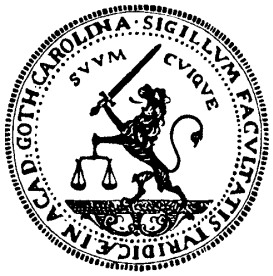

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The action for failure to act: Article 175 EC

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Contents

1 Abbrevations

CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
EC	European Community
ECB	European Central Bank
ECLR	European Competition Law Review
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
ELRev.	European Law Review
EU	European Union
Euratom	European Atomic Energy Community
LIEI	Legal Issues of European Integration
OJ	Official Journal
TEU	Treaty on European Union

2 Introduction

2.1 Purpose

The people of the European Union as well as its institutions have both privileges and obligations. The conduct of the institutions of the Community is an exercise of governmental powers, which needs legally imposed limits or there is a great risk for abuse of these powers. This thesis deals with the enforcement of these limits by way of judicial review before the courts of the Community.

The institutions of the Community are under a duty to effectuate many of the objectives of the Community (e.g. the internal market or the Common Transport Policy).[1] If an institution of the Community does not fulfil its obligation to act, for example omits to adopt certain acts or to fulfil other obligations, the Member States, the Community institutions and private parties may pursue an action against the failure to act. Provisions regarding the action against the failure to act are found in Article 175 of the EC Treaty, which reads:

> ”Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and other institutions of the Community may bring an action before the Court of Justice to have the infringement established.
> The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.
> Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.
> The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter’s field of competence and in actions or proceedings brought against the latter.”

The main purpose of this thesis is to thoroughly examine the action for failure to act under Article 175 EC**,** by critical analysis of both case law and literature. I will especially look at the possibility for private parties to protect their judicial interests by using this action. The thesis will shed light on problem areas, past and present, with possible solutions developed through

[1]Chalmers Damian, *European Union Law Volume 1*, Brookfield: Dartmouth, 1988, pp. 566-8.

the Community judicature and through the literature. I will examine and comment on discrepant views in both case law and among scholars,

Article 175 has been much criticised as being a weak and meaningless tool, for the judicial protection in the Community. I will examine this criticism and review if it is justified. My outset is that Article 175 fulfils a purpose, even if limited, within the Community legal system, and that it might even be possible to widen the use of the action for private parties.

2.2 Outline

Even though this thesis examines the action for failure to act under Article 175 of the EC Treaty, there are similar provisions under the ECSC Treaty (Article 35) and the Euratom Treaty (Article 148). A thorough examination of these provisions is outside the scope of this thesis. However, much of the case law concerning the action for failure to act under these Treaties (especially the Euratom Treaty) is also relevant under the EC Treaty, and will be treated as such.

The action for annulment under Article 173 and the action for failure to act under Article 175 are connected in many ways. Throughout the thesis, this interaction results in cross-references between case law and literature regarding both actions. The borderline between the two articles is dealt with in Chapter three. In Chapter four the basis for a claim under Article 175 is examined. This includes an analysis of grounds for illegality in an action for failure to act. The judicial process in an action for failure to act is rather special and it is evaluated in Chapter six. The grounds for illegality are to be seen as a framework for the locus standi requirements, that is a party's right to bring an action, which will be dealt with in Chapter five, while Chapter seven examines consequences of a successful action. Chapter eight concludes the thesis.

2.3 Method and References

In this thesis I have mainly used case law from the Court of Justice and the Court of First Instance. However, the judgements of both courts are collegial**,** no dissenting views are published and one can assume that the judgement consist of a compromise between different opinions, thus they tend to be rather brief and not very explaining. The opinions of the Advocate-Generals[2] therefore becomes important as they usually express their views more freely and readable. In addition to these sources, general

[2] A judge may sometimes act as Advocate-General before the Court of First Instance. See Rules of Procedure of the Court of First Instance, Articles 16-18, O.J. L136/1 [1991].

works and articles of scholars, have also been helpful and essential in the understanding of this, somewhat complicated area of Community law.

2.4 The Treaty of Amsterdam

The signing of Treaty of Amsterdam has brought about changes of the EC Treaty. Most significantly for this thesis, it will lead to changes of the numbers of Articles mentioned. However, since the Treaty of Amsterdam is not yet in force, and for an easier understanding of references to case law and literature, I will use the ”old” numbers of the articles in this thesis.

When the Treaty of Amsterdam comes into force, Article 175 will become Article 232, and Article 173 will become Article 230.

3 Borderline between Articles 173 and 175

3.1 The interaction between Articles 173 and 175.

The action for annulment and the action for failure to act may be seen as ”two sides of the same coin.”[3] They both provide for review of the legality of the institution’s conduct, and they both have the same purpose, to end a situation that is contrary to the Treaty. The system of judicial protection under the Treaties would clearly be incomplete if only a Community institution’s action could be subject to judicial review, and not its inaction (the reverse system would of course be just as incomplete). However there are differences as to the result of both actions. While a successful action for annulment brings about a legal change (an act is retroactively annulled and ceases to exist),[4] a successful action under Article 175 does not lead to any legal change. The purpose of an action for failure to act under Article 175 is only to bring about a declaratory relief. The Court of Justice or the Court of First Instance cannot create the act that should have been taken, even though they may indicate what sort of act is required. However the declaratory relief creates an obligation on part of the institution which failed to act, to issue the contested act.[5]

These differences notwithstanding, if Articles 173 and 175 are to provide an effective and complete judicial protection against actions or omissions by the institutions, which are contrary to the Treaty, both articles should be read together as complementary actions.[6] However, the action for failure to act cannot be used as a substitute to, or a parallel to, an action for annulment.[7] Where the protection by one article ends, the protection by the other article commences. Thus, the two articles should not be interpreted in such a

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[3]Toth A.G., *Legal protection of individuals in the European Communities*, Volume II, Amsterdam: North-Holland Publishing Company, 1978, p. 97.
[4]See Article 174 EC.
[5]Smit Hans & Herzog Peter E., *The Law of the European Communities: A Commentary on the EC Treaty,* New York: Mattew & Bender, 1998, (loose-leaf), p. 411; Schermers Henry G. & Waelbroeck Denis F., *Judicial Protection in the European Communities*, 5th ed. London: Kluwer Law and Taxation Publishers, 1992, pp. 247-8.
[6]Schermers & Waelbroeck, *op.cit.,* p. 258; Rasmussen Hjalte, *EU-ret i kontekst*, 1995, p. 459; Vaughan David, *Law of the European Communities Service*, Issue 46 London: Butterworths, 1988, loose-leaf, p. 2[227]; Weatherill Stephen & Beaumont Paul, *EC Law*, 2nd ed. London: Penguin Books, 1995, p. 272.
[7]*Eridania v Commission* (10, 18/68), [1969] ECR 459; Toth, *op.cit.,* (1978) p. 98.

manner that a no-mans land without judicial remedies is created, where the Community institution's conduct cannot be attacked under either article.[8]

Even though these articles are each other's counterparts, and related in many ways, there other differences than merely the effect of a judgement under each article. In principle the locus standi requirements under both Articles are similar, and the case law has developed a rather unified interpretation (infra), but differences remain.[9] Furthermore, the acts that may give rise to an action for annulment may also in principle form the basis for an action for failure to act if they have not been adopted (infra).[10] Finally, the procedure under Article 175 diverges quite much from the one under Article 173. Before an action for failure to act, the applicant must go through a pre-procedural requirement and request the institution to fulfil whatever action the applicant consider it to be obliged to fulfil (infra).[11]

3.2 The unity principle

The so called unity principle[12] was adopted by the Court of Justice in the *Chevalley* case.[13] Amedeo Chevalley, a land owner from Italy, had originally brought an action against the Commission for its failure to act. However the applicant was uncertain as to whether an action for failure to act or an action for annulment was the appropriate form of action. Hence, as an alternative action, Chevalley invited the Court of Justice to also examine his application from the viewpoint of Article 173 (i.e. an action for annulment).The Court of Justice stated:

> "The concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as both provisions merely prescribe one and the same method of recourse."[14]

Hence it was not necessary to characterise the proceedings as being brought under Article 173 or Article 175. The Court of Justice examined the application, and held it as inadmissible, under both articles. In *C. Mackprang jr. v Commission,* another case proceeding soon after the *Chevalley* case, Advocate-General Dutheillet de Lamothe also argued for an interpretation of Article 175 in line with the interpretation of Article 173. If not, the actions of the Community institution to which an application was

[8]Smit & Herzog, *op.cit.,* p. 410.
[9]Rasmussen Hjalte, *Domstolen i EF*, Kopenhavn: Juristforbundets forlag, 1975, p. 189; Hartley Trevor, *The Foundations of European Community Law*, 4th ed., Oxford: Oxford University press, 1998, p. 378.
[10]Rasmussen, *op.cit.,* (1995), p. 459.
[11]Hartley, *op.cit.,* p. 378.
[12]Steiner Josephine & Woods Lorna, *Textbook on EC law*, 5th ed., London: Blackstone Press Limited, 1997, p. 445; Hartley, *op.cit.,* p. 379.
[13]*Amedeo Chevalley v Commission* (15/70), [1970] ECR 975.
[14]*Amedeo Chevalley v Commission* (15/70), [1970] ECR 975, consideration 6.

brought under Article 173 or 175, would determine the absence or existence of a judicial remedy. If the institution replied by acceptance or rejection the applicant would be entitled to proceed under Article 173 even if it was not the addressee of the measure adopted or omitted, provided that the applicant was direct and individually concerned by the measure. If, on the other hand, the institution did not reply at all, and the applicant was not the addressee of the measure, no judicial remedy would be available, even if the applicant was direct and individually concerned. [15] The unity principle have been adopted by the Court of Justice in the *Transport Policy* case and many other cases after the *Chevalley* case.[16]

However in the context of locus standi the unity principle was later denied in the *Comitology* case,[17] in which the Court of Justice stated that there was "no necessary link" between the two actions. This was contrary to the Opinion of Advocate-General Darmon,[18]and the impact of this holding by Court of Justice beyond this case is uncertain (see also 6.1.1).[19] In the *Chernobyl* case[20] the position was somewhat modified. Even though no explicit reference was made to the *Chevalley* case, the holding by the Court of Justice in the *Transport Policy* case, in which the Parliament got locus standi under Article 175, formed part of the basis for the holding, which gave the Parliament locus standi under Article 173 as well, even though only in order to protect its own prerogatives. A principle that was later amended to Article 173 by the Treaty of the European Union (TEU). Thus the amenders of the Treaty did not fully incorporate the unity principle. After the TEU the Parliament has standing in only order to protect its prerogatives under Article 173, while under Article 175 there exist no such limitation.

It is submitted though, that the unity principle has been adopted in case law and accepted in literature.[21]

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[15]Opinion of Mr Advocate-General Dutheillet de Lamothe [1971] ECR 806, at 807-8.
[16]*European Parliament v. Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 36. See also e.g. *T.Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung* (C-68/95), [1997] 1 CMLR 1.
[17]*European Parliament v Council (Comitology)* (302/87), [1988] ECR 5615.
[18]Opinion of Mr Advocate-General Darmon, *Parliament v Council (Comitology)* (302/87), [1988] ECR 5627.
[19]According to Shaw Jo, *Competition complaints: a comprehensive system of remedies?,* (1993) 18 ELRev. 427 at 436, the judgement in *Asia Motor France SA v Commission* (T-28/90), [1992] ECR II-2285, in which the Court of First Instance held that the Commission can be compelled to adopt an act which does not itself have legal effects and thus is not reviewabel under Article 173, clearly moves away from the unity principle; in *AITEC v Commission* (T-277/94), [1996] ECR II-351, the Court of First Instance does not explicitly adopt the unity principle. See 8.1.
[20]*European Parliament v Council (Chernobyl)* (C-70/88), [1990] ECR I-2041, consideration 15.
[21]See e.g. *The EC Treaty Project*, (1997) 22 ELRev. 395 at 423-5; Hartley, *op.cit*., p. 378; Gravells Nigel P., *Article 173 and 175 EEC in he context of state aids*, (1988) 14 ELRev. 228 at 233; Wyatt Derrick & Dashwood Alan, *European Community Law*, 3rd ed., London: Sweet 6 Maxwell, 1993, pp. 134-7; Weatherill & Beaumont, *op.cit*., p. 272.

Even if the unity principle is to be followed, the problem still remains if Article 173 is supposed to be interpreted in the light of Article 175 or vice versa.[22] In the *Chernobyl* case the Court of Justice interpreted Article 173 in the light of Article 175. However, judging from the amount of interest given to both the articles in the literature, Article 173 is clearly the most significant one, and this indicates that Article 175 must be interpreted to follow Article 173 and not the other way around.

A consequence of the unity principle is that much of the case law under Article 173 is also relevant for the interpretation and evaluation of the action for failure to act under Article 175. Comparisons with the case law and literature concerning Article 173 will therefore be done below. The Community courts and scholars make these comparisons as well.

[22]Schermers & Waelbroeck, *op.cit.,* p. 257 is not certain which article to favour; However, Rasmussen is of the opinion that the interpretation of Article 175 should follow the interpretation of Article 173, Rasmussen, *op.cit.,* (1975), p. 190.

