

Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty

(2002/C 152/03)

(Text with EEA relevance)

1. INTRODUCTION

1. By virtue of its Article 97, the Treaty establishing the European Coal and Steel Community (ECSC Treaty) expires on 23 July 2002 ⁽¹⁾. This means in principle that as from 24 July 2002 the sectors previously covered by the ECSC Treaty and the procedural rules and other secondary legislation derived from the ECSC Treaty will be subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty ⁽²⁾.

2. The purposes of this Communication are

— in its section 2, to summarise for economic operators and Member States, in so far as they are concerned by the ECSC Treaty and its related secondary legislation, the most important changes with regard to the applicable substantive and procedural law arising from the transition to the EC regime,

— in its section 3, to explain how the Commission intends to deal with specific issues raised by the transition from the ECSC regime to the EC regime in the areas of antitrust ⁽³⁾, merger control ⁽⁴⁾ and State aid control.

3. The principles that underlie the competition rules of the two Treaties are similar. Articles 81 and 82 of the EC Treaty are clearly inspired by the corresponding Articles 65 and 66(7) of the ECSC Treaty. Furthermore, practices under the two Treaties have been converging for many years. In its Twentieth Report on Competition Policy (1990) ⁽⁵⁾, the Commission announced that the time had come to align the enforcement of ECSC competition rules as much as possible with the practice under the EC Treaty. In 1998, it published a notice ⁽⁶⁾ dealing with the alignment of procedures for processing mergers under the ECSC and EC Treaties. In practical terms, the changes, both substantial and procedural, arising from the expiry of the ECSC Treaty are likely to be limited in scope. The objective of this Communication is to facilitate the changeover by setting out how certain situations will be dealt with in the transition from the ECSC to the EC regime. This Communication is made without prejudice to

the interpretation of the ECSC rules and EC rules by the Court of First Instance and the European Court of Justice.

2. THE MOST IMPORTANT CHANGES DUE TO THE EXPIRY OF THE ECSC TREATY

2.1. Antitrust

2.1.1. Jurisdiction

4. Under the ECSC regime, as the Commission had exclusive jurisdiction, the national competition authorities and national courts could not apply either Articles 65 and 66 ECSC Treaty ⁽⁷⁾ or their national competition rules to deal with coal and steel cases.

5. With the transition to the EC regime, the national authorities and courts responsible for competition will become competent ⁽⁸⁾ to apply the European competition rules in the coal and steel sectors as the relevant provisions of the EC Treaty have direct effect, with the exception of Article 81(3), for which the Commission retains at present sole competence ⁽⁹⁾. Thus, under the principles of the EC regime, the Commission and the national authorities and courts will have parallel powers to apply Community competition law ⁽¹⁰⁾.

6. It should also be noted that, unlike Articles 65 and 66(7) ECSC Treaty, which did not include any conditions relating to effect on trade, Articles 81 and 82 EC Treaty apply only if trade between Member States is affected. Thus, where agreements or practices restricting competition, or an abuse of a dominant position, do not affect trade between Member States, the national competition authorities and the national courts will, from 24 July 2002, be authorised to apply their national competition rules in the field of coal and steel ⁽¹¹⁾.

7. The national competition authorities and the national courts, which had no powers to apply competition law under the ECSC regime, will now be able to apply either national law and Community law or, where trade between Member States is not affected, only the relevant national law.

2.1.2. Substantive antitrust rules

8. As regards the question of an appreciable restriction of competition under Article 81(1) of the EC Treaty, the Commission would first point out that the policy concerning agreements of minor importance in terms of market share⁽¹²⁾ (agreements that are not therefore covered by Article 81(1)⁽¹³⁾) will apply in full to the coal and steel sectors as from 24 July 2002.
9. Under the ECSC regime, joint ventures have generally been regarded as being covered by the provisions on concentrations (Article 66(1) to (6) of the ECSC Treaty)⁽¹⁴⁾. Joint ventures notified after 23 July 2002 that do not have the characteristics of a 'full-function' joint venture within the meaning of Regulation (EEC) No 4064/89⁽¹⁵⁾ will be regarded as agreements within the meaning of Article 81 EC Treaty⁽¹⁶⁾. Agreements concluded by such undertakings will therefore be covered by the relevant provisions of Regulation No 17⁽¹⁷⁾.
10. The system requiring price lists and conditions of sale to be notified to the Commission and made public will be abolished⁽¹⁸⁾. Effectively, the undertakings concerned will no longer be required systematically to communicate such data to the Commission before making use of it⁽¹⁹⁾.

