application, may be regarded as a duty imposed unilaterally either at the time of importation or subsequently, and which, if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect on the free movement of products as a customs duty.

This concept, far from being an exception to the general rule prohibiting customs duties, is on the contrary necessarily complementary to it and enables it to be made effective.

The concept of a charge having equivalent effect, invariably linked to that of 'customs duties', is evidence of a general intention to prohibit not only measures which obviously take the form of the classic customs duty but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory or protective results as customs duties.

5. Although the first paragraph of Article 95 by implication allows 'taxation' on an imported product, it is only to the limited extent to which the same taxation is imposed equally upon similar domestic products. The field of application of this Article cannot be extended to the point of allowing compensation between a tax burden created for the purpose of imposition upon an imported product and a tax burden of a different nature, for example economic, imposed on a similar domestic product.

6. To resolve the difficulties which might arise in a given economic sector, the Member States wished Community procedures to be established in order to prevent unilateral intervention by national administrations.

In Cases 2 and 3/62

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Hubert Ehring, Legal Adviser of the European Executives, acting as Agent, with an address for service in Luxembourg at the Chambers of Henri Manzanarès, Secretary of the Legal Service of the European Executives, 2 Place de Metz,

applicant,

v

1. GRAND DUCHY OF LUXEMBOURG (Case 2/62) represented by Jean Rettel, Legal Adviser attached to the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Ministry of Foreign Affairs, 5 rue Notre-Dame,

and

2. KINGDOM OF BELGIUM (Case 3/62) represented by its Deputy Prime Minister and Minister of Foreign Affairs, having appointed as its Agent

Jacques Karelle, Director of the Ministry of Foreign Affairs and Foreign Trade, assisted by Marcel Verschelden, Advocate of the Cour d'Appel of Brussels, with an address for service in Luxembourg at the Belgian Embassy, 9 Boulevard du Prince-Henri,

defendants,

Application for a ruling on the legality of:

— Increases in the special duty levied by Belgium and Luxembourg on the issue of import licences for gingerbread; and

— The extension of that duty to products similar to gingerbread under Heading No 19.08 of the Common Customs Tariff;

which is contested on the ground that they were introduced after 1 January 1958;

THE COURT

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

Advocate-General K. Roemer

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

In Belgium and Luxembourg, by Decrees of 16 August 1957 and 20 August 1957 respectively, a special import duty was created which was to be levied upon the issue of import licences for gingerbread.

After the entry into force of the Treaty on 1 January 1958, the amount of this duty, which was originally fixed at 35 francs per 100 kg., was progressively increased to 137 francs in 1961 and thereafter reduced to 95 francs and then to 70 francs at the end of that year.

Finally, by Decrees of 24 and 27 February

1960 respectively, the special duty was extended in both countries to products similar to gingerbread coming under Heading No 19.08 of the Common Customs Tariff.

The Commission complained to the Belgian and Luxembourg Governments by letter of 19 May 1961 that they had failed to fulfil their obligations under Article 12 of the Treaty and, after receiving their observations, sent them on 2 October 1961 a reasoned opinion dated 27 September 1961 in which it stated that they had infringed the Treaty and invited them to take the necessary measures to comply with the Treaty within a period of one month.

Having obtained an extension of this period until the end of November, the two Governments by letters of 27 November and 4 December 1961, without denying that 'a unilateral measure is of its very nature open to criticism', expressed the wish to obtain the authorization of the Commission, under Article 226 of the Treaty, to levy on imports of gingerbread coming from Member States a charge having equivalent effect to the special duty.

By a letter dated 20 December 1961 the Commission declared that it was prepared to examine as a matter of urgency the particular situation with regard to the products in question, on condition that the special duty, which had been increased or put into effect after 1 January 1958, should be suspended until a decision had been given on the protective measures sought.

The Governments concerned did not agree to this proposal and, by letters dated 1 and 17 February 1962, they declared that they were relying upon a decision taken under Article 235 of the Treaty, and confirmed on 4 April 1962 by the Council of Ministers of the Community, which provided for the imposition of duties on the imports of certain goods arising from the processing of agricultural products.

The Commission then brought two actions before the Court under Article 169 of the Treaty, in which it sought declarations that Belgium and Luxembourg had failed to fulfil their obligations under the Treaty. The applications were lodged at the Court Registry on 21 February 1962.

By an Order dated 19 June 1962 the Court joined the two cases on the ground that they related to the same subject matter, since the Grand Duchy of Luxembourg had adopted the same conclusions and arguments as the Kingdom of Belgium.

The procedure followed the normal course.

