OPINION OF ADVOCATE GENERAL TESAURO
delivered on 28 June 1994 *

Mr President,
Members of the Court,

1. The Court has once more to consider the so-called dock dues, which were the subject-matter of Case C-163/90 *Legros*. [1] As is well-known, dock dues are a pecuniary charge levied in the French overseas departments on goods brought into those territories, irrespective of their provenance and/or origin, which may be another Member State of the Community, a non-member country or even a region of France itself. In *Legros*, the Court treated dock dues as a charge having effect equivalent to a customs duty; it also held that for the purposes of such classification it was irrelevant that the charge was imposed equally on goods from other parts of France.

It should be borne in mind, first, that in the *Legros* case, the subject-matter of the main proceedings was the levying of the said charge on goods coming from other Member States (as well as from a non-member country bound by a free trade agreement with the Community), and which were thus 'imported' in the proper sense. Secondly, the Court limited the temporal effects of the judgment in question, in that the incompatibility of the charge with the Treaty could not be relied on in support of an action for the repayment of dues paid before the judgment was delivered, except where the application had already been lodged.

2. On 22 December 1989, hence before the judgment referred to had been delivered but after the events material to that case had occurred, the Council adopted Decision 89/688/EEC [2] on the basis of Articles 227(2) and 235 of the Treaty; Article 1 of the decision, taking into consideration the part played by dock dues in supporting the economic and social development of the overseas departments but also in view of 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, [3] imposes on the French authorities the obligation to amend the dock dues arrangements by 31 December 1992 so that they apply without distinction to all products whether imported into or produced in those areas.

* Original language: Italian.

1 — Case C-163/90 *Legros* [1992] ECR I-4625.

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

3 — See recitals 3 to 6 in the preamble to the decision at issue.

Article 2 of the decision provides furthermore for the possibility of authorizing, in favour of local production, partial or total exemptions from the charge according to economic requirements; such exemptions may not however be authorized for a period of more than ten years from the date of introduction of the new system. Finally, Article 4 provides that 'pending implementation of the reform of the dock dues arrangements in accordance with the principles set out in Article 1, the French Republic shall be authorized to maintain the current dock dues arrangements, until not later than 31 December 1992 (...)'.

It is precisely that provision which falls to be considered in this case. [4]

3. The questions referred to the Court by the Tribunal d'Instance, Saint-Denis (Réunion), and the Cour d'Appel, Paris, follow logically from the *Legros* case in at least one way; they also present a particular aspect of considerable importance. In the proceedings pending before the Saint-Denis court (Cases C-407/93 to C-411/93), the plaintiffs claimed repayment of all sums paid as dock dues in the period between July and December 1992 when they brought goods into the region, whether from Member States of the EC, from non-member countries or from other regions of France. It should be noted that in Case C-409/93, payment of the charge at issue relates *solely* to French beer.

Taking account, therefore, of the implications of the judgment given in the *Legros* case, and especially of the fact that it is not possible to deduce from it that the prohibition on dock dues extends equally to dues levied on internal French trade, the court asks:

(a) whether the provisions of Article 9 et seq. of the EEC Treaty, in so far as they lay down the principle of a single Community customs area, prohibit a Member State from levying a charge proportional to their customs value even on goods from other regions of the same State, merely by reason of the entry of those goods into a particular region of that State, and

(b) whether Article 4 of Decision 89/688/EEC, authorizing the French Republic to maintain in force the current dock dues arrangements, even if only temporarily until December 1992, is valid.

4 — In his Opinion in the *Legros* case, Advocate General Jacobs had invited the Court to give a ruling on the validity of the 1989 decision as well, in so far as it authorized the arrangements then in force to be temporarily maintained. That suggestion was not however followed up in the judgment, on the grounds that — as pointed out earlier — the facts in the case referred to predated the decision which clearly did not have retrospective effect.

Although in the main proceedings in Case C-363/93 the subject-matter of the dispute is dock dues levied, as from 1974, *exclusively* on products (flour) from metropolitan France brought into Martinique, the Paris Court of Appeal considered it necessary to refer to the Court a single question on the validity of the Council Decision of 22 December 1989. The national court in fact upheld the appeal, lodged before the *Legros* judgment, in so far as it related to the charge which applied until the adoption of the disputed Council decision, starting from the assumption that the manner in which the charge was classified in that judgment — and therefore the prohibition under Article 9 et seq. of the Treaty on maintaining charges with an effect equivalent to customs duties — related also to French internal trade.