2.1.3. Procedural rules relating to antitrust

11. The Commission has for many years⁽²⁰⁾ endeavoured to apply the same principles, *inter alia* at procedural level, to practices under the ECSC Treaty and to those under the EC Treaty: thus important procedural features such as access to the file, hearings or the closing of a case with a comfort letter were introduced into ECSC practice on the basis of EC practice. The transition to the EC regime will enhance the transparency of these practices.
12. As regards agreements restricting competition, two innovative factors will be introduced into the sectors concerned: the requirement, where parties apply to the Commission for negative clearance or exemption, that the agreements be notified on form A/B⁽²¹⁾ will be officially introduced⁽²²⁾. In addition, prior consultation of an Advisory Committee will be required before the adoption of any Commission decision mentioned in Article 10 of Regulation No 17.
13. Undertakings are also informed that the provisions implementing the ban on abuse of a dominant position are more straightforward under the EC regime than under the ECSC regime. Indeed, under the Article 82 EC Treaty procedure, the Commission can immediately adopt directly applicable decisions, whereas under Article 66(7) ECSC Treaty, it must first send the undertaking concerned an ECSC recommendation and only then can it take a decision in consultation with the Member State concerned.

2.2. Merger control

2.2.1. Jurisdiction

14. As far as jurisdiction is concerned, the ECSC Treaty gives the Commission exclusive jurisdiction over all concentrations involving coal and steel undertakings. On the other hand, the EC Merger Regulation⁽²³⁾ gives the Commission jurisdiction only over concentrations involving undertakings whose turnover exceeds certain thresholds. Therefore, some operations which would have required prior authorisation from the Commission under ECSC rules, but do not meet the thresholds under the EC Merger Regulation, will after the expiry of the ECSC Treaty fall outside the Commission's jurisdiction and fall to be examined by the national authorities in so far as national merger rules exist.

2.2.2. Substantive law relating to concentrations

15. In relation to substance, the tests under Article 66(2) ECSC Treaty⁽²⁴⁾ and under Article 2 EC Merger Regulation⁽²⁵⁾ though not expressed in the same language, are similar.

2.2.3. Procedural law relating to concentrations

16. The procedures for the treatment of concentrations have been aligned to a large extent since March 1998 when the Commission started to apply the provisions of its Notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties⁽²⁶⁾.
17. However, the timing of notifications under the ECSC regime and the EC regime is different. The ECSC rules allow notification at any time, while the proposed concentration cannot, however, be legally completed without the prior authorisation of the Commission. The EC Merger Regulation requires parties to notify within one week of the 'triggering event', i.e. the moment when the operation becomes irrevocable. The Commission must then adopt its decision(s) within the time limits prescribed by the EC Merger Regulation, otherwise the proposed operation is automatically authorised.

2.3. Control of State aid to the steel industry

2.3.1. Substantive rules relating to steel aid

18. As for the notion of State aid, Article 4(c) ECSC Treaty does not require the affectation of trade between Member States for a measure to be considered State aid, contrary to Article 87 EC Treaty. In practice, this difference will be, however, of very limited importance given the intense trade between Member States in steel products.

19. Under the EC rules, the criteria for assessment of compatibility of State aid with the common market will be in summary the following:

— Regional investment aid will continue to be forbidden⁽²⁷⁾. This prohibition also covers the granting of regional aid supplements to small and medium-sized enterprises (SMEs).

— Rescue and restructuring aid will continue to be forbidden⁽²⁸⁾.

