JUDGMENT OF THE COURT
19 February 1998 *

In Case C-212/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal Administratif, Saint-Denis de la Réunion (France), for a preliminary ruling in the proceedings pending before that court between

Paul Chevassus-Marche

and

Conseil Régional de la Réunion

on the interpretation of Articles 9, 12 and 13 and the second paragraph of Article 95 of the EC Treaty, and on the interpretation and validity of Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues *(octroi de mer)* in the French overseas departments (OJ 1989 L 399, p. 46),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Conseil Régional de la Réunion, by Pierre Soler-Couteaux, of the Strasbourg Bar,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in that directorate, acting as Agents,

— the Council of the European Union, by Ramón Torrent, Director in its Legal Service, acting as Agent, and

— the Commission of the European Communities, by Michel Nolin, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Conseil Régional de la Réunion, represented by Katia Merten, of the Strasbourg Bar; of the French Government, represented by Jean-François Dobelle, Deputy Director of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Anne de Bourgoing; of the Council, represented by Ramón Torrent; and of the Commission, represented by Michel Nolin, at the hearing on 15 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By judgment of 5 June 1996, received at the Court on 25 June 1996, the Tribunal Administratif (Administrative Court), Saint-Denis de la Réunion, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 9, 12 and 13 and the second paragraph of Article 95 of the Treaty, and on the interpretation and validity of Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues *(octroi de mer)* in the French overseas departments (OJ 1989 L 399, p. 46).

2 Those questions were raised in the context of proceedings brought by Mr Chevassus-Marche, a commercial agent residing in metropolitan France, for annulment of the resolution of 11 December 1992 by which the Conseil Régional de la Réunion adopted the new rates of *octroi de mer* applicable in Réunion, on the ground that locally-produced goods may be exempted.

3 The applicant in the main proceedings claims that that resolution is incompatible with Decision 89/688.

4 Like Council Decision 89/687/EEC of 22 December 1989 establishing a programme of options specific to the remote and insular nature of the French overseas departments (Poseidom) (OJ 1989 L 399, p. 39, 'the Poseidom Decision'), which was adopted on the same day, Decision 89/688 was adopted by the Council on the basis of Articles 227(2) and 235 of the EEC Treaty.

5 Under a law dating from 1946, a charge termed *octroi de mer* ('dock dues'; hereinafter 'the old *octroi de mer*') was levied in the French overseas departments on all goods, irrespective of their origin (including those from metropolitan France and, in principle, those from other overseas departments), by reason of their introduction into the overseas department in question. Products of the overseas department itself were, however, exempted from the old *octroi de mer* or any equivalent internal levy. The revenue from the old *octroi de mer* went essentially to finance local authority budgets according to the rules governing autonomous regions.

6 According to the first recital in the preamble to Decision 89/688, the powers necessary to ensure the economic and social development of the French overseas departments were not provided for under Article 227(2) of the Treaty 'and it is therefore appropriate to have recourse to Article 235 of the Treaty'.

7 The fifth recital states that the old *octroi de mer* system had features which necessitated its reform as a means of integrating the French overseas departments fully into the process of completing the internal market, while taking account of their fragile economic structure.

8 According to the sixth recital, the *octroi de mer* system ought to be adjusted into a system of internal taxation applicable to all products marketed in the French overseas departments.

9 The seventh recital states that, for the purposes of creating, maintaining and developing activities in those departments, it would be advisable to authorise the local authorities to exempt local activities either totally or partially, according to economic requirements, from the application of the new *octroi de mer* for a period not exceeding, in principle, 10 years.

10 According to the ninth recital, at the end of that 10-year period the tax arrangements should be fully in line with the principles of Article 95 of the Treaty, it being understood that support measures with the same aims can still be adopted in the context of regional aid and in compliance with the provisions of Articles 92, 93 and 94 of the EC Treaty. The Commission is to present a report to the Council, before the expiry of the 10-year period, concerning the implementation of the arrangements and their impact on the development of the overseas departments, together, where appropriate, with a proposal directed towards maintaining the possibility of exemptions.

