organization for the national organizations. Thus Article 12 constitutes a fundamental rule and any possible exception, which in any event must be strictly construed, must be clearly laid down.

3. Articles 39 to 46 contain nothing conferring exemption from Article 12.

4. Article 12 also prohibits measures taken within the framework of a market organization in so far as they constitute customs duties or charges having equivalent effect.

5. A market organization is a combination of legal institutions and measures on the basis of which the appropriate authorities seek to control and regulate the market.
Therefore a market organization cannot possibly be separated from its constituent institutions, nor can it exist independently of these institutions.
The maintenance of a national market organization cannot possibly mean anything other than the maintenance of the institutions on which it depends. On any other view the concept of a national market organization would lose all force and plain meaning.

In Joined Cases 90 and 91/63

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Georges Le Tallec, Legal Adviser of the European Executives, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz, Luxembourg,

applicant,

v

GRAND DUCHY OF LUXEMBOURG (Case 90/63), represented by Édouard Molitor, Assistant Legal Adviser at the Ministry of Foreign Affairs, Luxembourg, acting as Agent, with an address for service in Luxembourg, at the Ministry of Foreign Affairs, Luxembourg, 5 rue Notre-Dame,

and

KINGDOM OF BELGIUM (Case 91/63), represented by the Deputy Prime Minister, and Minister of Foreign Affairs, by his Agent Jacques Karelle, Director at the Ministry of Foreign Affairs and Foreign Trade, assisted by Marcel Verschelden, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Belgian Embassy, 9 boulevard Prince-Henri,

defendants,

Application concerning the introduction by the defendants, after 1 January

1958, of a special duty leviable upon the issue of import licences for certain milk products,

THE COURT

composed of: Ch. L. Hammes, President, A. M. Donner (Rapporteur) and R. Lecourt, Presidents of Chambers, L. Delvaux and A. Trabucchi, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I—Facts and procedure

It is common ground that by Royal Decree of 3 November 1958 and by Grand-Ducal Decree of 17 November 1958 the Belgian and Luxembourg governments introduced a duty levied on the issue of import licences for certain milk products. Maximum rates were fixed by these decrees, and the amounts actually charged were fixed in each case by a ministerial order made on the same day. These duties were later amended by both governments by a long series of orders fixing the maximum rates and the rates actually charged.

The Commission took the view that these measures, which applied to the importing of products originating in Member States or in free circulation in those States, were contrary to Article 12 of the Treaty. So by letter of 8 November 1961 it expressed its disapproval of the maintenance of these measures to the Belgian and Luxembourg governments, and invited them to present their observations on this matter. On 19 April 1963 the Commission, after receiving these observations, issued a reasoned opinion dated 3 April 1963 under the first paragraph of Article 169 of the Treaty stating that the two governments had failed to fulfil their obligations arising out of Article 12 of the Treaty and inviting them to take the measures necessary to comply with it within a period of one month.

By letter of 8 May 1963 the Belgian government stated that it agreed 'to abolish the duties in force on licences for milk products so soon as an adequate substitute formula is established by agreement with the Commission'. By letter of 9 May 1963 the Luxembourg government stated that it supported the attitude adopted by the Belgian government for the products in question.

Since the levying of the duties in question was continued the Commission instituted the present proceedings on 15 October 1963.

By order dated 28 November 1963 the Court joined the two cases as having related subject-matter.

The procedure followed the normal course.

II—Submissions of the parties

In each of the two cases the *applicant* claims that the Court should hold that the imposition and the charging of 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 cheese, decided upon by the defendant and introduced after 1 January 1958, are contrary to the Treaty, especially Article 12 thereof.

The applicant also asks that in each case the defendant should be ordered to pay the costs.

The *defendants* contend that the Court should declare the application inadmissible, further declare that it is unfounded, dismiss it and order the applicant to pay the costs.

On admissibility

The defendants assert first of all that according to the terms of its Resolution of 4 April 1962 the Council, considering that it was necessary to make a regulation setting up a system of levies and gradually establishing a common organization of the markets in the milk products sector, agreed to take a Decision on the basis of Article 43 of the Treaty before 31 July 1962 such that the regulation referred to above would come into force on 1 November 1962 at the latest and invited the Commission to present its proposals on this matter before 1 May 1962.