— Under the ECSC rules, environment aid was permitted in accordance with the Community guidelines on State aid for environmental protection adopted in 1994⁽²⁹⁾ and with the annex to the Steel Aid Code⁽³⁰⁾. From 24 July 2002, the Community guidelines on State aid for environmental protection adopted in 2000 will apply⁽³¹⁾. The most important difference of these guidelines in comparison with the guidelines applicable to the steel industry before the expiry of the ECSC Treaty is that aid granted for conforming with standards will no longer be allowed (except for aid to SMEs in limited conditions).

— Research and development aid will continue to be permitted in line with the Community framework for State aid for research and development⁽³²⁾.

— Aid in connection with closures will continue to be permitted⁽³³⁾.

— Aid for small and medium-sized enterprises at aid rates of up to 15 % and 7,5 % respectively will be permitted in line with Commission Regulation (EC) No 70/2001⁽³⁴⁾ (except for large individual aid grants as defined in Article 6 of that Regulation which will continue to be forbidden).

— *De-minimis* aid will be permitted in line with Commission Regulation (EC) No 69/2001⁽³⁵⁾.

— Training aid will be permitted in line with Commission Regulation (EC) No 68/2001⁽³⁶⁾.

— Employment aid will be permitted in line with the guidelines on aid to employment⁽³⁷⁾.

2.3.2. Procedural rules relating to steel aid

20. Council Regulation (EC) No 659/1999⁽³⁸⁾ will apply as from 24 July 2002. This will not entail major changes

as compared with the provisions established in Article 6 of the Steel Aid Code⁽³⁹⁾.

21. As for notification requirements, unless otherwise established, aid granted to the steel industry under schemes authorised by the Commission will no longer be subject to the prior notification requirement established in the Steel Aid Code. The same applies to aid block-exempted by virtue of Commission Regulations (EC) No 70/2001⁽⁴⁰⁾ and (EC) No 68/2001⁽⁴¹⁾.

2.4. Control of State aid to the coal industry

2.4.1. Substantive rules relating to steel aid

22. Until the expiry of the ECSC Treaty, State aid to the coal industry will be assessed on the basis of the rules as laid down in Decision 3632/93/ECSC⁽⁴²⁾.

23. On 25 July 2001, the Commission adopted a proposal for a Council Regulation on State aid for the coal industry after the expiry of the ECSC Treaty⁽⁴³⁾. The proposal is based on Articles 87(3)(e) and 89 EC Treaty. It has to be adopted by the Council, after an opinion from the European Parliament⁽⁴⁴⁾. It would apply from 24 July 2002. The draft Regulation stipulates that aid covering costs for the year 2002 will, on the basis of a reasoned request by the Member State, continue to be subject to the rules and principles laid down in Decision No 3632/93/ECSC.

2.4.2. Procedural rules relating to coal aid

24. According to the proposal adopted by the Commission on 25 July 2001, in addition to the provisions of Article 88 EC Treaty and Council Regulation (EC) No 659/1999, State aid to the coal industry would be subject to special rules of notification, appraisal and authorisation as laid down in the State aid regime proposed by the Commission.

3. SPECIFIC ISSUES RAISED BY THE TRANSITION FROM THE ECSC REGIME TO THE EC REGIME

25. When assessing the impact of the expiry of the ECSC Treaty on cases which would so far have been covered by the ECSC rules, three situations have to be distinguished:

— First, cases, which have been completed in all factual and legal respects on or before 23 July 2002, will be subject to the ECSC rules only and are therefore unproblematic.

