JUDGMENT OF THE COURT
1 MARCH 1966[1]

Alfons Lütticke GmbH and Others v Commission of the European Economic Community[2]

Case 48/65

Summary

Member States of the EEC — Failure to fulfil an obligation arising under the Treaty — Application to the Commission to initiate the procedure provided for in Article 169 of the EEC Treaty — Refusal of the Commission — Application for annulment — Inadmissibility

An application for the annulment of a measure by which the Commission has arrived at a decision on an application to initiate the procedure laid down to deal with the failure of a Member State to fulfil an obligation under the EEC Treaty is inadmissible, since the initiation of this procedure is part of the administrative stage thereof and no measure taken by the Commission during this stage has any binding force.

In Case 48/65

(1) ALFONS LÜTTICKE GMBH, having its registered office at Köln-Deutz,

(2) DR OTTO SUWELACK NACHF. KG, having its registered office at Billerbeck (Westphalia), represented by its partner bearing personal liability, Wolfgang Suwelack,

(3) KURT SIEMERS & Co., having its registered office in Hamburg, assisted by Peter Wendt, Advocate of the Hamburg Bar, with an address for service in Luxembourg at the office of Félicien Jansen, huissier, 21 rue Aldringer,

applicants,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by its Legal Adviser, Jochen Thiesing, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

1 — Language of the Case: German.
2 — CMLR.

Application, principally, for the annulment of a decision of the Commission of the EEC and, alternatively, against the failure of that body to act, each application concerning the imposition, by the Federal Republic of Germany, of a turnover equalization tax on dairy products imported after 1 January 1962,

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner (Rapporteur), A. Trabucchi, R. Lecourt and R. Monaco, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:
The applicants are importers specializing in powdered milk and other dried milk products, (tariff heading 0402 of the Common Customs Tariff) which they import mainly from Belgium, France and the Netherlands.
On several occasions between 19 December 1962 and 1 July 1963 they informed the EEC Commission that, in their opinion, the imposition by the Federal Republic of Germany since 1 January 1962 of a turnover equalization tax on imported powdered milk products was contrary to the EEC Treaty.
As their wishes and proposals did not result in any action being taken by the Commission against the Federal Republic of Germany, the applicants made on 15 March 1965 a formal application to the Commission within the meaning of the second paragraph of Article 175 of the Treaty establishing the EEC.
In this letter, received by the Commission on 17 March 1965, the advocate for the applicants requested the Commission:
'1. To take a decision pursuant to the first paragraph of Article 175 of the EEC Treaty declaring that as from 1 January 1962 the imposition by the Federal Republic of Germany of a turnover equalization tax of 4% on the importation of powdered milk and other dried milk products (tariff heading 0402 of the Common Customs Tariff of the European Communities) constitutes an infringement of the prohibition on discrimination set out in Article 95 of the Treaty;
2. To take a decision initiating the procedure provided for in Article 169 of the Treaty against the Federal Republic of Germany, in order to secure the abolition, as from 1 January 1962, of the turnover equalization tax on the products set out above under 1;
To take a preliminary decision giving the Federal Republic of Germany the opportunity to submit its observations and to act in accordance with the second paragraph of Article 169 if this State does not comply with the opinion of the Commission within the required period;
3. To keep my clients informed as to the decisions requested under 1 and 2';

By letter of 6 May 1965 the Commission informed the applicants that it would define its position within a short period, after consideration of their application.

On 17 May 1965 the applicants received the following express letter from the Commission:

EUROPEAN ECONOMIC COMMUNITY
Brussels

Commission
Directorate-General for Competition
IV/C/4

MK/rb

14 May 1965

65–03701
P. Wendt Esq., Advocate,
2 HAMBURG 13
Bieberstraße, 3

Subject: Levy of a turnover equalization tax on powdered milk and other dried milk products (tariff heading No 0402) imported into the Federal Republic of Germany

Ref: Your application of 15 March 1965, under the second paragraph of Article 175 of the EEC Treaty, calling upon the Commission to act

