JUDGMENT OF THE COURT
30 April 1998 *

In Joined Cases C-37/96 and C-38/96,

REFERENCES to the Court under Article 177 of the EC Treaty by the Tribunal d'Instance, Paris, for a preliminary ruling in the proceedings pending before that court between

Sodiprem SARL and Others (C-37/96),

Roger Albert SA (C-38/96)

and

Direction Générale des Douanes

on the interpretation of Articles 9, 12 and 95 of the EC Treaty,

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,

* Language of the case: French.

P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

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

after considering the written observations submitted on behalf of:

— Sodiprem SARL and Others, and Roger Albert SA, by Christian Charrière-Bournazel and Jean-Pierre Spitzer, of the Paris 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 the same directorate, acting as Agents, 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 Sodiprem SARL and Others and of Roger Albert SA, represented by Christian Charrière-Bournazel and Jean-Pierre Spitzer; of the French Government, represented by Jean-François Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agent, and Anne de Bourgoing; of the Council of the European Union, represented by Ramon Torrent, Director in its Legal Service, acting as Agent; and of the Commission, represented by Michel Nolin, at the hearing on 5 November 1996,

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

gives the following

Judgment

1 By two judgments of 30 January 1996, received at the Court on 12 February 1996, the Tribunal d'Instance (District Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 9, 12 and 95 of that Treaty.

2 That question was raised in the context of actions brought by Sodiprem SARL and Others and by Roger Albert SA (hereinafter 'Sodiprem and Others') against the Direction Générale des Douanes (Directorate-General of Customs) for repayment of the *octroi de mer* ('dock dues'; a levy charged in the French overseas departments) paid by them on all products imported from metropolitan France or from a Member State of the European Community after the entry into force of Law No 92-676 of 17 July 1992 concerning *octroi de mer* and implementing Decision 89/688.

3 Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues in the French overseas departments (OJ 1989 L 399, p. 46) was adopted on the basis of Articles 227(2) and 235 of the EEC Treaty, as was 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), which was adopted on the same day.

4 Under a law dating from 1946, a charge termed *octroi de mer* (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.

5 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.'

6 Article 2(2) provides: '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.'

7 The first sentence of Article 2(3) reads: '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 ...'.

8 Under the second subparagraph of Article 2(3), such exemption arrangements are to be notified to the Commission, which is to inform the Member States thereof and define its position within two months. If the Commission has not defined its position within that period, the arrangement is deemed to be approved.

9 Article 4 authorised the French Republic to maintain the then current *octroi de mer* arrangements until not later than 31 December 1992, pending implementation of the reform set out in Article 1.

10 On 16 July 1992, in Case C-163/90 *Administration des Douanes* v *Legros and Others* [1992] ECR I-4625, the Court ruled that a charge, proportional to the customs value of goods, levied by a Member State on goods imported from another Member State, constituted a charge having an effect equivalent to a customs duty on imports.

11 On 9 August 1994, in Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others* v *Direction Générale des Douanes* [1994] ECR I-3957, the Court declared Decision 89/688 invalid in so far as it authorised the French Republic to maintain the old *octroi de mer* arrangements in force in the overseas departments until 31 December 1992.

12 On 17 July 1992, the French Republic adopted Law No 92-676, Article 1 of which provides:

'In the regions of Guadeloupe, Guyane, Martinique and Réunion, the following transactions are subject to a charge designated *octroi de mer*:

(1) imports of goods;

(2) deliveries for value by persons engaged in production activities there; "production activities" means the manufacture, processing or renovation of corporeal movable goods, together with agricultural, mining and quarrying operations;

(3) deliveries for value by persons who buy with a view to export or to resale to other persons liable to *octroi de mer* and who fulfil the conditions laid down in Article 3(2).'

13 Article 2(1) provides for exemption from *octroi de mer* for exports out of the regions of Réunion, Guadeloupe and Martinique, for exports out of the region of Guyane with the exception of exports to Guadeloupe or Martinique and for imports into the regions of Guadeloupe or Martinique of products on which *octroi de mer* has been charged in Guyane.

