In Joined Cases 90 and 91/63

COMMISSION OF THE EUROPEAN [UNION], 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 Manzanares, 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 Edouard 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 Routte

gives the following

JUDGMENT

Grounds of judgment

The defendants, arguing that the application is inadmissible, complain that the [Union] failed to comply with the obligations falling on it by reason of the Resolution of the Council of 4 April 1962, and as 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 258 TFEU]. In their view, since international law allows a party, injured by the failure of another party to perform its obligations, to with[h]old 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 [Union] 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 [TFEU] 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 288 TFEU]. 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 30 TFEU] was not caused by anything done by the [Union], 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 [Union] 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 258 TFEU] against a Member State for failure to eliminate barriers concerning agricultural products as contemplated in [Article 30 TFEU]. This question comes down in fact to the problem of how far the provisions of the Title concerning agriculture derogate from [Article 30 TFEU]; 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 30 TFEU], 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) [TFEU] 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 44 TFEU], and that it is clear particularly from Articles 43 [TFEU] and 45 [repealed] that national market organizations shall continue to function so long as one of the forms of common organization mentioned in [Article 40(1) TFEU] has not replaced them. The defendants further argue that it follows from these provisions combined with those of Article 44 [repealed] 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 30 TFEU] 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 30 TFEU] on creating any new customs duties or increasing existing ones and the subsequent 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 30 TFEU].

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 30 TFEU] 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 30 TFEU] constitutes a fundamental rule and any possible exception, which in any event must be strictly construed, must be clearly laid down.

[Articles 39 to 44 TFEU] do not contain any provision explicitly contrary to the prohibition of new customs barriers in the agricultural sector. On the contrary, Article 44 [repealed] which, in terms similar to those of [Article 30 TFEU], 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 30 TFEU] an be inferred.

Furthermore Article 44 (2) [repealed], 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 30 TFEU]. The same is true of Article 45, paragraph (2) [repealed] 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 44 TFEU] contain nothing conferring exemption from [Article 30 TFEU].

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 [Union] authorities or with their approval.

Thus Article 12 [repealed] 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 [repealed].

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 [on the Functioning of the European Union], especially [Articles 30, 38 to 44, 258 and 288 TFEU];
Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];
Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

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 [repealed] 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 Routte
Registrar

Ch. L. Hammes
President