On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties on the preliminary objection;
Upon hearing the opinion of the Advocate-General on the preliminary objection;
Having regard to the Treaty establishing the European Economic Community especially Article 173;
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 69 and 91,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**
2. **Orders the applicants to pay the costs.**

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 16 June 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 14 MAY 1970[1]

Mr President,
Members of the Court,

The Commission of the European Communities asks the Court, on the basis of Article 91 of the Rules of Procedure, to dismiss as inadmissible and without examining the substance of the case, the application lodged by three Belgian companies, which import and process unwrought

1 — Translated from the French.

aluminium, against a decision of 12 May 1969 addressed to the Kingdom of Belgium and the Grand Duchy of Luxembourg, which decision refused to allow those two States permission to open in respect of the year 1968 a tariff quota for that product. The Commission considers that the applicant companies are not concerned either directly or individually by the decision the annulment of which they seek.

After going into greater detail and taking the contested decision in its framework I shall consider only whether this objection is well founded.

In fulfilment of Article 20 of the Treaty, the Member States, by the agreement of 2 March 1960, determined the rates of duty under the Common Customs Tariff for products in List G. This rate is 10% for unwrought aluminium (heading No 76.01 A of that tariff). However, Protocol No XII annexed to the agreement provides that as regards that product the Commission should, as from the first steps to align national tariffs on the Common Customs Tariff, authorize the Federal Republic of Germany and the Benelux countries, at their request, to open annual tariff quotas subject to a duty of 5% to cover, subject to certain conditions, the import needs of their processing industries. Such an authorization was successively granted for the years 1964 to 1967 inclusive to the Belgo-Luxembourg Economic Union on whose behalf a similar request was submitted by the Belgian Government on 3 May 1967 for the year 1968.

Following the Kennedy negotiations held under the auspices of GATT, the Community undertook to open, as from that year, an annual 'Community' tariff quota of 130 000 metric tons for unwrought aluminium at the rate of 5%. This undertaking was implemented by a decision of the Council of 29 May 1967 and Belgium and Luxembourg were granted an allocation of 11 400 metric tons. As this quota was insufficient to cover the needs of the Belgo-Luxembourg Economic Union, the Belgian Government renewed its request based on Protocol No XII. On 7 October 1968 it requested, still in respect of 1968, a national tariff quota of 5 000 metric tons; this was increased to 8 000 metric tons in a letter of the following 24 December. But the Commission, considering that the conditions for the grant of a national tariff quota had not been met, rejected this request by a decision of 12 May 1969, notified the following day to the Belgian Government. This is the decision contested by the three applicant undertakings.

I

The first question need not detain us for long.

The applicants, whose application was registered on 25 November 1969, state that they had been informed of the contested measure by a letter of 7 October 1969 from their trade association, which forwarded to them a copy of a communication received on the subject from the Belgian Ministry for Economic Affairs.

Without submitting formally that the application is inadmissible on this point, the Commission wonders whether it should not be regarded as out of time, in view of the period laid down in the third paragraph of Article 173 of the Treaty. In fact, although the contested decision was not published in the Official Journal and although, consequently, the running of time, as regards the undertakings to whom the decision had not been addressed, began on the day when they were informed of it, the defendant institution considers as 'very probable' that the applicants were so informed before 7 October of the existence and contents of the decision, if not of its exact wording. In these circumstances, should they not have displayed greater diligence in obtaining, either from the Commission or from their national authorities, the text of a measure by which they considered themselves concerned? The Commission refers on this point to the opinion in *Società Eridania Zuccherifici Nazionali and Others* v *Commission of the European Communities* (Joined Cases 10 and 18/68, 10 December 1969, Rec. 1969, p. 459).