4 The basis for the claim

4.1 Introduction

To be successful in an action for failure to act three preconditions must be present. There must be an obligation to act on part of the institution, the institution must have failed to perform this obligation, and this failure must be ”in infringement of this Treaty”.[23]

4.2 Obligation to act

Applicants must show that there was an obligation to act on part of the institution for an action for failure to act to be possible. The fact that the institution is only ”entitled” to act is not sufficient.[24] Difficulties, which stand in the way for compliance with this obligation, are irrelevant.[25] In many situations the Treaty gives the institution discretion to act, and even provisions of an imperative nature may provide a certain amount of discretion.[26] This has several reasons. A legal system with rules for every possible situation, tend to be very rigid, incomplete, and inefficient, because the Treaty makers cannot possibly cover all situations that may occur. Furthermore, the institutions' resources are limited and they must use these in the best possible way. However, with discretion comes always an uncertainty as to the conduct of the institution and to the Courts' interpretation of this discretion. Furthermore, the existence of a wide margin of discretion on part of the concerned institution will often make it difficult to succeed with an action for the failure to act, because it may be hard to prove an obligation on part of the institution.[27]

It must be remembered though, that this discretion given to the institutions is not absolute, it cannot behave completely as it pleases. The power given to the institution comes with a duty. Even if this only complies the institution to consider, without bias, whether to exercise its discretion or not, it is still a duty.[28] Public authorities (as the institutions of the Community), are obliged

[23] Paragraph 1, Article 175 EC.
[24] Schermers & Waelbroeck, *op.cit.,* p. 249.
[25] *European Parliament v Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 48.
[26] Smit & Herzog, *op.cit.,* p. 419.
[27] See e.g. *Star Fruit Company SA v Commission* (247/87), [1989] ECR 291, consideration 11; *AITEC v Commission* (T-277/94), [1996] ECR II-351, considerations 65-68; *Ladbroke Racing Deutschland GmbH v Commission* (T-74/92), [1995] ECR II-115, consideration 39.
[28] E.g. *FEDIOL v Commission* (191/82), [1983] ECR 2913, where the applicants were entitled to review of their application to ensure their procedural rights, even though the

to exercise its discretion for the public good. If the institution fails to give the matter proper consideration, it will be guilty of infringement of the Treaty. Furthermore, the institution is not only under a duty to properly consider whether to exercise its discretion or not. If the institution actually does give the matter proper consideration, but decides not to act, the decision could still be improper, for example because of mistake of law or fact from the institution.[29] Thus, a discretionary power comes with an implied obligation to exercise the power properly, and even though many cases have been dismissed because the institution has had discretion to act, this discretion has its limits.[30] Hence, an action for failure to act will lie when the institution has an absolute duty to act as well as when it has discretion to act but abuses this discretion by failing to act.[31]

Even if the discretion leaves the institution an option to act, pursuing every Treaty violation might do more harms then good for the obedience of Community law. For example, national governments tend to resent enforcement proceedings against them (they often see it as an insult and as a question of prestige), and since mutual trust and goodwill between the institutions of the Community and the Member States are essential for the functioning of the Community legal system, excessive enforcement proceedings against Member States might be very damaging.[32]

Ordinarily whenever there is an obligation to act it is in principle irrelevant what sort of act the obligation bring about. However, until fairly recently, the position of the Court of Justice, the Court of First Instance and most scholars, was that it was important to distinguish between the obligation to act, and the obligation to take binding acts. According to this view, under the EC Treaty, Member States and Institutions of the Community may challenge the failure to take any acts, while natural and legal persons only may challenge the failure to take binding acts.[33] Hence, only when an institution of the Community has an obligation to take a binding act, may a natural or legal person lodge an action for failure to act. The development of the case law, in especially competition cases, has somewhat modified this view, and at least in this area may a natural or legal person complain of the failure to take a non-binding act (6.2.1.1).

According to Schermers and Waelbroeck, whenever there is an obligation to act, and the obligation is performed incorrectly, leading to the wrong act being taken, the correct action to take is an action for annulment under

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Commission could not be forced, due to its discretion, to act according to the complaint; See also *GEMA v Commission* (125/78), [1979] ECR 3173; *Ladbroke Racing Ltd v Commission* (T-32/93), [1994] ECR II-1015; Hartley, *op.cit.,* p. 302, the Commission's discretion is restricted in so much that there is an implied obligation to consider, with an open mind, whether to investigate or not. See 6.2.1.2.

[29]Hartley, *op.cit.,* pp. 427-9.

[30]See not 23.

[31]Smit & Herzog, *op.cit.,* p. 419.

[32]Hartley, *op.cit.,* pp. 302-3.

[33]Schermers & Waelbroeck, *op.cit.,* p. 249.

Article 173, but this action must wait until the wrong act enters into force. However, if no action is initiated, the action for failure to act is the correct remedy to take.[34] I disagree with this view. If the requested act is not taken, how can the obligation be fulfilled? In the view of the complainant it must be irrelevant in most cases if the no action is taken or if the wrong act is taken. The requested act still remains unadopted. Schermers and Waelbroeck's view has support in *Deutscher Komponistenverband v Commission* in which the Commission was not held to have failed to act when, upon a request, it adopted an act other than the one requested. In this case, however the applicants were provided with a similar measure to the one that they had requested, and maybe this ”reconciliation” for the applicants influenced the Court's holding.[35]

According to Smit and Herzog, who also disagrees with the view advocated by Schermers and Waelbroeck, as long as the action demanded is not completely discharged, the obligation to act is not fulfilled.[36] This has support in *Ladbroke Racing Deutschland GmbH v Commission*. In this case a complaint was made to the Commission under Article 3 of Regulation 17/62[37] for breach of Articles 85 and 86 EC. The Commission conducted an investigation solely on the basis of Article 85. The Court of First Instance held that a definition of position on the complaint had not been taken by the Commission in so far that it was based on Article 86.[38]

4.3 Grounds for illegality

Paragraph 1 of Article 175 reads:

> ”Should the European Parliament, the Council, or the Commission, in infringement of this Treaty, fail to act, the Member States and other institutions of the Community may bring action before the Court of Justice to have the infringement established.”

A textual interpretation, leads to the conclusion that ”infringement of this Treaty”, is the only ground for illegality that may be invoked in an action for failure to act. However, the words ”in infringement of this Treaty” should be

[34]Schermers & Waelbroeck, *op.cit.,* pp. 248, 258.
[35]*Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 716.
The applicants requested to be heard pursuant of Article 19 (2) of Regulation 17/62 read together with Article 5 of Regulation 99/63. The Court of Justice found it sufficient that the Commission had afforded the applicants the opportunity to submit its observations in writing.
[36]Smit & Herzog, *op.cit.,* p. 414.
[37] O.J. Special ed. [1959-1962] p. 87.
[38]*Ladbroke Racing Deutschland GmbH v Commission* (T-74/92), [1995] ECR II-115, considerations 60-63.

interpreted broadly as to encompass all forms of Community law.[39] In Article 35 of the ECSC Treaty (the equivalent of Article 175 EC) secondary legislation is expressly covered. Even though Article 175 does not mention secondary legislation, it is covered as well.[40] The same is true for amendments, protocols and all implementing measures. Furthermore, international agreements[41] and internal Codes of Conduct[42] have been held to be reviewable acts under Article 173. This follows from the notion that an infringement of legislation passed under the Treaty is an infringement of the Treaty itself.[43] The Court has accepted that the Euratom and ECSC articles may be brought in support of an action brought under the EC Treaty and vice versa.[44]

Furthermore, unlike Article 173, Article 175 does not mention four specified grounds for judicial review. Nevertheless, it can be derived from the complementary nature of the two articles, that in principle, the same grounds may form the basis for a claim under Article 175.[45] The first ground mentioned in Article 173 however, ”lack of competence”, cannot, because of its nature, form the basis for a claim under Article 175. If the institution has no competence it, how can it have failed to act?[46] Most scholars agree that the second ground, ”infringement of essential procedural requirements” also is excluded. Non-action obviously has no form and no procedural requirements from which it could have departed.[47]

Another ground for review mentioned in Article 173 is ”infringement of any rule of law relating to its [the Treaty’s] application”. This rather unspecified statement includes rules of international law and general principles of law. Many scholars submit that Community acts made or omitted in violation of binding rules of international law are illegal.[48] General principles of law must be compulsory to serve as a ground for illegality and an important compulsory principle of law is respect for fundamental rights.[49] ”Respect for

[39]However, see Chapter 6 for the sort of acts that may form the basis for an action for failure to act, for privileged and unprivileged applicants respectively.
[40] Hartley, *op.cit*., p. 428.
[41]*France v Commission* (C-327/91), [1994] ECR I-3641.
[42]*France v Commission* (C-303/90), [1991] ECR I-5315.
[43]Hartley pp. 427-8; Smit & Herzog, *op.cit*. p. 418. *Amedeo Chevalley v Commission* (15/70), [1970] ECR 975.
[44]*Greece v Council (Radioactive Products Case)* (C-62/88), [1990] ECR I-1545; Hartley p. 428; Schermers & Waelbroeck, *op.cit.,* p. 216.
[45]Smit & Herzog, *op.cit*., p. 418.
[46]See e.g. Hartley, *op.cit.,* p. 427; Schermers & Waelbroeck, *op.cit.,* p. 252.
[47]See e.g. Hartley, *op.cit.,* p. 427; Schermers & Waelbroeck, *op.cit.,* p. 252; Smit & Herzog, *op.cit.,* p. 428, are less certain on this issue, and argue that an institution may infringe upon a procedural requirement by failing to observe it.
[48]Chalmers, *op.cit.,* p. 540; Schermers & Waelbroeck, *op.cit.,* p. 218; Smit & Herzog, *op.cit.,* p. 418, specifically no significance is to be attached to the circumstance that Article 173 explicitly mentions not only the Treaty, but also ‘any rule of law relating to its application.’ No reasonable argument could be advanced for giving in this respect a broader construction to Article 173 than to Article 175”´; Hartley, *op.cit.,* p. 428, less certain. International agreements are ”probably covered”.
[49]Schermers & Waelbroeck, *op.cit.,* p. 218.

fundamental rights form a integral part of the general principles of law protected by the Court of Justice."[50] Hartley is uncertain regarding the ground "any rule of law", but he considers it possible, that the Court of Justice might hold that respect for general principles of law is inherent in Community law. Article 164, which states that the Court of Justice shall ensure that "the law" is observed in interpretation and application of the Treaty, might form the basis for such a holding.[51]

The last ground for review mentioned in Article 173 is "misuse of powers". It is a proper ground for relief under Article 175 and would "undoubtedly" be considered as an infringement of the Treaty. [52] For example an institution may fail to act because of its pursuit of improper purposes (détournement de pouvoir) or when it has discretion to act but abuses this discretion. If Article 175 is to provide an effective and complete legal protection, relief must be available in situations like these. "No reasonable argument can be advanced for providing such relief when the institution acts but not when it fails to act."[53] This is in conformity with the unity principle.[54] Rasmussen finds support for this view in the fact that an infringement of the Treaty is abuse of power, and also because, as a general principle, Treaty provisions for the judicial protection of natural and legal persons shall be interpreted widely.[55]

If a Community institution performs an illegal act, it is under a duty to undo it. The failure to comply with this obligation is however not actionable under Article 175. Every action under Article 173 would otherwise automatically be converted into an action under Article 175. Such a result would not only be contrary to the purpose of Article 173 but would also cause unnecessary delay.[56]

[50] *Internationale Handelsgesellschaft v EVGF* (11/70), [1970] ECR 1134, consideration 4.
[51] Hartley, *op.cit.,* pp. 427-8.
[52] Schermers & Waelbroeck, *op.cit.,* p. 252; To prove misuse of powers the applicant must sufficiently support its allegation by objective, relevant and consistent evidence, *Automec Srl v Commission* (T-24/90), [1992] ECR II-2223, consideration 105.
[53] Smit & Herzog, *op.cit.,* pp. 418-9.
[54] *Amedeo Chevalley v Commission* (15/70) [1970] ECR 975, consideration 6.
[55] Rasmussen, *op.cit.,* (1975), p. 193.
[56] Smit & Herzog, *op.cit.,* p. 420.

5 Procedure

5.1 Introduction

The action for failure to act has three stages. In the first stage the applicant must call upon the institution to act. This is an important procedural difference compared with an action for annulment. It serves several purposes. It is a demand for action, a notice to the institution that court action will be initiated if it does not comply with the demand, and it gives the institution a chance to reconsider its position. The second stage is the reply of the institution. It might comply fully or partly with the demand, it might define its position and state that it will not comply with the demand, or it might do nothing. The third stage is the procedure before the Court.

5.2 Stage one: Called upon to act - Demand for action

The calling upon the institution to act, is a formal act,[57]and not every application addressed to the institution will qualify as such.[58] It must clearly indicate what action that is demanded and that further proceedings will be initiated if the institution does not comply with the demand.[59]A demand for action has been considered specific enough if it would have been possible for the institution to comply with it.[60] A request to the institution to take ”appropriate measures” is not precise enough.[61] It is important for the applicant to be thorough in making this demand, because it is the legal document on which further actions will be based. If the action is to be brought before the Court, the applicant can complain only of the failure to comply with the action actually requested in the demand. Another important aspect is that time limits start running with the demand for action.

[57]*Nuevo Campsider v Commission* (25/85), [1986] ECR 1531, consideration 8.
[58]Opinion of Mr Advocate-General Roemer in *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 716.
[59]*European Parliament v Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 24. *Nuevo Campsider v Commission* (25/85), [1986] ECR 1531, consideration 8. Advocate-General Roemer in *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 716.
[60]*European Parliament v Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 35.
[61]*Ernst Hake & Co.* v *Commission* (75/69), [1970] ECR 535, consideration 4.