Dear Sir,

By promulgating on 31 March 1965 the law making the sixteenth amendment to the law on turnover tax (Umsatzsteuergesetz) of 26 March 1965 (BGBl. I, p. 156), the principal effect of which was to lower, as from 1 April 1965, the rate of the turnover equalization tax on powdered milk from 4% to 3%, the Federal Republic of Germany put an end to the infringement of the first paragraph of Article 95 of the Treaty, which the EEC Commission had noted and criticized. The Commission has therefore ceased to insist that the Federal Republic of Germany reduce the rate of the tax in question retroactively to 1 January 1962, in particular as this rate has clearly been taken into consideration in fixing the countervailing charge provided for in Article 46 of the EEC Treaty on the importation of powdered milk other than skimmed milk and, in addition,—since the implementation of Regulation No 13/64 of the Council on the progressive establishment of a common organization of the markets in milk and dairy products (1 November 1964)—in fixing the levies provided for in Article 2 of Regulation No 13/64 of 5 February 1964 (Official Journal p. 549/64).

The Commission is unable to share your opinion that the turnover equalization tax imposed by the Federal Republic of Germany on powdered milk constitutes an infringement of Article 95 of the EEC Treaty and that the Commission must therefore require its withdrawal *in toto*. The Commission is of the opinion that the Federal Republic has just adapted the rate of the turnover equalization tax on powdered milk to the tax burden on turnover borne indirectly by powdered milk from the domestic market. The Commission considers therefore that further intervention is unnecessary.

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 you 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.

Yours faithfully,

P. Verloren van Themaat
Director-General for Competition

On 12 July 1965 the applicants lodged the present application at the Court Registry.

II — Conclusions of the parties

In their application, the *applicants* claim that the Court should:

'1. Annul the decision of 14 May 1965 addressed to the applicants (and notified on 17 May 1965);
2. In the alternative, declare that the failure of the Commission of the EEC to act regarding the imposition by the Federal Republic of Germany of a turnover equalization tax on the importation of powdered milk products (tariff heading 0402 of the Common Customs Tariff) after 1 January 1962 and its failure to act following the request made by the applicants on 15 March 1965, constitute an infringement of the Treaty;
3. Order the Commission of the EEC to pay the costs'.

The applicants reserved the right to supplement these conclusions with a claim for damages in accordance with Article 215 of the EEC Treaty.

In its statement of defence lodged on 23 September 1965, the *defendant* contended that the Court should:

'— give a preliminary ruling on the admissibility of the application, in accordance with Article 91 of the Rules of Procedure;
— dismiss the application as inadmissible and order the applicants to pay the costs'.

In their observations presented on 26 November 1965, the *applicants* claimed that the Court should:

— give no preliminary ruling on the admissibility of the application, in accordance with the procedure provided for in Article 91 of the Rules of Procedure;
— in the alternative, give no ruling on the admissibility of the application until the main action be ready for hearing;
— in the further alternative, declare that the application is admissible'.

During the oral procedure the applicants claimed that, even if their application be declared inadmissible, the defendant should be ordered to pay the costs since they had been misled by the equivocal nature of the letter of the defendant of 14 May 1965.

III — Submissions and arguments of the parties with regard to the objection of inadmissibility

The *defendant* considers that both the principal conclusions and those in the alternative are inadmissible.

A — *The principal conclusions*

The *defendant* maintains that the principal conclusions of the application are inadmissible, since the letter from the Directorate-General for Competition of 14 May 1965 did not constitute a decision within the meaning of the second paragraph of Article 173 and the fourth paragraph of Article 189 of the Treaty establishing the EEC and thus could not be the subject of an application for annulment.

The form of the letter of 14 May 1965

It is clear from the form of the letter of 14 May 1965 that the document in question constitutes a letter from a department of the Commission and not a decision on the part of that body. The heading of the letter shows that it emanates from the Directorate-General for Competition and it is

