OPINION OF ADVOCATE GENERAL TESAURO

delivered on 20 March 1997 *

1. The present cases concerning references for preliminary rulings focus the Court's attention once more on the problem of the legality of 'dock dues', a charge imposed on all goods entering the French overseas departments, that is to say, Martinique, Guadeloupe, Réunion and Guyana (hereinafter 'the French overseas departments').

The Court has already considered this question in the cases of *Legros and Others*, [1] *Lancry and Others*, [2] and *Cadi Surgelés and Others*. [3] I should like to point out that in the first of these judgments the Court held that the dock dues then applying constituted charges having equivalent effect to a customs duty. In the *Lancry* case it ruled in particular that Article 4 of Council Decision 89/688/EEC of 22 December 1989 [4] (hereinafter 'the Decision'), which authorised the temporary maintenance of the dock dues arrangements in force at the time when the Decision was adopted, was invalid. The Court also held that the dues in question constituted a charge having equivalent effect to a customs duty even though they were levied, upon entry into the French overseas departments, on goods *originating in* and coming from another region of the French Republic, hence even in a purely domestic situation.

Lastly, in the *Cadi Surgelés* case the Court ruled that application of the dock dues to imports into the French overseas departments of goods from third countries not linked to the Community by a trade agreement was incompatible with the Treaty.

The French courts in Réunion (Case C-212/96) and Paris (Joined Cases C-37/96 and C-38/96) are raising once again the issue of dock dues in the form introduced by Law No 92-676 of 16 July 1992 (hereinafter 'the Law'), which in turn implements Decision 89/688 cited above. That decision required the French Republic to convert the dock dues into a tax which would apply to all products without distinction, subject to the possibility of exemptions for local products over a particular period.

The relevant provisions, the facts and the questions referred for a preliminary ruling

2. It should be borne in mind, above all, that the French overseas departments form an integral part of the French Republic and of the Community customs territory. The

* Original language: Italian.

1 — Case C-163/90 [1992] ECR I-4625.

2 — Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93 [1994] ECR I-3957.

3 — Case C-126/94 [1996] ECR I-5647.

4 — Decision concerning the dock dues in the French overseas departments (OJ 1989 L 399, p. 46).

application of the Treaty to those departments is governed by the special rules contained in Article 227(2), which states that:

'With regard to the French overseas departments, the general and particular provisions of this 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;

— the institutions,

shall apply as soon as this Treaty enters into force.

The conditions under which the other provisions of this Treaty are to apply shall be determined, within two years of the entry into force of this Treaty, by decisions of the Council, acting unanimously on a proposal from the Commission.

The institutions of the Community will, within the framework of the procedures provided for in this Treaty, in particular Article 226, take care that the economic and social development of these areas is made possible.'

3. As the Court confirmed in the judgment given in the *Hansen* case, [5] Article 227(2) thus draws a distinction between the first subparagraph, which includes in particular provisions relating to the free movement of goods and competition that have been directly applicable since the entry into force of the Treaty, and the 'other' provisions, to be applied to the French overseas departments in stages, leaving the Council with the power to adopt, as regards these matters, rules tailored to the specific requirements of those parts of French territory.

4. Making use of the power thus conferred on it, the Council adopted a series of measures to support the development of the

5 — Case 148/77 [1978] ECR 1787.

French overseas departments. [6] In particular, by Council Decision 89/688 cited above, the Council, taking into consideration the part played by the dock dues in supporting the economic and social development of the overseas departments but also the need to reform the dues system in force in order to integrate the French overseas departments fully into the process of completing the internal market, imposed on the French authorities, in Article 1 of the Decision, the obligation to amend the dock dues arrangements by 31 December 1992 at the latest so that they applied to all goods without distinction, whether imported into or produced in the French overseas departments.

Article 2(2) of the Decision provides that the competent authorities of each French overseas department are to establish a basic rate of tax, which may be adjusted according to the categories of products. However, this adjustment must not be such as to 'maintain or introduce discrimination against products from the Community'.

Article 2(3) provides as follows:

'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.' [7]

5. The French Republic expressly implemented the Decision by Law No 92-676, cited above. Article 1 of that Law provides that, in the regions of Guadeloupe, Guyane, Martinique and Réunion, a charge named 'dock dues' is to be imposed on the entry of

6 — See in particular 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).

7 — As I have already mentioned, Article 4 was declared invalid by the Court in the *Lancry* judgment (cited in footnote 2) in that it authorised the French Republic to maintain the dock dues arrangements then in force until 31 December 1992.

goods, the supply of goods for payment by persons engaged in those regions in production or in agriculture or in mining activities, and the supply of goods for payment by persons buying them in order to export or resell them to third parties liable to pay dock dues.

The Regional Councils are authorised to exempt from the charge the entry or supply for payment of products and raw materials intended for certain specific activities.

6. The present cases concern the interpretation of Community law with regard to the Decision and the national law implementing it. More specifically, Case C-212/96 raises the question of the validity of the Decision, whilst Joined Cases C-37/96 and C-38/96 raise the issue on to whether the national legislation giving effect to the Decision is compatible with Community law.

For evident reasons of methodology, I think I must deal with the issues as a whole by examining in turn the question concerning the Decision (I) and the question concerning the national legislation (II).

