2. Orders the applicants to pay the costs.

Donner Delvaux Rossi
Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 14 December 1962.

on behalf of the President
A. Van Houtte L. Delvaux
Registrar President of Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 14 NOVEMBER 1962[1]

Mr President,
Members of the Court,

In the two applications brought against the Commission of the EEC by two German undertakings, the debate in today's oral procedure was confined to the question of the admissibility of the applications and this accordingly prescribes the limits of my remarks.

The applications are directed against a number of Decisions of the Commission, relating to the fixing of a countervailing charge imposed on imports of whole powdered milk into the Federal Republic of Germany. They are the Decision of 15 March 1961, published in the Official Journal of 13 April 1961 at page 595, the amendment of that Decision, published in the Official Journal of 2 May 1961 at page 688, and the Decision of 13 December 1961 extending the first mentioned Decision, published in the Official Journal of 27 January 1962 at page 137. The Commission took all these Decisions under the fourth indent to Article 155 of the Treaty. They are measures which can in principle be the subject matter of applications for annulment.

These applications were originally founded on Article 184 of the EEC Treaty. During the oral procedure the applicants pleaded as a subsidiary point the second paragraph of Article 173.

It is in the light of these two provisions that the admissibility of the applications should be examined, and there is certainly no need to consider all those specific problems which the parties have dealt with, at times in great detail, namely the admissibility of changes in the conclusions, or whether the contested measures should be described as decisions or regulations.

1. *Article 184*

According to the applicants, the intention of Article 184 is to extend judicial protection for persons who, by virtue of the legislative nature of a contested measure, are not entitled to institute proceedings under the second paragraph of Article 173. It is also claimed that Article 184 is meant to make the parties independent of the decision of a national court or tribunal whether or not to refer a question to the European Court of Justice under Article 177. The conditions for Article 184 to apply are said to be met in the present case, because the applicants are involved in proceedings before national courts.

It seems to me that this interpretation is clearly wrong.

1 — Translated from the German.

Article 184 reads as follows: 'Notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a regulation of the Council or of the Commission is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation'.

In my view, it is clear from the text itself that this provision does not supply a new method of recourse, that is to say, it does not create a right to bring an action. It merely extends the existing methods of recourse in certain respects, within the framework of legal proceedings based on other provisions:

— Any party, and consequently also one who is prevented by Article 173 from directly challenging a regulation, may request a declaration that the regulation is inapplicable in a specific case. Such declaration is quite distinct from an annulment.

— The request may be made even after the expiration of the period during which a direct application may be made for the annulment of the regulation.

Article 184 regulates the so-called objection of illegality, the dogmatic definition of which, at least so far as the ECSC Treaty is concerned, was the subject of Joined Cases 9 and 10/56. These Cases made it clear that an applicant has the right 'after the expiration of the period prescribed in Art. 33, to take advantage of the irregularity of general decisions or recommendations in support of proceedings against decisions or recommendations which are individual in character'.[1] With reference to Article 184 of the EEC Treaty, it was stressed that 'the Treaties establishing the European Economic Community and the European Atomic Energy Community expressly adopt a similar point of view'.[1] It is therefore clear that Article 184 applies only in the context of proceedings instituted before the European Court of Justice. It does not allow the introduction of separate proceedings before this Court in order that an incidental matter, which is relevent for the determination of proceedings pending before a national court or tribunal, may be examined.

Only this interpretation gives a sensible meaning to Article 184, in accordance with the system of the judicial protection afforded by the Treaty, whereas the view adopted by the applicants is one which would result in the complete elimination of the restrictions, both in respect of time and subject matter, on the right to institute proceedings laid down by Article 173, and which, moreover, by allowing the parties concerned to refer a matter directly to the Court of Justice, would fundamentally alter the relations between the judicial bodies of Member States and the European Court of Justice, which are definitively governed by Article 177.

Article 184 is thus eliminated as a basis for making these applications.

2. *The Second Paragraph of Article 173*

As a subsidiary point, the applicants rely upon Article 173, taking the view that the time allowed for instituting proceedings under the third paragraph of Article 173 only begins to run from the moment when it becomes evident that the measure concerns an applicant. I will not consider whether this argument, submitted at this late stage, and the object of their application can be taken into account at all. If the argument is examined, it becomes clear immediately that the applicants' point of view is untenable. Article 173 was so drafted, in the interests of legal certainty, that there is in principle no difficulty in ascertaining the commencement of the period during which proceedings must

1 — Rec. 1958, p. 27.

be instituted. If the application is directed against a measure which has been published, the period clearly runs from 'the publication of the measure'. This is particularly clear from the French, Italian and Dutch texts of the Treaty.

I have already mentioned the dates of publication in the Official Journal of the contested measures. The following dates should be noted: 13 April 1961, 2 May 1961 and 27 January 1962. The applications were lodged on 4 October and 9 October 1962. As the period during which proceedings must be instituted is two months, it is therefore clear that the proceedings were not instituted within the prescribed period. Even if one wished to take the view that this period would start to run when the parties affected came to know of the measure, even if this is only at a later date, this would make no difference, because the applicants have not submitted that the measures in dispute only came to their knowledge within the two months preceding the commencement of their proceedings.

We therefore arrive at the result that the applicants cannot achieve their objective by the means they have chosen, that is to say, by bringing the matter directly before the Court of Justice. The reservations they have expressed on the question whether their interests are sufficiently protected by the opportunity of invoking the illegality of the decisions of the Commission within the framework of legal proceedings instituted under national law, and of persuading the national court to refer the matter in question to the Court of Justice under Article 177, are primarily matters for national courts to decide and cannot be dealt with here.

In the present case, the Court of Justice should therefore find that the applications are inadmissible and that the costs of the proceedings should be borne by the applicants.

ORDER OF THE COURT
30 OCTOBER 1962[1]

In Case 31/62[2]

MILCHWERKE HEINZ WÖHRMANN & SOHN KG, Wesel/Rhein,

applicant,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

defendant,

1 — Language of the Case: German.
2 — the order in Case 33/62 is identical with that in Case 31/62.