munity, especially Articles 12, 13, 38 to 46, 169 and 189;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby declares that the applications are admissible and:

1. **Rules that the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg have failed to comply with the obligations laid down in Article 12 of the Treaty in that after 1 January 1958 they introduced and charged a special duty leviable upon the issue of import licences for skimmed-milk powder whether sweetened or not, whole-milk powder whether sweetened or not, concentrated and sweetened canned milk, hard and semi-hard cheeses, processed cheeses, soft cheeses and blue-veined cheeses;**

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

Hammes Donner Lecourt
Delvaux Trabucchi

Delivered in open court in Luxembourg on 13 November 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 OCTOBER 1964[1]

Summary

1—Translated from the German.

Mr President,
Members of the Court,

The Commission has brought an application under Article 169 of the EEC Treaty and is asking the Court to rule that the Kingdom of Belgium and the Grand Duchy of Luxembourg have infringed an obligation arising out of the Treaty, namely the 'standstill' laid down in Article 12. It is alleged that the breach lies in the introduction of a special duty levied on the issue of import licences for certain milk products (milk powder, concentrated milk and certain kinds of cheese) coming from other Member States and that although at the time when the Treaty entered into force no special duties of this sort were levied import of these goods has become freer. I do not need to go in detail over the legislative measures complained of. Only one point is worth mentioning and that is that the origin of these measures is a Royal Decree of 3 November 1958 and a Grand Ducal Decree of 17 November 1958 which established the principle of levying duties and fixed maximum rates. Ministerial implementing orders fixed the rate applicable in each case. In subsequent years variations were made in the systems but they evolved *pari passu* in Belgium and Luxembourg because both States, within the framework of the Belgo-Luxembourg Economic Union and in conformity with the Convention of 23 May 1935 on the introduction of a common import, export and transit system, have pursued a common policy for the goods in question through similarly framed market organizations.

In accordance with the provisions of Article 169 of the Treaty the Commission informed the Belgian and Luxembourg governments in letters addressed to them on 8 November 1961 of its view on the measures taken and called on them to submit their observations. They did so, the Belgian government on 9 February 1962 and the Luxembourg government on 20 February 1962. A note from the Belgian government addressed to the Commission on 17 October 1962 contains other arguments on the question in dispute. There followed a number of contacts between the officials of the Commission and the two

governments with a view to regularizing the situation complained of and, possibly, as the Commission made clear, with a view to applying an escape clause in the Treaty.
However no solution was found and therefore the Commission found itself obliged to deliver a formal reasoned opinion, under Article 169, dated 3 April 1963. Notice of this opinion was given to the two governments in letters of 10 April 1963. The Belgian government replied by a letter of 8 May 1963, in which it declared that it was ready to abolish the duties in question as soon as an agreement with the Commission on a suitable alternative had been reached. In a letter of 9 May 1963 the Luxembourg government concurred with the Belgian government's view.
As the levying of the import duties continued unchanged, the Commission brought applications before the Court of Justice on 15 October 1963. Its submissions are in line with the findings in the opinion of 3 April 1963.
Both the defendant Member States consider the applications to be inadmissible and in any event unfounded and request the Court to give judgment accordingly.
During the case the defendant Luxembourg government has simply aligned itself with the arguments of the Belgian government on all matters of substance.
Since the facts of both cases are identical, the Court decided to join them together during the course of the proceedings, both for the purposes of the procedure and of the judgment (Order of 28 November 1963). No opinion given below is equally valid for the two cases, unless otherwise expressly stated.

Legal consideration

I — Admissibility of the applications

As is argued by the defendants, the examination of the dispute must begin with observations on the admissibility of the applications. This is questioned or disputed on several grounds.

1. First of all we see from the written pleadings that the defendant Member States, in their replies to the Commission's observations, have declared their readiness to abolish the measures complained of as soon as it is possible to work out with the Commission solutions for replacing the existing system.
However it is clear that declarations of this kind cannot by themselves exclude a right of action. On this point I refer you to the judgment of the Court in Case 7/61, where it was held that the attitude of a Member State can give rise to legal consequences as to the admissibility of an action before the Court only if that Member State *takes steps to put an end* to the situation complained of by the Commission whilst a request for the application of escape clauses in the Treaty does not have any such legal effect.
Here, no request of this kind has even been put forward in a concrete form supported by sufficient reasons. Therefore, using the procedure in Article 169, the Commission was right not to be satisfied with the declaration mentioned. Thus the actions it has brought are not inadmissible on those grounds.