I — The validity of Decision 89/688 (Case C-212/96)

7. In the proceedings pending before the Tribunal Administratif, Saint-Denis (Réunion), the plaintiff sought the annulment of the resolution of 11 December 1992 by which the Regional Council of Réunion adopted rates for the dock dues applying in that department and exempted from the charge all goods produced on the island. According to the plaintiff, the contested resolution does not comply with either the spirit or the letter of Decision 89/688, assuming that the latter is compatible with the Treaty.

Taking the view that the decision in the case necessarily entailed a determination whether the Decision was compatible with the Treaty, the Tribunal Administratif, Saint-Denis (Réunion) referred the following two questions to the Court:

'1. Is Council Decision 89/688/EEC authorising the maintenance of dock dues payable 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/EEC be regarded, in the light of the second paragraph of Article 95 of the Treaty of Rome, 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?'

8. In my view, in order to reply to the questions referred by the Réunion court, the Court of Justice must first and foremost ascertain whether, by authorising exemptions from the payment of dock dues in favour of local undertakings, the Decision authorised the maintenance of a charge having equivalent effect to a customs duty or tax discrimination which falls for consideration in the light of Article 95, and, in the latter case, whether such authorisation is compatible with the Treaty and, in particular, Article 227(2) thereof.

9. The French Government and the Commission point out that Article 1 of the Decision lays down the principle that all products, whether local or imported, are liable to dock dues and that Article 2(2) provides that, pursuant to Article 95 of the Treaty, the amount of the charge should be set so as not to create discrimination against imported products. In their view, the power conferred on local authorities under Article 2(3) of the Decision to grant total or partial exemptions in favour of local products does not alter the fact that the charge constitutes internal taxation. The exemptions in question are transitional and are subject to conditions which will prevent the system of trade from being adversely affected to an extent contrary to the common interest. Moreover, although it introduces a difference in treatment between local and imported products, the authorisation of such exemptions can none the less be regarded as compatible with the Treaty. According to the judgment in *Hansen*, [8] it is permissible to derogate from Article 95 since that provision is not one of those referred to in the first subparagraph of Article 227(2) which have been directly applicable to the French overseas departments since the entry into force of the Treaty.

10. For its part, the Council maintains, as its primary submission, that the Decision requires the French Republic to alter the dock dues arrangements radically by converting them into internal taxation which is levied on all products without distinction. In that form, the arrangements fall within the scope of Article 95 of the Treaty, a provision for the application of which to the French overseas departments the Council is entitled under Article 227(2) to lay down the conditions. As regards Article 2(3), the Council stresses, as do the Commission and the French Government, the non-systematic nature of the exemptions authorised under that provision and concludes that those exemptions are not likely to distort the nature of the tax system introduced under the Law. Lastly, the Council stresses that the question of the validity of the Decision is not to be confused with the question of whether the national implementing measures are unlawful and that, should this be found

8 — Cited in footnote 5.

to be the case, the illegality of those measures would have no influence on the validity of the Decision itself.

11. I shall begin by pointing out that, as the Court has consistently held, [9] under the system established by the Treaty a particular tax cannot simultaneously be a charge having equivalent effect to a customs duty, within the meaning of Articles 9 and 12, and internal taxation within the meaning of Article 95. Articles 9 and 12 prohibit the imposition as between Member States of customs duties on imports and exports and of charges having equivalent effect, whereas Article 95 merely confines itself to prohibiting internal taxation which discriminates against products from other Member States, and only prohibits it to that extent. More specifically, the essential feature of a charge having equivalent effect to a customs duty which distinguishes it from internal taxation, is the fact that the former applies exclusively to an imported product as such, whereas the latter applies both to imported products and to domestic products, in accordance with objective criteria applied irrespective of the origin of the products. [10]

12. I would next point out that, in its judgment in *Legros*, [11] the Court excluded the possibility of including the 'old' dock dues arrangements in the concept of internal taxation within the meaning of Article 95. Although all goods entering the island of Réunion were subject to the dues, local products were systematically exempted from them, on the basis of objective criteria which could also have applied to imported products, but specifically on account of their local origin.

13. In my view the Decision made it possible, in disregard of the Court's ruling in *Legros*, to reintroduce a measure which is incompatible with the Treaty. [12] Although Article 1 of the Decision requires the French authorities to amend the dock dues arrangements in order to convert them into a system of non-discriminatory internal taxation, Article 2(3) of the Decision — which is the subject of the question referred for a preliminary ruling — allows partial or total exemptions to be granted for the benefit solely of local products, and thus on the basis not of an objective criterion but of the origin of the products. This amounts therefore to authorising the maintenance of a discriminatory tax system, since the exemptions are granted to local products and withheld from imported products, which are the only products *de facto* and *de jure* on which the charge is levied.

In view of the fact that the system allowed by the Decision discriminates *prima facie* against imported products, it is necessary to establish whether the charge amounts to internal taxation prohibited under Article 95 or to a charge having equivalent effect to a customs duty.

9 — Case 193/85 *Co-Frutta* [1987] ECR 2085, paragraphs 8 to 11.

10 — *Co-Frutta*, cited above, paragraph 9, and Case C-45/94 *Ayuntamiento de Ceuta* [1995] ECR I-4385, paragraph 28.

