In Case 4/69

ALFONS LÜTTICKE GMBH, having its registered office in Germinghausen and a branch office in Cologne-Deutz, represented by Peter Wendt, Advocate of the Hamburg Bar, with an address for service in Luxembourg at the office of Félicien Jansen, huissier, 21 rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, Jochen Thiesing and Rolf Wägenbaur, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

Application for damages under the second paragraph of Article 215 of the EEC Treaty,

THE COURT,

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

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The Alfons Lütticke company, through its branch in Cologne-Deutz, imports into the Federal Republic of Germany among other articles milk and powdered milk products.

The importation of these goods into the Federal Republic gave rise, until 1 January 1968, to the imposition of a turnover equalization tax for milk and other powdered milk products and for food preparations containing cocoa (headings 04.02 and 18.06 respectively of the Common Customs Tariff).

The rate of this tax, which on 1 January 1962 was 4% for the two headings in question, was reduced to

3% for tariff heading 04.02 as from 1 April 1965 by the 16th Law amending the law on turnover tax of 26 March 1965 (Bundesgesetzblatt I, p. 156) and was raised to 6% for tariff heading 18.06 on 1 June 1963 by the 12th Law amending the law on turnover tax of 16 May 1963 (Bundesgesetzblatt I, p. 321).

Taking into account certain corrections made to the notices of assessment for customs purposes by the German customs authorities and of refunds prescribed in a circular from the Federal Ministry for Finance of 20 September 1968, Lütticke claims to have paid as turnover equalization tax in respect of imports from other Member States from 1962 to 1964 a total sum of DM 124 396.04.

As early as the end of 1962, Lütticke pointed out to the Commission that the imposition by the Federal Republic of Germany of the turnover equalization tax on the importation of powdered milk products had been, in its opinion, since 1 January 1962 contrary to the EEC Treaty and in particular the first paragraph of Article 95 thereof.

In reply to a formal notice under the second paragraph of Article 175 of the Treaty, the Commission, on 14 May 1965, informed Lütticke, in particular,

— that by lowering from 4% to 3% the rate of the tax at issue relating to heading 04.02, the Federal Republic had ceased to infringe the first paragraph of Article 95 since that rate henceforth corresponded to the indirect taxes on milk powder from domestic sources;

— that there was no need for a reduction in that rate operating retroactively to 1 January 1962, since the rate was taken fully into consideration in fixing the countervailing charge under Article 46 of the Treaty in respect of unskimmed milk powder and in fixing the levies under Article 2 of Regulation No 13/64 of 5 February 1964 on the gradual establishment of a common organization of the market in milk and milk products;

— that the imposition of the tax at issue does not constitute an infringement of Article 95 of the Treaty and there is no reason to require its complete abolition.

An action brought before the Court on 12 July 1965 by Lütticke seeking, principally, the annulment of the said letter of the Commission of 14 May 1965 and, alternatively, a finding of failure to act by the Commission, was dismissed as inadmissible by Judgment of 1 March 1966 (Case 48/65, [1966] ECR 19).

In the context of domestic law, Lütticke brought in 1963 an administrative action against the decision of a German customs office which, on the importation of a consignment of whole milk powder, had ordered it to pay the turnover equalization tax.

On Lütticke's claim being rejected by the competent Hauptzollamt (principal customs office), it brought an action before the Finanzgericht of the Saarland.

That court referred to the Court of Justice, in accordance with Article 177 of the EEC Treaty, a number of questions of interpretation relating to Article 95 to which the Court gave replies by judgment of 16 June 1966 (Case 57/65, [1966] ECR 205).

In 1968, on Lütticke's being unable to obtain from the Commission compensation for the damage which it claimed to have suffered by reason of the latter's failure to take action against the Federal Republic, it instituted the present action for damages on 22 January 1969.

II — Procedure

The written procedure followed the normal course.

