JUDGMENT OF THE COURT
8 JULY 1970[1]

Ernst Hake and Co.
v Commission of the European Communities[2]

Case 75/69

In Case 75/69

ERNST HAKE & Co., Düsseldorf, represented by Jochen Hake, assisted by Peter Schambach, of Oberstedten/Taunus, Advocate of the Bars of Bad Homburg von der Höhe and Frankfurt-am-Main, with an address for service in Luxembourg at the office of Felicien Jansen, Huissier, 21 rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Erich Zimmermann, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Application concerning the alleged failure of the Commission to take the appropriate measures to guarantee competition in the market in ferrous scrap,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi, W. Strauß (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

1 — Language of the Case: German.
2 — CMLR.

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:
The applicant is a firm dealing in ferrous scrap. On 16 September 1969 it sent a letter to the Commission (Directorate-General for Competition) in which it asked that institution:

'(1) to find

(a) that as from a time dating from at least 1958 certain German steelworks and wholesale undertakings dealing in ferrous scrap which formed part of their group infringed the provisions of Article 65 of the ECSC Treaty by setting up an increasingly rigid cartel for the purchase of ferrous scrap; and

(b) that they continue to infringe these provisions by agreements and concerted practices which are contrary to the Treaty;

(2) to impose on the undertakings forming the cartel (the names of which are known to the Commission through documents in its possession), and especially on the Wirtschaftsvereinigung Eisen- und Stahlindustrie of Düsseldorf, on the steelworks which take part in the cartel and on the commercial undertakings within the group, the sanctions which they incur through having concluded and implemented, in particular on the initiative of the Wirtschaftsvereinigung Eisen- und Stahlindustrie, agreements concerning the following:

'(1) the determination, fixing and control of prices;

(2) the sharing of markets, involving for independent dealers a restriction and abolition of their chances of supplying those undertakings which are both members of the cartel and the principal consumers of ferrous scrap in the Federal Republic of Germany, in particular the German steelworks;

(3) the limitation of purchases of ferrous scrap to given quantities, divided according to a quota system among the ferrous scrap consumer undertakings which have concluded the cartel for the purchase of ferrous scrap;

(4) the limitation of the total quantities which may be delivered by independent dealers to a percentage fixed at between 20% and 30% of the total tonnage as calculated from time to time by the administrative bodies of the cartel, which has gradually prevented independant dealers from supplying the iron and steel undertakings directly;

(5) discriminatory practices with regard to dealers outside the cartel, consisting in the granting of price advantages (for example, delivery premiums) to the commercial companies linked to the undertakings which are members of the cartel and resulting in the exclusion of the independent dealers from the market.'

This letter reached the Commission on 19 September 1969.
On 3 October 1969 the applicant wrote to the same Directorate-General, setting out the following points:
Hake & Co's. 'decisive interest' lies 'in seeing the normal conditions of competition on the German market in ferrous scrap re-established and guaranteed, so that it again has access to the market which it has been gradually refused by the cartel for the purchase of ferrous scrap, with the result that it is now completely excluded'.
The requests contained in its letter of 16

September 1969 may therefore be summarized as follows:
The Commission of the European Communities is requested to take adequate and appropriate measures in order to re-establish and guarantee normal conditions of competition on the German market in ferrous scrap, in particular:

(1) by prohibiting the agreements and practices preventing normal competition which have been implemented by the Wirtschaftsvereinigung Eisen- und Stahlindustrie of Düsseldorf and certain iron and steel undertakings which are the principal German consumers of ferrous scrap, as well as by the commercial companies belonging to that group, all of which are known to the Commission from the documents concerning the cartel in its possession;

(2) by imposing appropriate fines on the undertakings which, from a time dating from at least 1954 and in the intervening years, have taken part in agreements and practices which prevent competition and which are known to the Commission from the documents concerning the cartel which it has in its possession.'