11 — Cited in footnote 1, paragraph 12.

12 — See my Opinion in the *Lancry* case, cited in footnote 2, point 14.

14. In my view, three ways of resolving the problem which has just been illustrated can be envisaged.

15. The first is to consider that the advantages which the contested provision confers on local products do not in any way detract from the character of the 'new' dock dues as internal taxation within the meaning of Article 95, because they are advantages linked to rules which provide for, and actually impose, a general, abstract system of taxation which applies to all goods without distinction.

This is a hypothesis which, as regards the interpretation of the relevant rules, favours the formal aspect of the system of taxation at issue as opposed to its substantive effects. From this perspective the system concerned comes under Article 95 and is prohibited in so far as it discriminates against imported products. One could even cite in support of this solution a passage from the case-law of the Court in which, although the Court does not deal with the substance of the question, it states in general terms that, where a tax system is so structured that it reserves exemptions or reduced rates of tax exclusively to domestic products, this constitutes discrimination prohibited under Article 95 of the Treaty. [13]

16. The second solution would be to regard the system of exemptions which concerns us here as being in substance, owing to its content and effects, a charge having equivalent effect to a customs duty. The granting of exemptions means that local products escape payment of the charge, although it is imposed in full on imported products by reason of their importation into the territory of the French overseas departments; the exemptions mean that only non-local products are liable to the charge and that therefore these products are in fact subjected to a financial burden which is identical in nature and effect to an import duty.

This is manifestly so in the case of full exemptions: since they result in the total exclusion of local products from the application of the charge, they cannot in any way conceal the fact that what is concerned is in substance a charge having equivalent effect to a customs duty, as the Court has already observed in the *Legros* judgment [14] and reaffirmed in the *Ayuntamiento de Ceuta* judgment. [15]

17. Moreover, a similar conclusion would have to be reached as regards partial exemptions: these too are authorised according to the criteria applicable to total exemptions, that is to say exclusively on the basis of the origin of the products. As a result, even in this case, the benefit accorded to local goods constitutes, just as in the case previously

13 — Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraphs 21 to 23.

14 — Cited in footnote 1, paragraph 12.

15 — Cited in footnote 10, paragraph 40.

examined, a form of tax advantage for which the origin of the products is the specific prerequisite. The only difference from total exemptions lies in the amount of the exemption, which only covers part of the charge. In substance, however, this amounts to enabling imported products to be made subject to the payment of (part of) a charge which is not levied on local products and hence to enabling the former to be taxed on account of their importation, which is therefore made more costly.

Ultimately, whether it be total or partial, the exemption deprives the charge of the general nature envisaged by Article 95, since from the outset it is only imported products that are subject, in whole or in part, to the tax.

18. I cannot hide my preference for the second solution which I have envisaged, since it is a more faithful reflection of the substance and effects of the system of dues which concerns us here and thus of the need to have, over and above the formal aspect, a realistic vision of the phenomena of economic life in order to ensure a more harmonious concordance between law and fact and thus to render the pursuit of the objectives of the Treaty more effective. In the present case it is only on the basis of a strictly formal approach that the system of taxation in question would fall under Article 95; in reality it falls under Articles 9 and 12. [16]

In this connection, it is moreover not inappropriate to point to the settled case-law of the Court according to which the characterisation of a tax for the purposes of Community law is a matter for the Court to establish in the light of its objective characteristics, irrespective of its classification under national law. [17]

19. I would add that the merits of the second solution described would not be invalidated by the arguments which the parties have put forward regarding the non-systematic nature of the exemptions authorised under Article 2(3) of the Decision in order to deny that that provision permits a Member State to introduce a charge having equivalent effect.

First and foremost, what the parties understand by 'non-systematic' is not clear, since none of them has provided any further particulars of this. Moreover, one cannot ignore the fact that the provision in question merely

16 — Advocate General Trabucci expressed himself similarly in Case 94/74 *IGAV* [1975] ECR 699; Opinion p. 715 and in particular p. 718. Although it related to a situation which was different from that in the present case and which concerned a parafiscal charge intended to fund the activities of a public body, the Opinion delivered in that case seems to me to establish a general principle.

17 — See most recently Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 39.

authorises 'partial or total exemptions' for a period not exceeding 10 years, without any mention of the procedures for or the frequency of applying such exemptions and, especially, without setting any limit for the local authorities as regards the granting of the advantages at issue. From this point of view, contrary to what the parties maintain, it seems difficult to conclude from the content of the Decision that the competent national authorities do not have the power also to exempt local products systematically. Accordingly, apart from the fact that it is generic, the interpretation suggested by the French Government and by the institutions is by no means confirmed by the text of the provision at issue.

20. If it were thought desirable to take into account a requirement for systematic consistency in the case-law of the Court, which calls for the adoption of like solutions for kindred problems, it seems to me possible also to envisage a third solution. This would involve applying to the case which concerns us here the criteria which have been elaborated in the case-law of the Court, in particular in the area of parafiscal taxes.