11 Article 1 of Decision 89/688 provides:

'By 31 December 1992 at the latest, the French authorities shall take the necessary measures for the dock dues arrangements at present in force in the French overseas departments to apply, in accordance with the principles and procedures set out in Articles 2 and 3, to all products whether imported into or produced in those areas.'

12 Article 2 provides:

'1. The revenue from this tax shall be put to use by the competent authorities of each French overseas department in such a way as to encourage as effectively as possible its economic and social development. The Commission shall be informed at the earliest opportunity of the measures adopted by the competent authorities in order to achieve this objective.

2. The competent authorities of each French overseas department shall establish a basic rate of tax. This rate may be adjusted according to the categories of products. This adjustment shall in no case be such as to maintain or introduce discrimination against products from the Community.

3. In the light of the specific constraints on the French overseas departments and with a view to achieving the objective referred to in Article 227(2) of the Treaty, partial or total exemptions from the charge according to economic requirements, may be authorised for local production activities for a period of not more than 10 years from the date of introduction of the system of changes under the conditions laid down in Article 3. These exemptions must contribute to the promotion or maintenance of an economic activity in the French overseas departments and be in line with the economic and social development strategy of each French overseas department, taking account of its Community aid framework, while not being such as to adversely affect the terms of trade to an extent contrary to the common interest.

Exemption arrangements adopted by the competent authorities in each French overseas department shall be notified to the Commission, which shall inform the Member States thereof and define its position within two months on the basis of the above criteria. If the Commission has not defined its position within that period, the arrangement shall be deemed to be approved.

The Commission shall submit to the Council a report on the implementation of the exemption arrangements no later than five years after the introduction of the system of charges in question.'

13 Article 3 of Decision 89/688 provides:

'Not later than one year before the end of the period provided for in Article 2(3), the Commission shall submit to the Council a report on the implementation of the arrangements referred to in Article 2, in order to ascertain the impact of the measures adopted on the economies of the French overseas departments and their contribution to the promotion or maintenance of local economic activities. The matters to be covered in the report shall include the effect of the system of charges in question on the economic and social adjustment of the French overseas departments taking as criteria the level of unemployment, the balance of trade, the regional gross domestic product both on the free movement of products within the Community and on regional cooperation between the French overseas departments and their neighbours.

In the light of the report's conclusions, the Commission, taking into account the objective regarding the economic and social development of the French overseas departments set out in Article 227(2) of the Treaty shall, if necessary, at the same time submit to the Council a proposal for maintaining the possibility of exemptions.

Support measures with the same objectives may be taken in the context of regional aid.'

14 Under Article 4, pending implementation of the reform set out in Article 1, the French Republic was authorised to maintain the old *octroi de mer* until not later than 31 December 1992.

15 Finally, Article 5 states that the decision is addressed to the French Republic.

16 On 17 July 1992, the French Republic adopted Law No 92-676 concerning the *octroi de mer* and implementing Decision 89/688 ('the new *octroi de mer*').

17 The national court considers that its decision in the litigation before it is dependent on whether Decision 89/688 is consistent with the Treaty in so far as Article 2(3) thereof allows the local production of undertakings situated in the French overseas departments to be exempted from the new *octroi de mer*. It has therefore stayed proceedings and sought a preliminary ruling by the Court on the following questions:

'1. Is Council Decision 89/688/EEC authorising the maintenance of *octroi de mer* payable both on imported products and on goods produced by undertakings located in an overseas department consistent with the Treaty and, specifically,

with Articles 9, 12 and 13 thereof, in that it allows the possibility of exemptions for local undertakings on the sole condition that they contribute to the promotion or maintenance of an economic activity?

2. If so, may Decision 89/688 be regarded, in the light of the second paragraph of Article 95 of the EC Treaty, as permitting fiscal differentiation with a view to achieving economic objectives which are consistent with the requirements of the Treaty and of secondary legislation, where such differentiation is justified by the particular economic conditions in the overseas departments?'

18 By those two questions, which should be considered together, the national court is seeking a ruling on the validity of Decision 89/688. The point is whether Article 2(3) thereof is consistent with Articles 9, 12, 13 and 95 of the Treaty, in so far as it authorises total exemptions for products of the French overseas departments, as distinct from imported products, or at least differentiates between those two categories as regards the rate of the charge.

