OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 25 February 1986 *

Mr President,
Members of the Court,

1. The applicant, Nuovo Campsider (hereinafter referred to as 'Campsider') is an association of undertakings within the meaning of Article 48 of the ECSC Treaty composed of Italian steelmakers using electric furnaces. They are particularly dependent on trends in the Community market for ferrous scrap, since scrap is the raw material used by steel mills of that type. From 1983 onwards, because of strong demand in the United States and the rise in the value of the dollar during that period, exports to the United States increased and prices for scrap in the Community rose.

According to Campsider, that market situation led to speculation and, in November 1984, to a shortage of scrap in Italy.

2. It was in those circumstances that Campsider sent the Commission a telex message on 16 November 1984 in which

(i) it emphasized that, contrary to what had been stated at a meeting on 12 November 1984 between steelmakers and scrap-dealers, the latter had increased their prices on the ground that the available quantities were insufficient, and added in a marginal note 'that is to say, ferrous scrap is in short supply';

(ii) it stated that the quantities made available to Italian steelmakers had diminished by 30% to 50% since October, forcing them to increase their imports from non-member countries correspondingly;

(iii) it indicated that for the month of December suppliers were refusing to guarantee quantities of scrap to buyers.

The final part of the telex message, which is of key importance for these proceedings, was as follows:

'We therefore draw the Commission's attention to these developments in the market which confirm what was stated by the Italian delegation at the meeting in Brussels on 12 November 1974, and ask the Commission to take into serious consideration the very urgent need to adopt measures stabilizing the market for scrap.'

With a view to obtaining a declaration that by failing to take action in response to that 'formal request' the Commission had 'failed to comply with its obligations under the Treaty' and 'misused its powers', the applicant brought these proceedings under Article 35 of the ECSC Treaty.

3. That summary of the circumstances in which the applicant says that the matter was brought before the Commission in accordance with the provisions of Article 35 is sufficient to justify the separate examination of the admissibility of the action.

* Translated from the French.

Article 35 of the ECSC Treaty, which lays down rules governing the action for failure to act, provides that where the Commission

'is required by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation and fails to fulfil this obligation',

or

'where empowered by this Treaty, or by rules laid down for the implementation thereof, to take a decision or make a recommendation, abstains from doing so and such abstention constitutes a misuse of powers',

'it shall be for States, the Council, undertakings or associations, as the case may be, to raise the matter with the [Commission]'.

It goes on to provide that:

'If at the end of two months the [Commission] has not taken any decision or made any recommendation, proceedings may be instituted before the Court within one month against the implied decision of refusal which is to be inferred from the silence of the [Commission] on the matter.'

Article 35 of the ECSC Treaty thus provides for a pre-contentious procedure at the end of which the Commission's silence for more than two months is treated as an implied decision of refusal, and may itself be the object of proceedings before the Court.

4. The Commission submits that the action for failure to act brought by Campsider is manifestly inadmissible on both formal and substantive grounds.

It points out in the first place that the content of the telex message does not meet any of the formal requirements laid down by the Court for bringing matters before the Commission as provided for by the first and second paragraphs of Article 35 of the ECSC Treaty:

(i) it does not allow the nature of the decisions to be taken by the Commission to be presumed with sufficient accuracy (Joined Cases 21 to 26/61 *Meroni* v *High Authority* [1962] ECR 73);

(ii) it does not contain any formal request or indicate an intention to pursue the matter and does not show sufficiently clearly that it constitutes the beginning of the period for lodging an application (Joined Cases 22 and 23/60 *Elz* v *High Authority* [1961] ECR 181).

Since it did not ask the Commission to adopt specific measures, the applicant in fact relied entirely on the Commission's discretion (Case 75/69 *Hake* v *Commission* [1970] ECR 535).

The telex could not therefore be treated as formal notice requiring the Commission to act in accordance with Article 35, a provision which was not even mentioned. The Commission was therefore justified in regarding it merely as written confirmation of the position expressed orally by the applicant at the meeting of 12 November and calling for no 'express reply'.

Secondly, the Commission argues that the application brought by Campsider is inadmissible by reason of its very subject-matter. An association of undertakings whose members are encountering difficulty in obtaining supplies of scrap cannot impose on the Commission the obligation to take general measures regulating a market, unless it can show that the Commission's refusal to do so was prompted only by the clear and deliberate desire to cause it harm.

5. For its part, Campsider argues that its telex message to the Commission was clearly intended to elicit an express reply from the latter, inasmuch as it confirmed in writing the position taken by Campsider at the meeting on 12 November.

Campsider challenges the relevance to this case of the judgments cited by the Commission in support of its argument; the applicant considers that:

(i) since it referred to the urgent measures which the Commission had to take in order to deal with the crisis on the market for scrap, the telex left no doubt as to its purpose, namely to ask the Commission to act in accordance with its obligations under Article 59 of the ECSC Treaty;

(ii) in that regard the telex expressly refers to the shortage of ferrous scrap, a situation clearly covered by Article 59 which in turn refers to Article 57 and thus to the various intervention measures which the Commission was obliged to take (Articles 60 to 64 and 71 to 75);

(iii) the very urgency of the action to be taken by the Commission was such that any reference to the period of two months available to the Commission under the third paragraph of Article 35 would have been redundant.