I should like to point out that, for the purpose of classifying charges of this kind in relation to the Treaty, the Court has considered it necessary to take into account the intended purpose of the charge concerned, in order to bring within the concept of charges having equivalent effect to a customs duty charges presented by Member States as part of a system of internal taxation which applied, in the same terms, to both domestic and imported products and which should therefore in principle have been assessed in the light of Article 95. [18]

21. In view of the impossibility, which I have already mentioned, of applying concurrently the provisions relating to discriminatory internal taxation and those relating to charges having equivalent effect, the test which the the Court has adopted for distinguishing between the two cases is whether the burden borne by national products, when placed on the market, is fully or partially offset by the advantages resulting from the use for which the revenue from the charge is intended. Thus, in the case of *total* offsetting, the Court considers that the charge affects *imports only* and therefore constitutes a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12 of the Treaty; if offsetting is

18 — In Case 77/72 *Capolongo* [1973] ECR 611, paragraphs 13 and 14, the Court had already stated in this connection that 'financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect ... when such a financial charge or duty is intended *exclusively* to support activities which specifically profit taxed domestic products' (emphasis added). This approach was subsequently confirmed by a series of judgments, among which I shall merely note Case 78/76 *Steinike and Weinlig* [1977] ECR 595; Case 77/76 *Cucchi* [1977] ECR 987; Case 105/76 *Interzuccheri* [1977] ECR 1029 and Case 32/80 *Kortmann* [1981] ECR 251. The same approach was repeated as regards specifically the application of Article 95. In Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 15, the Court held that 'in an interpretation of the concept "internal taxation" for the purposes of Article 95 it may be necessary to take into account the purpose to which the revenue from the charge is put. In fact, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic products it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on domestic products is neutralised by the advantages which the charge is used to finance whilst the charge on the imported products constitutes a net burden.'

partial, the Court considers that the domestic product enjoys in any case a reduction in the tax burden and that there is therefore discrimination against the imported product, contrary to Article 95. [19]

22. The application of this test to the matter which concerns us would be bound to lead to the conclusion that the system falls under the prohibition contained in Articles 9 and 12 in the case of *total exemption*; but in the case of *partial exemption* the system comes under Article 95 and is prohibited because it is discriminatory, since it imposes on imported products a burden which is heavier than that borne by local products.

23. The last solution envisaged, although it does not in my opinion meet in full the need, which I have already mentioned, to ascertain the real nature of a tax system in order to classify it in relation to the Treaty, would at least have the merit of being partially in harmony with the case-law relating to the intended use of the revenue from the tax.

24. That said, the fact remains, in my opinion, that the provision at issue, whether it be regarded as incompatible with Article 95 or with Articles 9 and 12, cannot in any event escape being declared invalid.

25. That, clearly, is necessarily the result one would arrive at if one were to classify the charge in question, which applies only to imported products and from which local products are exempt, as a charge having equivalent effect to a customs duty. As the Court reaffirmed in the *Lancry* judgment, [20] Article 227(2) excludes the possibility of derogating from the application in the French overseas departments of the provisions mentioned in the first subparagraph of that paragraph, including those relating to the free movement of goods. The Council could not, therefore, by its decision legitimately authorise the French Republic to introduce a system of tax exemptions reserved for local products that would transform the charge concerned into a charge having equivalent effect to a customs duty, which is unquestionably prohibited, as such, by the provisions of the Treaty relating to the free movement of goods.

26. Moreover, even if the Court were not to hold that the authorisation of exemptions distorts the system as a whole, or at least with respect to partial exemptions (so that there would remain *de facto* a discriminatory tax system for the purposes of Article 95), no different conclusion should, in my view, be

19 — See in this connection, Case C-72/92 *Scharbatke* [1993] ECR I-5509, paragraphs 10 to 16; Case C-266/91 *Celbi* [1993] ECR I-4337, paragraphs 13 to 19; Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraphs 17 to 22; Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 14 to 19; Joined Cases C-144/91 and C-145/91 *Demoor and Others* [1992] ECR I-6613, paragraphs 18 to 21; Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez* [1992] ECR I-3899, paragraphs 20 to 22; and Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraphs 26 to 28.

20 — Judgment cited in footnote 2, paragraphs 37 and 38.

reached as regards the invalidity of the provision at issue.

On this point the French Government and the Commission have maintained that the Decision could perfectly well permit derogations from Article 95 and hence authorise discriminatory tax measures, since Article 95 is not one of the provisions listed in the first subparagraph of Article 227(2) from which the Council is not permitted to derogate. This, they add, was confirmed by the Court itself in the *Hansen* judgment.

27. This argument cannot, it seems to me, be accepted. It is certainly true that, from the point of view of its formal position in the structure of the Treaty, Article 95 ranks among what are referred to as the 'tax' provisions, which are not expressly included among those, referred to in Article 227(2), which are not open to derogation. However, the distinction between the particular and specific scope of Article 95 (prohibition of discriminatory internal taxation) and that of Articles 9 and 12 (prohibition of charges having equivalent effect to a customs duty) by no means excludes the complementarity of the function performed by the former provision in relation to the rules which govern the free movement of goods within the common market and which therefore come within the category of provisions from which it is not permitted to derogate. The prohibition laid down in Article 95 in fact plays no more than an ancillary role in relation to the prohibition laid down in Articles 9 and 12, in that it is intended to prevent the latter prohibition from being circumvented and evaded by means of a different fiscal instrument. Nor should it be forgotten that in both cases it is taxes that are concerned, customs duties and charges having equivalent effect being of a fiscal nature just as is the taxation referred to in Article 95, and this is so irrespective of any economic aim pursued, which may still be the same in both cases, for instance a protectionist aim.