signed by the Director-General concerned in his own name; it bears a reference from Directorate-General IV and, opposite the date, the initials of the draftsman and typist, from which it emerges that it was drafted in a department of the Directorate-General for Competititon.
Moreover, the letter was signed by an official of the Commission in his own name and not, as required by the third paragraph of Article 12 of the rules of procedure of the Commission, by the President or another member of that body empowered to do so under Article 24 of those rules.
The Commission takes its decisions, in accordance with the Treaty, by the majority laid down in Article 163. The decisions are binding in their entirety on the addressees named therein. It is clear that the content of the letter of 14 May 1965 had not been the subject of an act on the part of the Commission and could not be considered to have legal consequences, but that the latter was restricted to providing certain information.
The fact that the departments of the Commission sent the letter 'express', in order to respect the period of two months provided for in the second paragraph of Article 175 of the Treaty, does not enable any conclusion to be drawn as to the legal nature of this communication.
Furthermore, in order to avoid any misunderstanding, the Directorate-General for Competition emphasized in the last paragraph that the object of the letter was merely to provide information.
The *applicants* maintain that the Directorate-General for Competition was in fact acting in the name of the Commission, as it was moreover obliged to do. In legal terms it is unimportant whether the Director-General for Competition, to whom the task was clearly delegated by the Commission, did or did not use the words 'for the Commission'.
It is undisputed, in particular in academic writing on German public law, that the internal rules of procedure of the highest executive bodies or of the legislature are not to be regarded as legislation. The defendant is thus wrong to refer to the procedural requirements of Articles 12 and 24 of its rules of procedure. Furthermore, the defendant's argument totally disregards Article 27, according to which the Commission may authorize officials, on an individual basis, to take such measures as are necessary to implement its decisions.
The argument as to form is thus insufficient to challenge the fact that the letter of 14 May 1965 constitutes a decision.
Moreover, the nature of a measure is not determined by the intentions of its author and it is thus necessary to examine the consequences of the communication from the Commission for its addressee.

The content of the letter of 14 May 1965

The *defendant* maintains that it is impossible to conclude from the content of the letter of 14 May 1965 that it constitutes a decision capable of forming the subject of an action. A letter informing a private person that the Commission sees no reason to set in motion, in accordance with his request, the procedure provided for in Article 169 has no legal consequences as regards its addressee. It is neither binding on the addressee nor does it authorize it to act in a specific manner and it contains no binding statement as to the existence or nonexistence of a subjective right. Whatever the meaning of the reply, it in no way affects the *legal* position of the addressee. It would only be otherwise if, in a particular case, the individual involved were entitled to require the Commission to set in motion the procedure provided for in Article 169. This was not the case in this instance. Article 169 provides that the Commission shall deliver a reasoned opinion *if it considers* that a Member State is failing to fulfil an obligation under the Treaty.
Moreover, the letter of 14 May 1965 could in no way be regarded as a decision, as in any case a measure by which the Commission complied with the demands of the applicants would itself have been incapable of constituting a decision.
According to the established case-law of the Court an express or implied decision of refusal can only form the subject of an application if the positive measure which the authority fails to take can itself be contested in legal proceedings. In consequence,

as the reasoned opinion claimed by the applicants constitutes a measure having no binding force and being incapable of giving rise to an application before the Court, this principle also applies to a declaration by which the Commission lets it be known that it does not intend to deliver such an opinion. This conclusion must *a fortiori* be drawn where the principal object of the applicants' request is to allow the Federal Republic of Germany an opportunity to submit its observations in accordance with the procedure provided for in the first paragraph of Article 169.

The *applicants* maintain that the defendant is wrong to claim that the letter of 14 May 1965 'contains no binding statement as to the existence or non-existence of a subjective right'. The phrase 'the Commission considers therefore that further intervention is unnecessary' showed that the Commission had decided to refrain from any action in a specific case and to refuse to exercise its power as requested. In this respect it is unnecessary to consider whether the letter lays down a specific course of conduct for the applicants.

Consequently, in order to establish the admissibility of the application, it is sufficient for the applicants to assert that the letter of 14 May 1965 constitutes a decision.

Moreover, the applicants point out that there is no discrepancy between the terms 'information' and 'decision'; a letter of information can certainly constitute a 'decision' (or, to use the German term a 'Verwaltungsakt'—an administrative measure).

It is, therefore, unnecessary to establish whether the initiation of the procedure in Article 169 of the EEC Treaty and the failure to take a decision, referred to in Article 175, constitute decisions. At the very least, a resolution to set in motion the procedure under Article 169 constitutes a decision, whether or not a subsequent opinion also does so. Even without accepting the general view that the acts referred to in Article 175 constitute decisions, it is true that what the applicants requested in point 3 of their application would still do so.

Thus it is not necessary to know whether or not the applicants had the right to request the Commission of the EEC to take a decision. The only important factor is whether the Commission did in fact take a decision.