19 It should be stressed that the present case does not concern an assessment of the way in which Decision 89/688 has been implemented.

20 It must be borne in mind from the outset that, as has consistently been held, one and the same levy cannot at the same time fall within the class of charges having an effect equivalent to a customs duty, referred to in Articles 9 and 12, and within that of internal taxes, referred to in Article 95 of the Treaty (Case 193/85 *Co-Frutta* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085, paragraphs 8 to 11). The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products, applying systematically to categories of products in accordance with objective criteria irrespective of the origin of the products (Case 90/79 *Commission* v *France* [1981] ECR 283, paragraphs 12 to 14).

21 In Case C-163/90 *Administration des Douanes* v *Legros and Others* [1992] ECR I-4625 and Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry* v *Direction Générale des Douanes* [1994] ECR I-3957, the Court ruled that a charge such as the old *octroi de mer*, which was levied exclusively on imports into the overseas departments, constituted a charge having an effect equivalent to a customs duty on imports.

22 As regards products from within the Community, including metropolitan France, or from countries party to a free-trade agreement, therefore, the Court held that a charge such as the old *octroi de mer* was incompatible with the provisions of the Treaty (in *Lancry*) or of such agreement (in *Legros*). The Court accordingly declared Decision 89/688 invalid in so far as Article 4 thereof authorised the French Republic to maintain the old *octroi de mer* arrangements in force until 31 December 1992 (see *Lancry*, paragraph 2 of the operative part).

23 As regards products from non-member countries not party to such an agreement, the Court has further held a charge such as the old *octroi de mer* to be incompatible with the Treaty unless, having regard to all its essential characteristics, it must be regarded as a charge already in existence on 1 July 1968, provided that the level at which it is levied has not been raised (Case C-126/94 *Cadi Surgelés and Others* v *Ministre des Finances and Another* [1996] ECR I-5647).

24 In Case C-45/94 *Cámara de Comercio, Industria y Navegación, Ceuta* v *Municipality of Ceuta* [1995] ECR I-4385, the Court considered whether a system of taxation levied in principle on both local and imported products, but providing for exemption for local products, was compatible with the Treaty. It held that in order to determine whether such taxation is to be classified as a charge equivalent to a customs duty, falling under Articles 9 and 12 of the Treaty, or as internal taxation,

falling under Article 95 of the Treaty, it must be analysed in the light of the wording of the provisions imposing it and in relation to the manner in which the administrative authority applies it. A charge liable to be borne by imported products or certain categories thereof, to the exclusion of local products in the same category would, in any event, be incompatible with the Treaty.

25 In Case 78/76 *Steinike und Weinlig* v *German State* [1977] ECR 595, at paragraphs 28 and 30, the Court held that any charge demanded at the time of or by reason of importation and imposed specifically on an imported product to the exclusion of a similar domestic product would have the same restrictive consequences on the free movement of goods as a customs duty and would thus be incompatible with Articles 9, 12 and 13 of the Treaty. If, however, the charge in question formed part of a general system of internal taxation applying systematically to domestic and imported products according to the same criteria, it might still infringe Article 95 if it affected domestic products and imported products differently in terms of rate, basis of assessment or method of levying.

26 It is clear from its wording that Article 2(3) of Decision 89/688 authorises a system of total or partial exemptions from the new *octroi de mer* for products of the French overseas departments. Such a system of exemptions would, in principle, be contrary to the abovementioned Treaty provisions. The ninth recital in the preamble to Decision 89/688, indeed, acknowledges that the system of exemptions for which it provides is incompatible with Article 95 of the Treaty.

27 It must, however, be considered whether the Treaty allows the Council to authorise a system of exemptions for local production such as that provided for in Decision 89/688, accompanied by a procedure for monitoring by the Commission, on a temporary or transitional basis. It is not disputed that only Article 227 of the Treaty, possibly in conjunction with Article 235, might be able to provide the legal basis for such a derogation.