It was completed on 25 June 1969 by the lodging of the defendant's rejoinder.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

At the Court's request, the defendant lodged several documents on 1 August and 11 November 1969.
The opening of the oral procedure, which had been fixed for 7 October 1969, was postponed at the request of the applicant so as to enable it to lodge an expert's report.
This report was lodged on 24 September 1970.
The oral observations of the parties were heard on 16 December 1970.
At that hearing they filed further documents and replied to questions put by the Judge-Rapporteur.
The Advocate-General delivered his opinion at the hearing on 17 February 1971.

III — Conclusions of the parties

The *applicant* claims that the Court should

(a) order the Commission to pay it the sum of DM 124 396.04, plus interest at 8% as from 20 April 1968;

(b) declare that the Commission should compensate it for all damage which it has caused it by neglecting to ensure that the turnover equalization tax imposed in the Federal Republic of Germany in respect of milk powder was abolished with effect from 1 January 1962;

(c) order the Commission to pay the costs of the proceedings.

The *defendant* contends that the Court should

(a) declare the action inadmissible;

(b) alternatively, dismiss it as unfounded;

(c) order the applicant to pay the costs.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — Admissibility

1. Irregularity of the application as to form

The *defendant* contends that the originating application does not satisfy the conditions required by Article 38 (1) of the Rules of Procedure by reason of the fact that it:

(a) refers to submissions and arguments put forward in other cases and does not itself prove that the rate of the tax at issue is excessive; for this reason, it is impossible for the Court or the Commission to appreciate, on the basis of the application alone, the precise content and scope of the submissions put forward;

(b) does not justify the claim relating to interest at 8% and consequently does not state, with regard to this point, the grounds on which it is based.

The *applicant* replies in the following manner to these two submissions:

(a) The reasons for which it considers the present cumulative tax of 3% on milk powder and on other dried milk products made in Germany to be excessive were set out in detail for the Court in previous cases; there seemed to it to be no need to repeat the same arguments. During the procedure the applicant added a schedule to its reply and produced an expert's report designed to show that the tax at issue was too high.

(b) The claim for the payment of interest at 8% is based on the fact that since 1962 the applicant has made use of bank credit, the annual rate of which has been at least as high as the interest claimed.

2. Disregard of the second parapragh of Article 97 and Article 169 of the EEC Treaty

The *defendant* alleges that, by invoking the provisions of the Treaty relating to non-contractual liability, the applicant is attempting to make the Court uphold the allegation that the Commission is guilty of failure to act. The real purpose

of the action is to force the Commission to take the measures prescribed in the second paragraph of Article 97 and in Article 169 not only in respect of certain imports of milk powder but, more generally, in all cases in which Article 155 of the Treaty confers on it a task of supervision.

The second paragraph of Article 97 modifies the procedure which is normally provided for in cases of infringement of the Treaty by a Member State; before the Commission, in accordance with Article 169, gives the Member State concerned the opportunity to submit its observations, it must, under the second paragraph of Article 97, address appropriate directives or decisions to the State concerned. If the Member State does not comply with these within the period laid down, the general provisions of Article 169 apply as to subsequent procedure.

The action is designed in fact to force the Commission, if it wishes to avoid an infinite number of applications for compensation, to initiate first the procedure under the second paragraph of Article 97 and then, if necessary that under Article 169.

In the subsequent stages of procedure applying where a Member State fails to fulfil an obligation under the Treaty in relation to taxation, the Commission enjoys a discretionary power which precludes individuals from forcing it to adopt a particular course of conduct.

To accord such a right to individuals would be contrary not only to the letter of the Treaty, but also to its spirit, because that would compromise the atmosphere of trusting collaboration which must govern relations between the Community institutions and Member States for the harmonious application of the Treaty.

The *applicant* expressly denies having disregarded the case-law of the Court, according to which individuals cannot constrain the Commission to bring an action against a Member State.

The sole object of the action is to obtain damages from the Commission, payment of which would eliminate the distortion of competition of which the applicant complains. There would no longer be any point in the Commission's bringing an action against the Federal Republic of Germany.

