2. Orders the applicants to pay the costs.

Lecourt Monaco

Pescatore Donner Trabucchi

Delivered in open court in Luxembourg on 15 July 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 7 JULY 1970[1]

Mr President,
Members of the Court,

You are called upon to give judgment under Article 91 of the Rules of Procedure on the preliminary objection of inadmissibility raised by the Commission of the European Communities against the application made to you by the Borromeos, owners in Italy of agricultural land which they lease.

Following the adoption by the Senate of the Italian Republic of a draft law on the method of fixing the rents on agricultural land, which seemed to them both to threaten their interests as owners and to give rise to a conflict between the national law and the Community rules, the applicants approached the Commission on 5 November 1969 under Article 175 of the EEC Treaty. They called upon that institution, through their counsel:

— to take action to ensure that the Italian State applied Articles 101 and 102 of the Treaty concerning the approximation of laws;

— to submit to the Council a draft directive with a view to harmonizing agricultural leases in the Member States;

— to take a decision in respect of the applicants fixing the terms and the detailed rules to be followed in practice on concluding leases of their agricultural property at the time when the draft law under discussion becomes law in the Italian Republic.

By letter of 22 December 1969, signed by the Director-General for the Internal Market and Approximation of Legislation and restating the terms of these requests, it was replied that the Commission's departments were studying the content of the draft law in question. It was further stated that this information was being given without the recognition of any legal obligation whatever and that, under the third paragraph of Article 175, the possibility of bringing an action based on the requests made remained out of the question.

1. This application has nevertheless been made to you by the Borromeos and the first question is what precisely is the scope of the conclusions put to you.

The applicants are not unaware that they cannot bring an action before you complaining that the Commission has failed to ensure a Member State's compliance with

1 — Translated from the French.

the Treaty. So their action for failure to act is not directed to the first two requests contained in their letter of 5 November 1969, at least not directly. In the wording of their original conclusions, they simply asked that after having declared that Italy had infringed the rules contained in Article 101 and 102 of the EEC Treaty and in the decision of the Council of the EEC of 4 December 1962, as regards the procedure for drawing up national legislation, and in Article 3 (d), the first paragraph of Article 31 and Articles 40 (2), 44, 46 and 92 of the EEC Treaty, as regards the content of the said law (which is still only a draft law), you should declare that by failing to take the decision sought in respect of them the Commission infringed the third indent of Article 155 of the Treaty. Such a preliminary or interlocutory declaration was justified, they said, by the fact that their request presupposed proof of a conflict between the provisions of the national law and those of Community law.

The Commission has not failed to counterargue that a declaration that a State had failed to fulfil its obligations under the Treaty could only be made on the initiative of that institution or of another Member State. Their request was thus inadmissible, even though presented as an interlocutory matter and by means of an action for failure to act. Thus in their subsequent observations the applicants abandoned it, at least on the assumption that you would regard such a declaration as useless and such as to render their application inadmissible. If I have understood the argument of their counsel during the oral procedure correctly, they abandon it expressly and unreservedly. After such abandonment of part of the conclusions, there being no rule of procedure to prevent such action, you are only called on to give judgment on the alleged failure of the Commission to take a decision with regard to the applicants.

2. The defendant argues first that there is no failure to act within the meaning of Article 175 of the Treaty, for it had 'defined its position' before the expiry of the two months' period. In fact—and here I quote—'the letter of 22 December 1969 and, in particular, the exclusion of any possibility of bringing an action for failure to act based on the request made constituted a reply implying a refusal to act in compliance with the request and amounts to a clarification of attitude which excludes the bringing of an action for failure to act'.