28. The Court has repeatedly had occasion to spell out this relationship of complementarity, stating that Article 95 'is intended ... to fill in any breaches which a fiscal measure might open up in the prohibitions laid down in Articles 9 and 12'. [21] This statement has been repeated and better elucidated subsequently:

'The abovementioned provisions (Article 95) *supplement*, within the system of the Treaty, *the provisions on the abolition of customs duties and charges having equivalent effect.* Their aim is *to ensure free movement of goods* between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. As the Commission has correctly stated, Article 95 must guarantee the complete neutrality of internal taxation as

21 — Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 5; emphasis added.

regards competition between domestic products and imported products.' [22]

In short, it may be inferred from this that the Court has already amply acknowledged that Article 95 belongs to the body of rules relating to the movement of goods, and has accorded priority, in interpreting and characterizing that provision, to the functional and substantive aspect as opposed to the aspect of title or definition which is linked to the formal position of the provision in the structure of the Treaty.

29. On the other hand, it does not seem to me possible to derive from the *Hansen* judgment anything of significance pointing to the contrary, even if one were inclined not to call into question in any way the approach demonstrated in that judgment, as regards a particular set of facts. In reality, in that judgment the Court confirmed the fundamental distinction drawn in Article 227 between the rules set out in the first subparagraph, which are immediately applicable from the entry into force of the Treaty, and the others, whose application to the French overseas departments was to take place gradually and which in any case left open the possibility of adopting as far as they were concerned rules suited to the special requirements of those territories. It is true that in that judgment the Court expressly referred to the 'chapters and articles of the Treaty' immediately applicable to the French overseas departments; however, I do not think it is possible to draw from that reference any unequivocal and definitive inference that the Court meant to exclude the possibility of Article 95 affecting the rules relating to the free movement of goods and, hence, of being covered by the first subparagraph of Article 227(2).

30. The idea of such exclusion does not seem to me to be tenable, for the reasons of complementarity to which I have referred earlier; moreover, exclusion would not appear to be justified even from the point of view of the wording of the provision. It should be remembered that the list contained in the first subparagraph of Article 227(2) is preceded by the phrase 'the general and particular provisions of this Treaty *relating to* ...'. I think therefore that the Community legislature did not intend to draw up an exhaustive list composed exclusively of the provisions set out under the titles expressly indicated, but rather a list of rules which, by virtue of their content and function, fall within the framework of the rules governing a particular matter.

31. It is therefore the subject-matter of the provisions rather than their characterisation in law which is relevant for the purpose of assessing them with regard to Article 227(2), according to the function which they perform within the general structure of the system.

22 — Case 168/78 *Commission* v *France* [1980] ECR 347, paragraph 4; emphasis added. See also Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, paragraph 5, in which the Court reaffirms that the aim of Article 95 is 'to ensure free movement of goods between the Member States in conditions of normal competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States', and more recently, the *Ayuntamiento de Ceuta* judgment cited in footnote 10 (paragraph 29).

However, if one were to adopt the opposite solution, excluding Article 95 from the provisions indicated in the first subparagraph of Article 227(2), the result, as paradoxical as it is unacceptable, would be to nullify the effectiveness of the rule, in particular of the immunity from derogation of the provisions relating to the free movement of goods and, hence, of the prohibition on the introduction of charges having equivalent effect. In short, this would amount to letting back in through the window what had been chased out through the door, in disregard of the logic of the system and notwithstanding the thirty-year-old case-law of the Court, cited above, which allocates to Article 95 the function of 'filling in any breaches which a fiscal measure might open up in the prohibitions laid down in Articles 9 and 12'. [23]

32. Nor does it seem to me that there is room for distinguishing between total and partial exemptions for the purpose of applying Article 227(2) — assuming, of course, that the Court were to include the former within the scope of Articles 9 and 12 and the latter within that of Article 95. It is not hard to imagine, in the event of Article 95 being regarded as a provision 'open to derogation' in the sense defined earlier, a shrewd legislator being able, by means of the instrument of partial exemption, to achieve the same result as would be obtained by granting a total exemption falling within the scope of Articles 9 and 12.

Let us take an example. Assuming a charge in the amount of 100, total exemption would give rise to payment of 0 on a local product and 100 on an imported product. The difference is clearly 100 between the charge borne by the second and that 'imposed' on the first. Now it would be perfectly possible to arrive at the same result by resorting to partial exemption. For this purpose it would be sufficient to raise the amount of the charge to 150 and to make provision for an exemption equivalent to 100 in favour of the local product. This way the local product would bear a charge of 50 and the imported product a charge of 150: again the difference would be equivalent to 100, exactly the same as in the case of total exemption described previously.