The requirement of a formal demand for action gives the institution a last opportunity to reconsider its position. ”It thus ensures that litigation against institutions not be commenced precipitously.”[62]

5.2.1 Time limits

There is no time limit provided in the EC Treaty within which the institution must be called upon to act. This seems logical since it often difficult to establish when a failure to act becomes reproachable. In *Kingdom of the Netherlands v Commission*, a case concerning the ECSC Treaty, the Netherlands' Government instituted proceedings for the failure to act against the Commission, by calling upon it to act 18 months after the Commission had informed the Netherlands' Government of its intention not to act. The Court of Justice stated that it followed from the common purpose of Articles 33 and 35 ECSC (the ECSC Treaty's equivalent of Articles 173 and 175 EC) that the requirements of legal certainty, and the continuity of Community action underlying the time-limits for bringing proceedings under Article 33 ECSC, must also be taken into account. Thus it was implicit that the exercise of the right to raise the matter for failure to act ”may not be delayed indefinitely”. Hence applicants for failures to act under Article 35 ECSC must call upon the institution to act within a ”reasonable time” after it is clear that the institution is not going to take any action. The court also found support for this view in the fact that the time limits after the demand for action is two months, and following the definition, one month (two months under Article 175 EC).[63] These requirements are equally applicable under Article 175 EC.

Advocate-General Roemer had considered the proposition later adopted by the Court, but he rejected it because a period of limitation of no specific time (i.e. within reasonable time) would be contrary to the principle of legal certainty.[64]

How long time is “reasonable” before calling upon the institution to act? It must be determined by the circumstances in each individual case. The same is true for the question whether the institution has manifested its intention not to act (and thus the time starts running). ”Mere inaction is not sufficient. It must in some way appear that the institution does not intend to act.”[65] An

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[62]Smit & Herzog, *op.cit.,* p. 430.
[63]*Kingdom of the Netherlands v Commission* (59/70), [1971] ECR 639, considerations 15-19. However, in *European Parliament v Council (Common Transport Policy)* (13/83), [1985] ECR 1513, the Court accepted an application in 1983 for a failure to fulfil an obligation which should have been fulfilled in 1969! This might have accepted been because the Council had acknowledged the need for it to take further action. In contrast to the defendant (the Commission) in case (59/70) which had clearly decided that it did not intend to take action, Wyatt & Dashwood, *op.cit*., p. 138.
[64]Opinion of Mr Advocate-General Roemer, *Kingdom of the Netherlands v Commission* (59/70), [1971] ECR 658.
[65]Smit & Herzog, *op.cit*., pp. 428-9.

applicant obviously faces considerable uncertainties when neither the length of the time period nor the time when the period starts running is clear. This is very unfortunate, but a logical consequence of the special problem of deciding when an institution did *not* act.

If the institution complies with the demand for action[66]or defines it's position[67] the purpose of the action for failure to act ceases to exist, and there is no need to give a decision, thus the applicant looses its right to relief.[68] This is the case even when the institution has discharged its obligation after that the two-months time limit following the demand for action has expired, or even after that an action has been brought before the Court, but before a judgement.[69] The action is after all intended to obtain an act and not to punish the institutions of the Community.[70] However, in the latter case the defending institution may be obliged to pay for cost of litigation. In *Ernst Hake & Co. v Commission* (a case under the ECSC Treaty) the Commission had adopted the measure requested after both the expiry of the two-month period and after the lodging of the action for failure to act. The Court of Justice found that it was no longer necessary to give a ruling since the applicant had obtained satisfaction, but it ordered the Commission to pay all the costs of the action.[71]

After the institution has been called upon to act it has two months to define its position. Time starts running from the day the institution received the demand for action. If the institution does not define its position within the two-month period, the applicant has another two months to bring the action before the Court. Time starts running from the day after the end of the first two-month period.

The time limits in Article 175 are strictly enforced. If the application is brought too early or too late, it will be declared inadmissible. It is therefore very important for the applicant to know if an initial communication constitutes a formal request. If the applicant brings the matter before the Court and it turns out that the initial communication was not a formal request, the application will be declared inadmissible and the applicant will have to pay the costs. On the other hand if it is considered a formal request,

[66]See the discussion above in 4.2, regarding different opinions whether it matters if the institution complies fully or partly with the demand for action.
[67]Note: this is true under the Prevailing view. See 5.3.1.1 below.
[68]See e.g. *Asia Motor France SA and others v Commission* (T-28/90), [1992] ECR II-2285.
[69]*C. Mackprang jr. v Commission* (15/71), [1971] ECR 797, consideration 8; *Josef Buckl & Söhne v Commission* (15, 108/91), [1992] ECR I-6061, considerations 15-16; *Ladbroke Racing Ltd v Commission* (T-32/93), [1994] ECR II-1015, consideration 22.
[70]Smit & Herzog, *op.cit.,* pp. 433-4; Hartley, *op.cit.,* p. 392. Schermers & Waelbroeck, *op.cit.,* pp. 251-2.
[71]*Ernst Hake & Co.* v *Commission* (75/69), [1970] ECR 535, considerations 2 and 11.

but the application fails to initiate the proceedings within two months, the right to bring proceedings is lost.[72]

Imagine a situation in which a Community institution adopts an act and an applicant request the institution to repeal the act, *after* the two-month time limit in Article 173 has passed. If the institution does not comply with this request, may the institution's inaction give rise to an action for failure to act? A strong support for such an interpretation is the fact that Community institutions, like any governmental body, must respect the law.[73] The Court of Justice however, has ruled against such an interpretation. In *Eridania v Commission* it stated that an action under Article 175 could not be used in order to escape the harsher time limits under Article 173.[74] There are however some special situations in which an action will be allowed. First, if a valid act becomes incompatible with Community law due to a later development, which takes place later than two months of the publication or notification of the act. The second situation occurs when a judgement making an act void requires the amendment or repeal of another act.[75]

5.3 Stage two: The institution's reaction

5.3.1 Definition of position

After the demand for action, the institution may define its position. What constitutes a definition of position? A "definition of position" means an express declaration of the view taken by the institution of the subject matter of the request and the merits of the case.[76] The reply to the applicant must clearly deny or confirm the alleged failure, or give another indication of the institutions views as to the action demanded.[77]A reply that does not deal with the full scope of the request has been held to not be a definition of position, regarding the part not considered by the institution (4.2). [78]

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[72]Hartley, *op.cit.,* p. 392. It is unclear whether the applicant could start over again with a new request for action. It is possible that the Court will find that this action is time-barred; Gravells, *op.cit.,* p. 231.
[73]Hartley, *op.cit.,* pp. 388-9.
[74]*Eridania v Commission* (10, 18/68), [1969] ECR 459, consideration 17; See also *Meroni v High Authority* (21, 26/61), [1962] ECR 78.
[75]Hartley, *op.cit.,* p. 391.
[76]Opinion of Mr Advocate-General Gand in *Gilberto Borromeo Arese and others v Commission* (6/70), [1970] ECR 815, at 822.
[77]*European Parliament v Council (Common Transport Policy)* (13/83), [1985] ECR 1513, considerations 24-25; Rasmussen, *op.cit.,* (1975), p. 197, if the institution did not reply at all, this is probably to be considered as a quiet refusal to act, and it should amount to an act which should be contested in annulment proceedings. Note this view was advocated long before the *Transport* case.
[78]*Ladbroke Racing Deutschland GmbH v Commission* (T-74/92), 819959 ECR II-115, considerations 60-63.

Furthermore, a statement that the issue is under consideration is obviously not enough to amount to a definition of position.[79] Neither is an "implied refusal" by silence.[80] A formal decision does not need to be taken. A reply by means of a letter might be sufficient.[81] However, the reply to the applicant must be understandable and so precise that it will be sufficient to bring an action for annulment against it.[82]

The institution may respond to the call to act by a so-called negative decision,[83] that is a decision in which the institution decides that it does not intend to act on the request for action. As a general principle a statement by the institution on how intends to act in the future, even if it is not binding on the institution, may still be regarded as a reviewable act under Article 173, provided that it is sufficiently clear and precise.[84]

It is an established principle that a refusal to act may only be the subject of an application for annulment if the positive act demanded might itself be contested.[85] For example in *Nordgetreide v Commission*, the applicant sought annulment of an act, which constituted a definition of position. The original act it had requested was a regulation. Since a regulation could not have been annulled under paragraph 2 of Article 173 the application was inadmissible.[86]

5.3.1.1 The Prevailing view

Does the definition of position exclude further proceedings? The Court of Justice has not been entirely clear on this issue and it has divided scholars and led to some confusion.

Under the so called Prevailing view,[87] favoured by most scholars and the Court of Justice in many cases, the definition of position under paragraph 2 of Article 175 exclude further proceedings in actions for failures to act. If

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[79]Rasmussen, *op.cit.,* (1975), p. 196; Herzog, *op.cit.,* p. 417.
[80]Toth, *op.cit.,* (1975) pp. 81-2.
[81]*GEMA v Commission* (125/78), [1979] ECR 3173, consideration 21; *Irish Cement Limited v Commission* (166, 220/86), [1988] ECR 6473, consideration 17.
[82]Rasmussen, *op.cit.,* (1975), p. 196.
[83]Hartley, *op.cit.,* p. 380.
[84]Hartley, *op.cit.,* p. 335; In *Germany and Bundesanstalt für Arbeit v Commission* (44/81), [1982] ECR 1855, consideration 6, the Court of Justice held that in a situation where an institution by refusing payments, disputes a prior commitment or denies its existence, the refusal is an act with legal effects and may thus give rise to an action for annulment. If the institution fails to reply (i.e. does not define its position) to the request for payment the silent refusal may give rise to an action for failure to act.
[85]Opinion of Mr Advocate-General Gand in *Alfons Lütticke GmbH v Commission,* (48/65), [1966] ECR 27, at 31. See also e.g. Toth, *op.cit.,* (1975) pp. 85-6.; Hartley Trevor, *Locus standi under Article 175: Lord Bethell loses the first round in his fight for lower air fares,* (1982) 7 ELRev. 391 at 393; Wyatt & Dashwood, *op.cit.,* p. 139.
[86]*Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 105, consideration 5.
[87]Smit & Herzog, *op.cit.,* p. 413.

the institution defines its position the only relief available is an action for annulment of the definition of position.[88]

A definition of position excludes further proceedings under Article 175 not only if made within the two month time limit after the call to act,[89] but also if it was made after the expiry of the two months but before an action was brought before the court,[90] or even after an action was brought before the court but before a judgement.[91]

Under the Prevailing view the defending institution may put an end to further proceedings under Article 175 in a number of ways. It may, by a formal act, comply with or refuse the demand. The institution may also put an end to the action by a formal act containing a measure other than the one demanded, [92] or by an informal taking of position or declaration of an attitude expressing a willingness or unwillingness to act.[93]

5.3.1.1.1 Problems with the Prevailing view

As noted above, under the Prevailing view the definition of position ends the action for failure to act. The applicant may then bring an Article 173-action for the annulment of the "definition of position". However since Article 173 paragraph 4, concerning natural and legal persons, only allows action against binding acts, and the fact that an act which itself is not open to an action for annulment nevertheless may constitute a definition of position within the meaning of an action for failure to act,[94] an action under Article 173 against the definition of position is sometimes not possible. Hence there is a gap in the legal protection for natural or legal persons.

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[88]See e.g. *Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 105, consideration 4; *GEMA v Commission* (125/78), [1979] ECR 3173, considerations 21-22; *Guérin Automobiles v Commission* (T-186/94), consideration 25; *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 705, considerations 2-3, the institution failed to act in compliance with the demand, but it had still defined its position, thus further action under article 175 was excluded; *Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27. Scholars include e.g. Hartley, *op.cit*., pp. 396-7.; Wyatt & Dashwood, *op.cit*., p. 139; Schermers & Waelbroeck, *op.cit*., p. 251; Weatherill & Beaumont, *op.cit.*, p. 273; Steiner & Woods, *op.cit*., 451.

[89]*Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 105, consideration 4.

[90]*San Michele and others v High Authority* (5-11, 13-15/62), [1962] ECR 859.

[91]*Josef Buckl & Söhne v Commission* (15, 108/91), [1992] ECR I-6061, consideration 15, the rejection to the call to act, came two days after the action was brought before the Court of Justice, which still held that the subject-matter of the action had ceased to exist.

[92]In *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 705, the Commission had defined its position even if it had failed to comply with the request for action, thus the application was inadmissible*; Irish Cement Limited v Commission* (166, 220/86), [1988] ECR 6473.

[93]Toth, *op.cit.,* (1975), p. 82.

[94]*Guérin Automobiles v Commission* (T-186/94), ECR [1995] ECR II-1753, consideration 25; *European Parliament v Council (Draft budget)* (377/87), [1988] ECR 4017; *European Parliament v Council (Comitology)* (320/87), [1988] ECR 5615. See 6.2.1.1.

This was the case in *Alfons Lütticke GmbH v Commission.* Lütticke, a private firm, had demanded the Commission to initiate an Article 169-procedure against Germany for violating Article 95 EEC by imposing a turnover equalisation tax on imported powdered milk. The Commission replied that it did not share the opinion that the turnover equalisation tax constituted an infringement of Article 95 of the Treaty. Lütticke then brought an annulment proceeding against the definition of position. The Court of Justice stated that the part of the matter, which precedes reference to the Court constitutes an administrative stage and no measure taken by the Commission under this stage had any binding force, hence the application for annulment was inadmissible. The alternative application for failure to act was also inadmissible because the Commission had defined its position.[95]In other words, the institution's definition of position did not expose it to attack under Article 173.