4. Finally, I might appropriately draw attention to the fact that in the proceedings pending in Réunion a further question had arisen, namely whether the application of the contested charge to imports from non-member countries was compatible with the Treaty. Since, however, the court considered it beyond dispute that Articles 9 and 13 do not apply to such goods, unless they are in free circulation or there exist special trading agreements concluded by the Community, neither of which is the situation in the case referred, it did not find it necessary to question the Court of Justice on that point. I shall merely observe here, in the absence of a specific question submitted to the Court, that once dock dues are classed as charges having an effect equivalent to a customs duty, the question of their compatibility with the Treaty rules concerning the Customs Union could arise, in so far as such dues are applied to imports from non-member countries. The Court has in fact frequently reaffirmed that Articles 18 to 29, like Article 113 of the Treaty, prohibit the Member States from altering the level of the charge imposed under the Common Customs Tariff by the imposition of additional national duties or charges. [5]

Validity of Article 4 of Decision 89/688

5. As far as the validity of Article 4 of Decision 89/688 is concerned, I believe I can endorse the Opinion of Advocate General Jacobs in the *Legros* case: it does not seem to me that the arguments put forward during these proceedings are capable of altering that position.

6. The Council maintains, first, that as a result of the contested decision dock dues

5 — See, on this point, the judgment in Joined Cases 37/73 and 38/73 *Sociaal Fonds voor de Diamantarbeiders* v *Indiamex and Association de fait De Belder* [1973] ECR 1609, and to the same effect also the judgments in Case 266/81 *SIOT* v *Ministero delle Finanze and Others* [1983] ECR 731, in particular paragraphs 16 to 19, and Joined Cases 267/81 to 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and SAMI* [1983] ECR 801, in particular paragraphs 26 and 27.

should now be regarded as a Community fiscal measure and not as a pecuniary charge unilaterally imposed by one State: they fall, therefore, outside the scope of Article 9 et seq. of the Treaty. As regards the basis of the Community's power to adopt the measure, the Council points out that the third subparagraph of Article 227(2) entrusts to the institutions of the Community the task of furthering the social and economic development of the overseas departments; since the action aimed at was required in order to attain that objective, although the Treaty did not provide the necessary powers, recourse to Article 235 was entirely legitimate, as all the conditions for its application had been satisfied in this case.

That argument is also put forward to support the validity of Decision 89/688 by the French and Spanish Governments and by the Commission as well. The latter, in particular, in further confirmation of the soundness of that argument, dwells on the reference in the third subparagraph of Article 227(2) to the procedures provided for in Article 226, which laid down a general protection clause for the transitional period to cover cases of serious difficulty in a sector of the economy or in a given area, permitting the Member States to derogate from the rules of the Treaty to such an extent and for such periods as are necessary to attain the objective pursued. Therefore, the Commission argues, since Article 226 can no longer be used but Article 227 is still applicable, the objective pursued by that provision is to be attained, following the rationale of Article 226, by recourse to a different legal basis, that is to say Article 235.

For the Commission, therefore, there can be no doubt as to the necessity of the measure taken because, if 'aids to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be considered compatible with the common market, within the meaning of Article 92(3)(a), which is indisputable with regard to the overseas departments, there is no reason to preclude the pursuit of such an objective from permitting exceptional and temporary derogations from the rules on the free movement of goods.

7. In my view, those arguments — which, in part at least, restate those put forward in the *Legros* case — cannot be accepted. So far as concerns the claim that dock dues are a Community measure, it is sufficient to point out that simply replacing regulation by a Member State with regulation by the Community, which — it is worth re-emphasizing — in this case merely amounted to authorizing the preservation of a national measure held in a judgment of the Court to be contrary to the rules of the Treaty, is not of itself or automatically sufficient to confer legitimacy on the measure at issue. As far as the rules on free movement of goods are concerned, to which the prohibition of dock dues can be traced in the light of the *Legros* judgment, the Court has several times ruled, with particular reference to Articles 30 to 36,

that although the said provisions 'apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market'. [6]

8. Nor can the reference to the objectives entrusted to the Community institutions by Article 227(2), in connection with the provisions of Article 235, serve as a basis for the validity of Decision 89/688. In fact, as Advocate General Jacobs correctly points out in his Opinion in *Legros*, that argument disregards the fundamental distinction drawn by Article 227(2) and confirmed by the Court in the *Hansen* [7] judgment between the provisions mentioned in the first subparagraph, including those relating to the free movement of goods, which were to apply as soon as the Treaty came into force, and the others, which were to be applied progressively to the overseas departments, allowing the greatest latitude possible for adopting specific measures to meet the needs of those regions of France. I believe that the effect of any other solution would be to distort the meaning and scope not only of Article 227 but also of Article 235 and the procedure it establishes for supplementing the powers of the Community.

9. If it were considered possible, by recourse to Article 235, to derogate from any provision of the Treaty, with a view to attaining the objective of developing the overseas departments, the result would be to render meaningless the distinction made by Article 227(2) between the different sets of Treaty rules. As it is necessary, however, in choosing between two possible interpretations of a given provision, to select the one which gives it legislative effect, that result appears plainly unacceptable.