2. The defendants also point out that when the proceedings were started the parties thereto were certain that it was reasonable to expect that a Community-wide organization of the milk market would be introduced in the near future in accordance with a proposal from the applicant and that this organization would substantially correspond to the Belgian and Luxembourg systems which are complained of. This being so, the applicant has allegedly no legal interest in pursuing its case; moreover it was possible to predict that anyhow the proceedings would not be finished before the common organization of the

market in milk had been set up.
According to the text of the Treaty it can first be objected to this defence that only the facts subsisting before the expiry of the time-limit fixed by the Commission are decisive. Yet at the expiry of the time-limit (10 May 1963) the Community was still very far from having worked out the common organization of the market in milk products. It was not adopted by the Council of Ministers until 5 February 1964.
It is perhaps possible to argue that from the admissibility point of view legal proceedings can be taken only if at the time when judgment is given there still exists an interest which merits protection. However I think that the entry into force of the common organization of the market in milk before the end of the proceedings does not reduce the interest of the Commission in obtaining the ruling which it requests. For on the one hand the defendants do not seem to envisage abolishing retroactively the measures complained of and on the other hand it cannot be denied that issues of fundamental importance arise. The interest of the Commission in a solution to these issues is indisputable so long as analogous facts can recur while no comprehensive organization of agricultural markets has been set up. Therefore the second objection too fails to show that the actions are inadmissible.

3. Finally the defendants invoke the Resolution of the Council of 4 April 1962 (OJ 20 April 1962) which stated that it was necessary to set up by 31 July 1962 a common organization of the market in milk in accordance with Article 43 of the Treaty, with a system of compensatory levies to take effect by 1 November 1962 at the latest. According to the defendants the Commission would not have had any reason to bring proceedings if the Resolution of the Council had been acted upon, because the common organization of the market would then have replaced the Belgian and Luxembourg system well before the Commission delivered its opinion under Article 169.
I am bound to note that the Resolution of the Council was not acted upon in due time and it must be admitted that this might well imply that an obligation based on the Treaty was not observed. But I think it is a mistake to conclude from this that the cases are inadmissible, using the argument from international law or civil law of '*tu quoque*'.
The defendants' objection rests on the assumption that in fact the Belgian and Luxembourg measures would have become superfluous if the Decision of the Council had been acted upon in due time. This, however, is pure supposition at least as regards the date when the proceedings were started and as such inadequate, taking into account the terms of the Resolution of the Council which are vague and do not give details of the organization of the market.
Another point which must be emphasized is that the alleged infringement of the Treaty by the defendants goes back to a time long before the adoption of the Resolution by the Council. Therefore, even if it were necessary to look upon the failure to fulfil the obligation imposed by the Council as the *causa causans* of the *continuation* of the infringement of the Treaty, the Commission can have a motive for obtaining a ruling that there is an infringement of the Treaty going back to the past, because there are no indications to suggest any intention to effect retroactive abolition which can be required in certain circumstances under Article 169.
The reality is that, speaking generally, the objection of the defendants concerns not the admissibility but the substance of the actions. In my opinion their arguments as a whole at most raise the question whether a possible formal infringement of the Treaty, which would here consist of a purely objective fact, might be *justified* by certain circumstances relating to the attitude of the

Council and to the need to avoid the consequences of its delay in acting. But considerations of this sort must be left over for the discussion as to the substance.

Therefore it is certain that no valid argument can be found against the admissibility of the action.

II — Substance

As regards the substance of the cases, the issue is not whether the introduction of the special Belgian and Luxembourg duty has the effect mentioned in Article 12. The Commission has proved this beyond doubt in referring to the criterion evolved by the case-law of the Court (Cases 3 and 3/62). What is debatable, however, is whether Article 12 is applicable at all. In other words does it permit for agriculture what it prohibits elsewhere?