As for the Commission's argument based on non-compliance with the substantive conditions regarding the admissibility of proceedings for failure to act, it has no basis in Article 35 of the ECSC Treaty.

6. The submissions put forward by the applicant in support of the admissibility of its action are unconvincing.

Under Article 35 of the ECSC Treaty proceedings may be brought against the Commission in the event of the latter's silence only where the applicant has first raised the matter with the Commission. The Court has emphasized the essential nature of that 'initial requirement', referring in particular to 'the need for notification which, by impugning the inaction of the [Commission], forces it to take a decision within a limited period regarding the legality or otherwise of its inaction' (Case 17/57 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1959] ECR 1 at p. 8).

Hence, for the purposes of the Treaty, a communication laying a matter before the Commission must display certain characteristics permitting it to have its full effect, particularly with regard to the period within which the Commission is required to act.

In reality 'the fiction of an implied decision of refusal arising on the expiry of a period of two months' (Case 59/70 *Netherlands* v *Commission* [1971] ECR 639 at p. 652, paragraph 12 of the decision) necessarily presupposes an explicit request on the part of the applicant calling upon the Commission under Article 35 of the ECSC Treaty to act in accordance with certain provisions of primary or secondary legislation. That is to say, the communication formally bringing before the Commission the claims which the person concerned intends, if necessary, to pursue before the Court must state unambiguously the obligations based on primary or secondary legislation with which the Commission is asked to comply and the intention of that person to enforce compliance with those

obligations. As Advocate General Roemer put it, 'according to a correct interpretation the request submitted to the administration must be sufficiently clear to show which measures are expected of the High Authority and will, if necessary, be enforced by bringing legal proceedings' (Joined Cases 22 and 23/60 *Elz* v *High Authority* referred to above, at p. 192).

The Court's case-law would appear to confirm that analysis.

The formal notice given to the Commission must permit the content of the decision it is called upon to make 'to be presumed with sufficient accuracy' (Joined Cases 21 to 26/61 *Meroni* v *High Authority* referred to above, at p. 77; see also Joined Cases 24 and 34/58 *Chambre Syndicale de la Sidérurgie de l'Est de la France* v *High Authority* [1960] ECR 281, in particular at p. 299), indicate the 'measures defined specifically' which the person making the request wishes it to adopt or 'give [some] details as to their content' (Case 75/69 *Hake* v *Commission* referred to above, at paragraphs 7 and 8 of the decision).

The request must be made in the form of a 'formal notice intended to encourage the defendant to take a preliminary express or implied decision which may be challenged in proceedings before the Court'; it must therefore contain a 'formal request or indicate an intention to pursue the matter' and 'show sufficiently clearly that it constitutes the beginning of the period for lodging an application' (Joined Cases 22 and 23/60, *Elz* v *High Authority*, referred to above, at p. 188).

7. The telex message of 16 November 1984 cannot be regarded as an *explicit* request addressed by the applicant to the Commission calling upon it, on the basis of Article 35 of the ECSC Treaty, to comply with certain obligations arising out of primary or secondary legislation. As I have pointed out, before the Commission's silence may be taken as an implied decision of refusal it must be possible to infer clearly from the preliminary request not only the decision desired but also the type of procedure initiated by the applicant.

The telex merely describes the difficulties encountered by the Italian electric steel mills in obtaining supplies of ferrous scrap. In that regard a mere reference to a scarcity of scrap cannot seriously be considered sufficient to permit the nature and content of the measures which the Commission was 'required' or 'empowered' to take under Article 35 to be presumed. In particular, the applicant's argument to the effect that that remark referred by implication to Article 59 of the ECSC Treaty, and thus to the other provisions to which that article itself refers, must be rejected. Such an interpretation confuses the implicit with the imprecise, to the detriment of legal certainty.

Nor can the telex be taken as formal notice calling upon the Commission to act. Admittedly the absence of any reference to Article 35 cannot be considered decisive in itself. Reference to a failure to act on the part of the Commission would have sufficed, had the applicant also stated that it intended to bring the matter before the Court should the Commission refuse to take action. But there is nothing in the telex to indicate to the Commission that it constituted formal notice preliminary to proceedings under Article 35. The wording of the telex does not require the

Commission to decide within a fixed period whether or not it is legally obliged to take action, but merely *draws its attention* to the situation prevailing in the market for ferrous scrap and *invites it* 'to take into serious consideration the very urgent need to adopt measures stabilizing the market for scrap'. Thus it is not clear from the actual wording of the telex that the applicant intended to obtain a decision from the Commission, failing which it would bring the matter before the Court of Justice. The reference to the urgency of the measures to be taken cannot in itself take the place of a clear indication to the Commission that it should regard the telex as the starting point of the periods referred to in the third paragraph of Article 35 of the ECSC Treaty.

8. For all those reasons, without there being any need to consider the question whether or not the action for failure to act meets other conditions, I propose that the Court:

(1) dismiss the application as inadmissible;

(2) order the applicant to pay the costs.