Following an application to the Court by the defendants which was lodged at the Court Registry on 10 November 1962, and thus made after the oral procedure had closed, and which contained a request for the reopening of the said procedure, the Court dismissed the request by an Order dated 3 December 1962.

II — Conclusions of the parties

The Commission asks the Court 'to find that, by increasing the special import duty levied on the issue of import licences for gingerbread after the Treaty entered into force, and by extending the levy of this duty to products similar to gingerbread coming under Heading No 19.08 of the Common Customs Tariff', Luxembourg and Belgium have 'failed to fulfil their obligations under the Treaty'.

It further asks the Court to order Belgium and Luxembourg to pay the costs.

The defendants ask the Court to 'declare the application inadmissible' and to 'state that there are no grounds for adjudicating upon it'.

They also ask the Court to 'declare the application in any event to be unfounded' and to 'dismiss it and order the applicant to pay the costs'.

III — Arguments of the parties

On Admissibility

The defendants have pleaded the inadmissibility of the application made by the Commission on the ground that, instead of following as it did the procedure laid down in Article 169, the Commission was obliged to deal as a matter of priority and urgency with their request for authorization of protective measures pursuant to Article 226 and with their request that the Regulation of the Council of Ministers adopted pursuant to Article 235 should be applied, both requests having been made in good time. The defendants state that in these circumstances the Commission is deprived of the capacity and the legal interest necessary for the purposes of taking action and that therefore its cause of action has lost all legal effect.
The applicant has answered this allegation by referring to the delay in making the requests mentioned above and the deficiency of the reasoning on which they were based, the impossibility of rectifying the situation created by a refusal to comply with a reasoned opinion by means of a subsequent request for a derogation from that opinion, the absence of any connexion between the procedure under Article 169 and that under Article 226, and finally the Commission's interest in obtaining a decision to settle the dispute on the interpretation of Article 12.

On the substance of the case

The applicant states that a charge having equivalent effect to a customs duty within the meaning of Article 12 is a charge levied on imported products only. In its view there is only one effect on the movement of goods which is common to all customs duties, namely the taxation of imported products alone, to the exclusion of domestic products. It suggests that the first paragraph of Article 95 cannot be interpreted in any other way.
Although the Commission does not deny the legality of a special duty in respect of rye, which is a raw material for making gingerbread, because rye is covered by the agricultural provisions of the Treaty, it cannot equate gingerbread, which is a processed product excluded from Annex II to the Treaty, with an agricultural product.
The defendants plead that, to constitute a charge having equivalent effect to a customs duty, the charge must have similar effects in all respects and not just in one specific aspect, whether fiscal or protective.

They stress the following points:

— the essential effect of the special duty at issue is not to impose burdens on foreign products but, through the operation of an independent marketing policy, to align their prices on those in the domestic market by means of a kind of compensation;
— the effect of the special duty is to enable the domestic market to be organized, and this is not illegal;
— the duty on gingerbread varies in accordance with the duty on rye the legality of which has not been called in question;
— the Council of Ministers has provided for the levy of a countervailing charge on certain goods resulting from the processing of agricultural products.

Grounds of judgment

On admissibility

In claiming the application to be inadmissible, the defendants submit that

the Commission has prevented the rectification of the situation under consideration by improperly demanding the suspension of the measures criticized before deciding upon the requests for derogation put forward by them both under Article 226 of the Treaty and under a Regulation adopted by the Council of Ministers on 4 April 1962, pursuant to Article 235. By 'abusing its powers and by adopting an excessively legalistic attitude' and by failing to decide as a matter of urgency upon the requests, as it was obliged to do, the Commission has in the defendants' submission, lost the right to take proceedings against the defendants for infringement of the Treaty.

As the Commission is obliged by Article 155 to ensure that the provisions of the Treaty are applied, it cannot be deprived of the right to exercise an essential power which it holds under Article 169 to ensure that the Treaty is observed. If it were possible to prevent the application of Article 169 by a request for rectification, that Article would lose all its effect.

A request for derogation from the general rules of the Treaty — in this case, moreover, made at a very late date — cannot have the effect of legalizing unilateral measures which conflict with those rules and cannot therefore legalize retroactively the initial infringement.

The procedures for seeking a derogation used in the present case, the outcome of which depended upon the view taken by the Commission, are entirely distinct both in their nature and effects from the warning procedure available to the Commission under Article 169: they cannot in any way frustrate the latter procedure. There is no need to consider whether a possible abuse by the Commission of its rights can deprive it of all the methods available to it under Article 169, as it suffices to state that in this case no proof of such an abuse has been given or tendered.