If I see it aright, the oral arguments have further reduced the area of dispute. This is because the written statements of the defendants give the impression that they think, in reliance on Article 38 (4), that the general rules of the Treaty do not apply to agriculture so long as a common agricultural policy has not been set up. In my opinion this view cannot be defended when one looks at Article 38 (2) and at the actual practice of Member States. However I do not need to go into this point further because during the oral arguments the defendants made it clear at all events that they do not consider that an 'absolute synchronization' of the application of Article 38 (4) (introduction of a common agricultural policy) and the application of the general provisions of the Treaty is necessary.

Their argument now consists merely in saying that where an agricultural market organization is in existence the general rules of the Treaty, including the provision on the 'standstill', must go.

Thus at the present stage of the proceedings there only remain the following problems to be considered:

— What does the Treaty mean by market organization;

— When the Treaty entered into force, did market organizations for the products to which the special duty applied exist in Belgium and in Luxembourg?

— Suppose that a market organization does exist, are Member States free to change the system in response to the needs of the economy, or does the 'standstill' also apply here?

1. *The definition of a market organization and its application to the facts of the Belgian and Luxembourg milk market*

It is clear that the parties have very divergent views on what a market organization is. The Commission considers that the following definition is accurate:

> 'A market organization consists of a set of provisions concerning the sale of a given product in a Member State, guaranteeing full employment and the standard of living of the producers in question. This condition is only fulfilled if the sale of the domestic product and the stability of the price-level are protected and guaranteed not only against the effects of imports, but also against the consequences of variations in domestic production or demand.'

For their part the defendants substantially take over the definition given in the Spaak report on the preparation of the EEC Treaty. This report considers a market organization as the opposite of free competition.

The truth is that it is not easy to define a market organization as mentioned in the Treaty, which itself contains no express definition. Furthermore it is certain that its authors clearly envisaged different types of national institutions when they conceived the provisions on agricultural market organizations.

On thing strikes me as certain *a priori*: any argument in this connexion which is not based on the Treaty itself cannot be of decisive importance in the discussion. This applies particularly to the defendants when they refer to Reports of the Organization for European Co-operation and Development: to be relevant these reports would have to show that an analogous concept of a market organization is found therein. The same goes for the reference to the Spaak report in the preparatory work on the Treaty. In fact this provides only a vague initial outline of the scheme of the Treaty. Finally, the same also goes for the reference to earlier statements by the Commission on the Belgian and Luxembourg organization of the market in milk (contained in various collated reports, in a letter from the President of the Commission and in the reasons given for a decision of the Commission on the introduction of a countervailing charge for the Federal Republic). This is because the Court must proceed to an *objective* examination, that is to say, it must base itself directly on the Treaty and not on an interpretation that the Commission may at some time have given to the Treaty.

As regards the last point it also seems to me that the declarations of the Commission during the proceedings have proved that its attitude is not inconsistent. First of all the decision mentioned above about the introduction of a countervailing charge cannot support the defendants' complaint because the application of Article 46 to the import of certain products (in this case whole-milk powder) does not necessarily imply recognition of the existence of a market organization for these products in the exporting State. On the contrary what is sufficient according to the terms of Article 46 is the existence in the exporting state of a market organization for products *of the same kind* (which is the case for milk) or *a system having equivalent effect* for the commodity exported (and it must be admitted that this applies to the Belgian and Luxembourg subsidy system for milk powder).

In trying to glean a definition of the concept of a market organization from the Treaty itself one necessarily comes up against Articles 43 and 45 as the Commission has correctly pointed out. Article 43 provides that a national market organization may be replaced by a common organization if it offers Member States, which are opposed to this measure and which have an organization of their own for the production in question, equivalent safeguards for the employment and standard of living of the producers concerned. According to Article 45, until national market organizations have been replaced by one of the forms of common organization, trade in products in respect of which certain Member States have arrangements designed to guarantee national producers a market for their products shall be developed by the conclusion of long-term agreements or contracts.