But in the dispute referred to by the Commission, the contested decision, granting the aid of the European Agricultural Guidance and Guarantee Fund to certain Italian

sugar refineries, had been, if not published, at least mentioned by way of an extract in the Official Journal either of the Belgian Government's request or of the Commission's rejection of that request. Furthermore, there is a certain contradiction in the attitude of the Commission by demanding that the applicants should display special diligence in obtaining the text of the contested decision in order to be able to dispute it and at the same time by maintaining that they cannot dispute the decision because they are not directly and individually concerned by it. It is this last point which is important with regard to admissibility, and if it were decided affirmatively it would be necessary to accept that time did not start to run until the day when the undertakings in fact knew of a decision which was not addressed to them, irrespective of the manner in which they were so informed. Furthermore, if the Commission had wished to guarantee legal certainty at the earliest possible moment it was open to it to cause time to run by publication in the Official Journal. It is therefore necessary to determine successively whether the contested decision *directly* concerns the three applicant companies as importers and processers of a crude product, in respect of which the Belgian Government had requested permission to open a quota, and also whether they are *individually* concerned. In considering this question, we must never lose sight of two special features of the present case: the contested decision constitutes a refusal to grant a request and it is retroactive; that is to say, when it was made the period for which the authorization had been sought had already expired. But we must also put the proceedings into the framework of the case-law which the Court has begun to formulate concerning more or less similar cases.

II

What, first of all, is the position in relation to the first condition?

In the view of the Commission, an applicant is directly concerned by a Community decision only to the extent to which the legal situation which he claims is derived from the decision in question. Against this proposition, the applicants immediately object that it adds to the wording of Article 173 of the Treaty and that it confuses the concept of a 'directly applicable' measure with that of a measure of 'direct concern' to individuals and they quote on this point the authority of the dictionary. But apart from the fact that the definitions which they gave in court referred only to the word 'concerned' and not to the whole expression 'direct concern', which makes their reasoning wholly irrelevant, one cannot overlook the close link which exists between the two concepts brought together by the Commission, which appears in the judgment in the *Toepfer* case (Joined Cases 106 and 107/63 [1965] ECR 405).

1. When a person is not the addressee of a decision, it is not enough for that person to be concerned by that decision in order to be able to challenge it; it is necessary that that person should be directly concerned, which presupposes a direct relationship of cause and effect between the measure and its possible effects on the person in question. Such is not the case as regards the decisions whereby the Commission grants authorizations under the conditions laid down in the protocols annexed to the Agreement of 2 March 1960. The Commission's powers are not unlimited, as the Member States keep a large measure of discretionary power which they may use both before and after the Community decision has been made. They are free, first, to request or not to request the opening of a quota and their initiative is a necessary condition for action by the Commission. They are then free to open the quota which has been granted to them. Consequently the direct cause of the legal position of the interested parties is the measure of the State and not the decision of the Community.

The applicants object to this analysis on the grounds that it ignores the reality of things. According to them, when a Member State —or at least the Kingdom of Belgium— submits a request, the tonnage requested has been determined after an inquiry by the trade association among the firms concerned. If it uses its discretionary power, it

is then that it does so, but, once the authorization has been granted, the opening of the quota is a purely automatic step giving effect to the authorization. It would hardly be a compliment to the Member State to deny it the minimum of logic, which consists of the effective use of the authorization requested.
To that argument, the reply could be, first, that diplomatic courtesy demands on the contrary that no attempt should be made to take the place of the State in deciding if and how it intends to use a facility which belongs to it and that it would be an encroachment on its sovereign power to prejudge what it will do. But, most of all, the examples given by the Commission seem to me to have shown most convincingly that its analysis is not purely theoretical: in fact, in several cases, Member States have failed to open quotas although they had been authorized to do so, or have opened them only partly. It was indicated in particular that in pursuance of Protocol No II to the Agreement of 1960 Belgium and Luxembourg were authorized to open every year until 1968 a tariff quota carrying a nil rate of duty for salt intended for processing by the chemical industry, but they have virtually never made use of the authorizations granted.
However that may be, once it is recognized that a State enjoys a discretionary power —and this is undeniable—the rights of individuals cannot be made to depend on the more or less effective use which a State makes of that power without causing somewhat inconsistent results: in the same State, industrialists interested in a tariff quota for one product could be entitled to a remedy, but not those interested in a quota of the same type but in respect of another product.

