The plea of inadmissibility is therefore well founded.

Costs

Under the terms of Articles 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

As the application of the applicants is inadmissible, they must be ordered to pay the costs.

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 Articles 169, 173 and 175 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice annexed to the Treaty establishing the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, in particular Article 69 (2);

THE COURT

hereby:

1. **Dismisses Application 48/65 as inadmissible;**

2. **Orders the applicants to pay the costs of the action.**

Hammes Donner

Trabucchi Lecourt Monaco

Delivered in open court in Luxembourg on 1 March 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 3 FEBRUARY 1966[1]

Mr President,
Members of the Court,

In accordance with Article 91 of the Rules of Procedure, you are only required today to rule on the plea of inadmissibility raised by the Commission of the EEC against the application brought by the Lütticke com-

1 — Translated from the French.

pany and two other German undertakings. You know the circumstances which gave rise to this dispute. These three companies, which import powdered milk from the countries of the Common Market, contend that the levy of a turnover equalization tax on the import of this product has, since 1 January 1962, the date of the beginning of the second stage, constituted an infringement of the EEC Treaty. As their unofficial approaches produced no results, they decided to use the procedure provided by Article 175 and on 15 March 1965 requested the Commission:

1. to issue a decision (einen Beschuß fassen) to the effect that the imposition of the turnover equalization tax in question was an infringement of Article 95 of the Treaty;
2. to initiate the procedure provided for in Article 169 against the Federal Republic with a view to the abolition of the tax as from 1 January 1962—to give this Member State a preliminary opportunity to submit its observations and subsequently, should this State not comply with the Commission's opinion within the period specified, 'to proceed in accordance with the terms of the second paragraph of Article 169', that is, to request you to find that the Member State concerned has failed to fulfil one of its obligations;
3. to inform the applicants of all subsequent action in connexion with the requests which I have set out.

After an interim reply, the applicants received by express delivery on 17 May 1965 a letter signed by the Director-General for Competition, the full text of which appears in the report of the hearing. This senior official indicated that by reducing from 4% to 3% the turnover equalization tax as from 1 April 1965 the German Federal Republic had put an end to the infringement of the first paragraph of Article 95 'which the EEC Commission had noted and criticized'. The Commission therefore decided not to insist on a retroactive reduction to 1 January 1962 of the rate of tax in question. Moreover, the Commission did not consider that the turnover equalization tax was in itself an infringement of Article 95 and did not therefore see any reason for further action on its part. The letter ended in the following terms: 'Furthermore, the Commission would like to point out that this information is given to you without recognition of any legal obligation. The possibility of proceedings for failure to act in connexion with your requests must be excluded, as far as your clients are concerned, under the terms of the third paragraph of Article 175 of the EEC Treaty'.

It was in these circumstances that the Lütticke company and the two other applicants submitted two sets of conclusions. They are asking you, on the basis of the second paragraph of Article 173 of the Treaty, to annul the 'decision' contained in the letter which I have summarized, which was both addressed and notified to them. If, however, you should consider that this letter does not constitute a decision, it would follow that the Commission had not 'defined its position' within the required time within the meaning of the second paragraph of Article 175. In such a case it would have failed to act, which in their alternative conclusions the applicants ask you to place on record.

Thus, the procedure has been opened by means of a formal notice, 'a request to act', within the meaning of Article 175. To assess the plea of inadmissibility it is therefore necessary, first of all, to define the scope of this Article of the EEC Treaty. It will be seen that the possibilities which it offers to individuals are much smaller than those resulting from Article 35 of the ECSC Treaty, which you have often had occasion to apply.

This Article, which is open to Member States and other institutions of the Community when, in infringement of the Treaty, the Council or the Commission fails to act, requires that the application should be preceded by a request for action. If the institution has not defined its position within two months from the date of this request, an application may be entered within a further period of two months. And let us note here in passing that the expression 'to define its position' is very vague and comprehensive.

The third paragraph of Article 175 adds: 'Any natural or legal person may, under

the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community *has failed to address to that person any act other than a recommendation or an opinion*'. It therefore follows that the main objective of proceedings for failure to act brought by a natural or legal person is to procure a legal measure, which by its nature and its purpose must be *addressed* to the *applicant* and which can only be a *decision*. This point was stressed by Advocate-General Roemer in his opinion in a rather similar application, Case 103/63 (*Rhenania Schiffahrts- und Speditions-Gesellschaft mbH and Others* v *EEC Commission*, Rec. 1964, p. 839) which did not proceed to judgment.

Together with Article 169, the provision which we have considered prevents a private person from obtaining a finding that a Member State has failed to fulfil one of its obligations. Under the system established by the ECSC Treaty it was for the High Authority to make this finding by means of a reasoned opinion, against which the State concerned had the right to bring an application in which the Court has 'unlimited jurisdiction'. You have accepted the possibility that an undertaking which considers a Member State to be failing in its obligations may request the High Authority to call upon that State to rectify the failure and, if the High Authority does not do so, may bring proceedings for failure to act under Article 35 (Joined Cases 7 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises*, Rec. 1955 –1956, p. 55, and Case 30/59, Rec. 1961, p. 3).