It must be deduced from these provisions that the Treaty considers that the concept of a market organization includes safeguarding for the producers in question their employment and standard of living, because a common market organization must fulfil this condition if it is to be able to replace national market organizations. To this must be added a sales guarantee within the meaning of Article 45, because economic arrangements for the safeguarding for the producers of their employment and standard of living usually achieve their objective by means of measures giving a sales guarantee for the products at given prices.

I do not think it possible to bring arguments of any weight against these conclusions.

It is possible to deduce from Article 40 amongst other things that each of the measures mentioned in paragraph (3) thereof is alone a sufficient indication that a national market organization

exists. Article 40 deals in a general way with the common organization of agricultural markets, and these markets may consist, as stated in paragraph (2), not only in the coordination of various national market organizations, but also in the establishment of common rules on competition. However, common rules on competition do not merit being described as a market organization for they clearly leave the influences of the world market out of account. I agree with the Commission that it is not possible to envisage a market organization effectively protecting producers, without protective measures against the outside world. Furthermore I cannot agree that such a concept of a market organization has in mind only the situation of countries where there is overproduction. Even countries where production balances demand or falls short of it cannot offer effective protection to their producers only by means of measures controlling prices, because sales depend not only on the price but also on the quality of the goods.

Thus the above reasoning only admits of one conclusion which is that when the Treaty entered into force no market organization for the milk products in question existed in Belgium and Luxembourg. The only legal provisions were subsidies to producers without the effect of guarantees within the meaning of Articles 42 and 45 of the Treaty.

However this does not bring the examination of the facts to an end. For the defendants assert that the system of subsidies mentioned above must not be looked at alone; rather must it be accepted that in *principle* the Belgian and Luxembourg system of subsidies for products derived from milk allows for the importation of supplementary measures of a kind which restricts imports. On this they refer to the levying of certain import duties in 1950 (to quote *verbatim* from the French written pleadings: '. . . car dans ce cas l'établissement momentané de cette taxe à l'importation variable par nature atteste que l'organisation du marché existant au 1er janvier 1958 comportait le *principe* de pareille taxe, même si celle-ci n'avait à cette date qu'une *existence virtuelle*') ('. . . for in this case the temporary introduction of this import duty, by nature a variable one, shows that the market organization existing on 1 January 1958 admitted the *principle* of such a duty, even if had only a *potential existence* at that date').

Furthermore it is not feasible to look for proof of a special organization of the market in milk powder, concentrated milk and cheeses because, as products derived from milk, these goods automatically came under a market organization for milk the existence of which is beyond question. If it is permissible to guarantee the protection of milk by direct measures, it must also be permissible to introduce indirect measures for the same purpose, where these measures relate directly to derived products, so long as this does not bring about a strengthening of the guarantees given to producers when the situation is looked at as a whole.

But these arguments do not seem to me to be persuasive either. First of all I must point out the fact that in 1950 import duties were levied only on certain products, and not on all those currently in dispute. The reference to the system of 1950 should not therefore be regarded as a complete justification for the measures adopted in 1958.

But what is much more significant is the following reasoning: if it were necessary to be content with the 'existence virtuelle' ('potential existence') of certain measures to make up the concept of a market organization, this would dangerously weaken the concept. It would mean that a market organization included anything which economic policy required at a given moment. No clear line of demarcation could be drawn because no one could say how far it was permissible to call former systems in aid.

This is why, in getting at the concept of a market organization as envisaged in the Treaty, it is essential to adopt a standard, a set of rules and orders, and in doing so to look at them as on the date when the Treaty entered into force. It is beyond doubt that the Belgian and Luxembourg organization fails in this respect, because no proof has been given of the existence of a law and of a regulation giving general powers to take all measures necessary at any time in order to guarantee the sale of milk produced. no matter how far production rises.

