THE COURT

in answer to the questions referred to it by the Belgian Cour de Cassation by judgment of that court dated 9 March 1970, hereby rules:

1. **Subject to the exceptions provided for therein, Regulation No 13/64/EEC and the Commission's decision of 17 July 1962 must be interpreted to mean that importers of goods from another Member State may only benefit from the intra-Community scheme in respect of goods covered by certificate DD4;**

2. **This interpretation must also be applied where it is necessary to establish the amount of levies evaded as a result of fraudulent importation, even though the Community origin of the product in question could be established by means other than the said certificate.**

Lecourt Donner Trabucchi

Strauß Monaco Martens de Wilmars Pescatore

Delivered in open court in Luxembourg on 22 October 1970.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 SEPTEMBER 1970[1]

Mr President,
Members of the Court,

The request for a preliminary ruling with which we have to deal today was submitted by the Belgian Cour de Cassation. Mr Craeynest and Mr Vandewalle, found guilty of complicity in the fraudulent importation from The Netherlands of 12 000 kilogrammes of butter, were sentenced by the Belgian criminal courts to pay the State, which was claiming damages in the action, the sum of 973,560 Bfrs by way of the amount of the levies evaded. This figure corresponded to the rate laid down for imports coming from third countries.

Although the trial judge accepted the fact that the butter came from the Netherlands, he emphasized that the import transaction had not been carried out under cover of a certificate DD4, a goods movement certificate adopted in the Commission's decision of 17 July 1962 for entitlement to benefit from the intra-Community levy scheme which is, as we know, more favourable. Before the Cour de Cassation Mr Craeynest and Mr Vandewalle maintained that once it was found that the product came

1 — Translated from the French.

from the Netherlands, no provision existed authorizing the 'third country' levy to be applied to it.

The Cour de Cassation therefore requests your interpretation of the scope of both Regulation No 13/64 of the Council of 5 February 1964 on the progressive establishment of a common organization of the market in milk and milk products, and of Articles 1 and 2 of the Commission's decision of 17 July 1962 adopting certificate DD4. Considered in conjunction, must these provisions be understood to mean that in the absence of such certificate the importer may *in no case* benefit from the application of the intra-Community levy scheme and from the reduced rate? More precisely, what rule applies to the case of a fraudulent importation of milk products coming from a country of the Community?

1. Although this question does not require lengthy explanation, the reply to it is not obvious. In order to find a solution to this problem, it is necessary to recall the major features of the common organization of the market in the milk sector, as established by Regulation No 13/64, and the place therein of certificate DD4.

Just as for all other goods, the attainment of the objectives of the common market must result, within the Community, in the free movement of agricultural products originating in the Member States or which are in free circulation there. However, this result, which can only be progressive, applies to products the market for which is governed by its own rules, as permitted under Article 39 et seq. of the Treaty. In general terms, the organization of the market is a system of price regulation which involves the fixing, in the interests of producers within the Community, of a price ('target price' or 'reference price'), the intention being to guarantee that price against imports at lower prices by raising the prices of imported products to the level of fixed prices. The machinery used for this purpose is the levy.

The latter is imposed on products imported from third States and also, to a certain extent and on a temporary basis, on intra-Community trade. In fact, under the system established in Regulation No 13/64 and until the adoption of Regulation No 804/68 of 27 June 1968, each Member State determines its own reference prices, within limits fixed by the Community, for the principal milk products, which may therefore vary in price in each State. The levy is also applied in order to protect the highest price fixed by a Member State against imports from another Member State hwere the price level is lower. However, the amount of this levy is calculated in such a way as to grant a trade preference to Community products and it is thus lower than the 'third State' levy.

This system is of course provisional and the intra-Community levies were designed to disappear gradually. They were, however, the necessary means of avoiding the disturbance which the sudden and total abolition of barriers to trade would have caused in the economy of the Community as a whole. Contrary to the arguments put forward by Mr Craeymenst and Mr Vandewalle in the written observations which they submitted to the Court, evasion of the levies cannot be regarded as constituting an act which is contrary only to the interests of the importing country. It is not for commercial operators to anticipate solutions which the Community authorities regard as expedient only on a more or less long-term basis.

The Commission emphasizes that to a large extent the Member States apply this levy machinery according to their own domestic rules. In fact, Article 27 of the Treaty imposes on them only a general obligation to take any steps necessary to approximate their provisions in respect of customs matters laid down by law or regulation, and this situation continued until the introduction of Regulation No 542/69 of the Council of 18 March 1969 based upon Article 235 of the Treaty. It is thus domestic rules which defined in principle the detailed rules for the practical application of the Community preferential scheme. In particular, as regards agricultural products which are the subject of a common organization of the market, the creation of Community arrangements and procedures has not prevented trade in those products being carried on according to the same customs procedures as other goods.

However—and this is the second aspect of the question—as there exists a preferential

Community scheme under which benefit may be claimed as of right for products which qualify under Article 9 (2) of the Treaty, a question of evidence immediately arises where it is necessary to establish that such requirements are in fact satisfied. Article 10 (2) of the Treaty intended to obviate the difficulties which the application of this system might meet as a result of domestic customs regulations which are frequently specific and formalistic, not to say over-meticulous. Concern over this matter resulted in the introduction of certificates DD1 and DD3 by the Commission's decision of 4 December 1968 and 5 December 1960, and of certificate DD4 by the decision of 17 July 1962.

