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.

ments and legal writers in general must be grateful to it for having been, probably, above all other private firms from Member States, the one which has brought before the Court the greatest number of applications giving rise to the greatest number of judgments on the implementation of the Treaty of Rome.

It is certain in fact that Lütticke has discovered, more rapidly than many others, all the possibilities which the provisions of this Treaty and Community law deriving from it might have for importers and exporters and has often, and almost systematically, sought to raise questions of Community law in the disputes which it has had with the German tax and customs authorities.

In the present action it attacks the Community authorities directly and asks the Court to order the Commission to pay it substantial compensation.

It is first necessary, I believe, to place this dispute in the category of those in relation to which it is in reality a development and, I hope, the final development.

As you know, the authors of the Treaty of Rome realized from the start that the provisions relating to the elimination of customs duties between Member States would be ineffective if those States, who retain their sovereignty in relation to internal taxation, could through that power compensate in some way for the effects of the abolition of customs duties or charges having equivalent effect.

Therefore Article 95 provided that no State should 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.

Furthermore, no Member State may impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Finally, the third paragraph of this same Article 95 provides that Member States shall, not later than at the beginning of the second stage, 'repeal or amend' any provisions existing when the Treaty enters into force and which conflict with the general rules which I have just recalled.

The application of these principles in the field of turnover taxes posed particularly delicate problems.

In fact, a single country, France, had introduced or was in the process of introducing a so-called 'integrated' tax: the 'tax on added value' imposed on a product only once and not at different stages of production or marketing.

All the other countries, on the other hand, applied a multi-stage tax system imposed on the product at different and successive stages of its production and marketing.

It was to overcome this difficulty that Article 97 of the Treaty provided that Member States which levied a turnover tax on a so-called 'cumulative multi-stage tax system' might, in the case of internal taxation imposed by them on imported products or of repayments allowed by them on exported products, establish average rates for products or groups of products, provided that there was no infringement of the principles laid down in Articles 95 and 96.

The final paragraph of Article 97 provided in addition that, where the average rates established by a Member State did not conform to these principles, the Commission was to address appropriate directives or decisions to the State concerned.

All these provisions, according to the Court's interpretation, resulted in a complex system which may briefly be summarized, as in the opinion of Mr Advocate-General Gand of 4 May 1966 in Case 57/65 and in the five cases in which the Court gave judgment on 3 and 4 April 1968, in the following manner:

(1) In relations between Member States, a product exported from one Member State to another was exempt from taxes in the country of origin, but could on the contrary be subject in the country of importation to a turn-

over equalization tax imposed on similar domestic products.

(2) This equalization tax could be calculated in accordance with the average rates determined by Member States where the latter have a multi-stage turnover tax system, but should not have the effect of subjecting the imported product to a heavier burden than that borne by the similar domestic product.

(3) For the purpose of fulfilling this obligation it is necessary to distinguish two periods:

— until 1 January 1962 Member States could retain existing distortions but could neither increase them nor introduce new ones;

— on the other hand, with effect from 1 January 1962, there had to be complete equality and for this purpose States having a multi-stage tax system had to establish average rates in order to calculate equalization taxes, so that imported products were not penalized as compared with domestic products.

(4) Finally, the Commission holds special powers under the last paragraph of Article 97 and I shall examine in a moment to what extent these powers are combined with those general powers which it holds under Article 169 of the Treaty.

For the importation of milk and products effected after 1 January 1962, Lütticke considered that the equalization tax imposed on it by the German tax authorities was, contrary to the first paragraph of Article 95 of the Treaty, calculated according to an average rate of turnover taxes borne by similar domestic products, which was higher than the actual fiscal charge imposed on the said products.

It therefore decided to take a number of legal or similar steps.

It first requested the Commission to use against the Federal Republic of Germany the powers conferred on it by Article 169 of the Treaty, in other words to institute proceedings for failure to fulfil an obligation.

When the Commission refused, Lütticke brought before this Court a direct action and alternatively an action against the Commission for failure to accede to the request which it had put to it.

The Court dismissed this application as inadmissible in its judgment of 1 March 1966 in Case 48/65 ([1966] ECR 19).