Therefore in this case it is impossible to recognize a right vested in the Community to have recourse to law with a view to compelling the two countries concerned to withdraw measures which would long since have been introduced in another form if the Community had fulfilled its obligations within the time-limits laid down.

The applicant disputes the soundness of this objection and asserts in the first place that in this case it is not the 'Community' but more precisely the Commission which is having recourse to law, and that the Commission has not failed in any obligation since it conformed with the Council Resolution of 4 April 1962, by presenting its proposal as early as 7 May 1962.

Furthermore in order to reject the objection of inadmissibility which has been raised it need only be observed that the infringement of the Treaty alleged against the Belgian and Luxembourg governments goes back respectively to 3 November 1958 and 17 November 1958 and is thus several years earlier than the wrong of which the defendants accuse the Community. Whatever else may be said, the setting up of a common agricultural policy for milk products could not in any case put right a past breach of the Treaty committed by the defendants.

The defendants reply in the rejoinder that Article 169 of the Treaty does not empower the Commission to bring proceedings before the Court of Justice for infringements committed by Member States at any time, applications provided for in this Article being admissible in so far as the infringement alleged against a Member State continues after expiry of the time-limit for compliance with the obligations of the Treaty which the Commission has given that State in its reasoned opinion.

If the Community itself infringes the Treaty prior to the expiry of this time-limit and if the consequence of that infringement is that the Member State does not comply with obligations arising under the Treaty, it cannot be considered as admissible for the Community to institute proceedings before the Court of Justice with a view to establishing a failing on the part of that State.

On the Substance

The applicant starts by recalling the

fact that under Article 12 of the Treaty Member States shall refrain from introducing between themselves any new customs duties on imports or charges having equivalent effect and that, failing any limitation indicated to the contrary, this prohibition must be interpreted as applying to all taxes in so far as their effect is equivalent to that of customs duties on imports.

A special duty levied upon the issue of import licences for certain goods constitutes a charge having an effect equivalent to customs duties as the Court of Justice has recognized in its judgment of 14 December 1962 (Joined Cases 2 and 3/62). It follows from this that the duties in question are thus comparable to charges of this kind and that, since they were introduced after the Treaty came into force, their introduction was contrary to the requirement of the 'standstill' propounded by Article 12 of the Treaty.

According to Article 38 (2) of the Treaty, 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.

If the existence of a national market organization can justify exceptions to the obligation to abolish barriers to imports, these exceptions to the principle that the development of trade is brought about by the free circulation of goods are only a logical consequence of Articles 40, 43 and 45 of the Treaty, because respect for the abovementioned principle would in fact render nugatory the application of provisions allowing for the conclusion of long-term agreements or contracts mentioned in Article 45, and presupposing the continuance of national market organizations until the establishment of a common organization of agricultural markets (Articles 40 and 43).

This however proves that none of these provisions may, considering the intention behind them, be interpreted as justifying an exception to the 'standstill' principle laid down by Article 12 of the Treaty, because, first, the 'standstill' does not ensure the development of trade, but simply maintains the status as at the coming into force of the Treaty and, secondly, the 'standstill' principle does not prevent the carrying out of longer-term agreements or contracts and does not prevent Member States from maintaining their existing national market organizations pending the establishment of a common organization of agricultural markets.

Without making any exceptions to these principles the Commission has simply allowed, in certain cases, the continuance in force as before of import duties the rates of which vary in response to fluctuations of prices on the world market, and which were an integral part of a national market organization as it existed at the moment when the Treaty entered into force, because the levying of these duties did not introduce any new or additional barrier to trade. The defendants object that no infringement of the Treaty has been committed in this case.

From a general point of view the Treaty does not lay down for agriculture the application of the system of free circulation of goods without its being accompanied by a common agricultural policy based on a common organization of markets.

The common agricultural policy for milk products had not been established either when the Treaty came into force, or on the date when notice of the opinion of the Commission was given, or when the present application was made. Therefore the application of the rules concerning the elimination of barriers to trade was not required at the dates referred to above but to apply them would have been contrary to Articles 39 to 46 of the Treaty, because their application is such as to jeopardize the achievement of the aims of the common agricultural policy, for it would have

had the effect of destroying the stability of markets that this policy is supposed to ensure in due course.

As a form of guarantee granted to Member States, the permission to maintain national market organizations until the establishment of the common organization of markets connotes the inapplicability of the 'standstill' laid down in Article 12 to agricultural products so long as the common agricultural policy has not been set up.

