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;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69;

THE COURT

hereby rules:

1. The issues in the case have been disposed of;

2. The parties shall bear their own costs.

Donner Hammes Trabucchi Delvaux
Rossi Lecourt Strauß

Delivered in open court in Luxembourg on 2 July 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 JUNE 1964[1]

Mr President,
Members of the Court,

In this case the applicants are German companies carrying on undertakings dealing with transport, chartering, trans-shipment and storage of German and foreign cereals.
They consider that they have suffered commercial loss as a result of the German law implementing Regulation No 19 of the Council of the EEC as set out on 19 July 1963 (BGBl. I, pp. 493 et seq.). They consider that this law infringes the third sentence of Article 7 (2) of Regulation No 19 to the extent that it set derived intervention prices at too low a level for the purely harbour centres of the Federal Republic, that is to say the localities connected directly by waterway with the marketing centre of the area with the largest deficit. This

1 — Translated from the German.

having been done, the normal flow of cereal deliveries has been diverted from purely harbour centres and the business of the applicants, who maintain transshipment and storage facilities at these places, has been damaged.

For this reason by a letter of 31 July 1963 they requested the Commission of the European Economic Community to ensure that the Federal Republic complies with the duty placed upon it by Article 7 of Regulation No 19.

As they received no reply, the applicants reminded the Commission by a telegram of 21 November 1963 to deal with their letter.

Finally the applicants instituted before the Court of Justice an action for failure to act based upon Article 175 of the EEC Treaty. This application was lodged on 29 November 1963, the same day as that on which the applicants received from the Commission a letter dated 25 November 1963 informing them that its departments had commenced the examination of the questions raised and that the applicants would be informed of the results as soon as it was completed.

In accordance with the request of the Commission, the oral proceedings dealt in the first place only with the question of the admissibility of the application. At the hearing of 14 May 1964, the parties made detailed observations on this point.

However, during the course of this hearing the applicants also made two statements which are such as to make it possible to shorten considerably the examination of the case before us.

From the beginning of his speech the applicants' representative stated that the Commission's letter of 25 November 1963 meant that the first head of their conclusions now had no purpose. The Agent of the Commission having stated that the latter had just commenced the procedure prescribed by Article 169 of the EEC Treaty in respect of the Federal Republic of Germany, the applicants' representative stated that the second head of the conclusions, and in consequence the whole of the application, had also lost its purpose. Only a decision on the costs of the proceedings remained necessary.

The Agent of the Commission did not oppose this statement.

What are the consequences of this situation for the consideration of the proceedings?

1. First of all it cannot be doubted that, even in the course of contentious administrative proceedings, it may happen that it becomes unnecessary to adjudicate. In particular one may say that it becomes unnecessary to adjudicate when events subsequent to the commencement of proceedings create a situation which satisfies the purposes of the application, that is to say when an applicant obtains satisfaction of his principal claim.

2. We must therefore only ask ourselves whether this is the situation in the present case, if we do not wish to maintain, which I consider correct, that the Court can be satisfied by the statement of the applicants and by its own finding that the other party has not contradicted that statement and that thus the parties are agreed that the issue is disposed of. A comparison between the conclusions and the steps which the Commission has taken after the commencement of the proceedings might lead to doubt whether the issue is disposed of.

Altogether, the applicants asked the Court to hold that the Commission had wrongly failed:

— to consider the request of the applicants of 31 July 1963 and in respect of them to place it on record whether the Federal Republic of Germany had infringed the obligations imposed upon it by the Treaty giving the form abovementioned to the law passed to implement Regulation No 19,

— to use its powers under Article 169 of the Treaty,

— to take a decision to the effect that the Federal Republic has been guilty of an infringement of Regulation No 19,
— and to inform the applicants of the measures introduced.

On its side, the Commission has only taken the following steps:

— it informed the applicants by letter of 25 November 1963 that it had begun an examination of the question raised;
— it commenced the procedure under Article 169 against the Federal Republic of Germany;
— it informed the applicants orally of this during the hearing before the Court.

Strictly speaking, a part of the application thus remains unresolved. Nevertheless in my opinion it is necessary to disregard it because the declarations of the parties which stated, at the time of the oral part of the proceedings, that the matters in dispute were settled may be regarded at the same time as a limitation of the original conclusions and as a partial discontinuance. Thus in fact the conclusions on the substance of the case are now disposed of.

3. For the purposes of the proceedings this means that a decision on the facts is superfluous. Instead, a mere declaration to that effect would suffice and perhaps there is even no necessity for it to appear in the operative fact of the Court's decision (cf. Stein-Jonas, *Kommentar zur Zivilprozeßordnung*, 17th edition, 1953, paragraph 91a, note I, 1).

On the other hand what is necessary is a decision as to costs (the appropriate form being that of an order), and it is only on this point that I must now give an opinion.