But in the meantime Lütticke had contested before the German fiscal courts some of the notices of assessment which had been addressed to it.

Following these claims, the Finanzgericht of the Saarland made a preliminary reference to this Court on the point whether the provisions of Article 95 have direct effect, in other words whether they give individuals rights which the national courts are bound to protect.

In its judgment of 16 June 1966 in Case 57/65 ([1966] ECR 205) the Court recognized that Article 95 had direct effect.

On the basis of this judgment, the terms of which were confirmed by the Court's judgment of 3 April 1968 in Case 28/67, Lütticke obtained partial satisfaction before the German courts.

But it was not content with this.

Maintaining that if the Commission had since 1962 used against the Federal Republic of Germany all the powers conferred on it by the Treaty it would have paid in tax, in respect of a certain number of transactions which it had effected, less than that which it had in fact had to pay and for which it was unable to obtain relief, it brought before the Court an action for damages based on the provisions of the second paragraph of Article 215 of the Treaty.

By this action the applicant requests the Court:

(1) to declare that the Commission is bound to indemnify Lütticke for all the damage which has resulted from the fact that the Commission has neglected to ensure that the tax im-

posed in the Federal Republic of Germany to compensate for the turnover tax for milk powder was abolished as from 1 January 1962;

(2) to order the Commission to pay it the sum of DM 124 396 plus 8% interest from 20 April 1968, and costs.

The Commission requests the Court to dismiss the application as inadmissible or alternatively as unfounded.

I

Let us examine first of all the questions of admissibility.

The Commission puts forward four objections of inadmissibility. The first is of a purely formal nature; the other three refer, in my opinion, to the substance of the case rather than to the admissibility of the application in the strict sense.

1. The Commission claims that the application does not satisfy the conditions of form required by Article 38 (1) of the Rules of Procedure of this Court in that:

— first, it refers to statements lodged in other cases to show that the tax in dispute is excessive,

— secondly, it does not justify in any way the amount of the interest claimed.

But I do not think there is any need in this case for excessive formalism.

In the course of the action, Lütticke expressly repeated or extended the arguments which it had invoked in support of its two claims.

It is true that, in order to show that the tax in dispute is excessive, it refers in its initial application to documents produced in other actions before this Court.

However, this fact cannot, in my opinion, by itself, cause its application to be regarded as lacking in grounds, since there can be no doubt as to the nature of the submissions raised and it is only for the purpose of putting forward those submissions that reference is made to statements lodged in previously decided cases.

The only consequence which such a reference can have is, in my opinion, to enable everyone, defendant as well as the Court, and even the Advocate-General, to make use if desired of information appearing in the proceedings to which reference has been made.

Finally, the fact that Lütticke has failed to give grounds or has not given sufficient grounds for its submissions on the payment of interest, an application which is ancillary to the principal application for damages, can only go against the Court's granting the said interest and cannot render the whole application inadmissible.

2. The second and the third objections of inadmissibility raised by the Commission, which are so closely related that I ask your permission to deal with them together, already touch to some extent on the merits of the case.

These grounds are taken, in fact, first from the second paragraph of Article 97 and Article 169 of the Treaty, and, secondly, from Article 173.

As regards the provisions of the second paragraph of Article 97 in conjunction with those of Article 169 of the Treaty, the Commission refers to the case-law of this Court in support of its objection of inadmissibility.

As the Commission reminds you, the Court has always accepted that it was not permissible for individuals to contest by means of an action for annulment the decisions of the Commission to make use or not to make use of the powers conferred on it by Article 169 and the second paragraph of Article 97 of the Treaty. The Commission, while seeking not to give this reference too much scope, deduces from this that an action for damages arising from an act or failure to act which could not give rise to an action for annulment is *ipso facto* inadmissible.

It adds, furthermore, that if such an action were accepted as admissible, this

would infringe the provisions of Article 173 of the Treaty and open up the possibility, indirectly, of appraising the legality of a Community act or failure to act even where Article 173 is inapplicable.