3. Disregard of Article 175 of the Treaty

The *defendant* is of the opinion that the applicant does not satisfy the conditions stipulated by Article 175 of the Treaty for the bringing of an action by any natural or legal person on the ground of failure to act. The only thing which is capable of being disputed is the refusal to take compulsory measures which, moreover, must be addressed to the applicant. Neither of these two conditions is fulfilled when the importer complains that the Commission has failed to take action against a Member State in relation to the rate of certain internal taxation. The limitation, intended by the Treaty, in respect of the legal protection of individuals under Article 175 would be of no effect if the same result could be obtained, without having to respect the very strict conditions of Article 175, by means of an action for damages under the second paragraph of Article 215. However, this is what would happen were the applicant to succeed, since the Commission would be obliged not only to pay it damages, but also, in accordance with Article 176, to take the measures consequent upon a finding of failure to act contrary to the Treaty.

The *applicant* replies that the reference to Article 176 of the Treaty is irrelevant in this case since this provision only concerns actions brought in pursuance of Articles 173 and 175 and not an action for damages under the second paragraph of Article 215.

There can be no possibility of confusion between an action for damages and an action for failure to act. The conditions of the latter, despite what the defendant maintains, are indeed less strict than those of an action for damages, which

must be supported by proof not only of the existence of an objectively illegal action but also of the existence of a culpable act on the part of the Commission. The effect of Article 215 is solely to ensure *a posteriori,* by the payment of a sum of money, a minimum of legal protection for a person subject to Community law, who is unable to avoid the damage caused him because he is not entitled to bring an action for the annulment of the express or implied decision which adversely affects him.

4. Disregard of the case-law of the Court relating to 'direct effect'

The *defendant* observes that the Court has held that Article 97 is not one of the provisions of the Treaty which have direct effect and confer on individuals rights which national courts must protect.

Although it does not disregard the difference between a case where a person concerned may invoke the nullity of provisions of national law before his national courts by relying on a directly applicable provision of the Treaty and a case where he may sue the Commission for damages, alleging a wrongful act or omission in the application of the same provision of the Treaty, the defendant observes that, by reason of the close connexion between the obligations devolving, on the one hand, on the Commission in its task of ensuring the observance of the Treaty and, on the other hand, on Member States in relation to observing this same Treaty, it is possible through an action for damages based on a wrongful act or omission brought against both the Commission and the Member State to deprive the distinctions established by the Court of all meaning.

The *applicant,* for its part, is of the opinion that the requirements for an action under Article 215 do not in any way coincide with those which are necessary before a provision of the Treaty has direct effect and confers rights on individuals.

On the contrary, Article 215 is of particular importance in cases where there is no legal rule which is directly applicable and where, in consequence, the person concerned has no recourse other than to bring an action for damages, since an application for annulment is not open to him.

5. Period of limitation

The *defendant* asserts that, for all practical purposes, the right of indemnity invoked by the applicant is in any case for the most part time-barred.

Under Article 43 of the Protocol on the Statute of the Court, proceedings against the Community in matters arising from non-contractual liability are barred after a period of five years from the occurrence of the event giving rise thereto; all the rights invoked by the applicant, which arose five years before the bringing of the action, are therefore barred.

The applicant is wrong in thinking that the period of limitation does not commence as long as the Commission is entitled to take action against the Federal Republic on the basis of the second paragraph of Article 97 of the Treaty. Since this provision, as well as Article 169, lays down no time-limit for action by the Commission against a Member State, the effect of the applicant's argument would be that actions for damages arising from unlawful failure to act are never barred.

The *applicant* points out that account must be taken of the time for payment of the tax in dispute; the damage arose only three months after each importation.

The event giving rise to the damage is the failure of the Commission which has up to the present unlawfully refrained from taking the measures prescribed by the second paragraph of Article 97.

It is generally accepted that even rights to which time-limits are not expressly attached are extinguished by efflux of time; this is the case with rights arising from infringement of the second paragraph of Article 97.

