On those grounds,

THE COURT

hereby:

1. **Declares that, by levying storage charges on goods which originate in a Member State or are in free circulation, and which are imported into the Kingdom of Belgium, and presented merely for the completion of customs formalities at a special store, the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 and 12 of the Treaty;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Mertens de Wilmars Pescatore Everling

Mackenzie Stuart Due Bahlmann Galmot

Delivered in open court in Luxembourg on 17 May 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 20 APRIL 1983 [1]

Mr President,
Members of the Court,

1. The cases to which this opinion refers originate in two actions which the Commission brought under Article 169 of the EEC Treaty, against the Kingdom of Belgium (Case 132/82) and the Grand Duchy of Luxembourg (Case 133/82). According to the applicant, the

1 — Translated from the Italian.

defendant States have failed to fulfil their obligations under Articles 9 and 12 of the Treaty inasmuch as they levy 'charges' when goods which originate in a Member State or are in free circulation are present at a special store in a public warehouse.

It may be noted immediately that Luxembourg has adopted the Belgian provisions; the legislation of the two States is therefore essentially identical. The grounds of action are also identical and the defences of the two Governments have been drawn up in similar terms. This makes it possible for me to consider the arguments advanced together, in a single opinion.

2. The provisions to which I have referred may be summarized as follows. The Belgian and the Luxembourg legislation on customs warehouses and temporary storage (the Law of 20 February 1978 and the Royal Decree of 29 January 1979, Moniteur Belge [Belgian Official Gazette] 1978, p. 3174 and 1979, p. 2596 in the case of Belgium; Ministerial Regulations of 21 April 1978 and 29 January 1979, Mémorial [Luxembourg Official Gazette] 1978, p. 508 and 1979, p. 1189 in the case of Luxembourg), provide that 'storage charges' on the goods deposited are payable to those responsible for the running of the public warehouses. The warehouses are generally made available to importers by municipal and port authorities. The latter also collect the charges while the part played by the State is to fix the maximum amount and to lay down rules for the payment thereof. In particular Articles 25 to 28 of the Belgian Law provide first that the charges are calculated at a flat rate with reference to the weight of the goods and to the type of operation involved; secondly they must not exceed 5.50 francs per package or per 100 kg if the goods are unloaded within the store; 3.50 francs per packet or per 100 kg if the load is discharged in the loading bay or the yard; and 13 francs per tonne (with a maximum of 130 francs and a minimum of 58 francs per truck, lorry or trailer), if, with the permission of the customs authorities, the goods are not unloaded.

Special stores are situated in the vicinity of the public warehouses where imported goods which have been declared summarily at the frontier may be stored for up to 15 days, until they have been declared for one of the procedures authorized under Article 35 of the Belgian Law, namely home use, transit, temporary duty-free importation, removal to another special store or another public or private warehouse, a fictitious operation or a fictitious re-exportation. Article 30 of the Royal Decree of 29 January 1979 establishes moreover that the charges are payable from the time at which the goods arrive at the special store, whether or not they are unloaded. Article 34 of the same Decree provides that the importer must pay even if, when the goods are presented, he has obtained an exemption from storage or withdraws them from transit.

3. May I comment briefly on the events which preceded the actions. The Commission took the view that the charges on goods presented at special stores constituted charges having an effect equivalent to customs duties and as such were prohibited by the Treaty. It therefore commenced the procedure laid

down by Article 169 with a letter of formal notice which was sent to Belgium (2 August 1978) and to Luxembourg (16 February 1981). The two Governments replied that the charges in question merely represented payment for a service benefiting the importers which was actually and individually rendered to the latter. However, the Commission was not convinced by their arguments. In consequence it issued reasoned opinions of 13 March 1981 (Belgium) and 8 December 1981 (Luxembourg). Only the Belgian Government replied, but reaffirming its own view. At that point the Commission brought before the Court the two actions which were lodged on 23 April 1982.

4. As the Court is aware, Title I of the EEC Treaty contains the fundamental prohibitions relating to customs duties. Thus Article 9 prohibits customs duties on imports and all charges having equivalent effect for products originating in Member States and for products coming from third countries which are in free circulation in the Community. Article 12 prohibits Member States from introducing or increasing financial charges of the same type.

The case-law of the Court has greatly contributed to the interpretation of the two provisions. In particular it has held that they are fundamental to the system of the Treaty and, by the well known judgment in *van Gend & Loos* ([1963] ECR 1) it has recognized that they have direct effect. It has gradually expanded and refined its interpretation of the concept of a charge having equivalent effect by its numerous, precise references thereto. We may leave aside the initial judgments in which discriminatory and protectionistic ideas still predominated with obviously restrictive results. The geat leap forward came with the judgment in Case 24/68 which identified the concept as "any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier ... even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product" (judgment of 1 July 1969 in Case 24/68 *Commission* v *Italian Republic* [1969] ECR 193, paragraph 9 of the decision and in similar terms the judgment of 1 July 1969 in Joined Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* v *Brachfeld and Chougol* [1969] ECR 211; judgment of 26 February 1975 in Case 63/74 *Cadsky* v *Istituto Nazionale per il Commercio Estero* [1975] ECR 281; judgment of 25 January 1977 in Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5; judgment of 8 November 1979 in Case 251/78 *Denkavit Futtermittel* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369).

