THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs.**

Lecourt Donner Trabucchi

Pescatore Mertens de Wilmars

Delivered in open court in Luxembourg on 18 November 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 21 OCTOBER 1970[1]

Mr President,
Members of the Court,

As the Court knows, Mr Chevalley's application shows, with some slight differences which I shall emphasize in a moment, great similarity with that made to the Court by the Borromeos and upon which the Court gave judgment on 15 July last.
Like the Borromeos Mr Chevalley is an Italian proprietor of agricultural land which he leases. Again like the Borromeos, Mr Chevalley felt himself affected by the adoption by the Italian Senate on 19 December 1969 of a draft law put forward by Senators De Marzi and Cipolla, certain provisions of which related to the fixing of a new method of determining agricultural rents.
In essence, those provisions laid down that the amount of such rents, which had to be paid in money, would be determined, to a certain extent on a flat-rate basis, by multiplying, in respect of each piece of land, the basic land tax by a co-efficient laid down by regional commissions.
It seems that the legislative provision envisaged did not favour the financial interests of the Borromeos and Mr Chevalley. Thus, in order to attempt to block it, they decided to 'appeal' for a ruling from the European institutions.
To this end, they sent letters to the Commission requesting it in exactly the same terms:

(1) to take action under Article 155 of the Treaty to organize the consultations provided for by Articles 101 and 102 between the Italian State, the Commission and the other Member States;

(2) to submit to the Council a draft directive in application of Articles 155,

1 — Translated from the French.

145 and 100 of the Treaty with a view to harmonizing agricultural leases in the Member States of the Community;

(3) to take a decision in respect of each of the applicants fixing the terms and detailed rules to be followed in practice on concluding leases of such agricultural property in the event of the draft law debated by the Senate becoming an effective law of the Italian Republic.

Mr Chevalley's request was sent on 9 December 1969 and was received by the Commission on 16 December.

Curiously, the replies sent by the Commission to the Borromeos and Mr Chevalley were different.

I shall come back to this point in a moment, but meanwhile it is enough for me to say that the President of the Commission replied to Mr Chevalley's request by letter of 16 February 1970 in which he indicated to the advocate of the person concerned:

— that, in the first place, the Commission was not obliged to adopt any measure whatever in respect of his client;

— and that, secondly, it was not possible to bring an action for failure to act, under the third paragraph of Article 173, based on the requests submitted by him.

This last statement did not convince Mr Chevalley and on 13 April 1970 he made the application which the Court is today considering.

I

The scope of the conclusions of this application, which have been amended during the proceedings, must in my opinion be specified.

The applicant's initial application was perhaps capable of being interpreted as presenting to the Court the three requests previously presented to the Commission.

Today it appears, in my opinion, both from the terms of the statement lodged by the applicant on 22 June 1970 and from the oral observations submitted to the Court this morning that the applicant contests only the failure or refusal of the Commission to indicate to him how, should the draft law debated by the Italian Senate be adopted, he could avoid infringing either Community law or national law on concluding future agricultural leases.

On the Commission raising *in limine litis* a preliminary objection as to the inadmissibility of this application, the applicant requested the Court on 22 June 1970 to declare his application to be admissible by considering it either as an action for failure to act brought in accordance with the conditions set out in Article 175 of the Treaty or, alternatively, as an application directed against a measure adopted by the Commission and brought in accordance with the conditions set out in Article 173.

Although this 'alternative' presentation might appear rather curious, I do not think that it is legally impossible, as the representative of the Commission maintained to the Court this morning.

We may see first of all that there is here an argument which is the inverse of that upon which the Court had to rule on 4 February 1959 in Case 17/57, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the ECSC* (Rec. 1959, p. 26).

In that case an applicant which had made an application for annulment under Article 33 of the ECSC Treaty wished during the proceedings to alter it into an action for failure to act under Article 35 of the ECSC Treaty, which, as the Court ruled, was obviously impossible as such an alteration would have had the effect of dispensing the party from all the preliminary procedure laid down by Article 35 for establishing the High Authority's failure to act.

The contrary is so in the present case. It is an action initially based on Article 175 of the EEC Treaty, which, in the alternative, the applicant would like to alter into an application for annulment under Article 173.

The Commission maintained before the Court this morning that such an alteration is impossible, as the conclusions based on Article 173 were presented only on 22 June 1970, being after the expiry of the period for instituting proceedings.

But in my opinion this argument cannot be accepted.

The admissibility of an application is to be assessed in the light of its conclusions and not of the submissions which it puts forward or the provisions on which it claims to be based.

It is common ground that in his application of 13 April 1970, which was lodged within the prescribed period, the applicant requested unequivocally the annulment of the Commission's decision of 16 February. It is sufficient to refer to page 5 of his statement to be convinced of this.

It is of little importance, therefore, that in the initial application the applicant relied solely on Article 175 and that now he also relies in the alternative on Article 173. No objection of inadmissibility based on the application's being out of time may, in my opinion, be raised against conclusions for annulment lodged within the prescribed period.

I propose therefore that the Court should examine the admissibility of this application by considering it first as an action for failure to act under Article 175 and then as an application under Article 173 directed against a measure adopted by the Commission.