B — *The substance of the case*

1. Is the rule which has allegedly been infringed intended to protect the interests of the applicant? ,

The *defendant* observes that, according to the case-law of the Court, the principle, whereby the legal rule whose infringement is relied on by an applicant must be intended to protect the interests of that person or the category to which he belongs, forms part of the general principles referred to in the second paragraph of Article 215 of the Treaty.

The fiscal provisions of the Treaty constitute a set of rules intended to safeguard the general interest in the effective attainment of the Common Market, but not to protect specific undertakings.

This point is of particular importance in respect of the provisions relating to the turnover tax system; the fiscal burden of this tax is passed on by the tax-paying seller to the purchaser, the result being that it is borne by the ultimate consumer of the article.

If the tax provisions of the Treaty were recognized as being rules intended to protect the interests of individuals and were capable of giving rise to the application of Article 215, it would follow that any slight error in the application of these provisions could confer a right of compensation on all consumers in the Common Market.

If the applicant's argument were accepted, the Community would be open to actions for damages based on an alleged disregard, on the part of the Commission, of the obligations imposed on it by Article 155 in relation to almost all the provisions of the second and the third parts of the Treaty.

According to the *applicant,* the case-law of the Court establishes, on the contrary, that Article 97 is in the nature of a protective rule.

The free movement of goods between Member States cannot be ensured without the participation of importers; a rule designed to promote this must therefore tend also to protect the interests of importers.

The conditions of competition do not allow the imposition on the consumer of the burden of the tax at issue. It is therefore impossible for all consumers in the Common Market to put forward claims for damages; they are not, moreover, the addressees of the disputed notices of assessment.

2. The culpable act (*Verschulden*)

In the written procedure, the *applicant* contended that the total cumulative tax, under the heading of turnover tax, imposed on milk powder from Germany was, from 1962 to 1965, less than 0.16% and that in accordance with the principles contained in the Council Directive of 30 April 1968, on a common method for calculating the average rates provided for in Article 97 of the Treaty (OJ, English Special Edition 1968 (I), p. 114) it should have been only 0.08%.

From the expert's report made by Mr Greiffenhagen, a Diplomkaufmann, and added to the documents of the case by the applicant before the opening of the oral procedure, it emerges that this tax was instead between 1.31% and 1.74% and therefore, according to the Commission directive, must be reduced to 1.5% for the two customs headings 04.02 and 18.06. However, this expert's report in particular adopted certain factors which should not have been taken into account in assessing the tax and based the calculation on figures which were too high. The total tax imposed on German milk powder products is, in fact, less than the rate of 1.5% adopted by the expert.

It is, in any case, indisputable that the tax of 3% (or even 6%) which is imposed, under the heading of turnover equalization tax, on the products imported by the applicant from other Member States of the EEC is much too high and does not observe the principles laid down in Article 95 of the Treaty.

The expert's report provided by the Brunswick-Völkenrode Research Institute, on which the Commission bases its

calculation, uses inadequate methods of analysis and data and is vitiated by numerous errors.

Despite the many times Lütticke has insisted on the Commission's taking action, the latter has refused to address a directive on a decision to the Federal Republic, even though it was obliged to do so by the second paragraph of Article 97 and by Article 169 of the Treaty. If the Commission had fulfilled its obligations and taken, within the appropriate time, all the prescribed measures, the turnover equalization tax imposed in the Federal Republic on products imported by the applicant company would have been lowered to a rate consistent with the actual tax borne by similar domestic products.

Since Articles 95 and 97 themselves lay down with mandatory force the date on which they are to come into force it is not possible to attribute to the Commission the discretionary power which it claims, for this would confer on it the right to determine the moment when these provisions become effective.

This alleged discretionary power is refuted by the basic provision of Article 155 of the Treaty. In the case of infringement of Article 97 by a Member State, the Commission is legally obliged to act against it; it possesses therefore no margin of discretion, either as to principle or as to the moment when it should take action, or as to the manner of action.