This case-law is explained by the fact that the application of Article 35 is subject to the general conditions concerning applications for annulment laid down in Article 33, that the individual decisions referred to in the second paragraph of Article 33 need not necessarily be addressed to the applicant, but may simply concern him and, finally, that the reasoned decision of Article 88 of the ECSC Treaty is an individual decision which may concern private persons within the meaning of the second paragraph of Article 33.

However, under Article 169 of the EEC Treaty, the Commission has no power to record, by means of a binding legal measure, an infringement of the Treaty by a Member State; it *has the power* only to refer the matter to you in the concluding stage of a procedure whose main feature is the publication of a reasoned opinion, before which the State concerned must be given the opportunity to submit its observations. The measures provided for in Article 169 are, therefore, elements in a procedure intended to settle a dispute between the defendant and a Member State, the final solution to which will only be provided by the Judgment which you are called on to give. Whether we are considering the request to the Member State to submit its observations or the reasoned opinion which precedes reference of the dispute to you, we are dealing with measures (using the word in its most general sense and without giving it any precise legal significance) issued in respect of a Member State and in no way addressed to the person who had called upon the Commission to act.

Thus, it is no accident that the wording of the third paragraph of Article 175 renders it impossible for a private person to bring proceedings for failure to act in the case of a failure to initiate the procedure laid down in Article 169 against a Member State; rather it is the result of the firm intention of the authors of the Treaty to abolish the right given to private persons by the combined provisions of Articles 33, 35 and 88 of the ECSC Treaty. Any interpretation which would permit the application of your earlier case-law within the framework of the EEC Treaty would certainly be contrary not only to the letter of the Treaty, but also to the intention of its authors.

I have stressed certain aspects of the procedure provided for in Articles 169 and 175 because the applicants themselves intended to employ the latter in order to compel the Commission to apply the former. I consider that the conclusions which may be drawn from this as to the admissibility of the application before you—whether on the basis of Article 173 or that of the third paragraph of Article 175—are fairly simple. I shall suggest that, whatever the dialectical skill of the applicants, you accept the plea of inadmissibility raised by the Commission.

1. In their principal conclusions the applicants are requesting you to annul the decision of 14 May 1965, which, they say, is addressed to them and was notified on 17 May 1965. This is a reference to the letter in which the Director-General for Competition, replying to specific questions asked of the Commission within the context of Article 175, indicated that the latter body did not consider the Federal Republic to have infringed Article 95 of the Treaty and therefore did not see any need for further action.

Let us consider the second paragraph of Article 173 which reads: 'Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'. I do not consider that the letter in question is open to challenge by the applicants on the basis of Article 173.

Not so much, as is maintained first by the Commission, because of the external features of this document, which are such that it cannot be regarded as a decision within the meaning of Article 173. I do not consider the fact that it was drafted in a department of the Director-General for Competition, that it was written on headed stationery and carried a reference number from that Directorate-General and that it was signed by the Director-General concerned in his own name rather than on behalf of the Commission to be decisive. It is clear from the very terms of the letter that its signatory is expressing the point of view of the Commission, and the Agent of this body has said during the oral procedure that the Commission had given prior approval to the contents of the letter. To an outsider, unfamiliar with the rules of procedure of the institution, such a document may appear to notify the position defined by the Commission as such and not by one of its departments.

But it is by reason of its contents that I consider that the letter in dispute cannot constitute a decision against which an application may be made. It is an established principle that a decision containing a refusal may only be the subject of an application if the positive act which the authority refuses to take might itself be contested. In the present case, the reasoned opinion which the Commission might issue in respect of a failure by the Federal Republic to fulfil its obligations, the request to that Member State to submit its observations and, more generally, the initiation of the procedure provided for in Article 169 are all stages which precede an application to you rather than legal measures capable by themselves of being the subject of an application. This is necessarily true of the refusal to initiate this procedure or to take these various measures.

Moreover, the letter in question does not constitute a decision capable of being the subject of an application, since it does not entail any legal consequences for those persons to whom it is addressed, who have no right whatsoever to request the Commission to set in motion the procedure laid down in Article 169: the Commission is to deliver a reasoned opinion only if *it considers* that a Member State has failed to fulfil an obligation and, if the State in question does not comply with this opinion within the period laid down, it *may* refer the matter to the Court of Justice. In these two successive stages of the procedure the Commission has discretion to assess the matter and, as a result, individuals have no right to request the Commission to take any given action. The applicants object that the Commission is obliged to set in motion the procedure provided for in Article 169 as soon as the conditions of fact are met and that it only possesses discretionary powers in respect of the second stage, that is, in respect of the measures which it is requesting the Member State to take. This point, although arguable, is of little importance; what is certain is that even if other Member States may, be means of Article 170, compel the Commission to deliver a reasoned opinion on an alleged failure of another Member State in circumstances resembling those of Article 169, natural and legal persons are, on the contrary, powerless to act. The applicants rightly point out that this Court is alone competent to decide whether the Commission's concept of the

obligations of the Member States is correct. They conclude, therefore, that as the Court may not intervene of its own motion but only at the request of a party, the individuals concerned must have the power to refer the matter to the Court. Here again, they are disregarding the fact that, according to express provisions, the failure of a Member State may only be referred to the Court by the Commission on the basis of Article 169, or by another Member State on the basis of Article 170.