The applicants further maintain that the statement by the defendant that it alone is entitled to decide whether or not to set in motion the procedure under Article 169 was incorrect. By virtue of Article 169, the Commission is obliged to initiate this procedure once the necessary conditions of fact are present. Once it is accepted that Article 12 of Regulation No 13/64, and Article 95 of the EEC Treaty are directly applicable ('self-executing'), the imposition by the Federal Republic of a turnover equalization tax on milk products constitutes an *infringement of the Treaty*. The Commission is therefore obliged to act in accordance with Article 169. It is clear from Article 155 read in conjunction with Article 169 that by failing to act the defendant is itself committing an infringement of the Treaty. This being so, the applicants are unable to understand how the Commission can describe as a 'purely internal measure' a decision concerning the initiation of a procedure under Article 169 against the Federal Republic and the measures which proceed from it.

B — *The alternative conclusions*

The *defendant* considers that the applicants' alternative conclusions (proceedings for failure to act) are also inadmissible. In accordance with Article 175, the bringing of such proceedings by an individual implies, among other things, that the institution against which the proceedings are brought has infringed the Treaty by failing to address to the applicant any act other than a recommendation or an opinion.

In their request of 15 March 1965, the applicants requested the Commission to take three separate measures.

By refusing to take the internal decision required in point 1 of the applicants' letter the defendant did not infringe the Treaty, since it does not provide for such decisions and, *a fortiori*, does not attach any legal consequences to them.

In point 2 of their letter the applicants re-

quested the Commission to set in motion against the Federal Republic of Germany the procedure provided for in Article 169. Both on the basis of the wording of Article 169 and in the light of the interpretation given thereto, citizens of Member States have no right to require the Commission to take such action.

The Commission is competent to initiate this procedure, without being under any obligation towards individuals to do so. This being so, individuals who propose recourse to the procedure in question cannot maintain that the refusal of the Commission to do so constitutes an infringement of the Treaty. For there is in any case no infringement of the Treaty as regards such persons.

The question whether the applicants were entitled to request notification of the measures taken or otherwise (point 3 of the applicants' request) is not important, since the Commission replied to their letter within a reasonable time (letter from the Directorate-General for Competition of 14 May 1965).

Furthermore, in order to be admissible, proceedings for failure to act presuppose that the Commission has failed to address to the applicant 'any act other than a recommendation or an opinion'.

Under the third paragraph of Article 175, proceedings for failure to act can only be brought where the Commission fails to carry out an act which is obligatory, without its being necessary to consider whether this implies other acts in addition to decisions.

For proceedings for failure to act to be admissible, the act in question must be 'by its nature and its purpose addressed to the applicants'.

In this instance these two conditions are not fulfilled.

The *applicants* dispute the fact that their request of 15 March 1965 (point 1) and the application before the Court require an 'internal measure' to be taken. They are of the opinion that the Commission was *obliged* to intervene against an infringement of the Treaty. Without sacrificing the implementation of the Treaty to the alliances of politics and power of the moment, Article 169 can only be regarded as a provision creating a true *legal obligation* for the Commission.

The applicants consider that the defendant's declaration that 'the question whether the applicants have the right to be informed of the measures taken or not taken may be set aside' confirms their view that the letter of 14 May 1965 does in fact constitute a decision.

C — *The general considerations put forward by the defendant*

The *defendant* has put forward certain general considerations which, in its opinion, are further evidence of the inadmissibility of the application.

1. To allow private persons to take advantage of Articles 173 and 175 in order to attack the steps taken by the Commission under Article 169 would in practice render the whole body of Community law directly applicable ('self-executing') irrespective of the distinctions drawn in this respect by the case-law of the Court. Any private person would thus be in a position, either by means of an application for annulment or proceedings for failure to act, to plead any kind of alleged failure on the part of a Member State to fulfil its Community obligations and to bring the case before the Court.

Such a scheme would not correspond to that established by the Treaty. The Court itself has always distinguished clearly between those provisions which are directly applicable and capable of giving rise to subjective rights and those without this effect.

The *applicants* dispute the allegation that they are seeking to render the whole body of Community law directly applicable ('self-executing'). They are also of the opinion that, like all citizens of Member States, they cannot claim any right to bring an application unless there has been infringement of a genuine obligation, that is, in the cases in which the Treaty provides in any case for an application to be brought. In this instance, the defendant has failed to fulfil an obligation arising directly from the Treaty (Articles 155 and 169).