It emerges from the oral procedure, moreover, that the defendants neglected to furnish the Commission with the necessary details to enable it to decide upon their requests. What is more, any wrongful act or default on the part of the Commission — which would have to be decided upon in an action especially brought on this point — would not in any way affect the proceedings for infringement of the Treaty brought in respect of decisions which still subsist at present and the legality of which the Court is bound to examine.

The applications must therefore be declared admissible.

On the substance of the case

The applications are brought for the purpose of obtaining a declaration of illegality in respect of the increase of the special import duty on gingerbread imposed after the Treaty entered into force, and of the extension of that duty to other similar products considered as a charge having equivalent effect to a customs duty prohibited by Articles 9 and 12.

1. *A charge having equivalent effect to a customs duty*

According to the terms of Article 9, the Community is based on a customs union founded on the prohibition of customs duties and of 'all charges having equivalent effect'. By Article 12 it is prohibited to introduce any 'new customs duties on imports . . . . or charges having equivalent effect' and to increase those already in force.

The position of these Articles towards the beginning of that Part of the Treaty dealing with the 'Foundations of the Community' — Article 9 being placed at the beginning of the Title relating to 'Free Movement of Goods', and Article 12 at the beginning of the section dealing with the 'Elimination of Customs Duties' — is sufficient to emphasize the essential nature of the prohibitions which they impose.

The importance of these prohibitions is such that, in order to prevent their evasion by different customs or fiscal practices, the Treaty sought to forestall any possible breakdown in their application.

Thus it is specified (Article 17) that the prohibitions contained in Article 9 shall be applied even if the customs duties are fiscal in nature.

Article 95, which is to be found both in that Part of the Treaty dealing with the 'Policy of the Community' and in the Chapter relating to 'Tax Provisions', seeks to fill in any loop-hole which certain taxation procedures might find in the prescribed prohibitions.

This concern is taken so far as to forbid a State either to impose in any manner higher taxation on the products of other Member States than on its own or to impose on the products of those States any internal taxation of such a nature as to afford indirect 'protection' to its domestic products.

It follows, then, from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and of the Treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated.

The concept of 'a charge having equivalent effect' to a customs duty, far from being an exception to the general rule prohibiting customs duties, is on the contrary necessarily complementary to it and enables that prohibition to be made effective.

This expression, invariably linked to that of 'customs duties' is evidence of a general intention to prohibit not only measures which obviously take the form of the classic customs duty but also all those which, presented under other names or introduced by the indirect means of other procedures, would lead to the same discriminatory or protective results as customs duties.

In order to see whether a charge has an equivalent effect to a customs duty, it is important to consider this effect in connexion with the objectives of the Treaty, notably in that Part, Title and Chapter containing Articles 9 and 12, that is in relation to the free movement of goods, and still more generally the objectives of Article 3 which are aimed at preventing the distortion of competition.

It is, therefore, of little importance to know whether all the effects of customs duties are present at the same time, or whether it is merely a question of one only, or again whether side by side with these effects other principal or ancillary objectives were intended, since the charge jeopardizes the objectives of the Treaty and is the result not of a Community procedure but of a unilateral decision.

It follows from all these factors that a charge having equivalent effect within the meaning of Articles 9 and 12, whatever it is called and whatever its mode of application, may be regarded as a duty imposed unilaterally either at the time of importation or subsequently, and which, if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect upon the free movement of products as a customs duty.

2. *Application to the present case*

The duty on gingerbread, introduced in Belgium by Royal Decree of 16 August 1957 and in Luxembourg by Grand Ducal Decree of 20 August

1957, is described as 'a special import duty. . . . levied on the issue of import licences'. The legality of this duty, imposed after the signing of the Treaty but before it entered into force, cannot be disputed.

The same cannot be said, however, of the increases in that duty subsequent to 1 January 1958 or of the extension of the said duty, by the respective Decrees of 24 and 27 February 1960 passed in the two countries, to products similar to gingerbread, coming under Heading No 19.08 of the Common Customs Tariff.

Determined unilaterally after the Treaty entered into force, these increases in a 'special duty', levied at the time and on the occasion of the importation of the products in question and imposed solely on these products by reason of their importation, raise a presumption of the existence of discrimination and protection contrary to the fundamental principle of the free movement of products which would be destroyed by the general application of such practices.

The defendants rebut this presumption—by asserting that the first paragraph of Article 95 of the Treaty permits the institution of such a duty if it constitutes the counterpart of internal charges affecting domestic products to meet the needs of an independent marketing policy. They regard the duty in dispute as the corollary of the supported price established for the benefit of national producers of rye under the derogations contained in the agricultural provisions of the Treaty.