14 Article 2(2) authorises Regional Councils to exempt imports of goods where they concern certain products, raw materials or capital goods. That exemption may cover capital equipment for the hotel and tourism industry (Article 50 *undecies* of Annex IV to the General Customs Code), building products and materials, fertilisers and industrial and agricultural tools or machinery (Article 50 *duodecies* of the sane annex) or raw materials intended for local production activities, equipment intended for the performance of regalian functions of the State and health equipment intended for hospitals.

15 That provision further authorises Regional Councils to exempt deliveries for value by persons who engage in production activities in the overseas departments, subject to the conditions laid down in Article 10.

16 Under the first subparagraph of Article 10(1), the rates of *octroi de mer* are to be determined by resolution of the Regional Council. The third subparagraph provides: 'The same rate is to be charged on identical or similar products falling within the same category which are subject to *octroi de mer* pursuant to Article 1(1) and (2), whatever their origin'.

17 By way of derogation from that provision, Article 10(2) authorises Regional Councils to grant total or partial exemption, in accordance with economic needs, for all products falling within the same category of deliveries for value by persons engaging in production activities in the overseas departments.

18 Under Article 3 of Law No 92-676, undertakings whose turnover in respect of the production activity exceeds FF 3.5 million for the previous civil year are automatically liable to *octroi de mer* (first subparagraph of Article 3(1)). Undertakings whose turnover is between FF 2 million and FF 3.5 million (third subparagraph of Article 3(1)) and persons who buy with a view to export or to resale to other persons liable to *octroi de mer* on such transactions, when those transactions exceed FF 1.5 million (Article 3(2)), may be made liable to *octroi de mer*.

19 Article 4 provides that the basis for assessment of the *octroi de mer* charged on imports of goods is the customs value at the place of importation. For transactions within the overseas departments, the basis of assessment is the price before tax, minus 15% marketing costs.

20 Article 16 provides that revenue from the *octroi de mer* is intended to be put to the use of supporting the economic development of the overseas regions.

21 It appears from the two judgments referring the question for a preliminary ruling that the Tribunal d'Instance has noted that, by exempting from the charge certain products or certain producers by reason of the turnover of their undertakings, or by reducing or varying the rate at which it is levied, Law No 92-676 is such as in fact to destroy equality of treatment as between undertakings within the regions concerned and those outside. That court therefore raises the question whether *octroi de mer* as provided for in that Law may be categorised as internal taxation and, if so, whether it has a discriminatory effect prohibited by Article 95 of the

Treaty. It therefore stayed proceedings and sought a preliminary ruling from the Court on a question which is identical in substance in both cases and which is worded as follows:

'Do the rules laid down by Law 92-676 of 17 July 1992 "concerning *octroi de mer* and implementing Decision 89/688 of the Council of Ministers 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*, by a genuine internal charge which is not discriminatory and which is consistent with the letter and spirit of the Treaty establishing the European Economic Community?'

22 When addressing that question, it must be borne in mind that, within the framework of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see, *inter alia*, Case C-134/95 *USSL No 47 di Biella* v *INAIL* [1997] ECR I-195, paragraph 17).

23 The plaintiffs in the main proceedings claim that the system of levying and calculating, the basis for assessing and the rate and method of charging the new *octroi de mer*, and in particular the fact that exemptions or derogations are granted only in respect of products originating in the overseas departments, in fact produce the same result, from a fiscal point of view, as a charge having an effect equivalent to a customs duty, which is prohibited by Articles 9, 12 et seq. of the Treaty.