Moreover, the defendant's argument would mean, in effect, that a failure on the part of the Commission to fulfil its obligations

under the Treaty could not even be the subject of an application in conditions similar to those in which private persons are entitled to refer administrative conduct incompatible with the Treaty successfully to the courts of Member States. Thus, as the basic duty of the Commission is to ensure respect for the Treaty, the system established therein would be challenged.

2. In conclusion the *defendant* observes that the inadmissibility of the application is no impediment to the legal protection of the private persons concerned. It is established that any national of a Member State may contest, before the courts of that State, any national measure which he considers to be incompatible with the Treaty. In accordance with the third paragraph of Article 177 of the Treaty, these courts are obliged, in the final instance, to submit to the Court of Justice questions of interpretation of Community provisions, in particular, questions as to their applicability. If it were a question of a directly applicable provision, everyone would be entitled to invoke this Article and take advantage of it.

The applicants have not claimed to have exhausted this possibility up to the present time.

The *applicants* maintain that the procedure under Article 177, advocated by the defendant, does not make it possible in all cases to prevent the occurrence of infringements of the Treaty. It is common knowledge that even today there is no procedure under German tax law which entirely fulfils all the criteria of a State which applies the principle of the rule of law ('Rechtsstaat'). As the new organization of the Finanzgerichte only came into force on 1 January 1966, several years might pass before a German tribunal has to deal with an application against a decision concerning turnover tax or turnover equalization tax. This German procedure is too slow to produce the effects desired by the authors of Article 177. The procedure under Article 177 would only give the Court of Justice an opportunity to rule on the infringement of the Treaty by a Member State five or ten years later, which is too long to enable the consequences of such an infringement to be completely eliminated.

IV — Procedure

By a statement lodged on 23 September 1965, the defendant requested the Court to give a preliminary ruling on the admissibility of the application, in accordance with Article 91 (1) of the Rules of Procedure.

On 26 November 1965 the applicants submitted their observations on the defendant's request.

At the hearing on 19 January 1966 the Court heard the parties on the objection of inadmissibility raised by the defendant.

At the hearing on 3 February 1966, the Advocate-General delivered his opinion that the application was inadmissible and that the applicants should be ordered to pay the costs.

Grounds of judgment

In a letter dated 15 March 1965, the applicants made an application to the Commission on the basis of Article 175 of the Treaty.

The applicants requested that the Commission take a decision ('Beschluß') to the effect that, as from 1 January 1962, the imposition by the Federal Republic of Germany of a turnover equalization tax of 4% on the importation of powdered milk and other dried milk products is an infringement of Article 95 of the Treaty and that it should decide ('beschließen') to initiate against the Federal Republic the procedure laid down in Article 169 and inform the applicants of the decisions ('Beschlüsse') adopted.

After considering this request, the Commission informed the applicants in a letter dated 14 May 1965 that it did not share their opinion that the said turnover equalization tax constituted an infringement of Article 95 of the Treaty.

The applicants then brought an application under Article 173 of the Treaty for the annulment of this definition of its position.

The defendant alleges that this application is inadmissible on the ground that an application for annulment cannot lie against the measure in question.

The object of the request of 15 March is to secure the initiation of the procedure laid down in Article 169 against a Member State and to compel the Commission to take the measures implied by that Article.

The object of the procedure under Article 169 is to prevent Member States from failing in their obligations under the Treaty.

For this purpose, the said Article empowers the Commission to set in motion a procedure which may lead to an action before the Court of Justice to determine the existence of such a failure by a Member State; under the terms of Article 171 of the Treaty the State concerned would then be required to take the necessary measures to comply with the judgment of the Court.

The part of the procedure which precedes reference of the matter to the Court constitutes an administrative stage intended to give the Member State concerned the opportunity of conforming with the Treaty. During this stage, the Commission makes known its view by way of an opinion only after giving the Member State concerned the opportunity to submit its observations.

No measure taken by the Commission during this stage has any binding force. Consequently, an application for the annulment of the measure by which the Commission arrived at a decision on the application is inadmissible.

In their alternative conclusions the applicants complain of failure to act under Article 175.

The defendant claims that the alternative application is also inadmissible.

Under the terms of the second paragraph of Article 175, proceedings for failure to act may only be brought if at the end of a period of two months from being called upon to act the institution has not defined its position.

It is established that the Commission has defined its position and has notified this position to the applicants within the prescribed period.

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.