But I consider that this argument has already been expressly rejected in one of the Court's judgments; I am referring to the judgment of 15 July 1963 in Case 25/62, *Plaumann* ([1963] ECR 95). In that case, the Court was asked, first, to annul a Community measure, and, secondly, to order the defendant to make good the damage caused by the allegedly illegal measure.

In agreement with the opinion of Mr Advocate-General Roemer, the Court dismissed the submissions relating to annulment as *inadmissible,* but on the contrary decided to *rule on the substance* of the submissions relating to damages. In my opinion, the Court thereby emphasized that in any case, and leaving aside certain hypotheses proper to the law governing European public officials, even when an action for damages is based on the illegality of an act or of a failure to act, the conditions of admissibility of the action for damages must be appraised by themselves and not in accordance with the conditions of admissibility of the action for annulment. The provisions of the second paragraph of Article 176 of the Treaty indeed tended towards this solution since they provide that this *restitutio in integrum,* which the annulment of a Community measure obliges the responsible authority to effect, is made 'without prejudice' to the obligations which may result from the second paragraph of Article 215, in other words precisely from the non-contractual liability which may be incurred by the Commission.

I therefore think that the fact that the action for damages in this case is based on a failure to have regard to the second paragraph of Article 97 or of Article 169 of the Treaty is of very great importance as regards the substance of the case, as I shall show in a minute, but, in my opinion, has no effect on the admissibility of the action for damages.

3. The considerations regarding the fourth objection of inadmissibility raised by the Commission are the same as those which I have submitted above.

This objection is based on the fact that, since the case-law of this Court has decided that Article 97 of the Treaty does not have direct effect and does not confer on individuals rights which national courts must protect, it follows that an action for damages based on the failure of the Commission to use the powers conferred on it by this article is by reason of this sole fact inadmissible.

But this subject of the action for damages is already sufficiently complicated and difficult without going beyond the question of admissibility and complicating it further by combining it with other legal principles which are completely separate.

The concept of 'direct effect', as developed by the case-law of this Court, has the purpose and the effect of determining what are the provisions of the Treaty or of Community law deriving from it which confer rights on individuals and which can therefore be invoked by them before national courts against in particular decisions or measures adopted by the authorities of Member States. It is therefore, if you will allow me the expression, for 'external use' and has no influence on the admissibility of an action for damages brought before the *Court of Justice* of the Communities against the *Community.*

I accept that there is a need to examine the effect which the concept of direct effect may have on the principle of the liability of the Community authority and I shall do so in a moment, but that is a problem of substance and not a problem of admissibility.

I consider therefore that none of the objections of inadmissibility raised by the Commission can be accepted, even though some of the considerations on which it has based its arguments in this connexion will be taken into account in

the examination of the substance of the case.

II

This examination of the substance of the case normally implies, as in any case of non-contractual liability, the successive examination of three questions:

(1) Is the fact complained of such as to make the Commission financially liable?

(2) Is there a causal link between this fact and the alleged damage?

(3) Finally, have the existence and amount of damage for which compensation is claimed been proved?

In this connexion, it is necessary, in addition, in the present case to determine the successive dates when the different instances of alleged damage occurred, since the Commission has raised against certain heads in the application the period of limitation prescribed by Article 43 of the Protocol on the Statute of the Court.

But I must first of all call the Court's attention to the fact that the documents in the file do not enable me to formulate my opinion and the Court to give a ruling, should it be necessary, on the third question set out above.

Although, in fact, everyone seems to agree that for a certain period the rate of the equalization tax imposed by the German Government on milk products was higher than the actual average rate of multi-stage taxes imposed on similar domestic products, there is considerable doubt as to the amount of such difference.

It is important in particular to notice, and this is one of the most salient peculiarities of this case, that the applicant company itself produced an expert's report giving figures far lower than those which it had previously advanced but different from those resulting from the calculations of the Commission or of the Government of the Federal Republic.

In these circumstances, only a further expert's report could help the Court with regard to these different points.

But I do not think it is necessary for the Court to order one. I believe in fact that, first, in this case, the fact complained of is not capable of giving rise to financial liability on the part of the Community and, secondly, and perhaps especially, the link of cause and effect between the fact complained of and the alleged damage has not been proved.