This gap in the legal protection of natural and legal persons has however been considered a special case of no real importance. The applicant, Lütticke, would have lost anyway. Since the Commission is under no duty to initiate proceedings in accordance with Article 169, the Court could have stated that the action for failure to act was inadmissible since the Commission had discretion to act. Even if the Commission had remained silent and not defined its position the result would have been the same.[96]

It seems like these scholars brush this problem of with the fact that it did not need to happen. However it did, and others are more concerned.[97]

5.3.1.2 An alternative view

Smit and Herzog advocate an alternative view as to the meaning of a definition of position. According to paragraphs 1 and 2 of Article 175 there is basis for an action for failure to act when an institution of the Community has failed to act. Thus the actual text of the Article implies that it is the original failure to act, which is the basis for the claim.[98] According to this view, the demand for action and the definition of position, serves only the purpose of giving the institution additional time to reconsider its position, and thus hopefully avoid further litigation before the Community courts, a construction that is well in conformity with the purpose of Article 175. The only time a response to a demand for action affects the availability of relief under Article 175 under this view is when the position taken by the institution actually constitutes a proper discharge of the obligation it failed to meet (i.e. the original failure). In this case it is however not the taking of

[95]*Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27.
[96]Schermers & Waelbroeck, *op.cit.,* p. 259; Hartley, *op.cit.,* p. 398.
[97]Smit & Herzog, *op.cit.,* pp. 415-16; Toth, *op.cit.,* (1975), pp. 82-3. "a very serious gap in the legal protection".
[98]Toth, *op.cit.,* (1975), p. 82 disagrees. A "failure to act", means a failure to take a position or adopt an attitude.

position that precludes further action under Article 175, but the actual fulfilment of the obligation.[99]

Another consequence of the Alternative view is that the definition of position only excludes further action under Article 175 to the extent that the institution accedes to the demand for action. To the extent it does not comply, the definition of position leaves the claim for relief under Article 175 unaffected; hence, the failure to act continues (4.2). The same is true if the institution does nothing after being called to act.[100] *Netherlands v Commission* indicates support for this view that it is the original failure, which form the basis for the claim under Article 175. The Court of Justice stated that there was a time limit (reasonable long), after the institution had manifested its intention not to act, within which the applicant must call upon the institution to act.[101] Accordingly, this ”reasonable long” time limit would be unnecessary if it was the failure to act following the demand that formed the basis for the claim.[102]

As noted above (4.2) Schermers and Waelbroeck are of another opinion, and stresses that the possibility of an action under Article 175 is lost as soon as there is any form of action. Relief should instead be sought in an action for annulment of the action taken by the institution.[103] This however, would lead to a rather paradoxical result. It would force the applicant to ask for annulment of a measure that partly gave it what it had requested, instead of being able to request what was not granted.[104]

It might be argued that it does not matter which view to take, because, under the Prevailing view, the definition of position, even though it excludes further action under Article 175, may be subject to an action for annulment. However, as noted above regarding the gap in legal protection, this will not always be true. Furthermore, as Smit and Herzog point out, the relief in an action for annulment is different from the relief available in an action for failure to act. The annulment of a measure brings about a legal change; the measure is retroactively revoked and ceases to exist. A judgement that an institution has failed to act is a declaratory judgement, and even though it creates an obligation on the defending institution, the Court cannot adopt the

[99]Smit & Herzog, *op.cit.,* p. 431.
[100]Smit & Herzog, *op.cit.,* p. 414.
[101]*Kingdom of the Netherlands v Commission* (59/70), [1971] ECR 639. See 5.2.1.
[102]Herzog, *op.cit.,* p. 415-6.
[103]Schermers & Waelbroeck, *op.cit.,* pp. 257-8. This view was supported by *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 705. In this case the Commission did not grant the applicant, as a legal person with sufficient interest, a right to be heard in accordance with Article 19 paragraph 2 of Regulation 17/62 read together with Article 5 of Regulation No 99/63. Instead the Commission afforded it an opportunity to submit written observations. The Court of Justice stated that the Commission did not fail to deal with applicants' complaint. Thus, the Commission had taken a position. See 4.2 for explanation of Schermer and Waelbroeck's view, and also *Irish Cement Limited v Commission* (166, 220/86), [1988] ECR 6473.
[104]Smit & Herzog, *op.cit.,* p. 417.

act (infra). It would also be most undesirable if the institution accused of the failure, merely by defining its position, could force an applicant with a valid claim under Article 175 to proceed under Article 173 instead.[105]

Advocate-General Gand's Opinion in the *Lütticke* case,[106] might be considered as in favour of the Alternative view, because he did not consider a refusal to act, as to amount to an act which can be subject of an application for annulment.

In the *Comitology* case[107] the Parliament argued that it should be given locus standi under Article 173, even though this was contrary to the wording of the article. The Court of Justice surprisingly stated that a refusal to act "however explicit" does not put an end to the failure to act. Unfortunately the Court of Justice did not state if this explicit refusal constituted a definition of position or not. Since there has been many cases where a much vaguer statement of intention had sufficed as a definition of position,[108] this indicates that the Court really regarded the explicit refusal as a definition of position, and that it did not put an end to the refusal to act. Hence, it abandoned the Prevailing view and, adopted the Alternative view.

Hartley, who advocates the Prevailing view, acknowledges that it follows from the judgement, together with previous case law, that the explicit refusal *did* constitute a definition of position. This holding by the Court of Justice however presents two problems according to Hartley. First, if an "explicit refusal" to act does not constitute a definition of position, it is difficult to imagine what reaction from the institution that would constitute a definition of position. Second, as noted above, the holding is contrary to the holding in many previous cases, where a mere statement has been held to constitute a definition of position. However, Hartley considers the Court of Justice's position on the matter in the Comitology to be based on rather special circumstances. Unlike the position in the other cases, the applicant in the *Comitology* case would have been deprived of a remedy had the explicit refusal (i.e. the definition of position) been held to exclude further action under Article 175. It might be that only under such circumstances that an explicit refusal does not amount to a definition of position.[109]

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[105]Smit & Herzog, *op.cit.,* pp. 414-5.

[106]Opinion of Mr Advocate-General Gand in *Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27, at 31. Even if he did not conclude if this refusal to act is to be considered as a definition of position, he did not rule out the possibility.

[107] *European Parliament v Council (Comitology)* (302/87), [1988] ECR 5615.

[108]See e.g. *Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 105, a refusal to adopt the measure requested constituted a definition of position; *Guérin Automobiles v Commission* (C-282/95), [1997] ECR I-1503, a letter under Article 6 of Regulation 99/63 was considered as a definition of position; *Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27. However, Advocate-General Gand stated that a refusal to act, must not be a definition of position.

[109]Hartley, *op.cit.,* pp. 382-3. This argument, that the Parliament was given "a break", is also supported by Due Ole, *Retsmidler mod EF-rådets passivitet*, Ugeskrift for retsvaesen 22, 1990 335 at 352.

The *Comitology* case is one of the few cases where the Court has departed quite radically from the Opinion of the Advocate-General.[110] Advocate-General Darmon argued for the view put forward by the European Parliament. That the Parliament should be given locus standi under Article 173, otherwise the efficiency of Article 175 would be denied under some situations.[111] This argument by the Advocate-General was of course based on the notion that the Court would hold the explicit refusal to act to exclude further action under Article 175. As noted above, the Court surprised the Advocate-General.

5.3.1.3 An intermediate view

Smit & Herzog, propose that if the Alternative view will not gain judicial favour, at least the ”most objectionable consequence” of the Prevailing view should be avoided. That is the possibility for the defending institution to ”convert actionable inaction into a non-actionable action” which leads to a gap in the legal protection. This can be done by interpreting the ”definition of position” in paragraph 2 of Article 175 as meaning definition of position of a formal (i.e. binding act), which, could always form the basis for an action for annulment. Hence Article 175-proceedings can only be precluded by an act that is challengable under Article 173.[112] Toth also support this intermediate position. He compares the situation under Articles 173 and 175 EC with the situation under articles 33 and 35 ECSC. Under the latter Treaty, the failure to act can be remedied only by the adoption of a formal decision that may be attacked under A173.[113]

As will be seen below in the discussion regarding competition cases (6.2.1.1), a measure even if it is not a reviewable act under Article 173, may constitute a definition of position and as such may terminate proceedings under Article 175, but only if it is the prerequisite for an act that itself open to annulment. This holding from *Guérin Automobiles v Commission*[114] does not, as the Intermediate view, maintain that a definition of position preclude further procedure under Article 175 only if it is reviewble in an action for annulment, but it say that an act, which is not reviewable under Article 173, may only constitute a definition of position if it is the prerequisite for an act that itself open to annulment. Thus the result is the same as under the intermediate view. There is no gap in the judicial protection of natural and legal persons in competition cases.

[110]Weiler Joseph, *Pride and Prejudice – Parliament v Council*, (1989)15 ELRev. 334.
[111]Opinion of Mr Advocate-General Darmon in *European Parliament v Council (Comitology)* (302/87), [1988] ECR 5627, considerations 12-13.
[112]Smit & Herzog, *op.cit.,* 416.
[113]Toth, *op.cit.,* (1975), p. 83.
[114]*Guérin Automobiles v Commission* (T-186/94), [1995] ECR II-1753, consideration 25.

5.4 Stage three: Proceedings before the Court

The third stage in an action for failure to act is the proceedings before the Court. The usual rules of procedure found in the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice[115] and the Court of First Instance[116] are to be applied. The only special provisions regarding Article 175 are found in Article 19 paragraph 2 of the Statute (concerning a documentary evidence of the date on which the institution was called to act), Article 46 of the Statute (regarding a statute of limitation arising from non-contractual liability), and Article 77 paragraph 2 of the Rules of Procedure (regarding costs and settlements).

[115]O.J. L 350/1 [1974].
[116]O.J. L 136/1 [1991].

6 Locus standi

6.1 Member States and Community Institutions

The Member States and the institutions of the Community are privileged applicants under Article 175. A Member State may proceed with an action against a Community institution even though it has not ”suffered any particular prejudice”.[117] However, when a Member State wants to proceed against another Member State for its failure to fulfil an obligation, it should do so under Article 170.[118]

In the sense of the applicability of actions by Community institutions, when read literary, the right to bring an action for the failure to act under Article 175 differs from the right to bring an action for annulment under Article 173. Under Article 173 the application for annulment can be made by the Council or the Commission, or by the Parliament and the European Central Bank (ECB) for the purpose of protecting their prerogatives. On the other hand, Article 175 only mentions ”the other institutions of the Community”, as possible applicants.[119] This difference in terminology is no longer relevant, and the right of action under Article 175 should be recognised for all Community institutions as defined in Article 4 of the Treaty.[120] The Court of Justice adopted this view in the *Transport* case when it permitted the Parliament to bring an action against the Council’s failure to introduce a Common policy for transport.[121] Thus, while the Court of Justice itself is ”logically excluded...because its role is to grant legal protection, not ask for it”, [122] the ”other institutions” which may bring an action under Article 175 are the Council, the Commission and the Parliament.[123] This development seems logical, since after amendments by the TEU, the Parliament was added to the institutions which inaction can be challenged under Article 175. The TEU also gave the ECB the possibility to bring proceedings but only in the areas of its own field of competence. Steiner and Woods consider that the development in the *Transport* case may be a great chance for the

[117]Smit & Herzog, *op.cit.,* p. 423.
[118]Smit & Herzog, *op.cit.,* pp. 420-2.
[119]Schermers & Waelbroeck, *op.cit.,* pp. 254-5.
[120]Weiler, *op.cit.,* p. 335; Smit & Herzog, *op.cit.,* pp. 423-4.
[121]*European Parliament v. Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 17, and Opinion of Mr Advocate-General Lenz p. 1519.
[122]Schermers & Waelbroeck, *op.cit.,* p. 255; See also Hartley, *op.cit.,* p. 384. However, Smit & Herzog, *op.cit.,* p. 424 are less certain.
[123]*European Parliament v. Council (Common Transport Policy)* (13/83), [1985] ECR 1513, consideration 17; Opinion of Mr Advocate-General Lenz (See also *Nuevo Campsider v Commission (* 25/85 R), [1988] ECR 751; Toth, *op.cit.,* (1975), p. 78.

European Parliament to increase its control over the Council and the Commission.[124] Other scholars are more sceptical.[125]

6.1.1 Reviewable omissions

Recommendations and opinions are excluded as reviewable acts in annulment actions brought by Member States or Community institutions. The unity-principle leads to the conclusion that only acts that are reviewable under Article 173, that is acts having legal effects, should be challengable under paragraph 1 of Article 175. Because if Article 173 and Article 175 only describe different aspects of the same legal remedy,[126] how could ”the subject matter” of one of the articles differ from the other? This is the so-called narrow interpretation.[127] On the other hand, support for a wide interpretation can be found in the actual text of Article 175. Non-binding acts are expressly excluded in paragraph 3, regarding natural and legal persons, but not in paragraph 1. If, as the narrow interpretation suggests, ”act” in paragraph 1 was impliedly limited to a reviewable act, why mention it in paragraph 3? Thus, a textual analysis indicates that the Treaty drafters intended a wide interpretation of the word ”act” in paragraph 1. In the *Draft budget* case,[128] Advocate-General Mischo favoured the narrow interpretation. He stated that the decisive criterion was if the act not adopted would have legal effects.