28 The first subparagraph of Article 227(2) of the Treaty provides that the general and particular provisions of the Treaty relating to

— the free movement of goods,

— agriculture, save for Article 40(4),

— the liberalisation of services,

— the rules on competition,

— the protective measures provided for in Articles 109h, 109i and 226, and

— the institutions

are to apply to the French overseas departments as soon as the Treaty enters into force.

29 The second subparagraph of Article 227(2) provides that the conditions under which the provisions of the Treaty other than those listed in the first subparagraph are to apply are to be determined, within two years of the entry into force of the Treaty, by decisions of the Council, acting unanimously on a proposal from the Commission.

30 The third subparagraph of Article 227(2) requires the institutions of the Community, within the framework of the procedures provided for in the Treaty, in particular Article 226, to take care that the economic and social development of the French overseas departments is made possible.

31 Article 226 of the Treaty provides:

'1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market.

2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.

3. The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.'

32 In Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787, at paragraph 10, the Court recalled that Article 227(2) made provision for the Treaty to be applied to the French overseas departments by stages, and in addition it made available the widest powers for the adoption of special provisions commensurate to the specific requirements of those parts of the French territories.

33 As regards the matters listed in the first subparagraph of Article 227(2), the Court noted, at paragraph 11 of its judgment in *Hansen*, that that provision precisely stated certain chapters and articles which were to apply as soon as the Treaty entered into force.

34 The 'rules on competition', which form Chapter 1 of what was formerly Title I of Part Three of the Treaty, entitled 'Common rules', and is now Title V of the Treaty, entitled 'Common rules on competition, taxation and approximation of laws', are among the provisions mentioned in the first subparagraph of Article 227(2), whereas the 'Tax provisions' which form Chapter 2 of the same title are not mentioned.

35 Furthermore, at paragraph 11 of its judgment in *Hansen*, the Court held that Article 95 of the Treaty, as part of those tax provisions, was not applicable to the French overseas departments as soon as the Treaty entered into force. On the other hand, in the absence of decisions taken by the Council on a proposal from the Commission under the second subparagraph of Article 227(2), all the other provisions of the Treaty, including Article 95, became automatically applicable to the French overseas departments.

36 At paragraph 37 of its judgment in *Lancry*, cited above, the Court specified that, by expressly authorising the Council to determine the conditions of application only of those Treaty provisions not listed in its first subparagraph, Article 227(2) excludes the possibility of derogating from the application in the French overseas departments of the provisions which are mentioned therein, including those relating to the free movement of goods. To interpret Article 235 of the Treaty as allowing the Council to suspend, even temporarily, the application of Articles 9, 12 and 13 of the Treaty in the French overseas departments would be to disregard the fundamental distinction established by Article 227(2) and to deprive its first subparagraph of its effectiveness.

37 It follows that the Council cannot, on any view, authorise a system of general or systematic exemptions which would amount to the reintroduction of a charge equivalent to a customs duty, contrary to Articles 9, 12 and 13 of the Treaty.

38 In the submission of the French Government and the Commission, the second subparagraph, read in conjunction with the third subparagraph, of Article 227(2)

of the Treaty, allows the Council, acting unanimously on a proposal from the Commission, even after the expiry of the period of two years from the entry into force of the Treaty, to vary the application to the French overseas departments of Treaty provisions, including Article 95, other than those mentioned in the first subparagraph. They point out that at paragraph 11 of its judgment in *Hansen*, cited above, the Court acknowledged that it remained possible, after all the provisions of the Treaty had entered into force for the French overseas departments, subsequently to adopt specific measures in order to meet the needs of those territories. The exemptions authorised by Decision 89/688 are thus, they submit, justified by the third subparagraph of Article 227(2) of the Treaty, in the light of the serious economic difficulties with which the French overseas departments are faced as a result of their isolation and distance from metropolitan France and their specific development needs.

39 The Commission draws a comparison with the State aid system. Tax exemptions for local production and local producers might constitute aid for the economic and social development of the French overseas departments, as areas where the standard of living is abnormally low or where there is serious underemployment.

40 Under the third subparagraph of Article 227(2) of the Treaty, the institutions of the Community are indeed required to make full use of the procedures provided for in the Treaty, in particular Article 226, in order to make the economic and social development of the French overseas departments possible.

