OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 10 MAY 1962[1]

Mr President,
Members of the Court,

In this application under Article 40 of the Treaty, Mr Worms, a scrap dealer at The Hague, seeks to obtain reparation for the injury he alleges he has suffered by reason of a wrongful act or omission on the part on the High Authority. The action arises out of the treatment he has received both from the Office commun des consommateurs de ferraille, considered as an organ of the High Authority, and from the High Authority itself, which as a public authority has the duty of supervising the activities of the Office commun and of applying Article 65.

The applicant claims that the Office commun systematically refused to do business with him and refused all his offers, at one point without giving any reasons and thereafter on various pretexts, and further that the High Authority:

1. failed to exercise its powers over the OCCF to ensure that he could continue to do business;
2. failed to intervene to break the boycott set up against him by the Dutch scrap dealers;
3. failed to act in a determined manner to end the acts of fraud in scrap-dealing and to proceed against those responsible.

A — With regard to the Office commun

The liability of this agency, a Belgian company under private law, cannot of course be called into question before this Court. This can only be done in respect of the liability of the High Authority, which is substituted by law for that of the Office commun in those matters relating to the functioning of the equalization scheme in accordance with the case law of the Court.

Those decisions, however, which treat the Brussels agencies as organs of the High Authority and go so far as to liken their acts to those of the High Authority itself, obviously only relate to the activities which they perform *as public authorities*. Until now your decisions have never been extended to the strictly *commercial* activities of such bodies and I do not think that it is possible so to extend them. If one considers, for example, Decision No 2/57, in force at the time of the facts at issue, one clearly sees the division of powers between the two agencies: the Caisse de péréquation, which is 'the executive organ of the financial arrangements established by this Decision' (Article 12) and which is made up of heads of the iron and steel industry of the Community, is alone competent to take all *decisions* required to ensure the functioning of the arrangements: fixing the tonnages to be taken into account for equalization, determining the conditions to which the grant of equalization shall be subject, fixing the equalization price, the basic rate of the contributions, etc. (Article 11 (1)). On all these matters, the Office commun only makes *proposals* to the Caisse.

On the other hand, the Office commun, made up largely of undertakings consuming ferrous scrap, 'is competent to negotiate purchases on joint account' (Article 11 (2)) and 'as far as is necessary for the regular supplying of the Common Market, the Office commun may also conclude contracts of purchase and charter — parties direct on behalf of consumers subsequently to be designated (Article 11 (3)). Here the Office commun has its own powers, but these are of a

1 — Translated from the French.

commercial nature; it is no longer a question of activities as a public authority at least in so far as they do not affect the functioning of the equalization scheme (as was the position in the Case of *Mannesmann and Others:* judgment of 4 April 1960). To this extent disputes relating to such activities fall within the jurisdiction of the ordinary courts and, in this sphere, the administrative liability of the High Authority is not substituted by law for the liability of the Office commun when it acts as statutory agent in the negotiation of purchases on joint account or, *a fortiori,* as a direct purchaser. The business relations which the applicant sought to establish with the Office commun by making offers for the sale of ferrous scrap are of the same kind as those he sought to establish with the dealers — it is a question of relationships governed purely by private law.

B — Complaints against the High Authority

I will dispose at once of the first and third of these complaints: the first (the High Authority failed to exercise its powers over the OCCF to ensure that Worms could remain in business) on the ground that the High Authority clearly had no such powers, and the third (that it failed to act in a determined manner to end the acts of fraud in scrap dealing and to proceed against those responsible) on the ground that it is the undertakings consuming ferrous scrap and liable to the equalization levy which are the victims of the frauds and not the applicant..

There remains the second complaint, which is the essential one, arising from the boycott which the applicant alleges he has suffered at the hands of both the OCCF and the Dutch dealers. The liability of the High Authority in this respect would lie in its failure to use its powers to break up the boycott.

The problem appears to me to be well stated thus. In fact, it is clear that if the applicant has a cause of action against the originators of the alleged boycott, including the OCCF, such action can be tried only before national courts. There is a more or less abundant body of case law in this field, both in the countries of the Community and in third countries. It is most highly developed in those countries which have no anti-trust legislation, for example Switzerland. It is for this reason that the federal courts have developed a body of case law which can be summed up in the following formula, to be found in several judgments:

'In economic life, the boycott is a means of competition which is admissible *per se;* it becomes inadmissible when the end in view or the means used are unlawful or contrary to morality, or when the advantage sought by the boycotters is out of all proportion to the injury suffered by the victim.'[1]

As regards the end in view:

'It is clearly unlawful if it sets out to satisfy a desire for revenge or a feeling of jealousy without being of any use to the boycotters.'[2]

In countries which have anti-trust legislation, boycotts are normally prohibited in so far as they constitute a threat to conditions of competition. For example, this is the case in Germany by virtue of paragraph 26 (1) of the Law against restriction on competition. In such countries, however, the application of special legislation combines with the ordinary law, providing a method of curbing acts of boycott which would not be caught under the anti-trust law. Thus in Germany, Article 823 (1) of the Civil Code, which is the basis of quasi-delictual liability,

'plays an important rôle in cases where the strict conditions of paragraph 26 (1)

1 — General report on boycotting, presented by Henri Deschenaux, Dean of the Faculty of Law at Freiburg University, to the Congress of the Henri Capitant Association in June 1956, Part X, p. 58.