> ”Thus, a ‘failure to act’ within the meaning of Article 175 may be constituted by the non-adoption by the Council or by the Commission of an act or measure, of whatever nature, form, or description, which is capable of producing legal effects *vis-à-vis* third parties.”[129]

However, the Court did not decide on the matter. The case was brought by the Parliament against the Council’s failure to put the draft budget before the Parliament in due time. Since the Council adopted the draft budget within two months after being called to act, the subject matter of the case ceased to exist. No decision from the Court was therefore needed.

In the *Comitology* case the Court found support from it’s own silence on the matter in the *Draft budget* case*,* and rejected the narrow interpretation. The draft budget, which is a preparatory measure, even though it is not capable

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[124]Steiner & Woods, *op.cit.,* p 447; See also Fennel Phil, *The Transport Policy case*, (1985) 10 ELRev. 264 at 276: ”Undoubtedly, the Parliament’s position within the constitutional system is considerably strengthened by this judgement...immense legal and political significance both in terms of constitutional law of the Community, in that it establishes beyond doubt a further channel through which the Parliament may exercise some measures of control over the legislative functions of the Council, and in terms of the development by the Court of the system of remedies provided by the EEC Treaty.”
[125]Smit & Herzog, *op.cit.* p. 424, ”limited impact”; Wyatt & Dashwood, *op.cit*., 134 p.
[126]*Amedeo Chevalley v Commission* (15/70) [1970] ECR 975.
[127]Hartley, *op.cit.,* p. 385.
[128]*European Parliament v Council (Draft budget)* (377/87), [1988] ECR 4017.
[129]Opinion of Mr Advocate-General Mischo, [1988] ECR 4017, at 4029.

of challenge under Article 173, the failure to adopt it by the Council can be challenged by the Parliament under Article 175. This established that an action can be brought for the institution's failure to adopt an act, which itself cannot be challenged under Article 173.

Hence, contrary to the unity principle, the Court of Justice stated that there was "no necessary link" between the action for annulment and the action for failure to act.[130] The wide interpretation, that the Member States and the Community institutions may challenge the failure to take any acts, binding or non-binding, also has a support in the doctrine.[131] Thus, a Member State or an institution may challenge the failure to issue a recommendation or an opinion even though they could not have sought annulment of neither act, had it been taken.[132] However, Hartley suggests that the wide interpretation will only apply in the case of preliminary acts (6.1.2).[133]

The idea that privileged applicants may bring proceedings under Article 175 for the failure to issue any act, is supported by Advocate-General Saggio in the resent case *Willi Burstein v Freistaat Bayern.*[134] The case concerned Article 100A(4) EC. Under this provision a Member State may apply national rules derogation from EC harmonisation measures to protect certain interests. If a Member State intends apply these national rules after the expiry of the implementation period of the EC harmonisation measure, it must notify the Commission. The Member State may not apply national measures until it has received a confirmation from the Commission.[135] Even if the Commission is under no obligation to issue a confirmation, Advocate-General Saggio proposed that Member States, which have notified the Commission in due time, should be able to challenge the failure to issue the confirmation in an action under Article 175. In its judgement however, the Court of Justice did not deal with this proposal from the Advocate-General.[136]

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[130] *European Parliament v Council (Comitology)* (302/87), [1988] ECR 5615, considerations 15-17.

[131] See. e.g. Schermers & Waelbroeck, *op.cit.,* p. 249; Toth, *op.cit.,* (1975), p. 80; Wyatt & Dashwood, *op.cit.,* p. 136; Smit & Herzog, *op.cit.,* pp. 425-6. who suggests that the differences in the text of Articles 173 and 175 are necessary to avoid a rather tortured grammatical construction.

[132] Smit & Herzog, *op.cit.,* p. 412.

[133] Hartley, *op.cit.,* p. 386.

[134] (C-127/97), Conclusion de l'Advocat Général Saggio, delivered May 7, 1998, not yet reported.

[135] *France v Commission* (C-41/93), [1994] ECR I-1829, consideration 30; On the other hand, if the Member State give notice in due time it could not be held liable for delay on the part of the commission in taking the decision required of it, Opinion of Advocate-General Tesuro, consideration 9; Friis-Bach Charlotte, *EU-Karnov 1996*, Köpenhavn: Karnovs forlag, 1996, p. 963, If the Member State has notified it does not have to implement the measure it intends to derogate from, while waiting for the confirmation from the Commission.

[136] *Willi Burstein v Freistaat Bayern* (C-127/97), delivered on October 1, 1998, not yet reported.

The scope of Article 175 is not limited to failures to take a special legal measure.[137] Even the failure to take a whole system of measures can form the basis for a successful action, as long as the scope of the measures can be sufficiently defined for the defendants, to be identified individually. The purpose of Article 175 would be frustrated if an institution's failure to adopt several decisions or a series of decisions, were the adoption of such decisions is an obligation that the Treaty imposes on part of the institution, would not be challengable.[138]

6.1.2 Preliminary acts

According to Hartley there are reasons to believe that the Court's wide interpretation will only apply in the case of preliminary acts, the first step in the adoption of other acts.[139] The Court of Justice has stated that even if a preliminary act has legal effects, it will not always be a reviewable act under Article 173.[140] Normally this does not have any grave consequences on part of the applicant, because the preliminary act may be reviewed in a proceeding to annul the final act. However, problems may occur in actions against failure to act when the preliminary act and the final act should be adopted by different Community institutions. It is not always possible to attack the institution responsible of adopting the final act, because it can simply defend its inaction with the fact that it cannot adopt the final act until the preliminary act is adopted. The situation in the *Draft budget* case[141] (6.1.1) is an example of this problem. Because the draft budget is a preliminary act adopted by the Council, the Parliament would have been left without any remedy, had it not been possible with an action against the Council's failure to act. The Parliament itself adopts the final budget, so it could not have brought any proceedings against its own failure to act.

6.2 Natural and legal persons

Natural and legal persons are unprivileged applicants in actions for failure to act. They may complain to the Court of Justice or the Court of First Instance if an institution of the Community "has failed to address to that person any act other than a recommendation or an opinion".[142] Thus the admissibility of an action for failure to act brought by a natural or legal person depends on both the nature and destination of the requested action. This gives rise to

[137] *European Parliament v. Council (Common Transport Policy)* (13/83), [1985] ECR 1513.
[138] *European Parliament v. Council (Common Transport Policy)* (13/83), [1985] ECR 1513, considerations 34-37.
[139] Hartley, *op.cit.,* pp. 386-7, "There are strong theoretical grounds for saying that drafts and proposals of this kind are reviewable acts."
[140] See e.g. *IBM v Commission* (60/81), [1981] ECR 2639.
[141] *European Parliament v Council (Draft budget)* (377/87), [1988] ECR 4017.
[142] Paragraph 3, Article 175 EC.

two problems of interpretation.[143] What does ”act” mean, and when is an act ”addressed to” the applicant? These two problems are in many ways connected and inseparable. However for comprehensibility they are divided below. After the examination of the nature and destination of the requested act I will try to summarise and “tie together” the two concepts and clarify the law as it stands. The nature of the requested act is dealt with in 6.2.1. This will also include an examination of the development in competition cases and cases regarding other procedural rights. The importance of the destination of the requested action is dealt with in 6.2.2, and the summary is found in 6.2.4.

6.2.1 Reviewable omissions

According to Article 173 paragraph 4 decisions addressed to the applicant or decisions, which are addressed to another person or in the form of a regulation, and are of direct and individual concern to the applicant, may form the basis for action for annulment. Article 175 paragraph 3 on the other hand, mentions only acts addressed to the applicant, while recommendations and opinions are expressly excluded. The reason for this exclusion was probably the desire to avoid “unnecessary” litigation, brought by natural or legal persons, about acts that would not be binding on them.[144] Since neither of these two types of acts have any binding force according to Article 189, it can be derived from the text of that article that natural and legal persons only may challenge the failure to take binding acts.[145] This was confirmed in the *Borromeo* case.[146] The applicants had initially sought the Commission’s advice on how to behave in the event of conflict between their national legislation and Community legislation. The Commission did not give any advice and the applicants appealed against the Commission’s failure to act. The Court of Justice could simply have stated that the Commission was not obliged to give any advice, but instead it expressly stated that the advice, if taken, would not have been a binding act. Hence the application was dismissed as inadmissible.[147]

This view, that only omissions to adopt binding acts could give rise to an action for failure to act for unprivileged applicants has been somewhat modified. Especially by the development in competition cases, see discussion below (6.2.1.1).

According to Article 189 binding acts are regulations, directives and decisions. Literary read, since only decisions are addressed to natural or legal persons, only the failure to take decisions could form the basis for a

[143]See e.g. Toth, *op.cit.,* (1975), p. 89: ” two different expressions of the same conception”.
[144]Smit & Herzog, *op.cit.,* p. 425.
[145]See e.g. Toth, *op.cit.,* (1975), p. 89; Wyatt & Dashwood, *op.cit.,* p. 137.
[146]*Gilberto Borromeo Arese and others v Commission* (6/70) ECR [1970] 815.
[147]*Gilberto Borromeo Arese and others v Commission* (6/70) ECR [1970] 815. considerations 6-7.

claim under Article 175 paragraph 3. However in practice this is not necessarily true. See discussion below (6.2.2).

A regulation, which is an act of general application, can never be ”addressed to” a natural or legal person. [148] The same is true for an act addressed to a Member State.[149] In *Nordgetreide GmbH & Co. Kg v Commission*, Advocate-General Roemer stated that the failure to take a regulation could not form the basis for an action under Article 175 paragraph 3. If the unity principle results in such a interpretation of the term ”act”, that it is to be given the same meaning as in the fourth paragraph of Article 173. Then, the same unity principle must also exclude regulations from the scope of Article 175 paragraph 3, since they are expressly excluded in Article 173 paragraph 4. Notwithstanding that the expression ”addressed to the applicant” is not to be interpreted strictly.[150] In its judgement the Court of Justice adopted the same position as Advocate-General Roemer and stated that the applicant was only affected by the omission as part of an abstract group, and not as a person to whom an act of direct and individual concern was addressed. Accordingly the application was dismissed as inadmissible.[151] It may be derived from the holding that the Court of Justice does not completely rule out the possibility that the failure to issue a regulation might be within the scope of the third paragraph of Article 175. If this was not true, why even mention the concept of direct and individually concerned?

In *Holtz & Willemsen GmbH v Council* the German applicants brought an action before the Court of Justice for the Council’s failure to adopt a regulation granting them a subsidy for colza and rape seed processed in oil mills. Such subsidies had already been granted, by regulation, to similar oil mills in Italy, and the applicants felt discriminated against their Italian counterparts. The provisions requested by the applicant were held to be of general regulatory character. Such a regulation could not ”either by its form or its nature” be described as an act addressed to the applicant.[152] Thus, the failure to take a general normative act was excluded from the scope of omissions, which a natural or legal person may institute proceedings against.

The position by the Court of Justice in these two cases, that unprivileged applicants cannot complain of the failure to issue a regulation, was also the predominant theory among scholars for a long period of time,[153] but the view has changed over the years. See discussion below (6.2.2 and 6.2.4).

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[148]Vaughan, *op.cit.,* p 2/138; Toth, *op.cit.,* (1975), p. 85.
[149]*C. Mackprang jr. v Commission* (15/71), [1971] ECR 797, consideration 4.
[150]Opinion of Mr Advocate-General Roemer in *Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 112 at 116.
[151]*Nordgetreide GmbH & Co. Kg v Commission* (42/71), [1972] ECR 112, considerations 5-6.
[152]*Holtz & Willemsen GmbH v Council* (134/73), [1974] ECR 1, consideration 5; See also *Granaria BV v Council and Commission* (90/78), [1979] ECR 1081, consideration 14.
[153] Vaughan, *op.cit.,* p 2/138; Toth, *op.cit.,* (1975), p. 85.

An institution of the Community cannot avoid the risk of judicial review by labelling a measure, for example ”Opinion”. The Court of Justice has adopted a functional view as to the kind of measures, which may be subject to judicial review. It is not the title or the form of the measure which is decisive, but its content and result.[154]

6.2.1.1 Competition cases

Since most legal acts which the Council is empowered to adopt, requires a proposal from the Commission, the special situation discussed above regarding preliminary acts (6.1.2), is not limited to the budget and privileged applicants. A similar situation may occur involving private subjects. In the area of Community competition procedure, the same institution adopts both the preliminary and the final act.[155] When there is an alleged infringement of Articles 85 or 86 of the EC Treaty, natural or legal persons with a legitimate interest may make applications to the Commission, pursuant to Article 3(2)(b) of Regulation 17/62, [156] to put its attention to the infringement. If the Commission find that there is an infringement, it *may* require the infringement to stop.[157] According to Article 19(2) of Regulation 17/62 read together with Article 5 of Regulation 99/63,[158] if the applicant can show sufficient interest it *shall* be afforded the opportunity to be heard.

