OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 JANUARY 1968[1]

Mr President,
Members of the Court,

The question put to us by the Gerechtshof (Court of Appeal) of The Hague relates to the tax provisions of the Protocol on the Privileges and Immunities of the European Economic Community. They are relevant in the following circumstances.

The plaintiff in the main action, who is an official of the European Economic Community resident in Belgium since July 1964, sent his daughter for the school year 1964–1965 to the local school in Rotterdam, his former place of residence. Since it is a school which is partly or wholly supported from public funds and since the plaintiff's daughter was no longer obliged under Netherlands law to attend school, in the view of the Rotterdam local authority a school levy was due, the amount of which was to be determined under the Law on school levy of 20 May 1955 (as amended on 8 December 1955). On the basis of this Law the school levy is assessed on the basis of the total amount which the parents liable for the levy have to pay as income tax for the last calendar year before the commencement of the school year and as wealth tax for the year current at the beginning of the school year. If this amount is less than Fl. 100 no school levy is due. At Fl. 100 the levy is Fl. 8 per child per year. It rises by 2% for every further Fl. 50 of tax liability to a maximum amount of Fl. 200, which is due in respect of tax liability amounting to Fl. 9 600. Article 9 of the Law provides moreover that persons not residing in the Netherlands liable to pay school levy shall pay the maximum amount unless they show that a lesser sum would be due if they lived in a district in which the school is situated (in which case the lesser sum is due). Similar provisions apply under Article 8 of the Law in respect of persons liable for school levy who are resident in the Netherlands and are exempt from income tax and wealth tax under provisions of the law. They can escape payment of the maximum amount on showing that without the exemption a lesser rate of levy would be applicable.

Apparently the lastmentioned provisions were applied to the plaintiff and this led to a demand for school levy amounting to Fl. 200 for the school year 1964–1965. Later, on the plaintiff's objection the demand was reduced to Fl. 120 having regard to the number of his children who were of the age of compulsory school attendance. The plaintiff was not satisfied with the partial success he had obtained and applied to the Gerechtshof of The Hague against the amended notice of assessment. In his claim he referred in particular to the Protocol on the Privileges and Immunities of the European Economic Community, that is to say, he stated that although his residence for tax purposes was still in the Netherlands (where the family had lived before the removal to Belgium), under Article 12 of the said Protocol officials of the Community were exempted from national taxes on salaries paid by the Community. This meant that his salary could in no way be taken into account for national taxation. Since the remainder of his income liable to tax lay below the legal minimum, neither income tax nor wealth tax was due for the years 1963 and 1964, and he could therefore not be made liable for the payment of school levy. On the basis of this argument the Gerechtshof of The Hague was faced with the question of the interpretation of the Protocol on the Privileges of the European Economic Community. Since it did not wish to decide the questions raised itself, it stayed the proceedings on 18 August 1967 and addressed the following question to the European Court of Justice under Article 177 of the EEC Treaty: 'Must school levy, imposed on the basis of the Netherlands Law on school levy, be regarded as a national tax on the salary paid by the Community that is to say, as a tax referred to in the second paragraph of Article 12 of the Protocol on the Privileges and Immunities of the European Economic Community?'

The plaintiff in the main action, the Nether-

1 — Translated from the German.

lands Government (the observations of which the Rotterdam authority supports), the Belgian Government and the Commission of the European Economic Community have submitted written observations on this question in accordance with Article 20 of the Protocol on the Statute of the Court of Justice. Only the Commission submitted oral observations.

After all these observations let us see what assistance in interpretation we can give the national court in deciding its case.

The answer to the question put

In the first place the question arises as to the meaning of the expression 'national taxes' in Article12 of the Protocol on the Privileges and Immunities applicable at the time in question (as also in Article 13 of the new Single Protocol on the Privileges and Immunities of the European Communities of 8 April 1965). Does it cover all kinds of charges imposed by public authorities or does it not apply to dues exacted by public bodies which arise when special advantage is taken of public or even non-public services (such as free schools), the use of which—and this is the question in the present case—is open to the parties concerned?