The Commission has no discretionary power either to decide whether, in the event of infringement of Articles 95 and 97, such infringement must be brought to an end retroactively. Likewise, there is no discretionary power with regard to the amount of the tax at issue; this follows from Article 95 and the first paragraph of Article 97.

Even if the Commission were recognized as having a certain freedom in the choice of methods, it must assume the risk entailed in such a choice.

As regards, more particularly, the action of the Commission against the Federal Republic, the applicant maintains that the Commission did not act with the required energy and despatch. It recalls that four years and four months elapsed before the tax at issue was reduced from 4% to 3% and then with effect only from 1 April 1965.

The Commission did not contact the organs of the Federal Republic competent to amend the domestic legislation; it was content to approach the executive, whereas, according to the case-law of the Court, the State is liable whatever the organ of State whose action or inaction is the cause of the shortcoming, even if it is an institution which is constitutionally independent.

According to the *defendant,* the general principles referred to in the second paragraph of Article 215 imply that the Commission must be proved to be guilty of culpable failure to fulfil an obligation. This is not the case here.

In general terms, the defendant is of the opinion that, although the third paragraph of Article 95 imposes specific obligations on Member States, the Commission possesses, within the framework of Articles 155 and 169 and the second paragraph of Article 97, for the purpose of ensuring that these obligations are fulfilled, a discretionary power inconsistent with the right of individuals to oblige it to adopt a particular measure; the search for an amicable solution takes priority.

Since 1959 the Commission has undertaken to ensure the observance of Article 97 by Member States.

As regards more particularly the Federal Republic of Germany, the problem of the rate of turnover equalization tax imposed on milk powder was tackled in 1961, before any claim was made by an importer. The examination undertaken by the Commission in collaboration with the tax experts of Member States established that the rate of 4% was too high but that a rate of 3% must be considered appropriate, having regard to the tax borne at the earlier stages by the basic product, milk. De-

spite the pressure which it brought to bear on the competent German authorities, the Commission succeeded only in 1965, owing to certain delays in the domestic legislative procedure, in getting the rate of the turnover equalization tax in dispute reduced to 3%.

The delays occurring in the legislative procedure are not attributable to it; the Commission was not in a position to reduce the delays since it could only approach the government.

As regards the problem of retroactivity, the defendant considers that, although Article 171 obliges Member States to comply with the judgment of the Court establishing their failure to fulfil their obligations and to redress the situation so as to conform to the Treaty, it does not follow that they are bound, or even in a position, to do so with retroactive effect.

In Community law as in domestic law the principle of legal certainty may be invoked in opposition to the annulment with retroactive effect of a rule of secondary legislation. This is the case, for obvious practical considerations, in relation to the rate of turnover equalization tax.

The defendant, in not requiring the Federal Republic to reduce the disputed rate retroactively, committed no wrongful act or omission, nor did it cause the applicant any damage.

As regards the compatibility of the rate of 3% with Articles 95 and 97 of the Treaty, the defendant emphasizes that this rate was based on a scientific expert's report made by the Institut für Betriebswirtschaft of the research centre of Brunswick-Völkenrode and establishing that the general burden of turnover tax borne, at the earlier stages, by milk is in the order of 2.9%. The results of this expert's report are largely confirmed by other surveys; the calculations made by the applicant and by the expert, Mr Greiffenhagen, do not take into account several important factors and are unreliable.

3. The damage

As damages, the *applicant* claims to be indemnified for, on the one hand, the sums of disputed tax which it was unlawfully constrained to pay and, on the other hand, the costs, at present still impossible to assess, occasioned by the proceedings which it was obliged to bring in the Federal Republic against the notices of assessment addressed to it. The rate of 3% does not comply with Articles 95 and 97 of the Treaty.

The defendant's assertion that the nature of turnover tax implies that it should be borne by purchasers is widely disputed by legal writers. In practice, the market conditions of milk powder products have ruled out this possibility; by reason of the advantages which similar domestic products enjoy, importers have been obliged to pay the turnover equalization tax out of their gross profit.