II

Considered as an action for failure to act, Mr Chevalley's application seems to me to be inadmissible for two reasons, the first of which is that Article 175 appears to me to be inapplicable in this instance.

An action for failure to act is only admissible when there is a failure to act, that is, according to the very wording of Article 175, when the Community authority is duly called upon to act and has not defined its position within two months.

If, on the other hand, that authority has defined its position within two months, an action for failure to act under Article 175 is inadmissible.

The Court expressly held this in its judgment of 1 March 1966 in Case 48/65, *Alfons Lütticke GmbH and Others* v *Commission of the EEC* [1966] ECR 19.

In this case, contrary to the situation in the Borromeo case, the Commission appears to me to have indeed 'defined its position'.

The President of the Commission wrote on 16 February 1970 to Mr Chevalley's advocate (I quote):

'After studying Mr Chevalley's request, the Commission wishes to inform you that it is not obliged to adopt any measure whatever in respect of your client'.

Such a letter has a scope quite different from the mere acknowledgement sent by a director of the Commission's departments to the Borromeos, which in compliance with Mr Gand's opinion the Court did not consider to constitute a definition by the Commission of its position.

On the contrary, the letter of 16 February 1970 appears to me indeed to constitute a definition of the Commission's position, a refusal without reasons being given but none the less clearly expressed, as the parties agree in stating.

It is a brief, perhaps somewhat summary, reply the meaning of which is in no doubt. It is true that Mr Chevalley's advocate attempted this morning in court to demonstrate that there was no difference between a failure to reply and an express refusal to reply, between simple silence and what he very happily described as 'expressed silence'. But I do not think that the Court can follow him over this terrain.

There is all the difference in those two sets of conduct between a manifestation of will, even though negative, and a complete lack of any such manifestation.

The very wording of the Treaties shows the authors' intention to distinguish clearly between those two attitudes in respect of proceedings.

The Commission's reply, a definition of its position, was moreover made on 16 February 1970, namely on the very day of the expiry of the period allowed to the Commission (on the day before if we are to count the number of clear days) for ruling on Mr Chevalley's request which it received on 16 December 1969, and this fact further emphasizes the intention of the President of the Commission to 'define the Commission's position' on Mr Chevalley's request within the period laid down in Article 175.

For this reason the application, although it should be considered as being made

under Article 175 of the Treaty, appears to me to be inadmissible.

It is also inadmissible for a second reason, being precisely that considered by the Court in its judgment in the Borromeo case. What Mr Chevalley wished to obtain from the Commission by asking it under what conditions, should the Italian law be passed he could conclude agricultural leases conforming both to the national law and the Community legal system was in fact an opinion, a piece of advice. According to the very wording of Article 175, there cannot be an action for failure to act in respect of a failure to give an opinion or draw up a recommendation, as the Court pointed out to the Borromeos.

Being aware of this difficulty, counsel for the applicant attempted this morning to convince the Court that what his client had asked the Commission for was not an opinion at all but an 'order' which would shelter him from any criticism of his future actions.

But I do not think that the Court may interpret the applicant's request to the Commission in this way, and this for two reasons:

1. His conclusions are drawn up in terms identical to those employed by the Borromeos and it is impossible to see on what basis the Court could interpret them differently.

2. It is even more impossible to see what the scope of an 'order' addressed in a contractual matter to only one of the possible contracting parties could have been and moreover even to imagine what legal basis it could have had.

In these circumstances, two objections of inadmissibility are capable of being raised against Mr Chevalley's application if it is considered as being an action under Article 175:

— if the Commission has defined its position, which I consider it to have done, that mere fact makes an action instituted under Article 175 inadmissible;

— if the Commission has not defined its position, its failure to give an opinion cannot give rise to an action.

III

Inadmissible if it constitutes an action under Article 175, Mr Chevalley's application is also inadmissible if it is considered to be an application under Article 173 against the Commission's decision of 16 February 1970.

As I have said, I consider that it was an 'opinion' which was being sought from the Commission.

The proceedings provided for in the second paragraph of Article 173 (proceedings by individuals) cannot be brought against measures which constitute opinions or recommendations.

The second paragraph of that article does not expressly mention them, it is true, but it is specified in that paragraph that the proceedings provided for are subject to the same conditions as those governing actions provided for in the first paragraph (actions by Member States, the Commission or the Council) and that first paragraph expressly excludes actions against opinions or recommendations.

It seems obvious to me therefore that the exclusion of any action against opinions by implication but necessarily involves the exclusion of any action against a refusal to give an opinion.

The method of interpretation adopted by the Court with regard to Article 175 must also be applied with regard to Article 173. Just as a failure to give an opinion is not capable of being contested by means of recourse to Article 175, so also a refusal to give an opinion cannot be contested by means of recourse to Article 173.

I would point out, further, as the Court recalled in its judgment in the Borromeo case, that in order to give the opinion sought by Mr Chevalley the Commission would first have had to assess whether the Italian draft law conformed with the Treaty and that the measure sought would therefore still have been a measure other than those referred to both in the third paragraph of Article 175 and in the second paragraph of Article 173.

For all these reasons, I am therefore of the opinion that:

— Mr Chevalley's application should be dismissed as inadmissible;

— the costs should be borne by the applicant.