The Court has therefore concentrated on the fact that charges imposed on the crossing of a frontier impede the movement of goods; and this it has done, on the one hand without taking into account the increases in price which may result from such charges, and on the other hand it has attached very little importance to such factors as the time at which the charge is collected, its amount, the means by which it is collected, the body which receives the sum, the use to which the sum collected is put or the purpose of the charge. However, that

does not mean that the concept of a charge having equivalent effect has been extended beyond reasonable limits. Thus the Court has provided that the following charges are not covered by the prohibitions contained in Articles 9 and 12: (a) those which represent the consideration for a service rendered to the importer (as may be seen in the case-law which I have already cited); (b) those imposed on similar or comparable imported and domestic products in the same way; (c) charges which, in the absence of products of the type and within the limits provided for by the Treaty, form part of a general system of internal taxation (in particular I refer to the judgment of 25 January 1977 in Case 46/76 which I have already cited, and that of 28 June 1978, in Case 70/77 *Simmenthal* v *Amministrazione delle Finanze* [1978] ECR 1453).

Clearly the storage charges levied in Belgium and Luxembourg are payable only on imported goods and therefore cannot be included in categories (b) and (c). It remains then to establish whether they may be regarded as the consideration for a service of benefit to the importer which is individually and actually rendered to him.

5. Indeed, it is on that very exception that the defendant governments base their defence. In the first place, they maintain that the service consists in the provision and use of the infrastructures which the special stores contain. The importers occupy the buildings and the parking areas where their goods are guarded by the administration. It should be added that, according to both texts, the goods are, in general, actually deposited in the special stores and the transaction is not fictitious. That is established by Article 34 of the Belgian Law, according to which the goods may be stored there for a maximum period of 15 days, in the course of which the importer must declare what he intends to do with them. Finally, it is true that customs operations are carried out in the stores. It is equally true, nevertheless, that the event giving rise to the charge is not the customs clearance but the use of the facilities. The Belgian Government states that it is pertinent to note that Mr Advocate General Roemer considered as representing payment for a service and therefore lawful charges "for customs clearance effected at night or on Sundays and public holidays and for the use of bonded warehouses and experts" (Joined Cases 52 and 55/65 [1966] ECR 159 at p. 178).

In addition both governments submit that the decisive factor is that the use of the stores is optional. Other possibilities are open to an importer wishing to complete customs formalities. He may, at no expense to himself, have the goods inspected at the frontier. He may have them cleared for customs on his own premises provided that he has been authorized so to do and that he pays for the necessary installations himself. Alternatively he may, obviously subject to payment, resort to private stores. In short the importer is not compelled to present his goods at the special stores of a public warehouse. If he does so, it is because it enables him to complete customs formalities nearer to the places where the goods are to be used.

6. The Commission disagrees. In its view the charge in question is closely connected with customs operations which Community provisions require to

be free of charge wherever they are carried out. The only benefit which the importers obtain in return for their payment is the possibility of presenting the goods for customs clearance near the place at which the goods are to be used. That is not sufficient for the relationship to be regarded as bilateral, as the defendant governments claim it should be. Thus the use of the stores cannot be said to be genuinely optional. That is shown by the lack of a connection between the amount of the charge and the duration of the relationship, and even more forcefully, by the fact that the importer must pay the charges even if he has obtained an exemption from storage.

Nevertheless, it seems to me that the arguments put forward by the two governments are well founded. In its case-law the Court has identified the characteristics which the service rendered to the importer must have, if the charge imposed is not to be regarded as a charge having an effect equivalent to a customs duty. Thus, (a) it is first necessary that the benefits of which the service consists be commensurate with such a charge (see judgment of 1 July 1969, in Case 24/68, which I have already cited; judgment of 11 October 1973, in Case 39/73 *Rewe* [1973] ECR 1039; judgment of 22 February 1975, Case 63/74, already cited; judgment of 5 February 1976, Case 87/75 *Bresciani* [1976] ECR 129; judgment of 25 January 1977, Case 46/76, already referred to; judgment of 12 July 1977, Case 89/76 *Commission* v *Netherlands* [1977] ECR 1355; judgment of 8 November 1979, Case 251/78, already cited). In the second place (b) those benefits must represent a general economic alternative to the various possibilities which are available to the importer for the completion of the customs transactions (judgment of 12 January 1983, Case 39/82, *Donner* v *Netherlands* [1983] ECR 19). Finally (c) by "benefits" should be understood not only services directly and specifically connected with the movement of the goods, but also advantages of a *more general character* which result from the use of the installations (judgment of 16 March 1983, Case 266/81, *SIOT* [1983] ECR 731). That case was concerned with port installations and waters, for the maintenance and navigability of which the public administration was responsible.