4. The decisive provision is that of Article 69 (5) of the Rules of Procedure which leaves to the discretion of the Court the decision as to costs (the French text reads: 'La Cour règle librement les dépens'). That certainly means that the Court is not obliged, merely for the purpose of a proper decision on costs, to consider the questions raised in the case exactly and in detail.

On the other hand it is possible to contemplate the decision on costs being taken *having regard* to the actual state of the case; that is what, for example, German law lays down in such case (cf. paragraph 161 (2) of the *Verwaltungsgerichtsordnung*). The Court should in this case, to a certain extent, undertake a *summary* examination of the chances of success of an application, that is to say, to *estimate* the probabilities of success of the two parties.

That is how I am going to proceed. For this I will begin from the latest state of the conclusions because, to the extent that one must speak of a limitation or discontinuance, the costs must in any case be borne by the applicants, because the second sentence of Article 69 (3) cannot apply in this case.

In respect of the first head of the conclusions, directed towards obtaining an answer from the Commission, that is to say, the information that an examination procedure has commenced, I consider that it is unimportant whether or not there is a *right* to obtain such an act, and whether this must be regarded as an 'act', in the sense of Article 175 and in consequence capable of being the subject of an application for failure to act.

In fact every public administration should consider that it is '*nobile officium*' for them to reply to serious representations made by those concerned, and which refer to an act coming within the competence of the administration. In the present case, if the administration had discharged this duty within a reasonable time and not after more than four months and after receiving the telegraphic reminder, the applicants would probably have refrained from including the first head of their conclusions. In consequence the Commission's unsatisfactory conduct has to this extent caused them to incur costs and may be taken into account in any

event in the decision on costs.

Nevertheless, in respect of the second head of the conclusions, a brief examination of the prospects of success does not appear favourable to the applicants. If one begins with the statement by the applicants at the hearing, they wished to make the Commission commence the procedure under Article 169 of the Treaty against the Federal Republic of Germany with a view in this way to obtaining a change in legislative provisions.

In this respect it is necessary particularly to refer to two factors: the *final objective* and the *measure which is the object of the application* (commencement of the coercive procedure of Article 169).

If one considers primarily the *final objective* it is necessary to state that private persons cannot seek to achieve aims of this kind by means of an *application for annulment*. It was in reliance on the fact that measures adopted by Community institutions must *individually* concern private undertakings that the Court of Justice has dismissed applications against decisions of the Commission which, in the last analysis, produced effects equivalent to a law, in the sense that they forbade the amendment of national legislation (by way of a suspension of customs duties). There are many arguments in favour of considering that it is necessary to impose requirements in relation to applications for failure to act, if a breach is not to be opened in the legal system of protection of the Treaty. That would thus exclude the application for failure to act which, in the final analysis, seeks to bring about an amendment of national legislation.

But this short examination leads once more to another consideration which is detrimental to the applicants' case. I do not see for the moment how they were intending to fulfil the conditions described in Article 175 '. . . to address to that person any act'. That can only mean this: the essential aim of the application for failure to act must be to secure the adoption of an act which by its nature and its purpose must be addressed to the person making the request. When the applicants ask the Commission to commence the procedure under Article 169 against a Member State, the adoption of a purely internal measure is foremost required for this request to be satisfied, in this case a decision to take action against a Member State. Any later action taken to carry out and put into effect this decision necessarily involves, under the legal system of the Treaty, measures (the legal nature of which does not matter) which must be taken in respect of the Member State concerned: request to the latter to submit its observations on particular problems; opinion of the Commission, that is to say, an explanation of its point of view with regard to the Member State; action brought by the Commission against the Member State. The *notification* of acts of this type to those concerned is only an ancillary matter, a reflexion of the measure itself, without legal content of its own, that is to say, of acts derived from the measure itself.

In consequence, and starting from the very essence of the measure which the applicants have requested, I am obliged to state that the act concerned in the present case is not one which must be taken in respect of the applicants. Thus, even according to the wording of Article 175 which one cannot ignore in one's interpretation without giving up an essential method of interpretation there is no right of action such as that conceived by the applicants.

A decision as to costs in relation to the second head of the conclusions could not in view of the foregoing be given in favour of the applicants.

Nevertheless, one further point remains: We know that this was the first case to give rise to an examination of Article 175, albeit in a very summary manner and with all necessary reservations. The discussions between the parties have

shown us what delicate problems are involved in the interpretation of this provision. Taking into account the legal problems raised in this case, we should thus decide, as in Cases 2 and 3/60, to rely upon Article 69 (3) of the Rules of Procedure which allows each party to be ordered to bear its own costs fully or partially when there are exceptional reasons for this.

As the Commission obviously has not incurred special costs it thus might appear equitable in the last analysis to order it to pay a part of the costs of the applicants (perhaps as much as half).

5. To sum up, I consider that the Court, in view of the statements of the parties during the oral procedure, should state, by way of an order, that there is no longer any necessity to give judgment and incorporate in the order a decision as to costs along the lines of the suggestion made above.