, was devised as a body of strict rules on which Member States as well as undertakings should be able to rely. This reliance was, under the circumstances of the year 1951, one of the fundamental elements on which depended the willingness of the Member States to sign and to ratify the Treaty. But the free market, as provided for in the EC Treaty, also depends on the rule of law.¹⁴ Here, as in the Coal and Steel Community, undertakings, because of competition, must be able to rely on general rules of law. And they must have access to the Court, where Community or Member States intervene. The Court must exercise a full review.

Since the Union cannot thrive if it does not place successful undertakings at the top of its agenda, legal rules must guarantee that efficient and successful undertakings are not deprived of the rewards which they merit as the result of their efforts. And they must prohibit subsidies for

12. Ehlermann, *Zur Wettbewerbspolitik und zum Wettbewerbsrecht der Europäischen Union* (1994) pp. 23 et seq.

13. Centre for Economic Policy Research, *Making Sense of Subsidiarity: How much Centralization for Europe?* CEPR Annual Report, (1993), at p. 34.

14. For the *lex lata* see Mestmäcker, in *Festschrift Willgerodt* (1994) p. 263, pp. 267 et seq. and 278 et seq.

the purpose of investment and modernizing old plants, where considerable excess capacity already exists.

What the Commission and the Council have done, and do, in the field of steel, is the opposite of following any rules of law. Two arguments can be brought.

First, a CEPR Annual Report has explained, with respect to Article 235 EC, that the “requirement of unanimity has also meant that the extension of competences has been guided by political opportunities rather than by any explicit economic or legal principles.”¹⁵ The same must be presumed for Article 95 ECSC, which corresponds to Article 235. Its application does not follow legal guidelines.

Second, permission for considerable state aid, not only in Italy and Spain, has been given by single decisions, which do not reflect any general rules or any effort to reconcile conflicting interests on the part of beneficiaries, their competitors and the common good. After, finally, steel codes containing general rules had been enacted, the Council and the Commission, in the above mentioned cases, deviated from the relevant code. This implies that political bargaining has become “suprema lex”, and this is the opposite of the rule of law. There have been, obviously, important political reasons for the Commission’s disregard for its own legislative acts. But those who remember the drafting of the ECSC Treaty, will refer to what was deemed, at that time, to be a fundamental precondition of successful European integration and what has been mentioned above: that precondition is the rule of law, because this rule alone can create the confidence of all participants in the Common Market (and now in the Union) that they are treated without discrimination, that they have equal chances and that they have to accept sacrifices only for the common good, not simply for the benefit of competitors. The authorization of state aid in violation of self-imposed general rules contradicts manifestly these fundamentals of the Coal and Steel Community.

One specific question may be raised here, because of its impact on other state and Community aid. The Commission obviously maintains that discrimination by public aid is excluded if the recipients of such aid

15. See *supra* note 13, at p. 15.

are forced to give some compensation for the benefit of their competitors. This seems to have become general practice. In the steel case, the recipients of aid must subscribe to a reduction of their capacity. This could be the right direction because such a reduction, if it were to reduce production, approaches what would have happened if the beneficiary of aid had failed and would have had to leave the market. To that extent, competitors would have no reason to complain. However, there is no compensation by the recipients of state aid, if the steel policy of the Community demands capacity reduction also from undertakings which do not receive aid, or if the only capacities which are reduced are those which have not been used for some time or have even been an equivalent of Gogol's Dead Souls.

The Commission sometimes imposes on the beneficiaries of state aid a second burden, which could be a compensation: steel companies are not permitted to increase steel capacity for some years, just as the Portuguese air carrier, after accepting state aid, will be forbidden to increase the number of its European flights for a couple of years. East German shipyards must reduce capacity definitely and irreversibly. This also contributes to an alleviation of the burden for competitors. However, such alleviation and compensation is a *contradictio in adiecto* and pure economic nonsense. It cannot be reconciled with Articles 3A and 102A EC. State aid in cases of steel, air carriers, as well as some other industries are justified with the argument that they enable undertakings to become competitive. But why on earth and how should they become competitive if the Commission, while authorizing state aid, imposes a ban on one of the most important parameters of competition? Nobody can explain such irrational ruling. And what could undertakings, which are castrated in this way, contribute to the welfare of the Union?

What the Community needs, for cases of state as well as of Community aid, is a body of better and more detailed legal rules. Such rules must protect not only competition, but also competitors of those who receive state aid. These competitors should not lose their lead in competition, which they have reached by better performance. With a view to failing undertakings rules must be coordinated with the law on insolvency. For those who work and live in the Union, such rules are more relevant than what is discussed with respect to minority votes in the Council

or to the powers of the European Parliament. Steelworkers are hit much more by either such rules or their inadequacy, than they could be hit by all the legal and social niceties provided for in the social chapter of the Maastricht Treaty. The necessary rules may be developed by the Court in future cases. The Commission envisages binding itself by administrative rules. It must be applauded for this intention. Yet the crucial cases, in which the continued existence of a national flag undertaking or of other important national industries may depend on state subsidies, certainly are beyond the reach of such administrative rules and the competence of the Union's administration. They should, therefore, be on the forefront of future revisions of the Treaties, at the latest when the end of the ECSC Treaty is imminent.

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