Having regard to the Protocol on the Statute of the Court of Justice of the ECSC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby:

1. **Declares that no ruling need be given on the first and second heads of claim in the present application;**
2. **Dismisses the third head of claim;**
3. **Orders the defendant to pay the costs of the action.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 8 July 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 16 JUNE 1970[1]

Mr President,
Members of the Court,

The application which Mr Hake, a dealer in ferrous scrap established in Düsseldorf, has made to the Court concerns the conditions of operation of the market in that product in the Federal Republic.

1. Since the entry into force of the ECSC Treaty the practices prevalent in this market have not ceased to cause serious difficulties and have on several occasions necessitated the intervention of the High Authority. As early as 19 May 1953, when authorizing the setting-up of the Caisse de Péréquation des Ferrailles Importées (Imported Ferrous Scrap Equalization Fund), the High Authority informed the German company Schrottvermittlung that its activities, which were essentially aimed at a division of the market in ferrous scrap, were contrary to

1 — Translated from the French.

Article 65 (1) of the ECSC Treaty and therefore requested that it go into liquidation. Two years later, in a decision of 20 July 1955, the High Authority refused the authorization requested by almost all the German iron and steel undertakings to enable the Westdeutsche Schrotteinkaufs-Gesellschaft to purchase ferrous scrap both at home and abroad and to distribute it, which this company had in any case begun to do even before submitting the request for authorization. These two counter-measures appear not to have had very lasting effects; indeed, since 1967 the applicant has had numerous contacts, either directly or through his counsel, first with the departments of the High Authority and later with those of the Commission, in order to inform them of the reconstitution of the prohibited cartel under another name. Subsequently, by two letters of 16 September and 3 October 1969, to which I shall refer again later, the applicant requested the Commission to take measures to re-establish and guarantee normal conditions of competition on the German market in ferrous scrap. The applicant announced its intention, if necessary, to institute an action for failure to act.

When it received no reply to its letter the applicant instituted proceedings by means of an application lodged on 15 December 1969, the conclusions of which are as follows:

Mr Hake is seeking a declaration that the Commission is obliged to:

— issue a prohibition against the members of the cartel and its administrative bodies referring to the agreements, decisions and practices restricting competition on the market in ferrous scrap;

— impose appropriate fines on such members or bodies;

— take measures to guarantee competition on the market in ferrous scrap, in particular by fixing a minimum quota of the ferrous scrap requirements of the iron and steel undertakings up to the amount of which supplies must be obtained from independent dealers.

2. After this application was lodged a decision adopted by the Commission on 21 January 1970 satisfied the first two heads of claim. This decision, which refers to 'the complaint lodged by a German ferrous scrap dealer', points out, first, that since July 1959 26 undertakings have resorted to a quota system in order to reduce their purchases on the domestic market and to maintain the prices of ferrous scrap at a low level and, secondly, that this system limited the possibilities for independent dealers to supply steel producers directly and turned them into sub-contractors of the 'group commercial companies'; in addition, the fixing of uniform parity points for freight has abolished all price competition between the dealers. The Deutsche Schrottverbrauchergemeinschaft (DSVG) played a decisive role in the application of these agreements and after its liquidation on 30 January 1969 the undertakings appear to have given up the irregular practices in question. The Commission thus finds that between July 1959 and January 1969 the 26 undertakings in question contravened Article 65 (1) of the ECSC Treaty, and it imposes on 25 of them fines ranging between 29 000 and 1 000 units of account.

Thus, the first two heads of claim have become irrelevant.

3. However, the defendant considers the third head of claim to be inadmissible as it was not contained in the letters by which the applicant had previously referred the matter to the Commission. Requests made in the context of an action for failure to act may only concern questions which have been referred to the authority and may only deal with the refusal of that body to take the decision which it has been called upon to adopt (*Chambre Syndicale de la Sidérurgie de l'Est de la France* v *High Authority of the ECSC*, Joined Cases 24 and 34/58, 15 July 1960, Rec. 1960, p. 609).

The letter of 16 September 1969 only required the Commission to establish that there had been an infringement of the provisions of Article 65 of the Treaty by the German steelworks and the undertakings dealing in ferrous scrap forming part of their group and to take 'the appropriate sanctions' against them.

The letter of the following 3 October shows no great difference. In it Mr Hake states that his main wish is to have fresh access to the market from which the cartel has gradually excluded him. The requests made in his previous letter must therefore be understood as asking the Commission to take 'satisfactory and appropriate measures to re-establish and guarantee normal competition on the German market in ferrous scrap', in particular by prohibiting the agreements and practices which hindered such competition and by imposing fines on the undertakings responsible.

The Commission rightly observes that it was justified in understanding the phrase quoted above as merely making a firm request for a prohibition and the imposition of a penalty, which was entirely satisfied by its decision of 21 January 1970.

If at that time Mr Hake intended to persuade the Commission to take measures other than those which it adopted, he did not indicate this in his letters; in particular, he never referred to the fixing of a minimum quota of their ferrous scrap requirements up to the amount of which the undertakings would be required to supply themselves from independent dealers. It is true that the applicant objects that this request was already contained in 'general terms' in his letter of 3 October 1969 and that he had to express it in greater detail because the Commission did not put forward any precise ideas as to the effective measures to be taken to re-establish and guarantee normal conditions of competition. But this conflicts with the system laid down in Article 35: the implied refusal, a fiction created by that article, may only exist in relation to an express request. If Mr Hake intended to obtain measures other than those which were adopted, it was for him to indicate them precisely when referring the matter to the Commission.

It is therefore unnecessary to consider the merits of the third head of claim on which the Commission has put forward detailed explanations, and I can only suggest that you dismiss it as inadmissible.

4. There remains the question of costs to which the applicant only referred in his conclusions in the reply.

After he had instituted the proceedings Mr Hake obtained satisfaction as regards two of the three heads of claim but remained unsuccessful as regards the third. As it appears to be impossible to separate the costs relating to each of the various heads of the application I propose that you should order the Commission to pay two-thirds of the costs, the remainder to be paid by the applicant.

I am therefore of the opinion that:

— no ruling is necessary on the first two heads of claim;

— the third head should be dismissed as inadmissible;

— the Commission should pay two-thirds of the costs, the remainder to be paid by the applicant;