- Second, cases, in which all the relevant events occur after 23 July 2002, will be subject to the EC rules only and are therefore unproblematic, too.
 - Third, cases, which from a factual or legal point of view started before the expiry of the ECSC Treaty and which in some way or other continue after the expiry, may raise issues specifically caused by the expiry of the ECSC Treaty. The remaining part of this Communication sets out how the Commission intends to deal with such cases.
26. With regard to procedural law, the basic principle for all three areas (antitrust, merger control, State aid control) is that the rules applicable are those in force at the time of taking the procedural step in question ⁽⁴⁵⁾. This means that as from 24 July 2002 on, the Commission will exclusively apply the EC procedural rules in all pending and new cases. Unless otherwise stated in this Communication, procedural steps validly taken under the ECSC rules before expiry of the ECSC Treaty will after the expiry be taken to have fulfilled the requirements of the equivalent procedural step under the EC rules.
- 3.1. Antitrust**
- 3.1.1. *The position which restrictive agreements/concerted practices exempted by the Commission on the basis of Article 65(2) ECSC Treaty before or on 23 July 2002 will have after 23 July 2002*
27. From 24 July 2002, all the EC competition rules will apply to those agreements or practices which have previously been authorised or the subject of a comfort letter adopted under the ECSC rules. Authorisations granted under the ECSC regime will also cease to be valid upon expiry of the ECSC Treaty.
28. It will therefore be for the undertakings concerned to review the legality of their agreements or practices in the light of Articles 81 and 82 EC Treaty. The Commission draws attention to the many block exemptions and guidelines applicable in this area. In addition, in view of the similarity of Articles 65(2) ECSC Treaty and 81(3) EC Treaty and the convergence policy applied by the Commission when examining ECSC cases over the years, the Commission informs undertakings that it does not intend, after 23 July 2002, to initiate proceedings under Article 81 EC Treaty in respect of agreements previously authorised under the ECSC regime and that, under the circumstances, it does not intend to impose any financial penalty on undertakings which are party to such agreements. This presupposes that, where Commission approval was subject to conditions or obligations, these continue to be complied with by the parties concerned.
29. The Commission reserves the right, however, under the EC rules, to initiate proceedings in respect of the future implementation of the practices and agreements referred to in the preceding paragraph if, owing to substantial factual or legal developments, such practices and agreements are clearly not eligible for exemption under Article 81(3) EC Treaty. In that case, the Commission would respect the legitimate expectation of the undertakings concerned and would intervene only in the following cases: where there has been a change in any of the facts which were basic to the making of the authorising decision; where the parties commit a breach of any condition or obligation attached to the decision; where the decision is based on incorrect information or was induced by deceit; where the parties abuse the authorisation pursuant to Article 65(2) of the ECSC Treaty granted to them by the decision.
- 3.1.2. *Notification cases in which the Commission started its procedure before expiry of the ECSC Treaty and in which this procedure is still pending after 23 July 2002*
30. As regards notifications made under the ECSC regime that are still being examined at the time of the transition, the Commission will apply Article 65(2) of the ECSC Treaty as regards the period before the date of expiry of that Treaty and Article 81(3) of the EC Treaty as regards the period thereafter. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law.
- 3.1.3. *Application of Articles 65 ECSC Treaty and 81 EC Treaty to other types of agreements*
31. If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law ⁽⁴⁶⁾.
- 3.2. Merger control**
- 3.2.1. *Clearance decisions with conditions/obligations adopted by the Commission under the ECSC Treaty before expiry of that Treaty, compliance with these conditions/obligations to be monitored after 23 July 2002*
32. Where a concentration has been cleared under the ECSC Treaty subject to conditions and/or obligations, which continue after 23 July 2002, and these conditions and/or obligations are not satisfactorily fulfilled after 23 July 2002, the Commission will take action under the appropriate provisions of the EC Merger Regulation ⁽⁴⁷⁾.

33. Similarly, if it proves necessary to modify after 23 July 2002 conditions and/or obligations based on commitments given by undertakings in order to secure the authorisation of their concentrations prior to the expiry of the ECSC Treaty, the Commission will take action as if the original authorisation decision had been adopted under the EC Merger Regulation.

3.2.2. Concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty

34. Three principal possibilities arise in relation to concentrations notified under the ECSC Treaty and pending at the expiry of this Treaty:

— Where the notified ECSC case does not meet the thresholds of the EC Merger Regulation, there is no longer a case with the Commission. In this situation, the parties must as of 24 July 2002 notify the case to the competent national authorities, where appropriate.

— If the notified ECSC case meets the thresholds of the EC Merger Regulation, its instruction by the Commission will continue under the EC Merger Regulation and it will be treated as though it had been originally notified under that Regulation, if the triggering event in the sense of that Regulation took place on or before 23 July 2002. If the triggering event occurs afterwards, the operation should be renotified.