2 — Ibid. p. 59.

of the Law against restriction on competition are not fulfilled' (Commentary of Müller, Henneberg, Schwartz, 1958, p. 569).

However, whether we are dealing with a boycott prohibited by anti-trust legislation or with a boycott illegal *per se* under the ordinary law, an action is always available to the victim before the courts.

In the present case, we have an anti-trust law, that of the Community, which is contained in Article 65. Infringement of this legislation which is incorporated into the national law of each Member State can be referred to the national courts is so far as the boycott complained of stems from a prohibited agreement or disregards the conditions of an authorized agreement. This is subject to a single reservation: that a possible dispute on the legality of an agreement under the Treaty should be settled by a preliminary ruling by the High Authority, and if need be, by the Court (Article 65 (4)). In other cases, however, the ordinary law remains applicable: in the Netherlands, it is Article 1401 of the Civil Code, which corresponds to Article 1382 of the Belgian and French Civil Codes (see, in this context, Molengraaff, 'Leidraad Nederlands Handelsrecht', 1953, pp. 145 and 151; see also Dorhout Mees, 'Kort Begrip van het Nederlands Handelsrecht', 3rd edition, 1961, Nos 472 and 473). Such is the action that Mr Worms could have brought against the originators of the boycott.

On the other hand, the only question which can arise against the High Authority, and the applicant has indeed recognized this, is one of a wrongful act or omission resulting from the negligence which that institution might have shown in exercising its powers against the originators of the boycott.

But what powers are we concerned with? Those which the High Authority holds under Article 65, and which must be exercised in particular within the context of Article 53 on the financial arrangements; moreover, Article 53 contains an express reference to Article 65.

I do not consider that Article 65 applies in this case.

That provision is in fact aimed at agreements:

'Tending directly or indirectly to prevent, restrict or distort normal competition within the Common Market.'

It is therefore concerned with attacks on competition within the Common Market, which aim in particular, as Article 65 itself states, at fixing or determining prices, restricting or controlling production, technical development or investment, or sharing markets, products, customers or sources of supply.

The boycott referred to by Mr Worms was, according to him, caused by his exposure of the scrap frauds to the Dutch authorities on 28 November 1957. Moreover, this boycott on the part of various undertakings and the OCCF consisted not in breaking off existing business relations, but in a systematic refusal to deal with him after his dismissal by Hansa, on behalf of whom he had worked since 1 January 1956. The dismissal had no cause other than the exposure. If these facts were proved, that is, the actual existence of the boycott, on the one hand, and the relationship of cause and effect between the exposure and the boycott, on the other, this would no doubt constitute a typical example of an 'unlawful' boycott under the ordinary law. On the other hand, this essentially subjective case seems to me to fall outside the scope of Article 65, and consequently the High Authority, as a public authority, was not obliged to take these matters into consideration.

The High Authority would have been able and obliged to intervene only if it had appeared to it, objectively, that the actions complained of by the applicant were capable of distorting normal competition within the market. However,

nothing justifies one in this *a priori* assumption.

Quite another question is whether the High Authority has exercised all the diligence necessary in order to break up the cartel formed by the scrap dealers recognized by the iron and steel undertakings of the Netherlands as their direct suppliers. This cartel requested authorization under Article 65 (2) on 26 April 1954 and its request was rejected only on 2 June 1960 (Official Journal of 24 June).

Throughout that period it was lawfully able to function under the system set up by the Transitional Provisions by virtue of Decision No 37/53 of 11 July 1953 and the liberal decisions of the Court in this respect. This long period in fact covered the whole time during which the equalization scheme was in force!

The applicant has referred to these facts and it is for this reason that I mention them here. His reasoning is that, if the High Authority had shown the necessary diligence and if the cartel had not existed at the time of the events giving rise to this action normal business relations could more easily have been established between the applicant and the purchasers of ferrous scrap. It is a question therefore at most of indirect injury, too far removed from the applicant's position, based on the wrongful failure of the High Authority to take action against the boycott from which he claims to have suffered. In relation to this, as I have already stated, the case does not, in my opinion, fall within the scope of Article 65 and does not call for intervention on the part of the High Authority.

I am therefore of the opinion:

— that the application should be dismissed; and

— that, subject to the application of the provisions concerning legal aid, the applicant should be ordered to pay the costs.