Therefore, as I have already stated, the Commission itself acknowledges that the service rendered by the Belgian and Luxembourg special stores satisfies the requirement under (b). In addition, the use of the warehouses and the parking areas attached thereto, in conjunction with the surveillance of the goods which such stores provide, are practically identical to the advantages which were identified in the judgment in *SIOT*. Therefore the criterion under (c) is also satisfied. Moreover the requirement under (a) is in my opinion largely fulfilled in view of the smallness of the maximum amounts which Articles 25 to 28 of the Belgian Law fix for storage charges (see above, paragraph 2). In that respect, the Belgian and Luxembourg Governments note that there is a disparity between the proceeds arising from such charges and the expenses borne by the local or port authorities on the warehouses (construction, maintenance, repair and management) and on the storage of the goods; the latter greatly exceed the former.

The Commission has not failed to emphasize that, in the judgment of 1 July 1969 in Case 24/68, the Court

refused to attach importance to figures. The Court stated that: "The very low rate of the charge cannot change its character with regard to the principles of the Treaty which, for the purpose of determining the legality of those charges, do not admit of the substitution of quantitative criteria for those based on the nature of the charge" ([1969] ECR 193, at p. 202, paragraph 14 of the decision). In my view, however, that objection misses the point. The amount of the charge is irrelevant *per se;* if the charge is found not to fall within the framework of a bilateral relationship, the fact that it is insignificant will not deprive it of its true fiscal character. However, when the charge is imposed in exchange for specific benefits (and in this case there are undoubtedly benefits of that type) it becomes necessary or at least useful to assess the amount of the charge. If that were not the case, the Court would not have referred in the same judgment of 1 July 1969, to the need for "proportionality" between the service rendered and the fee which the importer is required to pay.

7. I consider another objection raised by the Commission to be of less importance. According to the defendant governments, the fact that the storage charges are not levied by the State, but by the municipal and port authorities is a strong indication that the charges are lawful. In their view that fact emphasizes the analogy with payments made by importers to private undertakings when they use their warehouses. The Commission refutes that proposition by citing the established case-law of the Court according to which a charge levied for customs clearance does not cease to be regarded as "a charge having equivalent effect" merely because the State has not itself collected it or received the profits thereof. (See judgments of 1 July 1969, Joined Cases 2 and 3/69; judgment of 10 July 1969, Case 24/68; judgment of 26 February 1975, Case 63/74, all cited above; judgment of 18 June 1975, Case 94/74 *IGAV* v *ENCC* [1975] ECR 699; judgment of 25 January 1977, Case 46/76, also cited above.) That claim would be valid if the charges in question were actually levied for customs clearance; it has now been established that in this case that possibility is excluded.

Finally, I turn to the question whether the use of the special stores is optional. As I have stated (paragraphs 5 and 6) the defendant governments maintain that it is genuinely optional whilst the Commission disputes that claim. I accept the view of the defendant governments. It is appropriate to recall that, for the completion of customs transactions, the importer may choose between various alternatives, some of which are free of charge whilst others are not. Nor are Member States under a duty to facilitate matters by allowing importers to effect clearance in the interior of the country rather than at the frontier. In that sense the EEC provision (see the sixth recital in the preamble to Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, official Journal 1977, L 38, p. 1) represents a request or perhaps rather a recommendation; it is certainly not an obligation. In my view there are therefore sufficient grounds for concluding that, by setting up public warehouses, the States seek to accomplish two objectives: to facilitate trade within the common market and to encourage importers.

Therefore the applicant's objection, which at first sight is impressive, that the fact that use of the warehouses is not optional is proved by the fact that the importer is subject to the charge even when he can show that he has obtained

an exemption from storage, loses its force. The benefit to the importer in that position is in fact the use, which in any case he makes of the facilities, even though of very short duration. In addition he has the opportunity, to which I have already referred, of declaring the goods in the place which is nearest to the locality in which it is to be marketed. Thus the law requires him to pay for that use and in particular that opportunity.

8. In conclusion I consider that "storage charges" levied in Belgium and in Luxembourg for the use of special stores of public warehouses on imported goods constitute the consideration for a service individually rendered to the importer from which the latter gains a real benefit. They do not therefore come within the concept of a charge having an effect equivalent to a customs duty.

I therefore propose to the Court that the actions brought by the Commission of the European Communities on 23 April 1982 against the Kingdom of Belgium and the Grand Duchy of Luxembourg be dismissed and that the Commission, as the unsuccessful party, be ordered to pay the costs.