The first point in the request is justified 'on the grounds of the methods ... which the cartel for the purchase of ferrous scrap agreed to adopt and has applied in practice for more than ten years'.
The second point is more urgent in nature since the members of the cartel have taken no account of the instructions addressed to them by the former High Authority, and in particular they have ignored the warning which it set out in its opinion of 24 February 1960 (OJ of 12.3.1960, p. 551).
The letter in question also referred to Article 35 of the ECSC Treaty and to the possibility of instituting proceedings before the Court of Justice. It reached the Commission on 8 October 1969.
The application was brought on 15 December 1969.
On 21 January 1970 the Commission drew up a decision (OJ of 6.2.1970, pp. 29 and 30) in which:

— it notes that 26 German iron and steel undertakings referred to by name 'have ... infringed Article 65 (1) of the [ECSC] Treaty from July 1959 to January 1969' by 'entering into and applying agreements with regard to purchase quotas, prices, parity points and minimum stocks for their purchases of steel scrap in the Federal Republic of Germany' and, as regards certain of these undertakings, 'by entering into agreements or by indulging in concerted practices for the purpose of covering a certain proportion of their ferrous scrap requirements by commercial companies within the group and the payment of special bonuses to certain companies';

— it imposes on all but one of these undertakings fines ranging from 1 000 to 29 000 units of account.

The preamble to the decision refers in particular to 'the complaint submitted by a German ferrous scrap dealer'. In its recitals the Commission put forward the following points in particular:
A short time after the financial arrangement made by the High Authority of the ECSC by Decision No 22/54 (OJ of 30.3.1954, p. 286) for the equalization of prices of ferrous scrap from third countries and domestic ferrous scrap was terminated in 1958/1959, a fresh increase in demand was recorded and it was feared that prices of ferrous scrap within the Community would reach the level of prices on the world market. The iron and steel industry of the Community attempted to resist this development (Recitals, Section I, No 1).
As from July 1959 the undertakings referred to in the decision resorted to a quota system in order to reduce their purchases of ferrous scrap on the national market, so as to adjust demand to the supply available and to maintain prices of ferrous scrap at a relatively low level (*ibidem*, Section I, No 4 and Section II, No 16).
The result of this system (which is described by the Commission in detail) was to restrict the possibilities open to independent dealers to supply direct to steel producers, so that they have become 'the sub-contractors of the commercial companies within the group' (this latter expression refers to

the wholesale dealers in ferrous scrap who formed part of the group made up of certain iron and steel undertakings). Competition between dealers in ferrous scrap has thus been restricted and distorted (*ibidem*, Section I, Nos 12 and 13, and Section II, No 16).
Moreover, the fixing of uniform parity points for freight has abolished all competition as regards prices between the dealers (*ibidem*, Section I, No 10 and Section II, No 19).
The undertakings concerned have not disputed the facts alleged but have maintained that the aim of the system in question was to stabilize the market, an objective which the administrative bodies of the Community themselves had often declared to be desirable.
The Deutsche Schrottverbrauchergemeinschaft (DSVG) played a decisive role in the application of the agreements in question. It was wound up on 30 January 1969. The trend of prices for ferrous scrap in the Federal Republic shows that as from that moment the undertakings in question ceased to infringe the provisions of Article 65 (1) of the ECSC Treaty (*ibidem*, Section II, No 20).

II — Conclusions of the parties

In its *application* the *applicant* claims that the Court should:
order the Commission of the European Communities:

1) to adopt a decision prohibiting certain agreements, decisions and practices which prevent competition in the market in ferrous scrap and to address it to the members of the cartel for the purchase of ferrous scrap (steelworks and commercial undertakings within the group), whose names may be deduced from the attached documents concerning the cartel, as well as to its administrative bodies, the Wirtschaftsvereinigung Eisen- und Stahlindustrie, 69, Breite Strasse, Düsseldorf, and the Deutsche Schrottverbrauchergemeinschaft GmbH, 11a, Grabenstraße, Düsseldorf;

2) to impose appropriate fines on the members and administrative bodies of this cartel, the names of which may be deduced from the abovementioned documents;

3) to take the appropriate measures to guarantee competition in the market in ferrous scrap, such as, in particular, the fixing of a minimum quota of the ferrous scrap requirements of the iron and steel undertakings, up to which amount supplies must be obtained from independent dealers (that is, those who do not form part of the group).