24 The French Government and the Commission acknowledge that the principle that *octroi de mer* is chargeable on all goods is subject, in Law No 92-676, to three

exceptions: undertakings whose turnover is less than FF 3.5 million are not liable (first subparagraph of Article 3(1)); certain transactions relating to categories of local products, determined by the Regional Councils, are totally or partially exempt by application of a zero or reduced rate (Articles 2(2) and 10(2)); and the basis of assessment is reduced by 15% for local products (Article 4(b)). They consider, however, that such exceptions cannot deprive *octroi de mer*, as introduced by Law No 92-676, of its nature as internal taxation for the purposes of Article 95 of the Treaty and that Decision 89/688 authorises the French Republic to derogate from that provision.

25 In order to supply the national court with a relevant ruling on the interpretation of Community law, therefore, this Court must define the characteristics of the exemption arrangements authorised by Decision 89/688, whereas assessment of the compatibility of Law No 92-676 with the arrangements envisaged by that decision is a matter for the national court itself.

26 In its judgment of 19 February 1998 in Case C-212/96 *Chevassus-Marche* v *Conseil Régional de la Réunion* [1998] ECR I-743, the Court examined Decision 89/688 and held that consideration thereof, 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, disclosed no factor of such a kind as to affect its validity. The national court must therefore classify and interpret its domestic law in the light of the criteria set out in that judgment.

27 As regards the distinction between a charge equivalent to a customs duty, falling under Articles 9 and 12 of the Treaty, and internal taxation, falling under Article 95, the Court referred, at paragraph 24 of the judgment in *Chevassus-Marche*, to its previous case-law to the effect that 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.

28 At paragraph 37, it pointed out 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. Such a system would be contrary to Articles 9, 12 and 13 of the Treaty.

29 At paragraph 46, it noted that 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.

30 At paragraph 49, the Court stressed that Decision 89/688 authorises only exemptions which are necessary, proportionate and precisely determined.

31 In addition, at paragraph 52, the Court noted that 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 EC Treaty, is such as to ensure that the system of precisely determined exemptions is compatible with the Treaty.

32 Those conditions are described in detail in paragraphs 44 to 51 of the same judgment. First of all, under the general rule, stated in Articles 1 and 2 of Decision 89/688, *octroi de mer* is to apply in principle to all products whether imported into or produced in the French overseas departments.

33 Next, the system of exemptions constitutes an exception to that general rule. It must disturb the common market as little as possible and may thus not adversely affect the terms of trade to an extent contrary to the common interest. Monitoring of those conditions is the responsibility of the Community institutions, in particular the Commission, which must assess the extent to which such measures are necessary and proportionate.

34 Finally, that system is a measure of support for local production faced with difficulties as a result of isolation and distance from metropolitan France, its aim being to promote the economic and social development of the French overseas departments in that it must contribute to the promotion or maintenance of an economic activity in those departments and be in line with an economic and social development strategy.

35 The answer to the national court's question must therefore be that, on a proper construction, Decision 89/688 precludes exemptions of a general or systematic order, which would thus amount to the reintroduction of a charge having an effect equivalent to that of a customs duty. That decision does, however, authorise exemptions which are necessary, proportionate and precisely determined and which respect the strict conditions laid down in Article 2(3) thereof, interpreted in the light of the limits laid down in Article 226 of the Treaty.

Costs

36 The costs incurred by the French Government, the Council and the Commission, 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 question referred to it by the Tribunal d'Instance, Paris, by judgments of 30 January 1996, hereby rules:

On a proper construction, Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues in the French overseas departments precludes exemptions of a general or systematic order, which would thus amount to the reintroduction of a charge having an effect equivalent to that of a customs duty. That decision does, however, authorise exemptions which are necessary, proportionate and precisely determined and which respect the strict conditions laid down in Article 2(3) thereof, interpreted in the light of the limits laid down in Article 226 of the EC Treaty.

Rodríguez Iglesias Gulmann Ragnemalm Wathelet

Mancini Moitinho de Almeida Kapteyn

Murray Edward Puissochet

Hirsch Jann Sevón

Delivered in open court in Luxembourg on 30 April 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President