Moreover, the precise indication in Article 227(2) of the titles and articles of the Treaty which were to apply immediately, even to the overseas territories, is consistent with the role they play in the general scheme of the system it was sought to establish. As far as the prohibitions laid down by Article 9 et seq. are concerned, in particular, the Court was able, as far back as its judgment in *Commission* v *Luxembourg and Belgium*, [8] to make it clear that the precision and unconditional scope of those prohibitions, as also the meaning of the provisions in which they are laid down in the general scheme of the Treaty — especially their connection with the principle of the free movement of goods — demonstrate their basic purpose; 'in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated'. Subsequent decisions of the

6 — See, for example, the judgment in Case 37/83 *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229, in particular paragraph 18.

7 — Case 148/77 *Hansen* v *Hauptzollamt Flensburg* [1978] ECR 1787.

8 — Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425, in particular p. 431-432.

Court have upheld that principle, frequently using the same wording. [9]

Another passage in the *Commission* v *Luxembourg and Belgium* judgment is significant, and even clearer, as if that were required; it states that in order to classify a financial charge as having equivalent effect to a customs duty and thus being contrary to Article 9, it is sufficient to establish whether it constitutes a barrier to the free movement of goods and has been imposed as the 'result not of a Community procedure but of a unilateral decision'. The interesting point in that case is the phrase 'the result not of a Community procedure': as I have already stated, not only does Article 227(2) not confer on the Community institutions the power to derogate from Article 9, but it expressly excludes the same. [10]

10. In my view, it is helpful in that regard to bear in mind the judgment in the *Commissaires Réunis and Fils de Henri Ramel* case. [11] The Court had been asked to give a ruling on the validity of an article in a regulation on the common organization of the market in wine authorizing the producer Member States to introduce and to levy, after the end of the transitional period and until the measures required for the management of that market had been applied in full, charges having an effect equivalent to customs duties in intra-Community trade in table wine, where that was necessary to avoid disturbance of the markets concerned.

After noting that Article 38(2) of the Treaty extends to agricultural products the rules laid down for the establishment of the common market and, further, that it was not possible to find in Articles 39 to 46 a provision which expressly or even by implication, *though unequivocally,* requires or authorizes the introduction of such charges, the Court found that the provision at issue was invalid. It also added: 'It is clear from all these provisions and their relationship *inter se* that the extensive powers, in particular of a sectoral and regional nature, granted to the Community institutions in the conduct of the Common Agricultural Policy must, in any event as from the end of the transitional period, be exercised from the perspective of the unity of the market to the exclusion of any measure compromising the abolition between

9 — See judgments in Case 24/68 *Commission* v *Italy* [1969] ECR 193, especially points 4 and 10, Joined Cases 2/69 and 3/69 *Diamantarbeiders* v *Brachfeld* [1969] ECR 211, especially points 7/8 and 11/12. See also the judgments in Case 77/72 *Capolongo* v *Azienda Agricola Maya* [1973] ECR 611, in particular points 10 and 11; Case 87/75 *Concena Daniele Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129, in particular points 7 to 9; Joined Cases 80/77 and 81/77 *Commissaires Réunis and les Fils de Henri Ramel* v *Receveur des Douanes* [1978] ECR 927, in particular points 24 to 26; Case 193/85 *Cooperativa Co-Frutta* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085, in particular paragraph 27, and Case 61/86 *United Kingdom* v *Commission* [1988] ECR 431, in particular paragraph 9.

10 — As to there being no possibility of recourse to Article 227(2) to restrict the application to the overseas departments of the rules set out in the first subparagraph of that article or to introduce a special system derogating from those rules in the regions and sectors mentioned therein, academic writers are essentially at one: see, for further bibliographical references, Dewost, 'Article 227', in *Le Droit de la Communauté Européenne* (Commentaire Megret), Volume 15, Brussels 1987, p. 474 et seq.

11 — Joined Cases 80/77 and 81/77, cited in footnote 9.

Member States of customs duties (...) or charges or measures having equivalent effect'. [12]

11. That also meets the objection of the Commission, which considers it can interpret the reference in the third subparagraph of Article 227(2) to Article 226 as permitting, even after the end of the transitional period and the consequent impossibility of using the procedure provided therein, the introduction of derogations from the rules of the EEC Treaty — from all the rules, including those stated by Article 227 to apply immediately — where such derogations are regarded as being necessary to the economic and social development of the overseas departments, merely by recourse to another legal basis, in this case Article 235.

In fact, the purpose of Article 226 was to make it possible, in the period immediately after the Treaty came into force, to derogate from the rules laid down therein, in order to permit the various national economies to adapt gradually to new circumstances, in the event of serious difficulties arising from the opening up of the markets, which was of special importance for the overseas departments on account of their distinctive characteristics. However, its function came to an end at the close of the transitional period and cannot, therefore, be held to subsist in a more or less indirect or limited form, especially as the Treaty provides for various other protective measures, of unlimited duration, in given areas (but not the area relevant in this case). I do not believe that Article 235 performs that role at present.

12. To take a different view, as already mentioned, would lead to the meaning of the provision in question being distorted. The purpose of Article 235 is to establish a formal procedure — one that is at the same time more flexible than that laid down for revision of the Treaties — intended, in the light of progress in completing the system and its overall development, to supplement the powers expressly conferred on the Community institutions with other powers and duties, as far as is necessary to attain the objectives pursued.