As has been shown, there are various reasons which suggest that a clear distinction must be made in revenue matters between taxes in the true sense and dues or administrative charges which are nothing other than consideration for the particular use of public services.

The Netherlands Government has given detailed proof of this as regards Netherlands law and cited a whole series of legal authors in its written observations. As regards German law it is sufficient to refer to Article 1 of the Reichsabgabenordnung (the German Tax Code) (which as is known is still valid in the Grand Duchy). It is stated there: 'Taxes are single or periodical monetary payments, which are not consideration for a special service and, for the purposes of obtaining revenue are exacted by a public body from all who fulfil the conditions of liability, prescribed by law... . Dues (Gebühren) for special services provided by the administration and payments by way of consideration (Vorzugslasten) do not constitute taxes'. It is unanimously and clearly stressed by writers that dues for the use of public institutions, such as school levy (cf. the commentaries on the Reichsabgabenordnung by Becker, Riewald, Koch, ninth edition 1963, Vol. 1, pp. 17 and 21; Nöll van de Nahmer, Lehrbuch der Finanzwissenschaft 1964, Vol. 1, pp. 212, 216) are not to be regarded as taxes within this definition. The same may be said of French law (Plagnol, Les impôts, 1958, p. 3; Formery, Les impôts en France, 1946, Vol. 1, p. 33), of Italian law (Berliri, Principi di diritto tributario, 1952, Vol. 1, p. 272; Giannini, Istituzioni di diretto tributario, 1965, p. 51) and of Belgian law (J. Van Houtte, Principes de droit fiscal belge, 1958, pp. 7, 8, and 9). This distinction—as the Commission has shown—is often made in dealing with the matter of diplomatic privileges so that those enjoying them are for the most part not exempted from administrative charges in the sense I have just described. This is expressly stated in the Vienna Treaty on diplomatic relations of 18 April 1961 (Article 34), according to which exemption from taxes does not include charges for specific services rendered. Further there may be mentioned the Treaty of 2 September 1949 on the Privileges and Immunities of the Council of Europe according to Article 7 of which: 'Le Conseil ne demandera pas l'exonération des impôts, taxes ou droits qui ne constituent que la simple rémunération des services d'utilité publique'. Finally—as was rightly stated—it must not be overlooked that, under Article 3 of the Protocol on Privileges and Immunities which concerns us, although the Community, its assets, revenues and other property are exempt from all direct taxes, this exemption does not apply in respect of taxes and dues which amount merely to charges for public utility services (for 'services d'utilité générale' as is stated in the French text).

Even after these few references there is no reason to see why as regards the interpretation of Article 12, which governs the exemption from taxes of European *officials*, other standards should apply. There are however other considerations, as the Netherlands Government has shown in its

written observations. Thus it is to be borne in mind that under Article 17 of the Protocol: 'Privileges, immunities and facilities shall be accorded to officials ... of the Community solely in the interests of the Community'. The significance that such a reservation has is shown by the judgment in Case 6/60 *Humblet* v *Belgian State*, which related to the provision in the ECSC Protocol which corresponds to Article 12 of the EEC Protocol. According to the judgment in the case of *Humblet* the Community is concerned in particular to be able effectively to exercise its power to fit the *actual* net amount of officials' salaries, which would not be the case if the salaries were subject to various national taxes. It is quite obvious, however, that such considerations apply only in respect of tax charges falling on income (that is, where the receipt of the salary is the reason for levying the charge) and not on the other hand in respect of charges, the reason for which is the rendering of a particular service by the administration and payment of which can be avoided by foregoing the service. A second consideration in the interpretation of Article 12 of the Protocol on Privileges and Immunities is the need to avoid *double* taxation of the European salaries on which taxation for the benefit of the Community is already levied. This danger does not arise in the case of an administrative fee which becomes due on attending school, since, as is known, a school levy for the benefit of the Community does not have to be paid by officials with children required to attend school. On the contrary, we see that under Article 67 of the Staff Regulations, apart from the dependent child allowance, an education allowance is expressly provided for (the Dutch, French and Italian texts refer more clearly to 'toelage voor schoolgaande kinderen', 'allocation scolaire' and 'indennità scolastica') that is to say, a grant which was obviously created in the expectation that officials would be liable to special charges by school authorities in respect of their children's school attendance. Finally it is necessary to bear in mind the actual consequences of a wide interpretation of Article 12 as sought by the plaintiff. If the imposition of administrative charges of the kind which concerns us now were ruled out on the basis of Article 12 then Member States in which the larger Community institutions are located would have considerable special burdens. It can scarcely be taken that the authors of the Protocol on Privileges and Immunities had this in mind. Moreover there would be discrimination against the citizen who did not enjoy the benefit of the Protocol, a condition which would scarcely be compatible with the growing realization of the Common Market and the ever increasing integration.