The second argument should receive a similar reply. The question whether the need for legislation to supplement the organization of the market in milk precludes its being considered as a market organization within the meaning of the Treaty can be left open; the Commission raised this point having regard to the effects of the required guarantee (Article 43). The argument which must also be decisive here is this: when for economic reasons a market organization for primary products is extended to derivative products, this fact is not of itself sufficient proof that the derivative products were included *ab initio* in the market organization for the primary products. I can support this argument by pointing in particular to the common organization of the market in milk, which lays down precisely what measures are authorized and for which products, including derivative products. Any other point of view would lead to abandoning legal certainty, for it would be impossible to show at what point a market organization extends to derivative products. In my opinion it is certain that no practical guidance is given on how the prohibition on strengthening generally the guarantees for producers is to be effected. It is very difficult, if not impossible, to measure and to compare the effect of different arrangements for the organization of the market. In the present case I do not think, for example, that it would be enough to accept proof that the subsidies granted to the producers of the derivative products were reduced by a sum equal to the amount of the countervailing charges, because in safeguarding the standard of living and employment what matters is not only the price of the goods produced but also the volume of production which, in the present case, has given rise to the introduction of the measures complained of for the very reason that production increased.

Thus I stand by my statement that in Belgium and Luxembourg there was no market organization for the products in question when the Treaty entered into force. Since the defendants themselves admit that it is not permissible to introduce new market organizations, the provisions of the Treaty on the organization of the agricultural market provides no justification for the special duties in dispute.

2. However I shall go on to consider what view should be expressed were it necessary to hold that the Belgian and Luxembourg system for products derived from milk in fact constituted a market organization. The problem then arises whether the two Member States were free to amend at will the system for the running of this organization in order to maintain its effectiveness and to ward off the danger of its being undermined by perfectly likely events (variations in production).

I share the Commission's serious doubts as to the lawfulness of acting thus, even though the Treaty does not expressly say that one must adhere absolutely and rigidly to the details making up a market organization as they existed when the Treaty entered into force.

As a matter of principle the rules to be applied on this subject must be those which the Court set out in its judgment on the Gingerbread Case concerning the relationship between the general provisions of the Treaty and the special provisions concerning agriculture. The

special character of the latter means that they must always be interpreted strictly. Therefore in every instance where the Treaty favours agriculture by allowing an exception to the general rule, the consequences must be limited to the absolute minimum necessary. A liberal interpretation of the provisions concerning the organization of agricultural markets is not compatible with this dictum.

But I shall not confine myself to looking at this basic principle and I shall now consider what supplementary arguments can be drawn from the special provisions of the Treaty for deducing the solution to the problem. The first thing that supports the Commission's view is the text of Article 38 (2). It says that the rules laid down for the establishment of the Common Market shall apply to agricultural products save as otherwise provided in Articles 39 to 46, and it is perfectly reasonable to argue that the opening words of Article 38 (2) ('Save as otherwise provided in Articles 39 to 46') do not affect the rules on the 'standstill' (Article 12). 'Establishment' is a dynamic concept invoking an active attitude and an action. On the other hand the very meaning of 'standstill' connotes no more than a passive attitude, a resignation such as can never lead to the establishment of the Common Market. It does not seem evident to me, as the defendants assume, that the 'standstill', which is in the nature of a preparatory measure for the establishment of the Common Market, cannot be separated from the rules on the elimination of barriers to trade. At all events I do not see any practical or logical reason why not.

Of course this argument taken by itself is not particularly persuasive but there are others to add to it. In fact the special provisions on agriculture contain so many allusions to the 'standstill' that it seems possible to talk of a 'standstill' underlying these special rules. I am thinking of the provision in Article 44 concerning minimum prices, paragraph (2) of which provides that 'Minimum prices shall neither cause a *reduction* of the trade existing between Member States when this Treaty enters into force nor form an obstacle to progressive *expansion* of this trade'. I am thinking of Article 45 which, as regards the very Member States which have market organizations, requires the conclusion of long-term contracts and in doing so makes it clear that 'As regards quantities, these arrangements or contracts shall be based on the average volume of trade between Member States in the products concerned during the three years before the entry into force of this Treaty and shall provide for an increase in the volume of trade within the limits of existing requirements, account being taken of traditional patterns of trade'. I must also mention here the decision of the representatives of the governments of Member States, meeting in Council, on more rapid progress towards attaining the objectives of the Treaty (12 May 1960, OJ 1960, pp. 1217 et seq.) for it lays down that where a long-term contract or agreement has not been concluded for certain products Member States shall allow them to be imported up to an amount equal to the average imports during the three years before the entry into force of the Treaty, *increased* by 10% per annum for the years 1959 and 1960 and for the further period up to the end of the first stage.