41 Whilst it is true that Article 226 of the Treaty applied, according to its terms, only during the transitional period, the third subparagraph of Article 227(2) refers back to the procedures for which it provides. Article 226 specifies that urgent protective measures cannot be adopted unilaterally by the Member States but only with the

intervention of the Community institutions, which may authorise only strictly necessary derogations for limited periods, giving priority to such measures as least disturb the functioning of the common market.

42 Such conditions limiting the possibility of derogating from the Treaty rules are all the more necessary in the present context in that the Treaty provisions applying immediately to the French overseas departments at the end of the two-year period include not only Article 95, which supplements the provisions on the abolition of customs duties and charges having equivalent effect (Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 4), but also the provisions relating to freedom of movement for workers and other natural and legal persons. The enjoyment by Community nationals of rights enshrined in the Treaty provisions referred to in the second subparagraph of Article 227(2), which form part of their legal patrimony, cannot be allowed to be eroded over time by Council decisions.

43 Decision 89/688 must therefore be examined in order to determine whether it meets the above criteria.

44 In the first place, it must be borne in mind that Decision 89/688 was adopted by the Council on the basis of Articles 227(2) and 235 of the Treaty, following the Poseidom decision. The programme provided for in the Poseidom decision steps up Community support for the French overseas departments with a view to promoting their economic and social development, since they suffer from a serious structural lack of development.

45 In the second place, the system of exemptions authorised by Article 2(3) of Decision 89/688 constitutes an exception to the general rule, stated in Articles 1 and 2 thereof, that the new *octroi de mer* arrangements are to apply to all products whether imported into or produced in the French overseas departments.

46 In the third place, the system of exemptions, as a support measure for local production, which encounters difficulties as a result of its isolation and distance from metropolitan France, is subject to strict conditions.

47 First, under the first subparagraph of Article 2(3) of Decision 89/688, the exemptions must contribute to the promotion or maintenance of an economic activity in the French overseas departments and be in line with the economic and social development strategy of each French overseas department, taking account of its Community aid framework.

48 That Community aid framework is reserved for Community structural intervention and is drawn up by the Commission on the basis of a regional development plan presented by the Member State concerned and provided for by Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1993 L 193, p. 5).

49 It follows that the decision authorises only exemptions which are necessary, proportionate and precisely determined.

50 Next, under the second subparagraph of Article 2(3) of Decision 89/688, exemption arrangements are to be notified to the Commission, which is to define its position within two months on the basis of the conditions laid down in order to qualify for an exemption — including the proviso that the terms of trade must not be adversely affected to an extent contrary to the common interest — thus allowing for strict control by the Commission of local production benefiting from the exemption.

51 Finally, under the first subparagraph of Article 3 of Decision 89/688, the Commission must submit to the Council a report on the implementation of the exemption arrangements in order to ascertain their effect, in particular, on the free movement of products within the Community.

52 The imposition of the strict conditions laid down in Article 2(3) of Decision 89/688, interpreted in the light of the limits laid down in Article 226 of the Treaty for derogations from the provisions of the Treaty, must be held to be such as to ensure that the system of precisely determined exemptions is compatible with the Treaty.

53 It follows that Decision 89/688, in so far it authorises a system of exemptions from the charge termed *octroi de mer*, provided that such exemptions are granted in accordance with the strict conditions which it lays down, is therefore not incompatible with Articles 9, 12 and 13 of the Treaty, and that the temporary derogations from Article 95 for which it provides are justified in accordance with Article 227(2), read in conjunction with Article 226, of the Treaty.

54 The answer to the national court's questions must therefore be that consideration of Decision 89/688, in so far as it authorises a system of exemptions from the charge termed *octroi de mer* subject to strict conditions which it lays down, has disclosed no factor of such a kind as to affect its validity.

Costs

55 The costs incurred by the French Government, by the Council of the European Union and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Administratif, Saint-Denis de la Réunion, by judgment of 5 June 1996, hereby rules:

Consideration of Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues in the French overseas departments, in so far as it authorises a system of exemptions from the charge termed *octroi de mer* subject to strict conditions which it lays down, has disclosed no factor of such a kind as to affect its validity.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 19 February 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President