— In cases where a triggering event has occurred and a case which meets the thresholds under the EC Merger Regulation has entered the informal second phase (initiated by means of a letter setting out the Commission's concerns) at the expiry of the ECSC Treaty, but where a statement of objections has not yet been adopted, the Commission will adopt a decision under Article 6(1)(c) EC Merger Regulation as soon as is practicably possible after the expiry of the ECSC Treaty. The Commission will endeavour in such cases to adhere to the timetable set out in the EC Merger Regulation to the greatest extent possible, counting from the date of notification. In particular, it will endeavour to ensure that the statement of objections is sent out at the appropriate time and that the overall five-month deadline for the adoption of a final decision is respected.

3.2.3. Form of notification

35. The approach to pending notified ECSC transactions outlined above only applies to ECSC notifications made

using Form CO and which are complete. Furthermore, it is clear from the EC Merger Regulation itself that its time periods only start to run once the Commission is in possession of a complete notification, in the form provided for ⁽⁴⁸⁾.

3.2.4. Operations exempted from the requirement of prior authorisation under Article 66 ECSC Treaty

36. Decision No 25/67/ECSC ⁽⁴⁹⁾ exempts certain operations from the requirement of prior authorisation under Article 66 ECSC Treaty. However neither the ECSC Treaty nor Decision No 25/67/ECSC set out when the exemption takes effect. There is no equivalent under the ECSC rules of the 'triggering event' under the EC Merger Regulation ⁽⁵⁰⁾. When an operation, which is exempted by Decision No 25/67/ECSC, has reached an irrevocable stage (for instance if the sale and purchase agreements have been finalised and signed) on or before 23 July 2002, then this operation remains exempted from the requirement of prior authorisation under the EC Merger Regulation. On the other hand, if the operation has not reached an irrevocable stage before 24 July 2002, the operation must be notified if necessary to the Commission under the EC Merger Regulation upon the occurrence of the triggering event.

3.2.5. Non-exempted ECSC transaction that has not been notified before expiry of the ECSC Treaty

37. Where a transaction which is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty has not been notified before expiry of that Treaty, the parties must notify the transaction under the EC Merger Regulation if the conditions for such notification are satisfied. Where the transaction is not notified in such circumstances, fines may be imposed for non-notification in accordance with Article 14(1)(a) of the EC Merger Regulation as of 31 July 2002 (i.e. one week after the EC Merger Regulation applied).

3.2.6. Non-exempted ECSC transaction that has been implemented and not been notified before expiry of the ECSC Treaty

38. Where a transaction, which in the sense of the preceding point 3.2.5. is not exempted from the requirement of prior authorisation under Article 66 ECSC Treaty and has not been notified, has in addition been implemented before the expiry of the ECSC Treaty, fines may be imposed for non-authorised implementation of the concentration in accordance with Article 14(2)(b) of the EC Merger Regulation as of 24 July 2002, provided the transaction comes within the scope of that Regulation ⁽⁵¹⁾.

3.2.7. Joint ventures

39. The practice under the ECSC Treaty has been to treat most joint ventures (with the exception of joint buying, joint selling and specialisation agreements and agreements strictly analogous to them) as concentrations under the provisions of Article 66. Therefore, certain operations which are subject to the requirement of prior authorisation under Article 66 ECSC Treaty may not be notifiable under the EC Merger Regulation, for example if they are not full function⁽⁵²⁾. If notifications of such joint ventures which would not be notifiable under the EC Merger Regulation are pending at the time of the expiry of the ECSC Treaty, the notifications could, in appropriate cases be converted under the provisions of Article 5 of the Implementing Regulation⁽⁵³⁾ into notifications under Regulation No 17.
40. The expiry of the ECSC Treaty will have no effect on joint ventures (full function or otherwise) authorised under Article 66(2) ECSC Treaty on or before 23 July 2002 or benefiting from an exemption within the meaning of paragraph 36 above.
41. After the expiry of the ECSC Treaty, Article 2(4) of the EC Merger Regulation will be applied to concentrations in the coal and steel sectors which fall within the scope of that Regulation. This Article, which has no equivalent in the ECSC rules, provides that where the creation of a full-function joint venture constituting a concentration in the sense of that Regulation has as its object or effect the co-ordination of the competitive behaviour of undertakings that remain independent, such co-ordination shall be appraised in accordance with the criteria of Article 81 EC Treaty⁽⁵⁴⁾.