But, above all, it must not be overlooked that the freedom sought by the defendants to make alterations to their market organization, which, let me say by the way, has brought about a noticeable reduction in the imports of certain products, would make extraordinarily difficult if not impossible the attainment of one of the important objectives of the Treaty concerning agriculture, namely the setting up of *common* organizations for agricultural markets. We all know that these organizations must offer equivalent

guarantees for the standard of living and the employment of the producers in question and that therefore they must follow the lines of what in fact exists in the national market organizations. This is not compatible with the power of Member States to make changes to their national market organizations beforehand, even with the proviso that the changes shall not increase their effects, because it seems to me that it would be difficult if not impossible to ensure observance of such a proviso. I therefore think that the 'standstill' must also apply as regards organizations for the agricultural market, at least to the extent that an amendment to the system of application, to use the defendants' terminology, consists in introducing entirely new restrictions on imports which have the precise effect of changing the character of the market organization.

I do not see how such a restriction on the State's freedom of action could cause national market organizations to crumble away. At all events, so far as the present case is concerned, it seems to me that there is no proof of this when the facts are looked at and moreover that as regards some of the products there is no evidence of the need to extend the market organization, considering that production is at present too high. Likewise the defendant's observation on the rules for long-term contracts is not conclusive, because it is hard to think that a 'standstill' in the structure of market organizations can create serious difficulties for the carrying out of these contracts.

Therefore, even if the existence of national market organizations for the two Member States were to be accepted, the measures complained of can still not be justified.

This result applies equally both to Belgium and to Luxembourg quite apart from the question whether there existed in Luxembourg quantitative restrictions on imports when the Treaty entered into force or whether the special protocol on Luxembourg made it legal to introduce them (which anyhow is not the case for all products). What is decisive is that at the time when the Treaty entered into force no import duties of the type in question in this case were being levied.

Alterations to measures for restricting imports are certainly not compatible with the 'standstill' where, as in this case, the effects of the measures are not analogous.

3. Finally there still remains to be examined the question whether other reasons, for example general legal principles, make it possible to justify the duties complained of.

Two lines of thought are possible.

On the one hand it could be said that the Belgian and Luxembourg system does no more than anticipate measures which must be taken later in any event in the common organization of the market in milk. However this justification will not do. In fact, as the Commission has proved, the effects of a national system are not identical with those of a common market organization. Furthermore according to the spirit of the Treaty it is not possible to justify as a matter of principle the unilateral introduction of a measure by a Member State by arguing that it ties in with a common set of rules made some time later, because in order to ensure that the provisions of the Treaty are respected it is necessary not just to look at the material effects of a measure, but also to observe the rules as to legal capacity.

On the other hand we must come back once again to a question which was touched upon when the admissibility of the case was being examined and consider whether Member States of the Community may unilaterally take necessary measures when it is clear that the Community is falling behind in carrying out its tasks (in this case the implementation of the Council resolutions of 1962). Here again this view strikes me as

untenable. Maybe in international law an *ultima ratio* permits taking the law into one's own hands when no other procedure exists for protecting legitimate interests. In Community law, however, other Community channels exist for solving the difficulties which arise. For example as regards the law on agriculture there is the application of the rules on minimum prices in accordance with Article 44, or finally the application of the general safeguard clauses in the Treaty. These ensure that the Community keeps a check on internal acts, and guarantee that the measures taken will not go beyond what is strictly necessary. It does not seem to me to have been proved that recourse to the remedies under Community law would not have made possible a satisfactory solution to the Belgian and Luxembourg question. Therefore to my mind the negligence of the Council does not constitute a justification of the attitude of the two Member States.

III — Conclusion

Thus the Commission's complaint seems to me in the event to be well founded. The Kingdom of Belgium and the Grand Duchy of Luxembourg have infringed the provisions of the Treaty, and in particular Article 12 thereof, in introducing a special duty not in existence when the Treaty came into force, and levied on the issue of import licences for certain milk products.

The case is substantiated and the defendants must bear the costs.