We should therefore first hold that on a proper interpretation of Article 12 of the Protocol on the Privileges and Immunities the exemption from taxes provided for therein does not extend to the charges of authorities for the special use of public or private services the use of which is open to the persons concerned. Further we may see, even if this perhaps does not come within the terms of Article 177 of the EEC Treaty, that the disputed Netherlands school levy is indeed to be regarded as an administrative charge in the abovementioned sense. In favour of this is the fact that its maximum amount is Fl. 200 per annum, a sum, as the Netherlands Government has rightly pointed out, which would be at least very unusual in tax provisions. Further support is provided by the fact that the said maximum amount is certainly less than the cost to the public authority so that the principle of the cost not exceeding the value of the service is satisfied, or, stated in another way, a proper realationship is maintained with the service rendered. Finally support may be gathered from the fact that under the provisions of the law which govern the matter the school levy becomes due only in the event of *actual* school attendance.

A particular problem appears to arise in that under the Netherlands Law on school levy the amount due is not uniform but has to be graduated according to the total amount of the income and wealth tax. Moreover, those liable to the school levy, whose income is not subject to Netherlands taxation, can avoid payment of the maximum sum only if they show that if the Netherlands tax laws applied to their income a lesser school levy would be due. If I understand it correctly, the plaintiff's main complaint is against these peculiarities.

I am convinced that the facts I have mentioned do not cause any *real* difficulty in the settlement of the case.

First the fact that the Netherlands school levy is graduated according to the means, in terms of capital and income, of the person concerned has no significance for the purpose of its classification. In the legislative systems of our countries which have an extensive social aspect it has long been recognized that even in the matter of fees for the use of a service the scale of charges may vary according to the means of the person concerned.

As far as concerns the fact that if European officials want to avoid payment of the maximum school levy under Netherlands law either they must allow their salaries to be subject to a *fictitious* national taxation or, less boldly stated, the national rate of tax must be computed *in order to find the exact amount of the school levy*, it would be in my opinion an unreasonable extension of the Protocol on the Privileges and Immunities, if what is solely a method of computation were excluded on account of its provisions. Contrary to the opinion of the plaintiff, nothing on this is to be inferred from the judgment in Case 6/60, on which he relies. It is true that in this judgment it was stressed that it is not permissible to have regard to the salary of a European official in computing the rate of tax on *other income*. It should not however be forgotten that in that case there was *genuine taxation* (namely the Belgian personal surtax) whereas in the present case it is a question of the determination of the rate of a due, that is to say, a charge which is not covered by the second paragraph of Article 12 of the Protocol on Privileges. To decide otherwise, that is to say, to exclude any consideration of the salaries of European officials in assessing the charges of national administrative authorities would lead to quite absurd consequences. One need think only of the case of court fees, which also can be wholly or partially reduced according to the person's means. No one, however, would think of relying on the Protocol on the Privileges and Immunities in order to enable European officials to obtain legal aid for the purpose of instituting proceedings before their national courts.

Summary

To summarize, I propose contrary to the plaintiff's view and in agreement with the position adopted by the Netherlands Government, the Belgian Government and the Commission, the following answer to the question referred: charges which represent a consideration for the voluntary use of public services are not national taxes within the meaning of the second paragraph of Article 12 of the Protocol on the Privileges and Immunities of the European Community even if the charges are computed on the basis of the salary which is paid to the official by the European Communities.