In *Deutscher Komponistenverband v Commission*[159] the applicant alleged that the Commission had failed to grant it such a hearing. It was however unclear if a failure to grant this hearing was challengable under Article 175. Advocate-General Roemer favoured a wide interpretation of the term ”act” in Article 175. He stated that there were ”good grounds” for interpreting ”act” as not identical to a decision. If this had been intended it could have been expressly stated in the text of the article. Advocate-General Roemer suggested that any measure that give rise to ”legal effects binding the institution” and which give rise to legal effects for the applicant, should be considered a reviewable act within the meaning of Article 175 paragraph 3. This would include ”procedural measures”, such as a hearing. Hence the failure to grant the applicant the hearing should be challengable under Article 175. [160] Contrary to Advocate-General Roemer’s opinion, the Court of Justice held that a failure to act under Article 175 referred to a failure ”to act in the sense of failure to take a decision or define a position, and not the adoption of a measure different from that desired or considered necessary by the person concerned.” Since the Commission had given the applicant the

[154]*Commission v Council (ERTA),* (22/70), [1971] ECR 263; Chalmers, *op.cit*., p. 539; Toth, *op.cit.,* (1975), p. 90.
[155]Hartley, *op.cit.,* p. 387.
[156]O.J. Special ed. [1959-1962] p. 87.
[157]Articles 3(1) and 3(2)(b).
[158]O.J. Special ed. [1963-1964] p. 47.
[159]*Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 795.
[160]Opinion of Mr Advocate-General Roemer, [1971] ECR 712, at 715.

opportunity to submit its submissions in writing there had not been any failure to act on their part.[161]

It has been stated by both the Court of Justice and the Court of First Instance that the rights conferred upon complainants by Regulations 17/62 and 99/63, does not include a right to obtain a decision within the meaning of Article 189, as regards the existence or non-existence of an infringement of the Treaty. Because its resources are limited, the Commission may set priorities as to which alleged infringements to pursue,[162] and it appears that the availability by remedies in national courts may be a decisive factor in setting these priorities.[163] There is no obligation to investigate the complaint, on part of the Commission.[164] However, the Commission is obliged to carefully examine the complaint in order to decide whether to investigate or not, and to state the reasons for its decision.[165] Complainants may use Article 175 to force the Commission to make this initial examination.[166]

If the Commission considers that there are insufficient grounds for granting the application pursuant to Article 3(2) of Council Regulation 17/62, the complainant has the right to receive a communication from the Commission, stating the reasons for not pursuing further. This communication, pursuant to Article 6 of Regulation 99/63[167] (a so-called Article 6 letter), is a preparatory act, and not challengable under Article 173.[168] However, in *GEMA v Commission*, a very illustrative case of the competition procedure, the Article 6 letter was held to constitute a definition of position, and, according to the Prevailing view (5.3.1.1), this would terminate the action under Article 175.[169] GEMA had complained to the Commission in accordance with Article 3 of Regulation 17/62, accusing Radio Luxembourg to be in breach of Articles 85 and 86 of the Treaty. By a letter, the Commission answered that it did not intend to act against Radio Luxembourg. GEMA then lodged an action under Article 175 of the Treaty for the Commission's failure to act, and in an alternative claim it sought the annulment of the letter from the Commission. The action for failure to act was inadmissible because the Commission's letter (the Article 6 letter) was

[161] *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 795. See also *Irish Cement Limited v Commission* (166, 220/86), [1988] ECR 6473 consideration 17.
[162] *Automec Srl v Commission* (T-24/90), [1992] ECR II-2223, considerations 83, 90.
[163] Shaw, *op.cit.,* p. 427.
[164] *GEMA v Commission* (125/78), [1979] ECR 3173, consideration 18. *Automec Srl v Commission* (T-24/90), [1992] ECR II-2223, consideration 76.
[165] *Automec Srl v Commission* (T-24/90), [1992] ECR II-2223, considerations 74-79; *GEMA v Commission* (125/78), [1979] ECR 3173; *Ladbroke Racing Deutschland GmbH v Commission* (T-74/92), [1995] ECR II-115.
[166] Shaw, *op.cit.,* p. 427.
[167] O.J. Special ed. [1963-1964] p. 47.
[168] *Automec Srl v Commission* (T-64/89), [1990] ECR II-367; *GEMA v Commission* (125/78), [1979] ECR 3173; *Guérin Automobiles v Commission* (C-282/95 P), [1997] ECR p. I-1503, consideration 34. The applicant must wait until the Commission adopts a definitive decision rejecting the complaint. This definitive decision may be the subject-matter of an action for annulment, considerations 36 and 38.
[169] *GEMA v Commission* (125/78), [1979] ECR 3173.

held to be a definition of position. Furthermore, the action for annulment failed because, even assuming the letter could be contested, the applicant was not entitled to a final decision on the existence or non-existence of an infringement of the Treaty.[170]

The next step in the development of the competition procedure came with *Asia Motor France SA and others v Commission.*[171] In this case it was held that if the complainant has not received the Article 6 letter within reasonable time, the Commission's omission is challengable under Article 175 because the issuing of the Article 6 letter is a obligatory act on part of the Commission, and as a natural or legal person, the complainant would have been the addressee of an act other than a recommendation or opinion.[172] Accordingly a failure to issue the Article 6 letter, as a prerequisite for the final act, must be actionable under Article 175, or the applicant would be left without a remedy.

Hence, in this case, just like in the holding by the Court of Justice in the *Comitology* case,[173] the Court of First Instance acknowledged a specific category of legal acts which, even though they do not have legal effects, an institution of the Community may be legally obliged to adopt.[174]

After receiving an Article 6 letter from the Commission, the complainant may submit further comments within the time limit fixed in the letter. In response to these submissions, the complainant is entitled to receive a final act rejecting the complaint. *This* act may be challenged in an action for annulment. This view was adopted by the Court of First Instance in *Guérin Automobiles v Commission*,[175] and also put forward by Judge Edward, acting as Advocate-General in *Automec Srl v Commission.*[176] If the complainant does not receive this final rejection, the omission may be challenged in an action for failure to act.

Accordingly, the development in the case law above appears logical. Even if an Article 6 letter itself is not a reviewable act under Article 173, the failure to send it must be actionable under Article 175.[177] If this was not the case, the Commission's failure to adopt a final rejection could easily be defended by stating that it could not adopt a definitive decision before it had sent the

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[170]*GEMA v Commission* (125/78), [1979] ECR 3173, considerations 16-18, 21-23.
[171]*Asia Motor France SA and others v Commission* (T-28/90), [1992] ECR II-2285.
[172]*Asia Motor France SA and others v Commission* (T-28/90), [1990] ECR II-2285, considerations 29, 33.
[173]*European Parliament v Council (Comitology)* (302/87), [1988] ECR 5615.
[174]Shaw, *op.cit.,* p. 436; Hartley, *op.cit.,* p. 386; Cumming George, *Automec and Asia France v Commission,* [1994] 1 ECLR 32-40, at pp. 36-7.
[175]*Guérin Automobiles v Commission* (T-186/94), [1995] ECR II-1753, considerations 24, 34. The decision was upheld on appeal (C-282/95 P), [1997] ECR I-1503.
[176]Opinion of Judge Edward acting as Advocate-General (T-24/90), [1992] ECR II-2226, considerations 94-96.
[177]Opinion of Mr Advocate-General Tesauro in *Guérin Automobiles* v Commission (C-282/95 P), [1997] ECR I-1503, consideration 16.

Article 6 letter. Hence there is no possibility for the Commission to evade judicial review. If the complainant receives a final rejection, Article 173 will be applicable, and if no final rejection or no Article 6 letter is issued, the proper action is under Article 175.

As seen above, Regulations 17/62 and 99/63 confer procedural rights on complainants, such as the right to be informed of the Commission's reasons and the right to submit observations.[178] In order to protect these rights, omissions by the Community institutions to grant them, must be subject to judicial review before the Community courts. Thus, at least regarding competition cases, may the failure to issue a non-binding act give rise to an action under Article175 unprivileged applicants.

6.2.1.2 Other procedural rights

Apart from competition cases under Articles 85 and 86 EC, natural and legal persons have also been held to have other procedural rights, and the omission to grant these rights have also been held to give rise to an action for failure to act.

In *FEDIOL v Commission,* the applicants, an EEC federation of seed crushers and oil processors, had tried to compel the Commission to initiate anti-subsidy proceedings against Brazil, in accordance with Regulation 3017/79.[179] After consulting the Brazilian Government, the Commission decided not to take further action. FEDIOL then called upon the Commission to act pursuant to Article 175. The Commission sent a letter to FEDIOL, stating that it did not intend to initiate anti-subsidy proceedings against Brazil. An action for annulment of this letter was then brought by FEDIOL. The Commission contested the admissibility of this action by emphasising the wide discretion granted to it by the regulation. The Court of Justice held that Regulation 3017/79 granted the applicants a number of procedural guarantees, such as the right to lodge a complaint (Article 5), the right to be consulted (Article 6) and the right to receive information (Article 9). This gave the applicant a legitimate interest in the initiation or non-initiation of protective action. Hence it must be entitled a judicial review by the Court as to whether the Commission had observed these procedural guarantees or not. Thus, the application was admissible. Even though the decision whether to initiate proceedings or not against Brazil, was held to be within the Commission's discretion, FEDIOL's procedural rights were respected.[180]

FEDIOL v Commission may be reconciled[181] with *GEMA v Commission*[182] In both cases the applicant was conferred certain procedural rights by

[178] *Automec Srl v Commission* (T-24/90), [1992] ECR II-2223, consideration 72.
[179] O.J. L339/1 [1979].
[180] *FEDIOL v Commission* (191/82), [1983] ECR 2913, considerations 11, 25-31.
[181] Steiner & Woods, *op.cit.,* p. 449.
[182] *GEMA v Commission* (125/78), [1979] ECR 3173.

regulations, and they were entitled to review under Articles 175 and 173 to protect theses procedural rights.

6.2.2 Addressed to the applicant?

In actions for annulment, natural and legal persons may bring proceedings against, not only acts addressed to them, but also acts of direct and individual concern to them. The locus standi rules for natural and legal persons under Article 175 are harsher, or at least seem harsher. A strict literary interpretation allows as admissible only failures to render acts ”addressed to” the applicant.[183] The Court of Justice and the Court of First Instance has through its case law however, developed a more liberal interpretation of the ”act” which may form the basis for an action under Article 175 paragraph 3.

Most of the early texts of Article 175 paragraph 3, such as the French, German, and English, read ”addressed to” the applicant (French text: ‘de lui adresser un acte’ to address an act to him). The Dutch and the Italian texts however, read ”with respect to” the applicant.[184] Thus the unity principle[185]and the Dutch and Italian texts supports a liberal interpretation of ”act” in Article 175 paragraph 3, so as to encompass acts of which the applicant is the ”de facto addressee”.[186]

Advocate-General Roemer first pleaded for a strict interpretation of the locus standi requirements in Article 175 paragraph 3. Only failures to adopt acts actually addressed to the applicant should be challengable.[187] This view was supported by Advocate-General Gand in *Alfons Lütticke GmbH v Commission.*[188] Advocate-General Roemer later renounced this point of view because it was ”too formalistic and too narrow”,[189] he did not rule out the possibility that a natural and legal person should be able to challenge the failure to adopt an act which would have been addressed to a third person, if the applicant would have been directly and individually concerned.[190]

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[183]Toth, *op.cit.,* (1978), pp. 114-5., Toth was uncertain if ”addressed to” means formally addressed to or ”acts ‘directed’ to the applicant in a material sense”, that is acts formally addressed to a third person but of direct and individual concern to the applicant. There is no uncertainty though regarding acts of general normative character (i.e. Regulations and Directives). Such acts are both by their nature and their destination always addressed to member States and never to natural or legal persons. However this was written as early as 1978.

[184]Schermers & Waelbroeck, *op.cit.,* p. 256. The Dutch text ”te zijnen aanzien”, and the Italian text: ”nei suoi confronti”.

[185]*Amedeo Chevalley v Commission* (15/70), [1970] RCR 975.

[186]Hartley, *op.cit.,* pp. 396-7.

[187]*Rhenania and others v Commission* (103/63), [1964] ECR 433.

[188]*Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27

[189]Schermers & Waelbroeck, *op.cit.,* p. 256, citing Karl Roemer*, Die Untätigkeitsklage im Recht der europäishen Gemeinshaften*, SEW 1966, pp. 1-15 at 13, 14.

[190]Opinion of Mr Advocate-General Roemer in *Nordgetreide v Commission* (42/71), [1972] ECR 112 at 116.

In *Lord Bethell v Commission*, The Court of Justice held that for the application for failure to act to be admissible, the applicant must show that the Commission had failed to adopt a measure which he was ”legally entitled to claim”. Furthermore, since the applicant in this case had actually asked the Commission to open an inquiry with regard to third parties and to take decisions in respect of them, he must also show that he was ”in the precise legal position of...the potential addressee” of a legal measure, which the institution has a duty to adopt with regard to him.[191]

Advocate-General Dutheillet de Lamonthe in the *Mackprang* case supported this wide interpretation (i.e. the de facto addressee).[192] However, the Court of Justice did not decide on the matter in this case or any other case fore more than 20 years. Even if its support for this wide view could be seen in several cases,[193] the matter was not settled until[194] *ENU v. Commission.*[195] ENU, a company in the uranium business, demanded the Commission to take a decision under Article 53 Euratom. The Commission did not comply and the ENU brought an action under an action under Article 148 Euratom (corresponds with Article 175 EC) for the Commission's failure to act. The Commission argued that ENU lacked standing because the decision would not have had been taken in respect of ENU, but in respect of the Euratom supply agency. The Court of Justice, however argued that ENU had locus standi under Article 148 since the decision, had it been taken and even if addressed to the Euratom supply agency, would have been of direct and individual concern to the applicant, who could therefore have contested it pursuant to paragraph 2 of Article 148 Euratom. The applicant must therefore be able to bring an action before the Court of Justice under paragraph 3 of Article 148 in order to challenge the failure to take the decision requested.[196]

In the *T-Port* case the Court of Justice confirmed the holding from the *ENU* case, and the unity principle. It stated: ”The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.”[197] Thus, law as it stands seems to be that a natural

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[191] *Lord Bethell v Commission* (246/81) [1982] ECR 2277, consideration 13 and 16.
[192] Opinion of Mr Advocate-General Dutheillet de Lamothe in *C. Mackprang jr. v Commission* (15/71), [1971] ECR 806.
[193] See e.g. *Star Fruit Co. SA v Commission* (247/87), [1989] ECR 291, consideration 13, *Lord Bethell v Commission* (246/81) [1982] ECR 2277.
[194] See e.g. Craig Paul & De Búrca Gráinne, *EU Law: Text, Cases, and Materials*, 2nd ed. Oxford: Oxford University Press, 1998, p. 494; Friis-Bach, *op.cit.,* pp. 1603-4; Smit & Herzog, *op.cit.,* pp. 426-7; Schermers & Waelbroeck, *op.cit.,* p. 257. However, according to Chalmers, *op.cit.,* p. 571, it is ”unclear” if this judgement, which was under Euratom Treaty, is applicable under Article 175 EC. Chalmers' view must be held to be an isolated exception among scholars today.
[195] *ENU v. Commission* (107/91), [1993] ECR I-599.
[196] *ENU v. Commission* (107/91), [1993] ECR I-599, considerations 17-18.
[197] *T-Port GmbH & Co. v Bundesanstalt für Landwirtschaft und Ernährung* (C-68/95) [1996] 1 CMLR 1, considerations 58-60.

or legal person has locus standi under Article 175 EC either if the act is formally addressed to the applicant, or if the applicant would have been the ”de facto addressee” of the act. This confirms the unity principle and consequently makes the position for natural and legal person the same as under Article 173.[198]

6.2.2.1 The test of direct and individual concern

The concept of the test of direct and individual concern has been developed through the courts' case law in actions for annulment. Since it is a very extensive area of Community law, the reader should refer to the literature regarding Article 173 for a thorough examination of the subject. However for a general understanding of the test I will briefly examine the case law and literature.