On this I have the most serious doubts. As I have just said, the letter to which the Commission is referring merely informs the applicants that the draft law is being studied by its departments; it is, in that light, an interim reply which does not involve any definition of position. On the precise point of the decision to be addressed to the applicants there is no reply of any sort; the Commission does not say that it will communicate its decision after examining the position, or that it refuses to address one to the applicants. As for pointing out that there is no possibility of bring an action on the basis of the requests presented, that is merely the statement of an opinion on the admissibility of any subsequent action, and not a definition of the Commission's position in response to the request (which sought a decision to be addressed to the applicants and not the recognition of their right to bring legal actions). It should also be noted that, according to the defendant, the wording used in the letter in question *implied a refusal* to act in the manner requested; but an implied refusal does not constitute the defining of the institution's position within the meaning of Article 175 of The Treaty, indeed it is the archetypal case for which the action instituted by that article was provided.

The Commission, it is true, cites your judgment of 1 March 1966 in *Alfons Lütticke GmbH and others* v *Commission of the EEC* (Case 48/65 [1966] ECR 19), but in my opinion mistakenly. In that case, the applicants had requested the Comimssion to declare that the conditions for the imposition by the Federal Republic of the turnover equalization tax on imported powdered milk products were improper, to decide to initiate proceedings under Article 169 and to inform them of the decisions adopted. Following the letter in which the Commission told them that it did not share their opinion that the equalization tax constituted an infringement of Article 95 and did not consider it necessary to intervene, they brought an action for failure to act. You

dismissed the action as inadmissible, because you held that the institution had defined its position; but, as opposed to the present case, the defining of its position related to the subject-matter of the request and to the substance of the case.

It must lastly be noted that on 12 March 1970 a Vice-President of the Commission informed the applicants, in order to avoid any misunderstanding, that the letter of 22 December 1969 defined exactly the position adopted by the institution following the request and that no further reply was to be expected. That letter, which moreover was subsequent to the lodging of the application, does not seem to me to constitute the defining of a position either; it is irrelevant to the determination of the admissibility of the Borromeos' conclusions and cannot lead you to consider that judgment should not be given (see, for a different situation, the judgment of 2 July 1964 in *Rhenania Schiffahrts- und Speditions- Gesellschaft mbH and Others* v *Commission of the EEC*; Case 103/63 [1964] E.C.R. 425).

3. Nevertheless I propose that you should hold the application inadmissible, but for another reason, also put forward by the Commission. An action for failure to act brought by a natural or legal person presupposes that *in infringement of the Treaty* the Commission has failed to address to the applicant *any act* other than *a recommendation or an opinion.* It is necessary therefore to prove the omission of an act which is obligatory upon the institution. But no provision of Community law requires the defendant to take with regard to the applicants the decision which they seek. They cite Article 155 of the Treaty, which requires that the Commission should watch over the conduct of all those subject to Community law, individuals as well as State, but it will be agreed that such an attribution of juristiction is a little too general to serve as the basis for the request made by the Borromeos.

Furthermore, what were they expecting from the Commission? According to their written observations, it was that it should take a decision, containing an express reservation that it should only be applicable if the draft law were definitively adopted, which would have laid down the detailed rules of form and substance whereby the applicants could have avoided infringing Community rules and the national rules, and which would have set out the procedural means or the material acts by which they would have had the possibility of complying substantially with the two rules. It was even pointed out to you at the hearing that the reply would have been valid, not only for the applicants, but for all landowners in Italy, if not throughout the Common Market, and that would in fact have necessarily been so. But would that not be to recognize that the measure sought would have had all the characteristics of a regulation 'applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety' (judgment of 14 December 1962 in *Confédération Nationale des Producteurs de Fruits et Légumes and Others and Fédération Nationale des Producteurs de Raisins de Table* v *Council of the EEC*, Joined Cases 16 and 17/62 [1962] E.C.R. 478), that is to say, an act which in any case is not to be *addressed* to an individual?

I consider therefore that the preliminary objection raised by the Commission should be upheld.

I am of the opinion:

— that the application of the Borromeos should be dismissed as inadmissible, and

— that they should bear the costs of the action.