In its *statement of defence*, the *defendant* contends that the Court should:

— declare that it is no longer necessary to take a decision on the first and second heads of the conclusions in the application;

— as regards the third head, dismiss this as inadmissible or alternatively as unfounded, and order the applicant to pay the costs of the action.

In its *reply*, the *applicant* declares:

— that it maintains its claim that the defendant be ordered to pay the costs and adheres to the third head of the conclusions in the application, but states that it is no longer necessary to rule on the first and second heads of those conclusions.

In its *rejoinder*, the *defendant* maintains its conclusions set out in its statement of defence and adds that as regards the first and second heads of the conclusions in the application, it 'leaves the question of costs to the wisdom of the Court'.

III — Procedure

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral

procedure without holding any preparatory inquiry.
The parties submitted their oral observations at the hearing on 13 May 1970.
The Advocate-General delivered his opinion at the hearing on 16 June 1970.

IV — Submissions and arguments of the parties

In its *application*, the *applicant* sets out various considerations which may be summarized as follows:
From at least 1953 a cartel for the purchase of ferrous scrap has existed within the Community in contravention of the provisions of Article 65 (1) of the ECSC Treaty. The defendant has been provided with detailed information on this matter, with numerous supporting documents. Independent dealers have been gradually excluded from direct trade with the ferrous scrap consumer undertakings which are members of the cartel and are still excluded at present.
It is 'obvious' that the members of the cartel, who were aware that their conduct was unjustifiable from a legal point of view, were encouraged by the fact that the former High Authority only took 'inadequate measures, which have consequently had no effect' and that 'despite the very clear nature of the reports and warnings given by the Restrictive Practices Division' the Commission took no measure to re-establish or guarantee normal conditions of competition. The applicant enumerates the documents published in this connexion by the High Authority and several internal reports drawn up by the relevant departments of the High Authority and the Commission.
The undertakings concerned have acted in such a way as to hide their practices from the Restrictive Practices Division of the High Authority.
The applicant obtained more and more clearly the impression that the efforts of the Restrictive Practices Division 'could not overcome the political influences affecting the machinery of the Commission and that, moreover, the bodies within the cartel obtained with a surprising rapidity certain information which was to be found in the exchange of correspondence to which this matter gave rise'. Although the Commission has been aware of the events in question since 1967, it has as yet taken no serious measure and in particular has adopted no decision.
It is this fact which led the applicant to make his requests of 16 September and 3 October 1969. The period laid down in the third paragraph of Article 35 of the ECSC Treaty expired at the latest on 9 December 1969. As the Commission had taken no action in spite of the obligations which were incumbent upon it, it appeared necessary to bring the present application.
In support of its allegations the applicant has annexed to the application a very large number of documents, in particular 48 files of 'documents relating to the cartel' as well as a 'statement concerning the working of a ferrous scrap cartel' and has given the names of numerous witnesses.
In order to describe the origin of its decision of 21 January 1970, the *defendant* makes the following points in its *statement of defence*:
In March 1967, a certain Mr Weber, residing in Constance, lodged a complaint with the High Authority concerning certain practices contrary to the Treaty, which were becoming evident on the German market in ferrous scrap. Following this complaint the High Authority carried out various checks. In June 1967 Mr Weber sent a large number of documents to the High Authority; the 48 files which the applicant has produced before the Court give an idea of the number of documents involved. The Commission's Directorate-General for Competition undertook to study these documents in the autumn of 1967. On several occasions between 1967 and 1969 the Commission had conversations with Mr Weber and with the applicant's counsel. Only in November 1968 did Mr Weber make it clear that he was acting on behalf of the undertaking which is the applicant in this instance. The applicant's representative has been aware from July 1969, when the last conversation was held, that within a short period the relevant departments of the Commission would refer the matter to this body. The departments in question brought

their inquiries to a conclusion in November 1969.

On the basis of all these factors the defendant concludes that the applicant's allegation that it has failed to take action is unjustified. It points out that the decision answers the first and second heads of the conclusions in the application, on which a ruling is therefore no longer necessary.