As noted above, natural and legal persons may bring actions to annul a regulation or a decision addressed to a third person if the measure is of direct and individual concern to the applicant. The Court of Justice has generally interpreted these provisions narrowly, and there have also been inconsistencies in its approach. Thus, it is ”not possible to identify a single line of authority”.[199]

To prove direct concern, a relationship of cause and effect between the act taken and its impact on the applicant must be established. The effect the act has on the applicant will depend on the discretion of another party.[200] If, for example, a Community institution, by adopting the contested act, merely grants a discretionary power to a third party (e.g. a Member State), the applicant will not be directly concerned by the act adopted by the institution, even if he is actually affected by the power given to the third party.[201]If the power given to the third party is not *de facto* discretionary,[202] or if it is exercised but not confirmed until later, [203] the applicants will be directly concerned.

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[198]Hartley, *op.cit.,* p. 397.

[199]Shaw Jo, *Law of the European Union*, 2nd ed. London: Macmillan Press Ltd., 1996, p. 320.

[200]Hartley, *op.cit.,* p. 369.

[201]See e.g. *SA Alcan Aluminum Raeren v Commission* (69/69), [1970] ECR 385. The Commission had refused a request from the Belgian government regarding a quota of unwrought aluminium imports at reduced rate. The applicants (aluminium importers) were not held to be directly concerned by a Commission's decision, since even if the request had been obeyed, the Belgian government would still have had a discretion to apply it or not.

[202]In *Werner A. Bock KG v Commission* (62/70), [1971] ECR 897, the applicants were held to be direct concerned. In this case the discretion given to the German government, had been waived, since they had declared what it would do if it received the authorisation requested from the Commission. See also *Piraiki-Patraiki v Commission* (11/82), [1985] ECR 207, in which the applicants were held to be direct concerned, because the possibility that the French government would use its discretion and act in an unpredicted way was ”purely theoretical”.

[203]See e.g. *Toepfer v Commission* (106, 107/63) [1965] ECR 405, in which the Commission's decision to confirm a refusal by the German government to grant import licenses, was held to be of direct and individual concern to the applicants.

The landmark case regarding individual concern was *Plauman v Commission.*[204] It set the tone for the Court's restrictive interpretation of the "entire system of direct judicial review".[205]

> "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them by reason of circumstances in which they are differentiated from all other persons by virtue of these factors distinguishes them individually just as in the case of a the person addressed."[206]

The development of the Court's case law has made it clear that, for the applicant to be individually concerned, the Court requires him to "be part of a closed class, membership of which is fixed at the date of the adoption of the contested measure."[207] An action for failure to act poses an additional problem compared to an action for annulment. The applicant must show that he was part of this closed class at the time of the inaction. This time may prove very hard to establish (see 6.2.1 regarding time limits).

6.2.3 Actions for the failure to act against Member States

According to Article 169, if the Commission considers that a Member State has violated the Treaty, it *shall* initiate proceedings against it. First by issuing a reasoned opinion, and finally, if the Member State does not obey the reasoned opinion, the Commission *may* bring the matter before the Court. As seen above (6.2.2), natural and legal persons may only complain to the concerned Community institution regarding a failure to adopt a measure of which they are potential addressees or "de facto addressees". In the context of an action for failure to fulfil obligations under Article 169, the only measure, which the Commission may adopt are measures addressed to Member States.[208] These can never be of direct and individually concern to a private applicant. It is established law that a natural or legal person cannot force the Commission to initiate proceedings under Article 169 against a Member State.[209]

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[204] *Plauman v Commission* (25/62), [1963] ECR 95.
[205] Shaw, *op.cit.,* (1996), p. 323.
[206] *Plauman v Commission* (25/62), [1963] ECR 95, at 107.
[207] Shaw, *op.cit.,* (1996), p. 323; In *Glucoseries Réunnies v Commission* (1/64), [1964] ECR 413, the Court of Justice held that even if the applicant was the only person likely to be affected by the measure, it was not a characteristic peculiarly relevant to him, as long as there was a theoretical possibility that someone else could be affected. See also e.g. *Spijker Kwasten v Commission* (231/82), [1983] ECR 2559; *Parti Ecologiste 'Les Verts' v Parliament* (294/83), [1986] ECR 1339.
[208] *Intertonic F. Cornelis GmbH v Commission* (T-117/96), [1997] ECR II-141, consideration 4.
[209] See e.g. Shaw, *op.cit.,* p. 430; Drijber B.J., *Case T-24/90 Automec Srl v . Commission*, (1993) 30 CMLRev. 1237, at 1242; Toth, *op.cit.,* (1975), p. 87, 89; Weatherill &

The leading case on this issue is *Star Fruit Co. SA v Commission.*[210] Star Fruit, a Belgian company, which imported and exported bananas, brought an action under Article 175 for the Commission's failure to initiate proceedings under Article 169 against the French republic. Star Fruit considered that regulations in the French banana market violated both the EC Treaty and the Lomé Convention.[211] It had requested the Commission to initiate proceedings against France, but the Commission had not obeyed the request.

The Court of Justice held that it was clear from the scheme of Article 169 that the Commission is not obliged to initiate proceedings. This discretion excludes the rights for natural and legal persons to require the Commission to adopt a specific position. Furthermore, by requiring the Commission to initiate proceedings under Article 169, the applicants were actually requiring the Commission to adopt measures which would not be of direct and individually concern to them, within the meaning of paragraph 4 of Article 173. Hence the application for failure to act was inadmissible.[212]

The Court of Justice never examined if the French regulations in the banana market were contrary to the Treaty. Star Fruit might have had more success if it had challenged the alleged illegal conduct of the French republic, instead of the Commission's inaction.[213]

Article 90 of the EC Treaty concerns government owned undertakings. The main aim of this article is to make sure that the Member States does not try to circumvent the Community competition rules in Articles 85-94. Paragraph 3 of Article 90 confers upon the Commission the task of ensuring compliance by the Member States with their obligations concerning the undertakings. To fulfil this task, the Commission is given the power to, when *necessary*, issue appropriate directives or decisions. However, there is no obligation on part of the Commission to act against a Member State. Accordingly, the Commission's inaction after receiving a request for action cannot constitute a failure to act within the meaning of Article 175.[214]

Beaumont, *op.cit.,* p. 273, who stresses that the Commission is "never" obliged to bring proceedings under Article 169.

[210]*Star Fruit Co. SA v Commission* (247/87), [1989] ECR 291; See also e.g. *Smanor SA and others v Commission* (T-201/96), [1997] ECR II-1081, considerations 2-3; *Intertonic F. Cornelis GmbH v Commission* (T-117/96), [1997] ECR II-141, consideration 4; *Asia Motor France v Commission* (C-72/90), [1994] ECR I-2181, consideration 13, *Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27, in which the Court of Justice held that no measure taken by the Commission under Article 169, before an action is brought before the Court has any binding force. For a further examination of this case see 5.3.1.1.1.

[211]O.J. L 25/1 [1976].

[212]*Star Fruit Co. SA v Commission* (247/87), [1989] ECR 291, considerations 11-13, 15.

[213]Weatherill Stephen*, Cases and Materials on EC Law*, 3rd ed., London: Blackstone Press Limited, 1996, p. 574.

[214] *Ladbroke Racing Ltd. v Commission* (T-32/93), [1994] ECR II-1015, considerations 36-43.

6.2.4 Law as it stands

As noted above, the concept of locus standi for natural and legal persons depends on both the nature and destination of the requested act. Because of the interconnected character of these two concepts and the sometimes inconsequent reasoning of the community courts, I will try to summarise the development of the case law and the law as it stands on the locus standi requirements for natural and legal persons in an action for failure to act under Article 175.

For a long period of time position was that only the failure to adopt binding acts in the sense of Article 189, and as such only decisions formally addressed to the applicant, was covered by paragraph 3 of Article 175. The question, whether only acts which would have been formally addressed to the applicant is within the scope of Article 175, seems to have been settled by the *ENU* case.[215]

When the applicant is a natural or legal person, the act that an institution failed to adopt does not have to be formally addressed to the applicant. Thus the failure to adopt a decision may give rise to an action under Article 175, even if the decision would have been addressed to a third person, provided the applicant would have been direct and individually concerned had the decision been taken. The same test, ”direct and individually concerned”, as in an action for annulment, is to be utilised in an action for failure to act. This parallelism between Article 173 and Article 175, in conformity with the unity principle, is indispensable in making these provisions truly ”one and the same avenue of legal redress.”[216] However, this does not mean that it will be easy for a private party to establish locus standi under Article 175. The test is to be interpreted just as strictly as under Article 173.[217]

In the cases cited above the failure to adopt regulations have been excluded since they are provisions of a general normative character, and cannot by its form or its nature be described as addressed to a natural or legal person. Article 173 paragraph 4 allows regulations to be contested by natural or legal persons if they are of direct and individual concern to the applicant. This has however proven very difficult, even though it has no been impossible.[218] The unity principle thus suggests the possibility, at least *de jure*, for applicants contesting the failure to issue a regulation. It is submitted

[215]Also support by the Opinion of Mr Advocate-General Lamothe in *C. Mackprang jr. v Commission* (15/71), [1971] ECR 797, and *Lord Bethell v Commission* (246/81), [1982] ECR 2277.
[216]Smit & Herzog, *op.cit.,* p. 427.
[217]See e.g. Craig & de Búrca, *op.cit.,* p. 494; Bellis Jean-Francois, *Judicial review of the EEC anti-dumping and anti-subsidy determinations after FEDIOL: The emergence of a new admissibility test*, (1984) 21 CMLRev. 539, at 540; Due, *op.cit.,* p. 349.
[218]Unsuccessful attempts include: *Beauport v Council and Commission* (103/79), [1979] ECR 17; *KSH v Commission* (101/76), [1977] ECR 797. On the other hand, in *Codorniu SA v Council* (C-309/89), [1994] ECR I-1853, a regulation, being of direct and individual concern to the applicant, was capable of challenge under Article 173.

though, that even if the development in the *ENU* case[219] together with the unity principle leads to the conclusion that the failure to adopt "any" acts[220] could give rise to an action for failure to act, provided that the measure, had it been taken, would be of direct and individual concern to the applicant, it will be extremely difficult, if not impossible, to show that a regulation affects the applicant in this manner.

Thus, law as it stands seems to be that a natural or legal person has locus standi under Article 175 EC either if the act is formally addressed to the applicant, or if the applicant would have been the "de facto addressee" of the act. This confirms the unity principle and makes the position for natural and legal person the same as under Article 173.[221]

Unlike, regulations, directives are not explicitly included in the text of paragraph 4 of Article 173. Thus, by a literary interpretation, the unity principle excludes the failure to issue a directive from the scope of paragraph 3 of Article 175. However, it has been suggested in the literature that also a directive should be challengable under Article 173 paragraph 4, provided that it is of direct and individual concern to the applicant.[222] This view has also has some support in the case law.[223] Furthermore, Smit and Herzog suggests that natural or legal persons may bring an action under Article 175 as long as the act would have been of direct and individual concern to the him, and it has legal consequences, irrespective of what form it takes.[224]

Since the development in the case law leading up to the *ENU* case,[225] and just as in the case of regulations, I cannot see any reason for a *de jure* exclusion of directives from the scope of paragraph 3 Article 175. However it is contested that it would be very difficult if not impossible for a natural or

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[219] *ENU v Commission* (107/91), [1993] ECR I-599.
[220] Smit & Herzog, *op.cit.,* pp. 426-7, suggests that a natural or legal persons may bring an action under Article 175 as long as the act would have been of direct and individual concern to the him, and it has legal consequences, irrespective of what form it takes; In *Codorniu SA v Council* (C-309/89), [1994] ECR I-1853, a regulation, being of direct and individual concern to the applicant, was capable of challenge under Article 173.
[221] Hartley, *op.cit.,* p. 397.
[222] Smit & Herzog, *op.cit*., p. 390; Even though Hartley, *op.cit*., p. 397. is less certain and suggests that directives might possibly be excluded.
[223] See e.g. *SA Alcan Aluminum Raeren v Commission* (69/69), [1970] ECR 385, consideration 4, in which the purpose of Article 173 (4) was to protect the legal interest of individuals in all situations in which they are individually concerned by an EEC matter "in whatever form it appears". This indicates that the Court did not rule out that directives could be challenged under Article 173 (4). Furthermore, in two cases the Court of Justice condidered whether a directive was in substance a decision. Thus the Court did not rule out the possibility that a directive might be challangeable under Article 173 (4). However in both cases the directive was held not to be a "Decision". *Féderation Européenne de la Santé Animale v Council* (160/88 R), [1988] ECR 4121; and *Gibraltar v Council* (C-298/89), [1993] ECR I-3605.
[224] Smit & Herzog, *op.cit*., pp. 426-7.
[225] *ENU v Commission* (107/91), [1993] ECR I-599.

legal person to get locus standi in an action for the failure to issue a directive.