The disputed tax could only have been reduced either by decisions of the courts in particular cases and on the basis that the disputed rates are not considered average rates or, in general, by legislation. If reduced, as required by Article 20 of the Grundgesetz (Basic Law) of the Federal Republic, by legislative means, the applicant would have been fully entitled to rely on such a measure with effect from 1 January 1962. The Federal Republic would have followed this course if the Commission had in due course taken measures under the second paragraph of Article 97 and Article 169 of the Treaty.

The applicant cannot be reproached for no having, since the end of the 1962, contested all the notices of assessment within the prescribed period.

The Federal Republic did not take the turnover equalization tax into account, in 1961, in fixing the countervailing charge on milk powder products. This countervailing charge was moreover almost entirely abolished by the 95th regulation modifying the German Customs Tariff of 1963 (Bundesgesetzblatt 1964, II, p. 1497).

Furthermore, the countervailing charge was in general applied only to whole milk powder having a specific fat content, but not to other dried milk products.

Even if the levy imposed, only after 1 November 1964, in pursuance of Regulation No 13/64 of the Council of 5 February 1964, on the gradual establishment of a common organization of the market in milk and milk products (OJ 1964, p. 549) was too low, the turnover equalization tax would nevertheless have remained too high. An illegal measure cannot be compensated for by a measure which is legally superfluous.

In any case it is arithmetically and technically impossible in respect of numerous importations that a levy which is supposedly too low could have a real compensatory effect since Regulation No 13/64 does not provide for any refund.

The applicant does not deny the Commission a right of recourse against the Federal Republic for the damages which it may have to pay.

The *defendant* denies that the applicant has suffered the damage which it alleges.

It has in no way justified, through adequate documentation, the exact object and amount of the payments which it claims to have made in settlement of the disputed tax.

Furthermore, even if these payments can be proved, this does not mean that the applicant's claims are well founded.

In fact:

The equalization tax at the rate of 3% complies with Articles 95 and 97.

The payment of the tax at the rate of 4% has caused the applicant no damage since the total burden of the turnover tax imposed on an article falls entirely on the ultimate purchaser.

Even if the applicant could prove that it did not pass on to its purchasers the turnover equalization tax, it must assume liability for a part at least of the damage which it claims to have suffered, since it did not avail itself of the legal remedies open to it to oppose the notices of payment fixed at the rate of 4% and therefore deprived itself of the right to be repaid the sums which had been unlawfully collected.

By reason of the difference in price between milk powder in Germany and milk powder imported from other Member States, the Commission, pursuant to Article 46 of the Treaty, by its decision of 15 March 1961 authorized the Federal Republic to levy, until the entry into force of a system of levies, a countervailing charge on imports of whole milk powder, taking into account the fact that the Federal Republic levied a turnover equalization tax of 4%. The system of levies introduced after the entry into force of Regulation No 13/64 by Regulation No 158/64 of 28 October 1964 relating to the flat-rate calculation of internal taxation levied on the importation of certain milk products (OJ 1964, p. 2726) fixed the amount of the levy at the threshold price level of the importer Member State minus in particular an amount representing the effect of internal taxation levied on importation and calculated, where appropriate, on a flat-rate basis. The countervailing charges or levies imposed on imports of milk powder were therefore raised where the rate of turnover equalization tax was itself reduced earlier or to a greater extent.

The applicant's arguments relating to the competitive position within the German milk powder market are based on the false premise that the national product only bore turnover tax at a maximum rate of 1%.

Furthermore, the advantages granted in the field of turnover tax in relation to the sale of powdered milk products benefited not the producers of those products but the producers of milk; importers were not therefore placed in a competitively disadvantageous position.

The applicant disregards the fact that a reduction in the turnover equalization tax would have caused an increase in the basic price of the article and, consequently, of the countervailing charge on milk powder.

The defendant observes, as a very subsidiary point, that if the applicant's

action for damages were upheld there would have to be contribution between the Federal Republic of Germany and the Community, in accordance with the general principles of law.