Since the 'standstill' principle is on a par with the progressive elimination of barriers to imports as one of the essential means which the Treaty relies on for achieving the free movement of goods, it would be contradictory to claim that the progressive elimination of these barriers is not in the circumstances outlined above, applicable to agricultural products, whereas the 'standstill', on the other hand, is applicable to them in its entirety.

Both the progressive abolition of the said barriers and the application of the 'standstill' would bring about the dissolution of national market organizations because the restrictions and duties on imports, which are integral parts of such organizations, could no longer respond to world prices and would therefore become ineffective.

In recognizing, as the applicant does, that import duties the rates of which vary in response to fluctuations of price on the world market, and which existed when the Treaty came into force, are not incompatible with the Treaty and do not strengthen pre-existing barriers to trade, the applicant seems to admit that national market organizations imply exceptions to the 'standstill' principle at least as it conceives that principle to be.

There is no point in the maintenance of national organizations unless they are allowed to be effective.

Agriculture is not static but essentially evolutionary and an amendment to provisions already in existence at the date when the Treaty entered into force, or the introduction of new measures, may be necessary so as to ensure that the national market organization will continue to be completely effective under new conditions and that the national products will command a ready sale.

Thus the right which is recognized by Articles 43 and 45 to maintain national market organizations does not mean so much the maintenance of the various arrangements applied when the Treaty came into force as the maintenance of the organizations themselves, and this right allows all measures necessary to that end.

Therefore, contrary to the opinion of the applicant, the disputed duties are not an additional barrier compared with those existing when the Treaty came into force, but are simply one of the means foreseen as a way of maintaining the effective national market organization in milk products in the two countries concerned.

The *applicant* further affirms that no national market organization existed for the products in question in Belgium and in the Grand Duchy of Luxembourg when the Treaty came into force. To support this assertion it relies on the legislation in force on this subject in Belgium on 1 January 1958, and on the fact that at that date no legal provision provided for control over imports of those products into the Grand Duchy of Luxembourg so far as it is aware.

On the basis both of the Spaak report and of Article 40 of the Treaty, legal theory and certain statements of the Commission itself, the *defendants* argue that a national market organization consists in essence of internal controls the practical result of which is to eliminate foreign competition or to control it at will.

They then set out the facts proving the existence of a national organization of the market in milk products within the meaning of the Treaty in the two countries in question.

Grounds of judgment

Admissibility

The defendants, arguing that the application is inadmissible, complain that the Community failed to comply with the obligations falling on it by reason of the Resolution of the Council of 4 April 1962, and was thus responsible for the continuance of the alleged infringement of the Treaty, which should have ceased before the issue of the reasoned opinion under Article 169. In their view, since international law allows a party, injured by the failure of another party to perform its obligations, to withold performance of its own, the Commission has lost the right to plead infringement of the Treaty. However this relationship between the obligations of parties cannot be recognized under Community law.

In fact the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. Therefore, except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.

Moreover, the Resolution of the Council to take a decision under Article 43 by 31 July 1962 at the latest, so that the rules for milk products would enter force by 1 November 1962 at the latest, does not create time-limits having the same effect as those laid down in the Treaty. The intention of the authors of the measures is clear from the fact that they adopted it under a style and form which are not those of the binding measures of the Council within the meaning of Article 189 of the Treaty. Therefore the Council did not infringe the Treaty when it failed to observe the time-limits which it had set itself in its Resolution of 4 April 1962.

Furthermore the alleged breach of Article 12 of the Treaty was not caused by anything done by the Community, particularly the Council. The disputed Belgian and Luxembourg decrees were made before both the Resolution of 4 April 1962 and the time-limits laid down therein, and nothing proves that they somehow became different just because the said time-limits expired.

On the other hand, according to the arguments put forward by the defendants themselves, had the Resolution of 4 April 1962 been carried out as

was hoped, this would at most have led the defendants to withdraw the said measures but not to legalize them retroactively. Thus neither the nature of the disputed Decrees nor their legality with reference to the Treaty can possibly have been altered by the failure to observe the time-limits laid down in the Resolution of 4 April 1962.