The view that only omissions to adopt binding acts could give rise to an action for failure to act for unprivileged applicants was the dominant approach in the Court of Justice and among scholars. Since the development in the courts' case law, this view has been modified, and, at least in the area of competition procedure and other procedural rights, the failure to adopt a non-binding act may also give rise to an action under Article 175.

7 Consequenses of successful action

7.1 Introduction

A holding by the Court of Justice or the Court of First Instance that an institution of the Community has failed to act under Article 175, creates an obligation on the institution to remedy its failure. Provisions for this are found in Article 176, an essential supplement to the strictly declaratory relief in Article 175. Article 176 reads:

> ”The Institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgement of the Court of Justice.
> The obligation shall not affect any obligations, which may result from application of the second paragraph of Article 215.
> This Article shall also apply to the ECB.”

7.2 The judgement under Article 176

What does the phrase “necessary measures” mean? Since the text does not explicitly authorise the courts to specify what measures it considers necessary, many scholars see Article 176 as granting to the institution to determine what measures it considers appropriate. The courts may however indicate what measures it requires. [226] If the institution does not comply with the Court’s judgement, there is no other recourse for the applicant than further Article 175 proceedings. Therefore an indication to what measures the courts find necessary might avoid unnecessary litigation, because the institution may then take sufficient measures right away.

The action by the institution will not always be the action favoured by the applicant, even though in many cases after a declaration that the institution has failed to adopt a certain act, the primary obligation will be to adopt the act the institution should have adopted in the first place.[227]

[226] See e.g. Chalmers, *op.cit.,* pp. 598-600.; Schermers & Waelbroeck, *op.cit.,* p. 248. *SNUPAT v High Authority* (42, 49/59), [1961] ECR 53.
[227] Smit & Herzog, *op.cit.,* pp. 438-9; Steiner & Woods, *op.cit.,* p. 454; Hartley, *op.cit.,* p 381.

A judgement under Article 176 requires the institution to ”examine all legal implications” and to adjust its position accordingly. This may affect the position of parties other than the applicants. For example it could mean that the institution would repay fines imposed on a private party by a measure, successfully challenged by other applicants.[228]

If the institution does not comply with the Court’s judgement, there is no other recourse for the applicant than further Article 175 proceedings. This can be compared with a much more powerful tool in Article 171, which by amendment by the TEU, provide for the imposition of fines and penalties if a Member State does not comply with a judgement under Article 169. Even if the obligation under Article 176 shall not affect the possibility for private parties to obtain damages for the Community’s non-contractual liability, provided for in Article 215, this is a poor help for the applicant, because it has proven very hard to obtain such damages.[229]

[228]Chalmers, *op.cit.,* p. 598; *AssiDomänKraft Products v Commission* (T-227/95), [1997] ECR II-1185, consideration 69.
[229]Steiner & Woods, *op.cit.,* p. 454.

8 Conclusions

8.1 Case law of the Court of First Instance

For nearly ten years, the Court of First Instance has had jurisdiction to hear actions for failure to act brought by natural or legal persons. [230] The judgement of the Court of First Instance may be appealed to the Court of Justice.[231]

Throughout the thesis I have refereed to case law from both the Court of Justice and the Court of First Instance. No distinction has been made between judgements from either court, simply because there is no real distinction to be made between the two courts in actions for failure to act. The progress in competition cases regarding locus standi for unprivileged applicants for failures to adopt non-binding acts, and the "gapless" system from *Guérin Automobiles v Commission,*[232] have been developed by the Court of First Instance. However this is logical since cases brought by private subjects must be brought to this court. The important holding in this case was also was upheld on appeal and the Court of Justice emphasised the same points as the lower court. Thus, even though the Court of First Instance has been in the forefront in competition cases, this is due to the reasons of the process rather than because of different viewpoints of the two courts.

However in *AITEC v Commission*[233] the Court of First Instance did not seem to fully accept the holding from the *ENU* case[234] regarding acts of direct and individual concern to the applicant. It is submitted though that this discrepancy with the Court of Justice is a minor one, and accordingly the Court of First Instance has later enforced the concept from the *ENU* case. [235]

8.2 Criticism of Article 175

The action for failure to act under Article 175 has rendered much criticism from numerous scholars. It has been considered as being a tame or useless

[230]Council Decision 93/350 O.J. L144/21[1993] and corrigendum O.J. L234/23 [1993].
[231] Statute of the Court of Justice and the Court of First Instance, Article 49.
[232]*Guérin Automobiles v Commission* (T-186/94), [1995] ECR II-1753.
[233] *AITEC v Commission* (T-277/94) [1996] ECR II-351, considerations 60-62.
[234] *ENU v Commission* (107/91), [1993] ECR I-599.
[235] Craig & De Búrca, *op.cit*., p. 494; See e.g. *Hedwig Kuchlenz-Winter v Council* (T-167/95), [1996] ECR II-1607.

tool.[236] Due sees it as a "absolute last resort" when the applicant has no other means of remedy.[237] It is also clear that Article 175 has been of little use in practice. Until December 1997 only 91 cases had been brought before the Community Courts (including 44 before the Court of First instance) under Article 175. Of these cases only 3 have been decided in favour of the applicant.[238]

It is true that there are many hurdles to pass before an applicant may succeed under Article 175. First of all, the special procedure under the article, render the action for failure to act to be a rather meaningless tool, since the institution, alleged of the failure to act, simply by defining its position preclude further process. Furthermore, if the definition of position is not a reviewable act under Article 173, it will lead to the gap in legal protection, and thus preclude *any* review of the institution's alleged inaction. Secondly, even if the action is admissible, the institution has often discretion to act that makes it very hard for applicants to succeed. However, as noted above, this discretion comes with a duty to exercise the discretion properly. Finally the locus standi requirements for natural and legal persons seem very harsh. Rasmussen stresses that these have been much too narrowly constructed in the text of the article. [239]

8.2.1 The Prevailing view

The Community judicature has undoubtedly favoured the Prevailing view, and most scholars have also supported this view, under which the definition of position terminates further action under article 175.[240] As noted above the Prevailing view has some deficiencies. Acts not reviewable in actions for annulment can still constitute a definition of position within the meaning of Article 175 paragraph 2, and thus preclude further process under Article 175. The institution may accordingly evade judicial review by the Community judicature of its inaction, simply by issuing an act that will constitute a definition of position but which will not be reviewable under Article 173. This gap in the legal protection would not be possible under the Intermediate view. As we recall, only a definition of position that is reviewable in annulment proceedings will terminate the action for failure to act under the Intermediate view.

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[236] See e.g. Smit & Herzog, *op.cit.,* p. 224. Hartley, *op.cit*., pp. 396-7; Wyatt & Dashwood, *op.cit*., p. 134; Schermers & Waelbroeck, *op.cit*., p. 251; Weatherill & Beaumont, *op.cit.*, p. 219; Toth, *op.cit*., (1978), p. 98.

[237] Due, *op.cit*., p. 352. Note: author's translation.

[238] *23rd to 31th General Report on the Activities of the European Communities/Uinion*, 1989-97; *Annual Report 1995-6*, Court of Justice of the European Communities.

[239] Rasmussen, *op.cit*., (1995), p. 459.

[240] Scholars include e.g. Hartley, *op.cit*., pp. 396-7.; Wyatt & Dashwood, *op.cit*., p. 139; Schermers & Waelbroeck, *op.cit*., p. 251; Weatherill & Beaumont, *op.cit.*, p. 273; Steiner & Woods, *op.cit*., 451. Cases include e.g. *Deutscher Komponistenverband v Commission* (8/71), [1971] ECR 705*; Irish Cement Limited v Commission* (166, 220/86), [1988] ECR 6473*; Alfons Lütticke GmbH v Commission* (48/65), [1966] ECR 27; *Nordgetreide v Commission* (42/71), [1972] ECR 112; *GEMA v Commission* (125/78), [1979] ECR 3173.

The Alternative view has some merit. First, why should the institution be able to decide what judicial remedies that are possible for the applicants? Secondly, the Alternative view is the most direct, why convert an action under Article 175 to an action under Article 173 and thus instead of a possible direct remedy provide for a possible indirect remedy? Thirdly, the Alternative view will not lead to any gap in the legal protection of unprivileged applicants. Finally, Smit and Herzog's argument that the failure to act remains unless the institution has complied with the request fully appears logical (see 4.2). Even if the Prevailing view is to be adopted, it is also difficult to overlook that the actual text of Article 175 (as Smit and Herzog correctly points out) implies that it is the original failure to act which is the subject of the action.

8.2.2 The nature and destination of the requested act

Member States and Community institutions, as privileged applicants, enjoy rather liberal locus standi requirements under Article 175. It is submitted that the wide interpretation has prevailed, and accordingly Member States and institutions of the Community may complain of failures to adopt any act.

Regarding locus standi requirements for unprivileged applicants, *Lord Bethell v Commission*[241] gave a strong indication for a more liberal interpretation, and following the *ENU* case[242] virtually "all" scholars are united. It is now clear that Article 175 paragraph 3 should be compared with and interpreted in the same way as Article 173 paragraph 4. The failure to adopt a decision addressed to third person or a decision in the form of a regulation, may give rise to an action for failure to act provided that the act, had it been taken, would have been of direct and individually concerned to the applicant. However, this should not in any way lead to the misconception that it will be easy for natural or legal persons to prove locus standi following the judgement in the *ENU* case.[243] As we have seen, the Community judicature has interpreted the prerequisite "direct and individually concerned" strictly. Even though a failure to issue a regulation now is within the scope of the third paragraph of Article 175, it will be very hard to prove direct and individual concern for a private applicant. This is even truer regarding the failure to issue a directive.

[241] *Lord Bethell v Commission* (246/81), [1982] ECR 2277.
[242] *ENU v. Commission* (107/91), [1993] ECR I-599.
[243] *ENU v. Commission* (107/91), [1993] ECR I-599.

8.3 The EC Treaty Project

The Centre for European Legal Studies within the Faculty of Law at Cambridge has published a proposal for amendments to the EC Treaty. The aim of this is project is to update the text of the Treaty so as to coincide with the development in case law and literature. The benefits of such amendments are obvious. It would be in conformity with the principle of legal certainty and clearly improve the understanding of Community law.

Article 175 as amended read (changes in Italics):

> The Community judicature shall review the failure to act, in infringement of this Treaty, of the European Parliament, the Council or the Commission. It shall for this purpose have jurisdiction in actions brought by the Member sates and the other institutions of the Community.
> The action shall be admissible only if the Institution has first been called upon to act *within a reasonable time*. If within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.
> *Natural and legal persons* may, under the conditions laid down in the preceding paragraphs, *institute proceedings when an institution of the Community has failed to enact a measure, other than a recommendation or an opinion that would have been of direct and individual concern to the former.*

I agree with these proposals for amendments, as they incorporate law as it stands, even though I would have liked to see an amendment stating that a definition of position precludes further action under Article 175 only if it is a prerequisite for the next step in a procedure, which is to culminate in a legal act, which itself is open to an action for annulment under Article 173.

8.4 Is Article 175 meaningless?

Even if Article 173 has proven more useful and applicants have had more success under that article in practice I think the critics miss the point.

First of all, in my opinion, most importantly is that there is a remedy against inactions of the Community institutions. Since Articles 173 and 175 merely describe one and the same method of recourse, one could easily argue that the critical matter is that one of the two actions is available. This might be the reasoning behind the support for the Prevailing view. Under this view as well as under the Intermediate view, the applicant is more or less forced to proceed with an action for annulment instead of an action for failure to act (except in cases with the possible gap).

Secondly, this might be a minor point, but to my knowledge there are no statistics regarding the number of calls for action to the institutions of the Community. Thus, the low number of applications under Article 175 might partly be due to the fact that the institution actually has realised that they are at fault and complied with the requests.

Finally, the holding in *Guérin Automobiles v Commission*[244] did not lead to any gap in the judicial protection. If this development in the area of Community competition procedure will be applied in other areas of Community law as well, it should lead to a welcome transition to a gapless system of remedies under Article 175. This development together with the development in the *ENU* case,[245] which widens the locus standi requirements of natural and legal persons, and makes the position for these applicants the same as under Article 173, might vitalise the action for failure to act under Article 175, and thus make it more useful.

[244] *Guérin Automobiles v Commission* (T-186/94), [1995] ECR II-1753.
[245] *ENU v. Commission* (107/91), [1993] ECR I-599.

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