2. Everything that has been said so far merely deals with the assumption that there has been a positive decision: would these conclusions be equally valid in respect of a decision refusing to grant a quota? The applicants disupte this, because in that case the Member State would not enjoy any discretionary power: it would have only one way open to it, that is, to levy duty at the full rate of the Common Customs Tariff and not at the reduced rate for a national quota.
This is so: but it should be pointed out that the obligation of a State originates directly from the Common Customs Tariff which is the rule, and not from the refusal to make an exception to that rule.
But above all, and contrary to the applicants' submissions, it is difficult to see how different solutions could be applied to decisions which grant or refuse authorizations in the same field, because such decisions constitute the two forms—positive and negative—of the exercise of the same power by the Commission, the two aspects of its relationships with the Member States. With regard to decisions taken on protective measures required by these relationships in the context of the common organization of the markets the Court's judgment in the *Toepfer* case points out that it would be illogical to confer different effects on decisions which abolish or amend such measures and those which confirm them and constitute, not an authorization, but a confirmation of decisions already taken by a Member State.
If, on the other hand, the matter were one in which the Commission was required to grant or to refuse an authorization, the reasons which lead to denying that a positive decision has direct effects on individuals are also valid in the case of a refusal. In his opinion in the *Plaumann* case (15 July 1963, Case 25/62 [1963] ECR 95) Mr Advocate-General Roemer showed clearly how, even in that case, there was room for governmental discretion. It is in fact for the Member State to which the decision is addressed either to comply with a decision addressed to it or continue to press for acceptance of its requests, if need be, by way of appeal. It is impossible to see how a third party could act in the place of the State. Moreover, even an annulment would not necessarily have the consequences anticipated by the applicants. Thus, for example, as the Commission points out, the German Government, after having obtained, in the Court's judgment of 4 July 1963 in Case 24/62 [1963] ECR 63, annulment of a decision which partly refusedits request for a tariff quota for wine under Article 25 of the Treaty, indicated that it would not proceed with its original request.
It seems clear to me, therefore, that any decision taken by the Commission in a case such as the present cannot be of direct

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III

This conclusion does not dispense us from the need to inquire whether it is of individual concern to the applicants.
On that point, you have already had occasion to state your position in terms which it is appropriate to repeat: 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'. It should be noted immediately that you take the factual situation into consideration and it was that which led you to decide that the application in the *Toepfer* case was admissible.

It cannot be overlooked that the contested decision, taken on 12 May 1969, is retroactive. If, instead of a refusal, it had granted the authorization applied for, it could have had no other consequence than to enable the Belgian Government to refund part of the customs duty paid within the quota limits fixed for the fourth quarter of 1968, that is to say, the duty paid by industrialists who had in fact made imports during that period. When the decision was made, the undertakings fulfilling this condition were, or at least could be, distinguished individually.

It is true that the Commission objects that it is a question of potential and not actual beneficiaries of the decision. Factors still unknown at the time would have had to be taken into account to determine who in fact would have benefited; such factors included not only actual imports, but also the size of the quota authorized, which could have been less than the 8 000 metric tons requested, as well as the size of the quota actually opened which might have been less than the quota requested, and above all the conditions imposed by the State for entitlement to benefit. The quota could have been open to any importer, or limited to some importers and shared according to rules which remained to be determined.

This last point has been the subject of much discussion. The Commission has told the Court that to the best of its knowledge there were no general rules, whether decreed by legislation or by executive action, to determine in the Belgo-Luxembourg Economic Union the way in which national tariff quotas were distributed, but that it was left to the administration to decide. According to the instructions on tariff quotas, that was tone, according to the circumstances of each case, on the basis of the 'most diligent importer', or of 'prior distribution'. The applicants reply that according to No 30 of those instructions the authorities, dealing with such a case as the present which concerned a supplementary quota after exhaustion of the main quota, were required to distribute it in proportion to the applications submitted, the balance, if any, being placed at the disposal of the most diligent importers. I am reluctant to take part in such a debate, as it seems to me to concern the interpretation of national rules, on which the parties are not in agreement, but it is not absolutely necessary, in my opinion, to come to a decision on the question. The Commission's interpretation appears to be too narrow. As far as the facts are concerned, *to have been* an importer of unwrought aluminium during the fourth quarter of 1968 appears to me a fact which sufficiently singles out the parties concerned, in relation to any other person or group of persons, to the extent necessary for them to be considered individually concerned by a decision relating to a quota retroactively granted or refused for that period.

I would therefore be willing to admit that the applicants meet one, but only one, of the two conditions laid down by Article 173. Therefore I can come to no other conclusion than that you should accept the Commission's preliminary objection of inadmissibility.

I am of the opinion that the application should be dismissed as inadmissible and that the applicant companies should pay the costs.