The latter—the only one which concerns us—adapts the system of certificate DD1 to the particular features of trade in agricultural products which are subject to a market organization. It constitutes a 'document in proof' which entitles the goods concerned to the benefit of the intra-Community levy scheme. It is issued at the exporter's request by the customs authorities of the exporting Member State and is endorsed by those authorities on the export of the agricultural products to which it refers. Article 3 of the decision specifies that such endorsement may only be given where it is possible for the certificate to constitute the documentary evidence provided for in Article 1. The document, which is held at the disposal of the exporter once exportation has in fact taken place, is presented to the customs authorities of the importing Member State according to the procedures laid down in the regulations of that State. Under Article 6, the same authorities may in addition require the import declaration to be supplemented by a statement from the importer to the effect that the goods fulfil the conditions required for the application of the intra-Community levy.

2. After this reconstitution of the scheme established by Regulation No 13/64 and the decision of 17 July 1962, what reply must be given to the question referred to you by the Belgian Cour de Cassation?

— On the basis of the wording used, the purpose of the question is to discover whether the abovementioned Decision *compels* the Member States to refuse to apply the reduced rate laid down for the intra-Community levy when it has not been shown, by means of certificate DD4, that the products in question uqalify for admission to the preferential scheme.

There does not appear to be any great obstacle to giving a negative reply.

First, Article 10 (2) of the Treaty, which forms the basis of the decision prescribing the certificate, does not foresee the establishment of a comprehensive Community system to replace domestic rules, but rather administrative cooperation between the Member States, and the new document in proof is intended to be integrated into the customs procedures of the national administrations. As I have said, it is produced in the importing State 'according to the procedures laid down in the regulations of that Member State'.

Secondly, unlike what is laid down in Regulation No 542/69, no provision in the decision expressly orders Member States to adopt certificate DD4 as the sole means of proof or compels them to refuse any other form of proof. There is also no provision which leads to the adoption of so strict an interpretation. I am therefore not convinced by the arguments contained in the written observations submitted by the Belgian Government. The latter considers that it must be *assumed* from the absence of the certificate that the conditions necessary for its issue are not satisfied and that, as a result, the goods in question are not in free circulation. Although this assumption is no doubt justified, it would still be necessarily representing the true situation, and I do not consider this to be implied in that text.

— However, we must go further and ask whether the decision prevents Member States from regarding certificate DD4 as the only possible evidence of the applicability of the Community rules, which would be justified mainly by the fact that commercial operators' compliance with the formalities involved in the production of such documentary evidence depends, to a large extent, on the consequences which result from its absence. It must be noted here that the decision does not prevent Member States from taking such a view. For such an

attitude to be reasonable, however, 'the operator must be in a position to obtain and make use of a certificate in all circumstances. This is foreseen in Article 3 of the decision of 1962, which provides that this document may be endorsed after the goods to which it relates have been exported if, owing to a voluntary error or omission, it was produced when they were exported, and it must then be produced within a period of one month from the date of its being endorsed at the customs office of the importing Member State.

There remains the case, which is that referred to by the Cour de Cassation, in which the certificate was not produced as the result of a voluntary omission, that is, the case of a fraudulent importation. In my opinion there is no reason to allow a swindler, who has placed himself voluntarily in a situation which prevents him from making use of the goods movement certificate to prove by other means that the imported goods qualify for benefit under the intra-Community levy scheme. Moreover, if a State regards certificate DD4 as the sole means of proof and therefore refuses to allow a swindler, to show by other means that the imported goods are Community products, it is the swindler himself who has voluntarily given up the means which were open to him to exercise his rights. I therefore share the view of the Commission that, although the decision of 17 July 1962 does not compel the Member States to refuse the preferential scheme where evidence of the 'Community status' of the goods is not produced by means of certificate DD4, neither does it prohibit their doing so.

It will perhaps be said that although it is the Member States' right and indeed duty to take the measures necessary to prevent fraudulent transactions, they are required to act only within the context and on the basis of their own legislation, and that to apply the 'third country' scheme to imports which are known to come from a Member State is as it were a perversion of the system. I do not consider this argument to be conclusive, taking into account the close connexion in this field between Community provisions and national customs regulations.

One last observation: you will remember that at the hearing the Advocate for the appellants in the main action declared that he agreed with the Commission's argument and with the wording which is suggested, subject to certain additions. He wished to see it specified that, in cases of fraud, the competent authorities in the Member States should decide whether to impose the levy on the basis of the rates applying to imports from third States. I do not believe that I am mistaken in thinking that this formula is intended to prepare for and to support arguments before the Cour de Cassation which would no longer be based on Community law, but on Belgian law. To embark on the course suggested to you would therefore be to exceed your powers.

In conclusion, the reply to be given to the court making the reference to you should be that Regulation No 13/46 of the Council of 5 February 1964 and the Commission's decision of 17 July 1962 must be interpreted to mean that the Member States are not compelled but merely empowered to refuse to apply the intra-Community levy scheme in the absence of certificate DD4 and may thus, in the case of fraudulent importation, even where it is materially possible to establish by other forms of evidence that products imported from a Member State satisfy the requirements of this scheme, calculate the amount of the levies evaded on the basis of the rates applying to imports from third States.