As regards the request contained in the third head of these conclusions, the applicant maintains that it is inadmissible because it did not appear in the letters sent by the applicant on 16 September and 3 October 1969.

It maintains, in addition, that this request is unfounded as it is not clear from the application on what provisions of the Treaty the applicant bases its contention that the Commission is obliged to take the action requested.

The Commission claims that by its decision of 21 January 1970 it fulfilled its obligation to take action to deal with infringements of Article 65 (1), and maintains that it has no power to fix minimum quotas to cover the needs of certain purchasers in favour of certain undertakings which sell products governed by the ECSC Treaty.

In its *reply*, the *applicant* develops the grounds on which it considers that the defendant must also pay the costs relating to the first and second heads of the conclusions in the application (on which, as has been said, no ruling is necessary). It maintains, in particular, that it appeared necessary to institute proceedings before the Court in order to compel the Commission to take rigorous action against the cartel for the purchase of ferrous scrap and that, in addition, this body did not act within the period of two months laid down in the third paragraph of Article 35 of the ECSC Treaty.

As regards the request contained in the third head of the conclusions in the application, after pointing out that this request already appeared in general terms in the letter of 3 October 1969 and that, therefore, it is not inadmissible, the applicant claims that, if it has been compelled to set out the subject-matter of its request in detail, this is because the defendant has not put forward any precise ideas concerning the effective measures to be taken in order to re-establish and guarantee normal conditions of competition.

In addition the applicant adds that this request is justified for the following reasons in particular: according to Article 3 (d), Article 4 (b) and (d), the third indent of the second paragraph of Article 5 and Article 14 of the ECSC treaty, the Commission is bound to take preventive measures in order to guarantee normal conditions of competition. As the Commission had been aware for 15 years of the practices existing in the purchase of ferrous scrap, it knew that the prohibitions contained in the Treaty were continually evaded and that 'each time that the associations which directed the cartel had been wound up, they had merely changed their business name and had continued their activities with the same staff and at the same address'. Thus, from the point of view of both its essential terms and the amount of the fines imposed, the decision of 21 January 1970 constitutes an inadequate measure which does not prevent the undertakings concerned from continuing their former practices.

The applicant maintains that both the Commission's evasiveness and the inadequacy of its action have convinced it that, far from being disposed to take adequate action to guarantee normal conditions of competition in the market in ferrous scrap, it is, on the contrary, clear that the defendant accepted the view held by business circles that cartels are indispensable in the iron and steel industry sector.

The arguments set out by the *defendant* in its *rejoinder* may be summarized as follows:

The first and second heads of the conclusions in the application

The Commission explains that although in its statement of defence it put forward no conclusions as to costs relating to these two requests of the applicant this is because the volume of the work required in the preparation of such decisions prevented its taking action within the period laid down in the third paragraph of Article 35. It points out, nevertheless, that the decision of 21 January 1970 was adopted before the expiry of the period fixed for lodging the statement of

defence. In accordance with Article 69 (5) of the Rules of Procedure it leaves the question of costs to the discretion of the Court.

As regards the other points contained in these heads of the conclusions, the Commission puts forward detailed explanations in answer to the applicant's allegations.

The third head of the conclusions in the application

The defendant maintains that this request is inadmissible. It is too vague to be taken into consideration. The applicant has failed to set out precisely the measures which it wishes to see taken. Its references to the general provisions of the Treaty are inadequate.

The defendant adds that requests submitted within the context of an application lodged on the ground of a failure to take action may only concern questions which have already been referred to the Commission. This condition is not satisfied in this instance. Neither of the letters of 16 September and 3 October 1969 showed in any way that the applicant expected the Commission to take measures more specific than those adopted in the decision of 21 January 1970. Before lodging its application the applicant never maintained that the Commission was required to fix quotas in favour of independent dealers.