Although, in the light of the cases in which it has actually been applied, it may be claimed without a doubt that a real and genuine 'constitutional procedure' intended for a particularly broad use of Article 235 has taken root, in the sense that Article 235 authorizes all measures connected directly and practically with the areas originally falling within the

12 — Paragraph 35.

Community's field of action or subsequently drawn into it, the limits of that procedure, which, it would seem, cannot be exceeded, should also be borne in mind. [13] It is beyond dispute that the provision under discussion has also changed the essential scope of some rules of the Treaty; however, compliance with the substantive principles of the 'Community constitution' must in any case form an insurmountable precondition for its application. The free movement of goods must certainly be counted among those principles; significantly, the rules governing that principle are placed at the beginning of the part of the Treaty dealing with the foundations of the Community.

On the other hand, it must be pointed out that, while the precondition for the application of Article 235 is the circumstance that 'action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community', in the present case it seems to me that resort to that provision is an attempt to evade a prohibition. On a correct reading, Article 227(2) definitively prohibits derogations from the applicability in the overseas departments of the rules on free movement of goods after the end of the transitional period. As Advocate General Jacobs also noted in the *Legros* case, it is not possible to interpret Article 235 as meant to authorize what Article 227(2) seeks to prohibit.

13 — On this point, see Tizzano: 'Competenze della Comunità', in *Trent'anni di Diritto Comunitario*, 1981, p. 45 et seq.

13. Finally, I find no relevance in the Commission's reference to the Treaty provisions concerning State aids, in particular Article 92(3), under which, notwithstanding the general prohibition laid down in Article 92(1), 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment' may be considered compatible with the common market. It is sufficient to reply [14] to that argument that although the Council possesses certain powers with regard to the application of the Treaty provisions on State aids by virtue of Article 92(3)(d), the third subparagraph of Article 93(2) and Article 94, it by no means intended to act in the context of the Treaty provisions on State aids in adopting Decision 89/688. Accordingly, any application of those provisions in this case can have no influence on the validity of that decision. Moreover, the rules and procedures relating to State aids may not in any event be relied on in order to achieve a result contrary to other rules of the Treaty. [15]

The reference to the system of rules governing State aids is, instead, helpful in showing that the Treaty, like the secondary legislation, provides various methods which may be used to achieve the aim, specified in the third

14 — As Advocate General Jacobs did in the *Legros* case, in which the Council had made a similar point.

15 — See the judgment in Case 73/79 *Commission* v *Italy* [1980] ECR 1533, in particular paragraph 11.

subparagraph of Article 227(2), of making the economic and social development of the overseas departments possible, without any need to undermine the foundations on which the Community is based.

It is not impossible, therefore, that the Court may yet have to deal with that question.

Nature of the dock dues levied on goods from other regions of France

14. In short, if the contested decision is held up to the light, it would appear that there has been an attempt to reintroduce by stealth what has been openly thrown out, that is to say, to maintain at all costs a measure which is incompatible with the Treaty and has been held to be so in a judgment of the Court. [16] That attempt first materialized in the shape of Article 4 of the decision — the subject-matter of my considerations here — which authorized the existing arrangements to be kept temporarily in force; however, at least on a first reading, the attempt was made by means of the decision as a whole. Indeed, while the decision requires the French authorities to adjust the dock dues arrangements for conversion into a system of internal taxation, it permits exemptions for local production for a period of not more than ten years. In that way the preservation of the previous system is ensured in fact, even if under another name, as seems to be confirmed by the national law adopted in implementation of the decision. [17] That system would *prima facie* appear to be incompatible with Article 95 of the Treaty since it discriminates between products originating in the overseas departments and similar products imported from other Member States.

15. The other question referred to the Court for a preliminary ruling is whether Article 9 of the Treaty is to be interpreted as precluding a Member State from levying charges with the characteristic features of dock dues even when they are applied to goods not coming from another Member State, merely by reason of the entry of those goods into a particular region of that State.

16. The plaintiffs in the main proceedings, the French Government and the Commission consider that the question should be answered in the affirmative on the basis of a series of arguments which do not, however, seem to me to be decisive.

They claim, first, that the articles of the Treaty relating to the Customs Union are based on the notion of a single Community customs territory, a principle that would be

16 — It is significant here that the Commission itself, in the *Legros* case, had claimed that the measure in question was incompatible with the Treaty.

17 — Law No 92/676 of 17 July 1992 (*Official Journal of the French Republic* of 19 July 1992, p. 9697).

defeated if it were open to Member States to reintroduce internal protection for certain local markets.