I shall endeavour to convince the Court of this.

Let us return, if you will allow me, to these two points.

A — As I have said, I do not think that the fact complained of, in other words the conduct of the Commission in making use or in making use only belatedly or insufficiently of the powers conferred on it by Article 97 of the Treaty, is, by its nature, such as to give an individual the right to be indemnified.

As you know, the second paragraph of Article 215 of the Treaty provides that in the case of non-contractual liability the Community shall make good any damage caused by its institutions *in accordance with the general principles* common to the laws of the Member States.

One of the general principles which the Court has already recognized as common to the laws of all the Member States, in particular in its judgment of 14 July 1967 in *Kampffmeyer* ([1967] ECR 245) is that any infringement of a rule of law by the authority entrusted with the task of ensuring the application or observance of that law does not necessarily give a right to reparation.

There are cases where the nature of the rule infringed precludes individuals from having any right to indemnification.

The case-law of the Court has taken, it is true, some considerable steps towards adopting criteria for determining the rules the infringement of which gives no right to indemnity.

The Court's judgment of 15 July 1963 in *Plaumann* ([1963] ECR 95) seemed to have adopted a relatively simple criterion connected with certain concepts

of French law: where the legality of a measure could not be disputed, the damage caused by that measure could give no right to reparation.

But you did, it seems, think that this criterion was in itself insufficient and in subsequent case-law, in particular in your judgment in *Kampffmeyer*, you returned to criteria which had already been developed for the application of Article 40 of the Treaty of the ECSC by your judgment of 14 July 1961 in *Vloeberghs* (Rec. 1961, p. 393).

It seems to me that the real criterion to emerge from this case-law is now the following: the rule which is alleged to have been infringed must be intended to protect the interests of those who have suffered the damage. This is a criterion which, as Mr Advocate-General Gand said in the *Kampffmeyer* case, is obviously inspired by certain principles of German law and in particular by Article 34 of the Grundgesetz of the Federal Republic and which, further, as you have also stressed, is not dissimilar to the concept of Italian law whereby 'rules which are exclusively or principally for the protection of public policy may confer a legitimate right to bring an action for annulment but do not confer on individuals the right to bring an action for damages'.

However that may be, if the Court applies this criterion to this case, it may suffice to justify the dismissal of the application brought before it.

This is in fact based on an alleged infringement by the Commission of the provisions of the last paragraph of Article 97 of the Treaty.

If one examines the scope of this paragraph, it may appear doubtful whether its principal or even subordinate object is to protect the interests of importers.

In seeking to establish this the applicant asks the Court in fact to examine this paragraph of Article 97 in isolation and maintains that, when the authors of the Treaty stipulated that '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', they certainly did not intend to protect exclusively the interests of importers, although the protection of these interests was necessarily one of their objects.

To this the Commission replies that since importers recover the turnover equalization tax from consumers this provision does not concern them in any way.

In reality, I think that in order to decide this question a slightly different standpoint must be taken, in other words Article 97 of the Treaty must be considered not in isolation but together with Article 169, with which it must, I think, be read in conjunction.

One of the concerns of the authors of the Treaty was to give the Commission the means necessary to enable it to ensure that Member States observe their obligations under the Treaty and under Community law deriving from it.

For this purpose, they instituted a general procedure applicable in all cases; this is the procedure for failure to fulfil an obligation under Article 169.

But they considered that in certain cases and for certain matters it was necessary to institute, before the opening of the action for failure to fulfil an obligation, a prior procedure which was special and different from that provided for general cases by Article 169.

This is what they did, for example, in regard to aid by the provisions of Article 93 (2) of the Treaty.

This is also in my opinion what they did in regard to turnover taxes by the last paragraph of Article 97.

The provisions of this paragraph have no object or scope other than to provide, in a particular case, for a procedure prior to the action for failure to fulfil an obligation, which is different from the general preliminary procedure provided for by Article 169.

If one accepts this argument, one has then to admit that this provision is not intended to protect individual interests

but to ensure the observance of the institutional equilibrium brought about by the Treaty.