33. It is scarcely necessary to add that the failure to adhere to the substantive content of Article 227(2) which would occur if the exemptions were considered to be contrary to Article 95 and if that article were excluded from the rules 'relating to' the free movement of goods, would also occur with regard to another aspect, that of the rules on competition. The system of exemptions under consideration could have consequences for the rules governing aid. According to the case-law of the Court, the concept of aid includes actions which in various forms reduce the charges normally borne by the budget of an undertaking and which therefore, although they are not subsidies within the strict meaning of the word, are similar in nature and have the same effects. The result of this is that a measure by which the public authorities grant certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more

23 — Case 24/68 *Commission* v *Italy* previously cited in note 21.

favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 92(1) of the Treaty. [24]

In such a case, since the rules relating to aid are 'expressly' included among those not open to derogation under Article 227(2), the derogation from Article 95 effected by the grant of exemptions would also result in avoidance of the provisions relating to aid and, hence, in infringing Article 227(2) also in this respect. This does not, of course, mean that a system of aid to the French overseas departments would be unlawful in any event; however, I think that, in order to grant such aid lawfully it is necessary to comply with the procedures laid down by the Treaty.

34. In view of the observations set out above, I consider that the answer to be given to the national court should be that Article 2(3) of Council Decision 89/688/EEC of 22 December 1989 is invalid in that it permits the introduction of a system of tax exemptions which are incompatible with Articles 9 and 12 of the Treaty. The same conclusion holds good if the Court holds the dues at issue, in whole or in part, to be incompatible with Article 95 of the Treaty.

24 — See Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 13 and 14.

II — The national rules relating to the 'new' dock dues (Joined Cases C-37/96 and C-38/96)

35. As I pointed out at the beginning, the French legislature implemented the Decision by Law No 92-676 of 16 July 1992, the same date as that of the *Legros* judgment. That law introduced the 'new' dock dues on the entry of goods into the French overseas departments and set out in detail the procedures governing liability to the charge and the exemptions from it; it also authorised the local authorities to make provision for special exemption cases.

36. In particular, Article 3-1 provides that all undertakings whose turnover exceeded FF 3.5 million in the preceding year are to be liable to the charge. In certain specific cases undertakings whose turnover was between FF 2 million and FF 3.5 million may also be liable to it.

The basis of assessment to the dock dues levied on imported goods is their value for customs purposes at the time of their entry into the territory of the French overseas departments (Article 4). As regards transactions internal to the French overseas departments, however, the basis of assessment is the price, excluding VAT, less 15% for marketing costs.

Lastly, under Article 10, identical or similar products belonging to the same category are subject to the same charge, irrespective of where they come from. This provision however authorises the Regional Councils to exempt from the charge, in whole or in part, depending on economic needs, deliveries effected in return for payment by persons engaged in production in the French overseas departments. Such exemptions must apply to all products belonging to a particular category.

37. In the cases pending before the Tribunal d'Instance, Paris, the plaintiffs, companies in Martinique which market products imported from other Member States, have claimed reimbursement of the dock dues which they have paid on all the products which they have imported since the Law entered into force.

In support of their claim they have submitted that the new dock dues arrangements, despite their apparent difference from those previously in force, produce the same result as a charge having equivalent effect to a customs duty in that they only affect imports, the vast majority of local products being exempt from payment of the charge.

38. The national court has first and foremost pointed out that under the national rules the dock dues apply without distinction to imported goods and to goods produced locally since they are levied on the basis of the same objective criterion: turnover. It therefore considers that it is not possible to classify the new dock dues as a charge having equivalent effect, as the plaintiffs are claiming.

However, taking into account the provisions of the Law which authorise, as we have seen, total or partial exemptions from the charge, and certain other forms of advantage for local products, which are likely to affect equality of treatment between local and foreign undertakings, the national court referred the following question to the Court of Justice:

'Do the rules laid down by Law 92-676 of 16 July 1992 concerning dock dues and implementing Decision 89/688 of the Council of the European Communities of 22 December 1989 have the effect of replacing a charge having equivalent effect to a customs duty on imports, as considered in the preliminary ruling of 16 July 1992 in *Legros*, and of establishing — by contrast with the dock dues arrangements previously in force — a genuine internal charge which is not discriminatory and is consistent with the letter and spirit of the Treaty establishing the European Community?'

39. If the Court were to arrive at the same conclusion as myself regarding the invalidity

of Article 2(3) of the Decision, what consequences should be drawn from this as regards the question raised by the Paris court?

Let me say at once that, if the provisions of the Decision which authorise the introduction of total and/or partial exemptions into the internal taxation system are declared invalid, the national measures which are linked to that authorisation are, in principle, incompatible with the Treaty. It is necessary, however, to examine more closely the legislation which was adopted specifically to implement the Decision, and in particular in what way and to what extent the authorisation provided for in Article 2(3) of the Decision has in fact been exploited.

40. Admittedly, the Law formally transformed the new dock dues into internal taxation applying without distinction to all goods, both local and imported. It did, however, provide for certain forms of advantage. These are, in particular, the tax exemption granted to undertakings whose turnover did not exceed FF 3.5 million (under the first subparagraph of Article 3-1), the total or partial exemption granted to certain local products (under the second subparagraph of Article 2-2 and Article 10-2) and the 15% reduction in the basis of assessment to the charge on local products [under Article 4(b)].