3.3. Control of State aid to the steel industry

42. With regard to State aid authorised by the Commission under the Steel Aid Code⁽⁵⁵⁾ or Article 95 ECSC Treaty subject to conditions, the Commission will after 23 July 2002 continue to monitor their fulfilment. In case of non-compliance, Article 88 EC Treaty will be applicable.
43. Where the aid was notified before or on 31 December 2001⁽⁵⁶⁾ and the Commission has initiated the procedure of Article 6(5) of the Steel Aid Code, it will endeavour to adopt a decision at the latest on 23 July 2002 on the basis of the information available to it. However, if for objective reasons, this is not possible, the Commission will continue the investigation under the provisions of Regulation (EC) No 659/1999 and adopt a final decision under Article 88(2) EC Treaty.
44. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without

prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid⁽⁵⁷⁾. According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

3.4. Control of State aid to the coal industry

45. After the expiry of the ECSC Treaty, the Commission will continue to monitor the application by the Member States of the decisions authorising State aid adopted under Decision No 3632/93/ECSC⁽⁵⁸⁾. In case of non-compliance, the case will be investigated following the procedures as laid down in Regulation (EC) No 659/1999.
46. It is expected that the majority of State aid which covers costs prior to 23 July 2002 will be the subject of Commission decisions before the expiry of the ECSC Treaty. However, there may be cases where the Commission is not in a position to adopt a decision before the expiry of the ECSC Treaty. These possible cases, and the Commission's proposed course of action in respect of them, are as follows.
- In accordance with Article 9(4) of Decision No 3632/93/ECSC, the Commission has to decide on the measures notified by a Member State within three months of receipt of notification. It may consequently happen that aid notified less than three months before the expiry of the ECSC Treaty (i.e. notification after 23 April 2002) is not the subject of a Commission decision before the expiry of this Treaty. This could also be the case of a notification made earlier, if the Commission considered that the notification was insufficient and requested further information from the Member State or, having doubts about the compatibility of the aid, decided to initiate the procedure provided for under Article 88 ECSC Treaty.
 - If there has been no Commission decision when three months from notification have passed, the expiry of the ECSC Treaty means that the Member State does not have the right to implement the notified measure at the end of the three-month period referred to above, as it would have had were Article 9(4) Decision No 3632/93/ECSC still in force. Indeed, any notification presented by the Member State before the expiry of the ECSC Treaty, which has not been the subject of a formal Commission decision, will have to be considered obsolete (i.e. non-existent from a legal point of view) after 23 July 2002.

- The Member State would have to proceed with a new notification under the provisions of the EC Treaty and of the possible new Council Regulation ⁽⁵⁹⁾ which, once adopted, would be applicable as from 24 July 2002. Alternatively, and more simply, the Member State could inform the Commission that the initial notification can be regarded as a newly submitted notification. The period in which the Commission will have to decide would start to run as of the date of this (new) notification. If such a case arose, the Commission would make the utmost efforts to ensure that a decision on the measure is adopted as soon as possible.
- The draft Council Regulation ⁽⁶⁰⁾, currently under discussion ⁽⁶¹⁾ and intended to be applicable after the expiry of the ECSC Treaty, stipulates that Member States will be able to opt, for aid covering costs for

2002, for the application of the rules and of the principles laid down in Decision No 3632/93/ECSC.

47. When taking decisions after 23 July 2002 in respect of State aid put into effect on or before that date without prior Commission approval, the Commission will proceed in accordance with the specific provisions in the Council Regulation currently under discussion ⁽⁶²⁾. When assessing aid, which does not fall under that Regulation and which has been granted on or before that date without prior Commission approval, the Commission will proceed in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽⁶³⁾. According to this notice, the Commission shall always assess the compatibility of unlawful State aid with the common market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted.