They also added that there was no point in the circumstances in referring to the case-law of the Court, according to which the provisions of the Treaty are not applicable to purely internal situations within a Member State, since dock dues are intended to be applied without distinction to all goods, whether they are from other regions of France, or are imported from other Member States of the Community or from non-member countries. In their view, certain passages from judgments of the Court — *Legros* and *Ligur Carni and Others* [18] — that were in fact taken into consideration both during the written procedure and at the hearing had already decided the issue arising in this case, which is whether or not the prohibition laid down in Article 9 applies also to internal trade. As far as the *Legros* judgment in particular is concerned, while acknowledging that the Court did not give a specific ruling on the compatibility with the Treaty of a charge levied on internal trade, those parties maintained that dock dues, which were described as charges having equivalent effect in that case and in so far as they applied to imports from other Member States of the Community, could not fail to be so classified even when they are imposed solely and exclusively on domestic trade, as is the situation in particular in two of the cases now before the Court.

18 — Joined Cases C-227/91, C-318/91 and C-319/91 *Ligur Carni and Others* v *Unità Sanitaria Locale No XV di Genova and Others* [1993] ECR I-6621.

17. Finally, as the Commission in particular pointed out, if a Member State were able to maintain tariff barriers between the various parts of its territory for its own products, serious practical problems would be caused by the need in any event to avoid the indirect taxation of a product imported from another Member State, not only where a product from a Member State bound for one of the French overseas departments is merely in 'transit' through a different region of France but also where goods are imported into France and only later shipped to an overseas department.

18. As I have said, I am not swayed by those arguments, in the light of either the relevant articles of the Treaty or the consistent interpretation thereof by the Court.

Article 9 lays down 'the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect', Article 12 prohibits Member States from introducing new duties or charges and Article 13 required customs duties on imports in force between Member States to be progressively abolished during the transitional period. It is plain, just from reading those provisions, that a financial charge falls within their ambit where it is

applied to goods when or because they cross a frontier between one Member State and another. Those provisions appear, moreover, in the section of the Treaty relating to the free movement of goods and, like the prohibition on quantitative restrictions on imports and exports and all measures having equivalent effect laid down in Article 30 et seq., they have as their object the complete liberalization of trade between the Member States of the Community.

It is therefore essential, for the purposes of the application of those rules, for two States to be involved. Consequently, if there is no crossing of a frontier, as is the case where a product from one State is brought into another region of the same State, the situation is not covered by Community law, in the same way as any other situation in which all the factors are confined within a single Member State. That is borne out by the settled case-law of the Court.

19. It does not seem to me to be possible to deduce any arguments supporting the opposite contention from the *Legros* judgment, contrary to the view taken in this case. Paragraph 18 of that judgment in particular — repeated in paragraph 1 of the operative part — is quite unequivocal: it states that a charge exhibiting the features of dock dues 'levied by a Member State *on goods imported from another Member State* by reason of their entry into a region of the territory of the first Member State constitutes a charge having effect equivalent to a customs duty on imports, notwithstanding the fact that the charge is also imposed on goods entering that region from another part of the same State' (emphasis added). It is self-evident in my view that such a statement cannot in any way affect the classification of the charge in question where it is applied to domestic goods; it simply makes clear that its application does not prevent a pecuniary charge *applied to imported products* from being held to be a charge having equivalent effect to a duty despite the fact of its being applied *also* to domestic goods.

That is also confirmed by paragraph 16 of the judgment which, after referring to the clarification provided by earlier case-law of the Court, namely that the prohibition of all customs duties in trade between Member States is justified by the fact that such pecuniary charges create obstacles to the movement of goods, states that 'a charge levied at a regional frontier by reason of the fact that goods are brought into one region of a Member State constitutes an obstacle to the free movement of goods at least as serious as a charge levied at a national frontier *on products entering a Member State as a whole*' (emphasis added). In other words, it is immaterial, for the purposes of ascertaining whether or not it is compatible with Article 9 et seq. of the Treaty, that a charge is applied to imported products at the time

when they enter the territory of a region which is not on the borders of the State, rather than when they cross the frontier. Nevertheless it is quite clear that the goods in question must move from one Member State to another. It is irrelevant, for example, whether Scotch whisky crosses the French frontier at Calais (because it has been shipped by sea) or at Lyon (because it has been sent by air): in both cases, for these purposes, the point is the crossing of a Member State's frontier.

20. The Court has repeatedly applied that principle when interpreting Article 30 as well. It has frequently stated, most recently in *Ligur Carni and Others*, [19] that a national measure cannot escape being characterized as discriminatory or protective for the purposes of the rules on the free movement of goods just because it has limited territorial scope and affects both products from other parts of the national territory and products imported from other Member States. There is no doubt, it seems to me, that the established incompatibility of the national measure in the cases considered related exclusively to the application of the contested measure to *imported* goods, and not to goods produced and marketed within the country. If, as a possible result of the Court's ruling, the measure is inapplicable to domestic products as well, that is merely a consequence either of the special mechanism set up by the internal rules which made provision for it and made it impossible, when applying it, to draw distinctions according to the origin of the goods, or else of the practical methods of implementation which in the end took the form of a different measure having equivalent effect, by reason of the checks that they entailed.