4. The causal link

The *applicant* contends that the failure to act on the part of the Comimssion is the sole cause of the damage which it alleges.
If the defendant had not failed to fulfil its obligations, the legislative organs of the Federal Republic would have had to comply with a decision or directive of the Commission or with the judgment of the Court, by amending legislation with effect from 1 January 1962.

The *defendant* is of the opinion that its conduct cannot have been the cause of the damage alleged by the applicant.
In fact, even if in compliance with the second paragraph of Article 97 it had addressed a directive or a decision to the Federal Republic, this would not have directly changed in any way the legal position of which the applicant complains; a law would have had to be passed in accordance with the legislative procedure in force.
It had no means of obtaining an earlier amendment of German law.
In any case, it appears from the circular of 20 September 1968 from the Federal Ministry for Finance that the Federal Administration is to repay the sums unlawfully collected.

Grounds of judgment

1 The applicant requests the Court, on the basis of Article 178 and the second paragraph of Article 215 of the EEC Treaty, to order the Community to make good the damage caused to the applicant by the Commission's failure to address to the Federal Republic of Germany a directive or a decision under the second paragraph of Article 97 ordering it to abolish with effect from 1 January 1962 the turnover equalization tax on milk powder or, at least, to reduce it to a level compatible with the provisions of Article 95 and the first paragraph of Article 97.

Admissibility

2 The defendant maintains that the application does not satisfy the requirements of Article 38 (1) of the Rules of Procedure by reason of the fact that, first, it refers, in respect of certain aspects of the dispute, to arguments put forward in other cases brought before the Court and, secondly, it does not give grounds for the claim of 8% interest in addition to the principal sum claimed.

Under Article 38 (1) of the Rules of Procedure the application must contain, *inter alia,* an indication of the subject-matter of the dispute, a brief statement of the grounds on which the application is based and the submissions of the applicant. The application has satisfied these requirements since it gives all the details necessary to establish with certainty the subject-matter of the dispute and the legal scope of the grounds invoked in support of the sub-

missions. In these circumstances, reference, in addition, to other proceedings brought before the Court of Justice does not affect the admissibility of this action. The question of giving grounds for the interest claimed in addition to the principal sum concerns the substance of the dispute and not the question of admissibility as such.

4 Consequently, the objection based on Article 38 (1) of the Rules of Procedure must be dismissed.

5 Secondly, the defendant contests the admissibility of the action by reason of the fact that, although introduced on the basis of Article 178 and the second paragraph of Article 215, it seeks in reality to establish a failure to act on the part of the Commission and to constrain it indirectly to initiate against the Federal Republic of Germany the procedure under the second paragraph of Article 97 and, possibly, that under Article 169. It is claimed that this manner of proceeding has the effect of distorting the conditions to which Article 175 has subjected actions for failure to act.

6 The action for damages provided for by Article 178 and the second paragraph of Article 215 was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose. It would be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty to regard as a ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175.

7 This objection of inadmissibility must therefore be dismissed.

8 Since the defendant asserts also that the right to damages claimed by the applicant is, for the most part, time-barred, it must be observed that this objection concerns, in reality, not the admissibility of the application but the extent of reparation and it must therefore be dismissed.

The substance of the case

9 The applicant, having been compelled to pay under German tax law the turnover equalization tax on certain products, bases its application on the fact that the Commission has refused to use the powers conferred on it by the second paragraph of Article 97 and by Articles 155 and 169 to obtain the complete abolition of the tax in dispute or, at least, its reduction to the level of taxation fixed by Article 95 and the first paragraph of Article 97 with, in either case, retroactive effect to 1 January 1962.

[10] By virtue of the second paragraph of Article 215 and the general principles to which this provision refers, the liability of the Community presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct.

[11] In this case, it is appropriate to examine first the question whether the Commission, acting as it did, failed to fulfil the obligations imposed on it by the second paragraph of Article 97.