However, the application of Article 95, with which Chapter 2 of Part Three of the Treaty dealing with 'Tax Provisions' begins, cannot be extended to every kind of charge. In the present case the duty in dispute does not appear, either by its form or by its clearly proclaimed economic purpose, to be a tax provision capable of coming within the scope of Article 95. Moreover, the field of application of this Article cannot be extended to the point of allowing compensation between a tax burden created for the purpose of imposition upon an imported product and a tax burden of a different nature, for example economic, imposed on a similar domestic product.

If such compensation were permitted, every State, by virtue of its sovereignty in its own domestic affairs, could in this manner compensate the widest variety of tax burdens imposed on any product and this practice would open an irreparable breach in the principles of the Treaty.

Although the first paragraph of Article 95 by implication allows 'taxation' on an imported product, it is only to the limited extent to which the same taxation is imposed equally upon similar domestic products. Moreover, it must be stated that in the present case the duty in dispute has as its object not the equalization of taxes imposing unequal burdens on domestic products and imported products but of the very prices of these products.

The defendants have in effect asserted that the charge in dispute was intended to 'equate the price of the foreign product with the price of the Belgian product' (Statement of Defence, p. 19). They have even expressed doubt whether it is 'compatible with the general scheme of the Treaty that within the Common Market the producers of one country may acquire raw materials at a cheaper price than the producers of another Member State' (Rejoinder, p. 29).

This argument ignores the principle according to which the activities of the Community shall include the institution of a system ensuring that competition in the Common Market is not distorted (Article 3 (f)).

To accept the argument of the defendants would lead, therefore, to an absurd situation which would be the exact opposite of that intended by the Treaty.

It follows from Article 38 (2) that the derogations allowed in the case of agriculture from the rules laid down for the establishment of the Common Market constitute measures which are exceptional in nature and must be narrowly interpreted.

They cannot, therefore, be extended otherwise than by making the exception the rule and therefore allowing a large proportion of processed products to escape the application of the Treaty.

The list contained in Annex II must consequently be regarded as being restrictive, and this is confirmed by the second sentence of Article 38 (3). Gingerbread does not appear in the products enumerated in Annex II and has not been added to the list under the Community procedure laid down by Article 38 (3).

To resolve the difficulties which might arise in a given economic sector, the Member States wished Community procedures to be established in order to prevent unilateral intervention by national administrations. In the present

case, however, the increases and extension of the duty in dispute were determined unilaterally. It follows from all these factors that the presumption of discrimination and protection raised against the defendants has not been rebutted. Moreover, until their request of 8 November 1962 for the reopening of the oral procedure they did not dispute that their market policy 'results indirectly in protection' (oral arguments on behalf of Belgium, p. 21), this being, according to them, only a side-effect and not the essential effect of the duty in dispute.

The said application of 8 November 1962, which contradicts this assertion, recognizes however that the special duties in dispute 'certainly constitute a hindrance to the free movement of goods".

Finally, in its letter of 27 November 1961, the Belgian Government, which in its Rejoinder (p.13) submits that the Commission 'was the cause of the perpetuation of the infringement which the defendant had shown that it was prepared to terminate', did not deny that 'a unilateral measure is of its very nature open to criticism'.

From all these considerations it must be concluded that the 'special import duty' on gingerbread, increased and extended in Belgium and Luxembourg after the Treaty entered into force, contains all the elements of a charge having equivalent effect to a customs duty referred to in Articles 9 and 12.

It must therefore be declared and adjudged that the decisions to increase or extend this duty, taken after 1 January 1958, constituted infringements of the Treaty.

Costs

The defendants, having failed in all their submissions, must, by virtue of Article 69 (2) of the Rules of Procedure, be ordered to bear the costs.

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 Articles 3, 9, 12, 17, 38, 95, 155, 169, 226 and 235 of the Treaty establishing the European Economic Community;
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, especially Article 69 (2);

THE COURT

hereby

1. **Rules that Applications 2 and 3/62 brought by the Commission of the European Economic Community against the Grand Duchy of Luxembourg and the Kingdom of Belgium are admissible and well founded;**

2. **Declares that the increases in the special duty determined by Luxembourg and Belgium on the issue of import licences for gingerbread, and the extension of that duty to products similar to gingerbread coming under Heading No 19.08 of the Common Customs Tariff, introduced after 1 January 1958, are contrary to the Treaty;**

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

Donner Delvaux Rossi
Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 14 December 1962.

On behalf of the President
A. Van Houtte
Registrar

L. Delvaux
President of Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 30 OCTOBER 1962[1]

Mr President,
Members of the Court,

The Commission of the European Economic Community which, in accordance with the Treaty, supervises the application of its provisions in order to ensure the proper functioning and development of the Common Market (Article 155), has instituted two actions,

1 — Translated from the German.