⁽¹⁾ Article 97 ECSC Treaty provides: 'This Treaty is concluded for a period of 50 years from its entry into force.'

⁽²⁾ The question which rules are applicable to individual cases, which started before the expiry of the ECSC Treaty and are not fully completed by 23.7.2002, is tackled under section 3 below.

⁽³⁾ In this Communication, the term 'antitrust' refers to the prohibition of restrictive agreements between undertakings, decisions by associations of undertakings and concerted practices, as well as the prohibition of abuses of dominant positions (Articles 65 and 66(7) ECSC Treaty; Articles 81 and 82 EC Treaty).

⁽⁴⁾ In this communication, the term 'merger control' refers to the control of any concentrations no matter whether they are effected by mergers between previously independent undertakings or acquisition of control of other undertakings (see Article 66(1) ECSC Treaty and Article 3 Council Regulation (EEC) No 4064/89 as amended by Regulation (EC) No 1310/97).

⁽⁵⁾ European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.

⁽⁶⁾ Commission notice concerning alignment of procedures for processing mergers under the ECSC and EC Treaties (OJ C 66, 2.3.1998, p. 36).

⁽⁷⁾ See judgment of the European Court of Justice (ECJ) of 13.4.1994, Case C-128/92, *Banks*, [1994] ECR I-1209 at paragraphs 17 and 18.

⁽⁸⁾ Where national administrations are concerned, on condition that their national law allows them to apply Community law.

⁽⁹⁾ The proposed amendment of Council Regulation No 17 (COM(2000) 582 final of 27.9.2000), currently before the Council and the European Parliament, foresees to give the national competition authorities and the national courts the power to apply Articles 81 and 82 EC Treaty in full.

⁽¹⁰⁾ The details of the cooperation between the Commission and the competent national authorities are defined in the Notice on cooperation between the national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ C 39, 13.2.1993, p. 6) and in the Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ C 313, 15.10.1997, p. 3).

⁽¹¹⁾ This does not of course prevent national law from applying in parallel with Community law where the condition of effect on trade is satisfied.

⁽¹²⁾ Commission notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (OJ C 368, 22.12.2001, p. 13).

⁽¹³⁾ Provided they do not contain any 'hard core' restrictions.

⁽¹⁴⁾ However, in the case of undertakings whose object was a joint buying or a joint selling agreement, a specialisation agreement or agreements analogous to specialisation agreements, Article 65(2) ECSC Treaty was applicable.

⁽¹⁵⁾ Concept described in the Commission notice on the concept of full-function joint ventures under Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998).

⁽¹⁶⁾ The sole exception will be transactions which benefited from an exemption from the requirement of prior authorisation under Article 66 of the ECSC Treaty and which have become irrevocable before 24 July 2002; see paragraph 36 below.

⁽¹⁷⁾ This will involve a modification of the timetable (there being much fewer rules on the time limits for the examination of such agreements by the Commission than for 'merger'-type procedures, except in the specific case of cooperative joint ventures 'of a structural character' where an accelerated procedure is established by Commission Regulation (EC) No 3385/94 of 21 December 1994), and of the criterion of compatibility of the agreement.

⁽¹⁸⁾ Pursuant to Article 60(2) ECSC Treaty, Decision No 4-53 of 12.2.1953 (OJ of the High Authority of 12.2.1953, p. 3) and, as regards coal only, Decision 72/443/ECSC of 22.12.1972 on alignment of prices for sales of coal in the common market (OJ L 297, 30.12.1972, p. 45). In practice, the implementation of this obligation had been gradually relaxed, but certain undertakings in the coal sector nonetheless continued to send this information to the Commission.

⁽¹⁹⁾ The removal of this requirement is without prejudice to the Commission's power to seek from the undertakings concerned all the information it requires to carry out the tasks assigned to it by the Treaty and Community law.

⁽²⁰⁾ European Commission, Twentieth Report on Competition Policy (1990), paragraph 122.

⁽²¹⁾ Commission Regulation (EC) No 3385/94 of 21 December 1994.