21. It is therefore absolutely clear — it is as well to stress — that in the cases referred to it was necessary to ascertain whether a pecuniary charge or a national measure applied to goods *imported from another Member State* could escape being characterized as a duty or a charge having equivalent effect for the purposes of Article 9 et seq., or as a quantitative restriction or measure having equivalent effect under Article 30 of the Treaty, on account of its being imposed also on domestic products: the reply has, rightly, been no.

The question now before the Court is a different one, namely, whether an individual can rely on Article 9 et seq. to avoid paying a pecuniary charge imposed on him, not on importing a product but on bringing a domestic product into a different part of the same State. The question arising here is whether an individual may rely on Community law, going back to the example used earlier, to obtain a declaration that a charge

19 — Cited above, especially paragraphs 37 and 38. See also the judgment in Case C-21/88 *Du Pont de Nemours Italiana* v *Unità Sanitaria Locale No 2 di Carrara* [1990] ECR I-889, in particular paragraphs 12 and 13; judgment in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivia* v *Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña* [1991] ECR I-4151, especially paragraph 24, and judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli* [1991] ECR I-5889, especially paragraph 21.

imposed on whisky transported from Scotland, not to Lyon but to London, or on San Daniele ham transported from Friuli, not to Stuttgart but to Sardinia, is unlawful. That question was not considered in either *Legros* or *Ligur Carni and Others*: to believe that it was would be to yield to an optical illusion and to waive the precise appraisal which is called for in this case.

22. The Court has consistently held, on the one hand, that the rules of the Treaty are not applicable to purely internal situations, and on the other that because a national law is held to be incompatible with Community law, it does not necessarily follow that it may not be applied to domestic products either.

Thus, in *Waterkeyn*, [20] when asked to clarify the scope of an earlier judgment which found that the French legislation on the advertising of alcoholic beverages was incompatible with Article 30, [21] the Court stated that the judgment 'only affects the treatment of products imported from other Member States ...' and that accordingly 'the breach of obligations found by the Court [did] not concern the rules applicable to national products'. [22] The court thus rejected the 'general effect' argument, according to which, as a result of the first judgment, the French legislation on the advertising of alcoholic beverages had been condemned in its entirety and, therefore, it was not permissible to distinguish between products according to their origin, applying less favourable rules to domestic products.

23. In the *Cognet* [23] judgment, the court making the reference asked whether the creation in a Member State of a dual pricing system in the same sector of the book trade which provided for fixed prices, apart from the possibility of a small reduction for books published and sold in that State without having crossed a Community frontier at the marketing stage, alongside non-regulated prices, particularly for books published in that State and reimported from another Member State, was incompatible with the rules of the Treaty. The Court made it clear that 'Article 30 of the EEC Treaty does not forbid such a difference of treatment. The purpose of that provision is to eliminate obstacles to the importation of goods and

20 — Joined Cases 314/81 to 316/81 and 83/82 *Procureur de la République and Comité National de Défense contre l'Alcoolisme* v *Alex Waterkeyn and Others; Procureur de la République* v *Jean Cayard and Others* [1982] ECR 4337.

21 — This is the judgment in Case 152/78 *Commission* v *France* [1980] ECR 2299.

22 — See paragraphs 8 to 12 in *Waterkeyn*, cited at note 20.

23 — Case 355/85 *Driancourt* v *Cognet* [1986] ECR 3231, in particular paragraph 10. See also the judgments in Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575, in particular paragraph 9; Joined Cases 80/85 and 159/85 *Nederlandse Bakkerij Stichting* v *Edah* [1986] ECR 3359, in particular paragraphs 18 to 20; Case 98/86 *Ministère Public* v *Mathot* [1987] ECR 809, in particular paragraphs 7 to 9 and Case 255/86 *Commission* v *Belgium* [1988] ECR 693, in particular paragraphs 5 and 6.

not to ensure that goods of national origin always enjoy the same treatment as imported or reimported goods. (...) A difference in treatment between goods which is not capable of restricting imports or of prejudicing the marketing of imported or reimported goods does not fall within the prohibition contained in Article 30.'

24. Finally, two further judgments are of particular importance. In *Smanor*, [24] the Court was asked whether Articles 30 and 34 of the Treaty precluded the application by a Member State to yoghurt which had been deep-frozen of national legislation prohibiting the sale of the product under the name 'deep-frozen yoghurt', the name 'yoghurt' being reserved for the fresh product alone. The Court held that such rules were incompatible with Community law, but only *if applied to products imported from another Member State* where they were lawfully manufactured and marketed under that name; with that the Court let it clearly be understood that there was nothing to prohibit the application of the rules in question to domestic products.