41. According to the plaintiffs in the main proceedings, the new arrangements conceal, under the guise of a tax system applicable without distinction to all goods, the characteristics and discriminatory effects of the 'old' dock dues; according to them, this is plain from the system governing liability to the charge, the criteria for calculating the charge and the procedure for collecting it. Since, in particular, it reserves for local products the advantages referred to above, according to the plaintiffs the Law ultimately brings about a manifest difference in treatment to the detriment of imported products.

The plaintiffs in the main proceedings add that, by creating discrimination to the detriment of imported products, the tax system introduced by the Law ultimately produces the same effects as a charge having equivalent effect to a customs duty. In those circumstances, if Article 95 were held to be open to derogation as not ranking among those mentioned in the first subparagraph of Article 227(2), the Law would still be incompatible with Articles 9 and 12 of the Treaty, which are immediately applicable to the French overseas departments by virtue of Article 227(2). In fact, since the new dock dues arrangements constitute an autonomous regional tax system and make the granting of the advantages for which they provide subject to a procedure for checking the origin of the products qualifying for those advantages, they have an adverse effect both on the unity of the customs territory and on the free movement of goods.

42. The French Government and the Commission develop lines of argument which are

almost identical. As a general point, they observe that the new dock dues arrangements constitute internal taxation within the meaning of Article 95, applying without distinction according to objective criteria to imported goods and to those produced in the French overseas departments. They acknowledge that the liability of all products to the charge is subject to some exceptions, represented by the advantages already mentioned, which are reserved for local products. However, they submit that those advantages, although discriminatory, are not such as to alter the nature of the new dock dues as internal taxation, since they are in addition justified by the need to ensure the economic and social development of the French overseas departments. In this connection, on the other hand, the French Government and the Commission stress that the tax advantages granted by the Law to local products must be regarded as wholly legitimate: they correspond to what is provided in the decision by which the Council, under the first subparagraph of Article 227(2), authorised the authorities of the French overseas departments to introduce tax systems which were more favourable to local products.

43. More particularly, the possibility of totally or partially exempting certain local products from the charge, accorded by the Law to the Regional Councils of the French overseas departments, is, it is submitted, entirely legitimate since it accords perfectly with what is provided in Article 2(3) of the Decision.

While it gives rise to discrimination, albeit justified by the specific needs of local undertakings, the 15% reduction in the basis of assessment prescribed for the charge on local products is not, in the light of the case-law of the Court, such as to deprive the charge in question of its character as internal taxation.

As regards the last exception provided for by the Law, which concerns exemption for undertakings whose turnover is less than FF 3.5 million, this, according to the French Government and the Commission, is an advantage which is necessary in order to support the weakest undertakings by making them more competitive on the market. In any case, on the basis of the figures it is clear that this exemption does not work exclusively or preponderantly to the benefit of local products; this means that the exemption is not discriminatory in character.

44. The legality of the system of taxation at issue must be considered in the light of Article 95, or else in the light of Articles 9 and 12. [25]

25 — The plaintiffs in the main proceedings have also invoked, incidentally, the prohibition on quantitative restrictions on imports laid down in Article 30 of the Treaty. In this connection, it should be noted that Article 30, which is a fundamental provision of the rules governing the free movement of goods, is a provision of a general nature, as compared with the special provisions relating to charges having equivalent effect to customs duties and to discriminatory taxation. As such, Article 30 applies in a very subsidiary, one might say residual, manner as compared with Articles 9 to 12 on the one hand and Article 95 on the other; in other words, if the prerequisites laid down by the Treaty are met, it is the special rules which must apply and not the general provision relating to measures having equivalent effect. See Case 74/76 *Iannelli and Volpi* [1977] ECR 557, paragraph 9, and, more recently, the judgment in *Compagnie Commerciale de l'Ouest and Others*, cited in footnote 19, paragraphs 20 and 21.

45. It is not in dispute, inasmuch as the French Government has admitted it and the Commission has acknowledged it, that the system of taxation introduced by the Law implementing the Decision displays a number of discriminatory aspects with respect to imports. Taken generally, this discriminations is, in my view, already unlawful because its alleged 'legal basis', namely Article 2(3) of the Decision, to which it is linked directly or indirectly, must be regarded as invalid. Since the Council did not have the power to authorise the introduction of derogations from the provisions of the Treaty in view of the requirements of the French overseas departments, national measures which introduce such derogations must be held to be unlawful.

46. As regards in particular the power accorded by the Law to the Regional Councils of the French overseas departments to grant total or partial tax exemptions solely in favour of local products, it is clear that the observations I have made and the criteria I have adopted in Case C-212/96 for the purpose of characterising the exemptions authorised by the Decision also apply here. [26]

47. As regards the reduction in the basis of assessment for calculating the charge levied on local products, I would point out that the Court has repeatedly made it clear that, for the purposes of the application of Article 95 of the Treaty, account must be taken not only of the rate of the internal taxation applying directly or indirectly to domestic and imported products, but also the basis of assessment to the charge concerned and the procedures governing its collection. The decisive criterion for the purposes of applying Article 95 is the actual incidence of each charge on the domestic product, on the one hand, and on the imported product, on the other. Hence, even if the rate of taxation is the same, the incidence of the charge may vary depending on the provisions concerning the basis of assessment and collection which are applied to the local product and the imported product respectively. [27]

48. Similarly, it follows from the case-law of the Court that the first paragraph of Article 95 prohibits the taxation of imported goods on the basis of a method of calculation, different from that used for the taxation of similar domestic products, which results in a heavier burden for the imported goods, irrespective of any difference in the impact on the prices of the domestically produced and the imported products, [28] or of the minor or incidental nature of the obstacle created by the national tax. [29] In particular, as the Court has made clear on many occasions, the first paragraph of Article 95 is infringed where the two taxes are calculated in a different manner on the basis of different criteria, leading to a heavier burden being imposed on the imported product. [30]

26 — See above, points 13 to 24.