- (22) The Commission had already asked the undertakings concerned to use a simplified form for their applications for authorisation (Twenty-first Report on Competition Policy (1991), paragraph 138).
- (23) Council Regulation (EEC) No 4064/89 as amended by Regulation (EC) No 1310/97.
- (24) Article 66(2) ECSC Treaty provides: 'The Commission shall grant the authorisation referred to in the preceding paragraph if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:
- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products, or
 - to evade the rules of competition instituted under this Treaty, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets'.
- (25) Article 2(2) EC Merger Regulation provides: 'A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'.
- (26) OJ C 66, 2.3.1998, p. 36.
- (27) Communication from the Commission, Multisectoral framework on regional aid for large investment projects (OJ C 70, 19.3.2002, p. 8).
- (28) Communication from the Commission, Rescue and restructuring aid and closure aid for the steel sector, (OJ C 70, 19.3.2002, p. 21).
- (29) OJ C 72, 10.3.1994, p. 3.
- (30) Commission Decision No 2496/96/ECSC of 18.12.1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (31) OJ C 37, 3.2.2001, p. 3.
- (32) OJ C 45, 17.2.1996, p. 5.
- (33) Communication from the Commission, Rescue and restructuring aid and closure aid for the steel sector, OJ C 70, 19.3.2002, p. 21.
- (34) OJ L 10, 13.1.2001, p. 33.
- (35) OJ L 10, 13.1.2001, p. 30.
- (36) OJ L 10, 13.1.2001, p. 20.
- (37) OJ C 334, 12.12.1995, p. 4. New rules are under preparation.
- (38) Council Regulation (EC) No 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).
- (39) Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (40) OJ L 10, 13.1.2001, p. 33.
- (41) OJ L 10, 13.1.2001, p. 20.
- (42) Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ L 329, 30.12.1993, p. 12).
- (43) OJ C 304, 30.10.2001, p. 202.
- (44) The Council reached a political agreement on this proposal on 7 June 2002.
- (45) Judgment of the ECJ of 6.7.1993 in Joined Cases C-121/91 and C-122/91, *CT Control v Commission*, [1993] ECR I-3873 at paragraph 22; Judgment of the ECJ of 12.11.1981 in Joined Cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Salumi*, [1981] ECR 2735 at paragraph 9.
- (46) Including the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).
- (47) Articles 6(3) and 8(5) of the EC Merger Regulation.
- (48) Article 10(1) EC Merger Regulation, Articles 3 and 4 of the Implementing Regulation (Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1)).
- (49) Decision No 25-67 of 22 June 1967 laying down in implementation of Article 66(3) of the ECSC Treaty a regulation concerning exemption from prior authorisation (OJ 154, 14.7.1967, p. 11). English special edition: Series-I 67, p. 186.
- (50) The 'triggering event' within the meaning of the EC Merger Regulation is defined as the moment when the operation becomes irrevocable, see above paragraph 17.
- (51) As regards implementation without notification or prior authorisation of a non-exempted ECSC concentration, see also Article 66(6) of the ECSC Treaty.
- (52) Commission notice on the concept of full function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ C 66, 2.3.1998, p. 1).
- (53) Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1).
- (54) Where a concentration in the coal or steel sectors was implemented without authorisation before expiry of the ECSC Treaty and the undertakings involved actually engaged in anti-competitive practices inconsistent with Article 65 ECSC Treaty, the principles set out in point 3.1.3 will apply.
- (55) Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry (OJ L 338, 28.12.1996, p. 42).
- (56) Under Article 6(1) and (2) of the Steel Aid Code notifications of aid plans must be lodged with the Commission at the latest by 31 December 2001.
- (57) OJ C 119, 22.5.2002, p. 22.
- (58) Commission Decision No 3632/93/ECSC of 28 December 1993 establishing Community rules for State aid to the coal industry (OJ L 329, 30.12.1993, p. 12).
- (59) See paragraph 23 above.
- (60) See paragraph 23 above.
- (61) See footnote 44.
- (62) See paragraph 23 above.
- (63) OJ C 119, 22.5.2002, p. 22.