In the second judgment, *Drei Glocken*, [25] the Court held that *the extension to imported products* of a prohibition on the sale of pasta made from common wheat or from a mixture of common wheat and durum wheat was incompatible with Articles 30 and 36 of the Treaty. Paragraph 25 of the grounds is particularly significant; in answer to the objection of the Italian Government which had maintained, in defending the national legislation on pasta products, that the rules were necessary in order to guarantee market outlets for the cultivation of durum wheat, the Court states: 'It should first be stressed that it is the extension of the law (...) to imported products which is at issue and that *Community law does not require the legislature to repeal the law as far as pasta producers established on Italian soil are concerned*' (emphasis added).

25. Analysis of the case-law provides confirmation, as the Council and the Spanish Government have correctly noted, of the more general principle that the rules of Community law imposing on Member States various prohibitions with regard to relations between them is not applicable to situations which are purely internal; that is borne out by the case-law on the free movement of persons or, again, on the right of establishment or the freedom to provide services. [26]

26. Finally, in answer to the Commission's objection that to maintain dock dues for

24 — Case 298/87 *Smanor* [1988] ECR 4489, in particular paragraphs 8 to 25.

25 — Case 407/85 *Drei Glocken and Another* v *USL CentroSud and Another* [1988] ECR 4233, in particular, paragraphs 23 to 25.

26 — I would merely refer to the recent judgments in Joined Cases C-330/90 and C-331/90 *López Brea and Hidalgo Palacios* [1992] ECR I-323, in particular paragraphs 7 to 9; Case C-332/90 *Steen* v *Deutsche Bundespost* [1992] ECR I-341, in particular paragraphs 8 to 12, and Case C-60/91 *Batista Morais* [1992] ECR I-2085, in particular paragraphs 7 to 9.

domestic products alone would create problems not easily resolved, in terms of setting up procedures in order to establish where goods come from and, accordingly, whether or not they are subject to the charge, I would point out that, while difficulties or complications are indeed possible, that does not mean that the issue of the applicability to internal French trade as well of the prohibition on duties or charges having equivalent effect has to be settled one way or the other. The solution of legal issues cannot depend on practical problems to such an extent. It seems to me, moreover, that checks of that type ought not to be so difficult to carry out (and that the Community procedure itself may perhaps provide helpful examples in that respect). If, however, they did create any barriers to the movement of goods from other Member States, they would in any case have to be examined in the light of Article 30 et seq. of the Treaty, and therefore be considered as measures, not charges, having equivalent effect. It is, consequently, for the national court to apply those rules and, in the event of uncertainty, to ask this Court to interpret them.

27. To summarize the points that I have developed, where goods *from one Member State* pass from one region to another *in the same Member State* the basic and essential condition for the application of Article 9 et seq. of the Treaty is not satisfied. That condition is the crossing of a frontier from one State to another. [27] In this case, the French overseas departments, whether they are islands (Réunion, Martinique, Guadeloupe) or not (Guyane), are 'frontiers' only where the products concerned come from another Member State; they are not 'frontiers' where the products come from and originate in another region of France. Accordingly, in the latter case the prohibition of duties and charges having equivalent effect is not applicable. To hold otherwise would amount, I repeat, to being deceived by appearances.

28. It must be acknowledged, however, that the solution of the problem as dictated by the interpretation of the Treaty and the case-law of the Court may seem somewhat paradoxical. An experienced lawyer will also notice the paradox of a single market in which barriers to trade between Portugal and Denmark are prohibited, whilst barriers to trade between Naples and Capri are immaterial.

Neither the Treaty nor the Court in its decisions can, or could, find a way out of such

27 — On this subject, for a different situation but one amenable to the same logic, see my Opinion of 26 April 1994 in Case C-130/93 *Lamaire* [1994] ECR I-3215, at page I-3217, pending before the Court — the subject-matter of the action being a pecuniary charge applied to agricultural products exported from Belgium — in which, taking account of the fact that the sole objective of Articles 9 and 12 of the Treaty is to prohibit charges having equivalent effect to customs duties levied on trade *between Member States*, I consider a contribution such as the one at issue not to be incompatible with those provisions, if it is applied to products exported to non-member countries.

paradox; that is possible only by an approach based on convenience, which will not be unfamiliar even to the least informed of legislatures, as is also borne out by the highly unusual nature of the case in point. Once duties on imports are abolished as being unlawful, I simply cannot imagine a legislature maintaining those same duties on domestic products. The remedy lies, therefore, *in rebus* and not in an overly casual construction of a fundamental and unequivocal rule of the Treaty, as irrefutably demonstrated by the Commission but which I cannot in any event endorse.

The same concept of the single customs territory, frequently referred to in the proceedings, leads to a formula which is very attractive but which cannot be separated from the Customs Union rules contained in the Treaty. Those rules, it hardly needs repeating, are intended to eliminate obstacles to trade between Member States (Article 12 mentions imports and exports) and not to trade between regions or municipalities within a single Member State as well.

The alternative, therefore, would be to consider that the abolition of duties between regions and municipalities was implicit in Article 12. To do so would, however, call into question once again the settled case-law of several decades on wholly internal situations, not only as regards the Customs Union and the movement of goods, but also as regards services and free movement of persons generally.