Undoubtedly, this institutional equilibrium concerns importers, as it does all other citizens of the Common Market, but in a manner which is too vague and general to make one believe that a rule which is intended to ensure its observance is intended to protect their interests.

The interest which it is intended to protect is instead Community public policy.

I think therefore that by reason of the very nature of the rule which is alleged to have been infringed the application for damages brought before this Court must be dismissed.

B — But that is also my opinion, and perhaps especially so, for a second reason.

Article 215 requires in fact that there should be a causal link between the damage suffered and the fact alleged.

In the context of the ECSC Treaty the Court stated that this causal link had to be *direct*.

This is, in my opinion, also valid for the application of Article 215 of the EEC Treaty. In fact, whether in the same terms or under the slightly different description of sufficient causality (*causalité adéquate*), this requirement of a direct link between the alleged fact and the damage is found in the general principles common to the laws of all the Member States.

In this case, I think, for my part, that there is no direct causal link between the damage which Lütticke claims to have suffered and the conduct of the Commission to which the applicant takes objection.

In truth, the fact that in this case they are essentially national decisions (that of general application by which the Government of the Federal Republic fixed the average rate of multi-stage taxes and the individual decisions constituting the notices of assessment which, *prima facie*, appear to be the origin of the alleged damage) is not by itself decisive.

The very close legal analysis which precedes the Court's judgments in *Kampffmeyer* and *Becher* shows indeed that there may be cases where the Community legal system and the national legal system are so closely linked that the common error of the national authorities and of the Community authorities may entail the liability of the latter.

But for this there must exist a link between the national decision and the 'reaction', if one may call it that, of the Community that is so close that they are indissociable.

To define this link I am tempted to use the old French term 'connexité' (connexity), although the concept which it covers is more one of procedure than a concept relating to the substance of law.

It is a question in fact of relations between two legal measures which are so close that they cannot be examined separately. That was the case in *Kampffmeyer*, which concerned a measure derogating from the provisions of a Community regulation; it was a measure decided initially and unilaterally by a Member State, but which had been made regular and legalized by a Community measure.

The situation in this case is completely different. Undoubtedly, the fact that the last paragraph of Article 97 does not have direct effect is, in essence, relevant solely to the rights which Lütticke may claim before the German courts, but is not decisive as regards the liability of the Commission.

But, before the Court can accept that the damage claimed by Lütticke was caused by the conduct of the Commission, the applicant must show (for here the burden of proof falls on it) that action by the Commission would necessarily and almost automatically have had the effect of altering the average rate adopted by the Government of the Federal Republic.

The applicant has not proved it and at the present stage of development of

European law it is probably impossible for it to do so.

Let us suppose solely for the sake of argument that the Commission should in 1962 have addressed a directive or a decision to the Government of the Federal Republic in compliance with the last paragraph of Article 97.

Would this have avoided the alleged damage? I do not think so.

1. In fact, it is very uncertain whether the directive or the decision which the Commission would have addressed would have entirely satisfied Lütticke's requirements, in particular as regards the retroactive effects which that undertaking would like to have seen given to the alteration of the average rate of multi-stage taxes in accordance with which the German Government had fixed the equalization tax.

2. Numerous possibilities remained open to the Government of the Federal Republic to defer or to moderate the application of this directive, even if it had been entirely to Lütticke's satisfaction. The Government of the Federal Republic could for example have brought before this Court an action for the annulment of the decision or the directive and could have applied to the Court for the suspension of its operation until judgment.

It could also, if it considered this directive partially or totally unfounded, have failed completely to comply with it and have taken, consciously and deliberately, the risk that the Commission would take against it an action for failure to fulfil its obligations under Article 169.

The many hypotheses which can be made with regard to the scope and consequences which a directive or a decision of the Commission might have had suffice, in my opinion, to show that there is no direct causal link between the damage suffered and the failure to act for which the Commission is reproached.

This is the second reason for my opinion that the Court should:

(1) dismiss Lütticke's application;

(2) order the applicant to bear the costs of the action.