27 — See in particular Case C-327/90 *Commission* v *Greece* [1992] ECR I-3033, paragraph 11 and Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 18.

28 — Case 45/75 *Rewe-Zentrale* [1976] ECR 181, paragraph 16.

29 — Case 20/76 *Schöttle* [1977] ECR 247, paragraph 22.

30 — *Commission* v *Greece*, cited in footnote 27, paragraph 12, and Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraph 20.

49. In the light of those principles, the incompatibility of the arrangements at issue with the Treaty is plain: the arrangements are already *prima facie* discriminatory since they provide for a reduction in the basis of assessment for the purpose of calculating the charge levied on the local product without extending the same reduction to imported products. This has not been disputed, moreover, and has indeed been expressly admitted both by the French Government and by the Commission. It is scarcely necessary to add that this advantage also clearly conflicts with Article 2(2) of the Decision, which states that the authorised adjustment in the basic tax rate according to categories of product must in no case be 'such as to maintain or introduce discrimination against products from the Community'.

50. It must therefore be concluded that domestic legislation is incompatible with the prohibition on discriminatory internal taxation laid down in Article 95 where, as in the present case, it provides for a system of calculating the basis of assessment which results in an imported product being taxed more highly than a similar local product.

51. Of the three forms of tax advantage envisaged by the Law, the one which remains to be examined is the exemption granted to undertakings whose turnover is less than FF 3.5 million.

The plaintiffs in the main proceedings claim, on the basis of data from the Chambers of Commerce, that this advantage concerns all undertakings only apparently: in actual fact it is an advantage reserved for local businesses, the majority of which, as regards their turnover, fall below the threshold laid down in the Law.

They add that it is in any event for the national court to ascertain whether the exemption at issue ultimately produces the effects which they suppose them to have.

52. In the observations formulated by the French Government and the Commission on this point the diametrically opposite view is taken. They both dispute the assertions made by the plaintiffs in the main proceedings and provide some data designed to prove, by demonstrating the non-discriminatory nature of the exemption at issue, that the plaintiffs' assertions are totally wrong.

53. It has therefore to be recorded that there is a clear conflict between the figures provided by the plaintiffs and those produced by the Commission. The latter are incomplete, as the institution itself admits, in that they do not cover all local production and, in particular, family businesses. The result is, therefore, that it does not appear possible to infer anything of significance from the various data provided by the parties.

Moreover, in view of the absence of clear, unequivocal particulars on this matter in the order for reference, the Court can only deduce from the question referred for a preliminary ruling the various possible hypotheses and indicate, for each of them, what are the applicable criteria. It will therefore be for the national court to make the findings of fact which will assist it in ascertaining whether the exemption at issue is actually reserved, exclusively or preponderantly, for local products.

54. In any case, it should be observed that the exemption concerned is granted on the basis of an objective criterion, turnover, which applies both to local products and to imported products. In point of principle, therefore, since this advantage is applicable to all goods without distinction, it must be held to be compatible with Article 95, but, of course, only to the extent that it has no discriminatory or protectionist effect whatever. Accordingly, it is necessary to ascertain whether, even though no formal distinction is made according to the nationality of the undertakings, a measure of this kind does not ultimately result in an advantage reserved solely for local products, and denied *a priori* to foreign undertakings. That is a matter for the national court whose duty it is to verify whether the threshold laid down by the Law has been determined in such a way that in practice only local undertakings, or at least the majority of them, benefit from the exemptions, whilst foreign undertakings, because they normally achieve turnover figures which exceed that threshold, are the only undertakings to which the charge applies. Should this in fact be the case, it is clear that there would be 'indirect' discrimination contrary to the prohibition on discriminatory internal taxation laid down in Article 95 of the Treaty.

55. In the light of the foregoing considerations, I propose that the Court should reply to the national court as follows:

— in Case C-212/96:

Article 2(3) of Council Decision 89/688/EEC of 22 December 1989 on the dock dues arrangements in the French overseas departments is invalid in that it authorises the introduction of a system of tax exemptions which is incompatible either with Articles 9 and 12 of the Treaty or with Article 95, and is not permissible in the light of Article 227(2).

— in Joined Cases C-37/96 and C-38/96:

(a) Articles 9, 12 and 95 of the Treaty preclude the tax system at issue in that it reserves for local products certain total or partial exemptions and a reduction in the basis of assessment to the charge.

(b) It is for the national court to verify whether the exemption provided for in the Law for the benefit of undertakings whose turnover is less than a certain figure fixed in advance is such as to give rise in practice to discrimination against foreign undertakings which is prohibited by Article 95 of the Treaty.