I do not intend to suggest that alternative to the Court either. Besides, there is no need to do so. It is just worth recalling that the national court can always, in the light of its own internal law, check whether the treatment of domestic undertakings and manufacturers is in fact discriminatory and whether, and if so how, such discrimination can and/or must be eliminated. [28]

Temporal effects of the judgment

29. The French Government asks, in short, if Decision 89/688 is found to be invalid, that the Court should impose temporal limits on the effects of its ruling. It should be borne in mind that a judgment of the Court in proceedings for a preliminary ruling declaring a Community act invalid in principle has retrospective effect, like a judgment annulling the act. [29]

28 — On this point, see most recently the judgment in Case C-132/93 *Steen* [1994] ECR I-2715, especially paragraphs 8 to 11.

29 — See, most recently, the judgment in Case C-229/92 *Roquette Frères* [1994] ECR I-1445.

However, I do not think that any justification for the request is to be found in the principles which have been laid down by the case-law on the temporal limitation of the effects of a preliminary ruling declaring an act of a Community institution to be invalid and which have been developed, moreover, with particular reference to regulations. It is difficult to claim that in this case grounds relating to the uniform application of Community law throughout the Community or to imperative requirements of legal certainty may be relied on to limit the effects of the Court's judgment. [30] Instead, the argument developed in the *Legros* judgment declaring that the application of dock dues to imports from the other Member States was incompatible with the provisions of the EEC Treaty ought, to say the least, to have given rise to reasonable doubts as to whether it was lawful to maintain the system, even if only temporarily and on the basis of a Community act.

30. That said, it is essential to take account of the fact that precisely on that occasion the Court held that the conditions enabling it exceptionally to limit the effects of a ruling on interpretation had been satisfied. It was noted, in particular, that there existed, in objective terms, uncertainty as to the lawfulness of the charge with regard to Community law, to which the Community institutions themselves had contributed, especially by adopting Decision 89/688, and a real risk that the system of funding local authorities in the overseas departments might retroactively be thrown into confusion, by reason of the large number of legal relationships based in good faith on the rules considered to be validly in force. Accordingly, without prejudice to the rights of those who had already brought an action or instituted equivalent proceedings, the Court held that the provisions of the Treaty concerning charges having equivalent effect to customs duties could not be relied on as the basis of claims for the reimbursement of dock dues paid prior to the date of the judgment.

31. Taking account of the fact that Article 4 of Decision 89/688 merely authorizes the national dock dues arrangements then in existence to be maintained in force, and also that the effects of the *Legros* judgment finding those arrangements incompatible with the provisions of the Treaty were limited, for the reasons set out above, to the date of the judgment itself, it would not, it seems to me, be consistent to make a declaration that Decision 89/688 is invalid take effect from an earlier date.

32. In the light of those considerations, if the Court intends to follow my Opinion as

30 — On this point, in addition to the *Roquette Frères* judgment cited in the previous footnote, see the judgments in Case 4/79 *Providence Agricole de la Champagne* v *ONIC* [1980] ECR 2823, paragraphs 44 to 46; in Case 109/79 *Maïseries de Beauce* v *ONIC* [1980] ECR 2883, paragraphs 44 to 46 and in Case 145/79 *Roquette Frères* v *French Customs Administration* [1980] ECR 2917, paragraphs 51 to 53. See also the judgment in Case 112/83 *Produits de maïs* v *Administration des Douanes et Droits Indirects* [1985] ECR 719, paragraph 17.

regards the inapplicability of Article 9 et seq. to internal French trade, it is clear that the question referred by the Cour d'Appel cannot simply be answered in the form in which it was asked.

In the proceedings pending before the Cour d'Appel, the issue was the levying of dock dues exclusively on goods of French origin, and the question concerning solely the validity of Article 4 of Decision 89/688 was justified by the belief that, in the light of the *Legros* judgment, levying dock dues was incompatible with the Treaty in those circumstances as well.

Accordingly, since there is no justification for that assumption in practice, it is necessary in a spirit of cooperation between the Court of Justice and the national courts to provide an answer that will assist the Cour d'Appel in resolving the dispute before it, and which must necessarily deal for that court too with the point that the prohibition on charges having equivalent effect to customs duties does not apply to French internal trade.

33. I therefore propose that the questions submitted in all the cases before the Court be answered as follows:

1. Article 4 of Council Decision 89/688/EEC of 22 December 1989 concerning the dock dues in the French overseas departments is invalid.

2. The invalidity of Article 4 of Council Decision 89/688/EEC of 22 December 1989, which has been established, does not permit the levying of dock dues by the French authorities in the period prior to 16 July 1992 to be challenged, without prejudice to the rights of those who brought an action or instituted equivalent proceedings for repayment before that date.

3. The prohibition on charges having equivalent effect to customs duties on imports does not apply to a charge levied by a Member State on the entry into one region of the State of goods originating in other regions of that State.