In my opinion, therefore, when the Commission refuses to take any action when asked to initiate the procedure laid down in Article 169, it does not make a decision which may be the subject of an application according to the provisions of the third paragraph of Article 173. It is true that this was not the sole object of the letter sent in the name of the applicants, who had also expressed the wish to be informed of the action taken on their principal request. On this point the letter which they are contesting constitutes an answer to their claims, but still cannot be the subject of an application. On this point I can only repeat the words of the Advocate-General in Case 103/63 that the notification of measures of this kind 'is only an ancillary matter, a reflexion of the measure itself, without legal content of its own', and is thus subject to the same rules.

2. You also have before you alternative conclusions put forward by the applicants in case—as they suspected from the start—you should consider that the letter addressed to them does not constitute a decision against which an application may be made under the terms of Article 173. The way would then necessarily be open to proceedings for failure to act under Article 175. But I refuse to accept the dilemma in which it is sought to place you and on this point I shall merely refer to what I have said earlier on the subject of this Article.

Proceedings for failure to act brought by a natural or legal person presuppose that, in infringement of the Treaty, the Commission, in spite of a request to act, has failed to address to the applicant any measure other than a recommendation or an opinion. But as individuals have no right to request that the procedure under Article 169 be initiated, the Commission's refusal to comply with such a request cannot constitute an infringement of the Treaty.

Furthermore, the application is admissible only if the institution has failed to address any act 'other than a recommendation or an opinion', that is,—and there is no need to be more specific—an act of a compulsory nature. It is further necessary that this act, by its nature, should be addressed to the person making the request and actually be intended for him. This was certainly not the case as regards the measures requested by the applicants, which were legal measures of a compulsory nature and which concerned the Federal Republic. This is shown by the third point of their letter of 15 March 1965, in which they merely expressed a wish to be informed 'as to the decisions requested under 1 and 2', which only concerned the Federal Republic.

Furthermore, by virtue of the second paragraph of Article 175, there is a failure to act only when the institution has not 'defined its position' within the necessary period of two months, a formula which is somewhat different from that in Article 35 of the ECSC Treaty. Is it not possible to conclude from this that by making a reply which constitutes a refusal to act as requested the Commission defines its position, which closes the door to proceedings for failure to act? In my opinion it is not necessary to answer this question in order to suggest that you reject these alternative conclusions.

In conclusion, I should like to make two observations:

The first is that, however subtle the application may be, all action by the applicants since the beginning has been directed to compelling the Commission to initiate the procedure laid down in Article 169 against the German Federal Republic. I have stated why they are not entitled to contest the institution's abstention or refusal. It must be added that, if you should judge otherwise and if you examine the justification of their conclusions, you ought to inquire whether the imposition of a turnover equalization tax on the import of powdered milk constitutes, on the part of the Federal Republic, an infringement of Article 95 of the Treaty. You would thus find, if necessary on the application of an individual, a failure of a

Member State to fulfil its obligations, without the matter being referred to you by the Commission or by another Member State, without the Member State in question being called upon to submit its observations and consequently in disregard of the formal rules of Articles 169 and 170 of the Treaty. This is further proof that such conclusions are not admissible.

If on the other hand—and this is my second observation—the opportunity provided by Article 169 is closed to private persons by the will of the authors of the Treaty, the applicants are not necessarily deprived of all legal protection, since they have that provided by Article 177; thus this protection is not purely theoretical, as is demonstrated by Case 57/65 in which, on a reference by the Finanzgericht of Saarbrücken, the question was raised of the direct application of Article 95 of the Treaty.

Finally you have to decide on costs, which the applicants' advocate requested at the hearing should be borne by the Commission, whatever the outcome. As I understand it, the letter sent by this institution in reply to the applicants' request is said to have had at least the appearance of a decision and to have led the Lütticke company to bring its application. I do not consider this argument to be convincing, since the reservations contained in the last paragraph of the document in question could, on the contrary, have acted as a warning to the applicants not to act rashly in instituting proceedings. Therefore I see no special reason in this case for departing from the rule laid down in Article 69 (2) of the Rules of Procedure that the unsuccessful party shall bear the costs if they have been asked for in the successful party's pleadings. The Commission has made such a request.

I am therefore of the opinion that:

— Application 48/65 should be dismissed as inadmissible;

— the applicants should be ordered to bear the costs.