The Commission also continues to maintain that the request is unfounded. The decision of 21 January 1970 laid sufficient emphasis on observance of the prohibition on cartels. The Commission has no reason to believe that the iron and steel undertakings in question will once again infringe the provisions of the Treaty, thus exposing themselves to the risk of greatly increased fines. Furthermore, the demand for steel and, therefore, for ferrous scrap has greatly increased during recent years, with the result that good opportunities exist for the disposal of ferrous scrap for all the dealers in that product within the Community.

Finally, the defendant maintains that the measure sought by the applicant would represent a serious interference with the market conditions and would be contrary to the principles set out in the second paragraphs of Articles 2 and 5 of the Treaty. Moreover, as there is neither a 'manifest crisis' (Article 58) nor a shortage (Article 59) of either iron or steel there can be no justification for fixing a quota.

Grounds of judgment

1 By an application lodged at the Registry on 15 December 1969 the applicant has brought before the Court an action for failure to act based on Article 35 of the ECSC Treaty, the purpose of which is to obtain an 'order' that the defendant take certain measures, the adoption of which the applicant had requested in its letters of 16 September and 3 October 1969, in order to ensure normal conditions of competition in the market in steel and ferrous scrap.

I — The first and second heads of claim

2 The parties agree in accepting that by the Commission's decision of 21 January 1970 (OJ L29, p. 30) concerning the agreement forming the subject-matter of the requests contained in the abovementioned letters the applicant obtained satisfaction as regards the first and second heads of claim in his application, with the result that it is no longer necessary to give a ruling with regard to them.

3 The Court takes note of this fact.

II — The third head of claim

4 In the third head of claim the applicant requests the Court to order the Commission 'to take the appropriate measures to guarantee competition in the market in ferrous scrap, such as, in particular, the fixing of a minimum quota of the ferrous scrap requirements [of the iron and steel undertakings] up to which amount supplies must be obtained from independent dealers (that is, those who do not form part of the group)'.

As, according to Article 35, the sole object of an action for failure to act is the implied decision of refusal which results from the silence of the authority, this request can only be accepted in so far as its relates to the annulment of the implied decision rejecting the request contained in the letters of 16 September and 3 October 1969 of fix minimum quotas under the conditions defined in the present application.

5 The defendant contends that this head of the application is inadmissible, on the ground that no such request appeared in the letters of 16 September and 3 October 1969.

6 The letter of 16 September 1969 contained no reference to such a fixing of quotas, but merely requested the defendant to note the existence of the agreement concluded between the German iron and steel producers and to impose sanctions upon those concerned, measures which the defendant in fact adopted in its decision of 21 January 1970.

7 In its letter of 3 October 1969 the applicant requested the defendant 'to take adequate and appropriate measures in order to re-establish and guarantee normal conditions of competition on the German market in ferrous scrap', in particular the measures already referred to in the letter of 16 September.

It cannot be concluded on the basis of this wording that the applicant requested the defendant to adopt not only the measures defined specifically in the letters in question, but also additional measures.

On the contrary, the letter of 3 October 1969 might as easily be interpreted to mean that as regards the possible adoption of such measures the applicant relied on the discretion of the defendant.

8 Moreover, even if it is accepted that the applicant formally requested the adoption of additional measures, it nevertheless omitted to give any details as to their content.

In these circumstances, the implied decision imputed to the defendant cannot be interpreted as the dismissal of a request for the fixing of minimum quotas in favour of independent ferrous scrap dealers.

9 Thus, the defendant cannot be regarded as having taken, within two consecutive months from being requested to act by the applicant, an implied decision refusing to fix minimum quotas in favour of independent ferrous scrap dealers as set out in the third head of claim.

10 This head of claim must therefore be declared inadmissible as being without purpose.

III — Costs

11 Under the terms of Article 69 (5) of the Rules of Procedure, where a case does not proceed to judgment the costs shall be in the discretion of the Court. It must be borne in mind in favour of the applicant that it was essentially upon its initiative that the defendant, realizing that the application was justified, adopted the measures requested in these heads of claim, although it did so both after the expiry of the period of two months referred to in the third paragraph of Article 35 of the ECSC Treaty and the lodging of the action for failure to act.

In these circumstances the defendant must be ordered to pay all the costs of the action.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Coal and Steel Community, especially Article 35;

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.