[12] Under the terms of Article 95, no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. According to Article 97, invoked by the applicant as the basis of its action, Member States which levy a turnover tax calculated on a cumulative multi-stage tax system may, in the case of internal taxation imposed by them on imported products, establish 'average rates' for products or groups of products, provided that there is no infringement of the principles laid down in Article 95. Under the terms of the second paragraph of this article, where the average rates established by a Member State do not conform to these principles 'the Commission shall address appropriate directives or decisions to the State concerned'.

[13] The object of Article 97 with regard to imports is to ensure that equalization taxes imposed within the framework of a cumulative multi-stage tax system are in conformity with the principles of Article 95. Having regard to the special characteristics of this system of taxation, the economic effect of which may very often only be calculated approximately, the Treaty allows Member States to take certain measures of a flat-rate nature consisting in the determination of average rates of tax on the importation of specific products or groups of products. Such a system necessarily implies, on the part of States which apply it, the exercise of a discretion in regard to the assessment of the burden of tax on the domestic product which determines the level of the average rates and the tax procedure which is connected with the general system of the legislation in question.

[14] For the purpose of safeguarding the requirements of Article 95 and the first paragraph of Article 97, a special power of supervision the exercise of which presupposes, in turn, a discretion to appraise the factors which the State has taken into consideration, is conferred upon the Commission in pursuance of the second paragraph of Article 97.

[15] This task has been allotted to the Commission for the purpose of ensuring that the national tax systems conform to the requirements of free movement

and non-discrimination which constitute the object of Articles 95 and 97. For this purpose, the second paragraph of Article 97 gives the Commission the power to define, through directives or decisions addressed to States, the requirements arising from the Treaty with regard to national tax laws.

16 Consequently, having regard both to the power of estimation implied in the conversion into 'average rates' of the complex elements relating to cumulative multi-stage taxes and to the nature of the steps provided for by the second paragraph of Article 97, the exercise of the task of supervision prescribed by this provision implies that account should be taken of the margin of discretion left to the Member States concerned by the first paragraph.

17 It is established that as early as 1962 the Commission began, with experts from the Member States, an examination of the average rates provided for by national laws with a view to checking their conformity with the requirements of Article 95 and the first paragraph of Article 97. During this examination it discussed with the German authorities and with those of the other Member States concerned in the powdered milk trade the rate applicable to this product. Having studied the arguments put forward by the German Government it informed it that the average rate of 4% in force for imports of milk powder into the Federal Republic seemed to it to be too high. Since the Federal Republic, following this intervention, reduced the rate of the tax at issue from 4% to 3% with effect from 1 April 1965—a date subsequently brought forward to 1 January 1962—the Commission considered that there was no longer any need to adopt a directive or a decision under Article 97 in order to obtain an even greater reduction. Furthermore, there were no complaints of any sort made by Member States whose exports could have been adversely affected by the tax system criticized by the applicant. It follows from the above that in the circumstances the Commission has not failed to perform its task of supervision.

18 In addition, although the expert's report produced by the applicant in support of its argument reaches the conclusion that for powdered milk the average rate should be lower, it is capable of confirming that the calculation of the indirect taxes imposed on this product includes a whole series of uncertain factors which may give rise to very different assessments, with the result that it is in general possible only to establish certain minimum and maximum limits between which several solutions appear equally justifiable.

19 The applicant has not proved that for the product in question an average rate of 3% exceeds the limits authorized by Articles 95 and 97 the observance of which the Commission must ensure. Consequently, the application must be dismissed.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs and since the applicant has failed in its submissions it must therefore bear 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 Economic Community, especially Articles, 95, 97, 155, 169, 171, 173, 176, 178 and 215;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 38 and 69;

THE COURT

hereby:

(1) **Dismisses the application;**

(2) **Orders the applicant to bear the costs.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 28 April 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 17 FEBRUARY 1971[1]

Mr President,
Members of the Court,

Since the entry into force of the Treaty of Rome and since the creation of this Court, the Lütticke Company, which is an important German import-export firm, has often shown before the Court its faith in Community law.
Those commenting on the Court's judg-

1 — Translated from the French.