Finally the defendants appear to argue that so long as the Community had not fulfilled the obligation to establish a common agricultural policy it could not be heard in applications brought under the second paragraph of Article 169 against a Member State for failure to eliminate barriers concerning agricultural products as contemplated in Articles 12 and 13 of the Treaty. This question comes down in fact to the problem of how far the provisions of the Title concerning agriculture derogate from Article 12; thus it is a question of substance, not of admissibility.

The application is therefore admissible.

The substance

It is not disputed that the contested measures are customs duties on imports or charges having equivalent effect within the meaning of Article 12 of the Treaty, and that they were introduced after the Treaty entered into force. The defendants only argue that this provision does not apply in the present case.

To this end they state that Article 38 (2) provides 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 of the Treaty, and that it is clear particularly from Articles 43 and 45 that national market organizations shall continue to function so long as one of the forms of common organization mentioned in Article 40 (2) has not replaced them. The defendants further argue that it follows from these provisions combined with those of Article 44 that until national organizations have been replaced the elimination of barriers to trade, in this case customs duties between Member States, is not compulsory. Thus their view is that, since the contested measures form an integral part of the organization of the Belgian and Luxembourg markets for milk products, they are not caught by Article 12 so long as a common organization of the said markets has not entered into force.

A distinction should be drawn between the prohibition in Article 12 on creating any new customs duties or increasing existing ones and the subse-

quent provisions concerning the progressive abolition of customs duties between Member States. The only problem is whether the introduction of new customs duties on agricultural products is caught by Article 12.

It follows that, insofar as the defendants case is designed to prove that the progressive elimination of customs duties in the sphere of agriculture could only take place parallel with the substitution of a common organization of the agricultural market for national market organizations, it is not relevant here.

Article 12 prohibits the introduction of new customs barriers, so as to facilitate the integration of national markets and the establishment of a common market. Without constituting of itself a measure removing economic protection, this prohibition of any new form of protection by way of customs duties constitutes an essential requirement both for the substitution of a common market for the different national markets and for the substitution of a common agricultural organization for the national organizations. Thus Article 12 constitutes a fundamental rule and any possible exception, which in any event must be strictly construed, must be clearly laid down.

Articles 39 to 46 of the Treaty do not contain any provision explicitly contrary to the prohibition of new customs barriers in the agricultural sector. On the contrary, Article 44 which, in terms similar to those of Article 13, decrees the 'progressive abolition of customs duties', whilst providing for a possible exemption from the provisions concerning the elimination of customs duties, contains nothing from which any sort of exception to the principle laid down in Article 12 can be inferred.

Furthermore Article 44 (2), which provides that minimum prices shall not cause a reduction of the trade existing between Member States, is based on a concern identical to that shown in Article 12. The same is true of Article 45, paragraph (2) of which provides that, as regards quantities, the agreements contemplated shall be based on the average volume of trade during the three years before the entry into force of the Treaty, and provides for an appropriate increase.

Thus Articles 39 to 46 contain nothing conferring exemption from Article 12.

However, the defendants allege that such a conclusion miscontrues the nature and functioning of national market organizations. They assert that the right given to Member States to maintain the said organizations implies that they are free to avail themselves not only of the means used at the date

when the Treaty came into force, but also of all those necessary to preserve their effectiveness and to adapt them to changes in circumstances.

Such a distinction between market organizations, on the one hand, and the legal institutions and measures constituting them, on the other, cannot be admitted. A market organization is a combination of legal institutions and measures on the basis of which appropriate authorities seek to control and regulate the market. Therefore a market organization cannot possibly be separated from its constituent institutions, nor can it exist independently of these institutions. The maintenance of a national market organization cannot possibly mean anything other than the maintenance of the institutions on which it depends. On any other view the concept of a national market organization would lose all force and plain meaning.

Thus the argument that prohibition on the use of new measures must gradually lead to national market organizations losing their effectiveness and so jeopardize agricultural activity during the transitional period is unfounded. The Treaty expressly provides means and special procedures for remedying the difficulties in question under the supervision of the Community authorities or with their approval.

Thus Article 12 applies also to measures taken within the framework of a national market organization in so far as they constitute customs duties or charges having equivalent effect. It therefore becomes superfluous to examine whether the Belgian and Luxembourg market organizations concerned do or do not exist. From all the above it follows that the disputed measures were taken in infringement of Article 12.

Therefore the applications are well founded.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs. The defendants have failed in their submissions.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Com-

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.