

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 20 May 1992 *

*Mr President,
Members of the Court,*

1. In this case, the Cour d'Appel, Saint-Denis, Réunion, asks for a preliminary ruling under Article 177 of the EEC Treaty on the legality under Community law of certain levies known as dock dues, which are imposed on the entry of goods into Réunion, a French overseas department. In my Opinion delivered on 21 November 1991, I concluded that such levies were incompatible with the provisions of the Treaty relating to charges having an effect equivalent to customs duties on imports, and with Article 6 of the Agreement between the Community and Sweden signed in Brussels on 22 July 1972, in so far as they were imposed on imports from Member States other than that of which the region concerned formed part, or from Sweden, respectively.

2. I also concluded that Council Decision 89/688 of 22 December 1989 concerning the dock dues in the French overseas departments (OJ 1989 L 399, p. 46) was invalid in so far as it purported to authorize France to maintain the current dock dues arrangements until 31 December 1992. The Council has authority to derogate from certain provisions of the EEC Treaty for the benefit of the French overseas departments by virtue of Article 227(2), but I took the view that that

provision, as interpreted by the Court in Case 148/77 *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, did not permit the Council to derogate from the Treaty provisions on customs duties on imports and charges having equivalent effect. Although the events which gave rise to these proceedings took place before Decision 89/688 was adopted and the question of its validity was consequently not specifically raised by the referring court, it seemed to me desirable, in the interests of clarity, that it should be made clear that, if dock dues constituted charges having an effect equivalent to customs duties on imports, the Council had no authority to authorize France to maintain them in force and that Decision 89/688 was accordingly invalid.

3. By Order of 22 January 1992, the Court reopened the oral procedure to hear argument on the question whether Decision 89/688 was valid in so far as it authorized France to maintain the current dock dues arrangements until 31 December 1992. A further hearing accordingly took place on 31 March 1992 at which the French Government, Réunion, the Council and the Commission were represented. This second Opinion is limited to the issues raised at that hearing.

* Original language: English.

The jurisdiction of the Court

4. The first issue which needs to be addressed is whether the Court has jurisdiction to rule on the validity of Decision 89/688 in the present proceedings. The Council did not address that issue, on which it expressed itself content to accept the view of the Court. The French Government and the Commission, however, maintained that the Court could not rule on the matter because, as I have indicated, the facts of the case took place before the decision was adopted and the referring court has not asked for guidance on its validity.

5. It is, of course, correct to say that the national court has not referred any question explicitly relating to Decision 89/688. However, the Court, when asked for a preliminary ruling, has never considered itself to be limited to the specific provisions invoked by the national court. On the contrary, the Court has consistently taken the position that it should rule on any provisions of Community law which are relevant to the issues confronting the national court: see e. g. Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8.

6. In the present case the validity of Decision 89/688 was put in issue by the Commission, which accepted that, if its view that dock dues constituted charges having equivalent effect to customs duties was correct, they could not be legitimized by a decision of the Council under Article 227(2) of the Treaty. Although Decision 89/688 was adopted on the basis of a proposal of the Commission itself, the Commission

explained that its proposal was based on political considerations. Very properly, the Commission did not seek to defend some other characterization of dock dues which, while legally dubious, might have appeared to justify the adoption of the decision.

7. The circumstances of the present case illustrate the need to avoid too narrow a view of the Court's powers under Article 177. Although the decision does not purport to have retroactive effect, nevertheless doubts could arise as to its temporal effects. There seems no reason of principle why dock dues, previously unlawful, should be treated as lawful only with effect from a particular date. Moreover, it might seem paradoxical to regard dock dues as lawful only after the adoption of a decision designed to ensure their reform, as would be the case if the decision were regarded as not being retroactive. But there is a point of greater significance as showing the relevance of the validity of the decision to the issues before the national court: the very adoption of the decision must, on the view I take, entail, if the decision is valid, that dock dues could never be regarded as customs duties or charges having equivalent effect. Accordingly the validity of the decision is inseparable from the issue before the national court.

8. It is clear therefore on that view that the Court does have jurisdiction to rule on the validity of the decision and it is in my opinion plainly desirable that the Court should so rule. Not to pronounce on the validity of the decision in circumstances in which its invalidity follows inescapably from the rest of the Court's ruling would create great legal uncertainty. Moreover, the same issues seem

bound to arise in relation to periods to which Decision 89/688 purports to apply. For the Court to fail to rule on the validity of the decision in such circumstances would therefore be liable to prejudice both legal certainty and the interests of procedural economy. The argument for ruling on the question is reinforced now that the question has been fully debated.

The validity of Decision 89/688

9. I must therefore consider whether any reasons were put forward at the second hearing which might lead me to revise my view that Decision 89/688 is invalid. That decision was defended on two grounds which had not previously been advanced.

10. The Council, which had not presented written or oral argument previously, argued that attention had hitherto been devoted exclusively to the imposition of dock dues on products imported into Réunion. In the view of the Council, however, the central issue is the legality of the exemption of local produce from dock dues. According to the Council, that exemption constitutes a State aid for the purposes of Article 92 of the Treaty which, although perhaps unlawful prior to Decision 89/688, was legitimized by the adoption of that decision.

11. I am unable to accept this argument. In the first place, the distinction to which the

Council attaches significance seems of no relevance. The subject of the questions referred to the Court is the legality of certain levies imposed on the entry of goods into Réunion. For the reasons given in my earlier Opinion, I consider that those levies constitute charges having an effect equivalent to customs duties on imports and that the Council has no power to derogate from the rules relating to such charges for the benefit of the French overseas departments. Even if the use to which the proceeds of dock dues are put may be considered an aid within the meaning of Article 92, or the fact that dock dues are not imposed on local produce constitutes such an aid, this would not affect the question whether dock dues themselves amounted to charges having an effect equivalent to customs duties: see Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 and C-83/90 *Société Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice Port* [1992] ECR I-1847, paragraph 32.

12. In any event, the Treaty provisions on aid granted by Member States form part of the rules on competition. Those rules are included in the first subparagraph of Article 227(2) among the provisions of the Treaty from which the Council has no power to derogate under the second subparagraph of Article 227(2). It is true that the Council has certain powers in relation to the applicability of the Treaty provisions on aid: see Article 92(3)(d), Article 93(2), third subparagraph, and Article 94. However, it is abundantly clear, both from the terms of those provisions and from the preamble to Decision 89/688 itself, that the Council, in adopting that decision, was not intending to act, and could not have been acting, under the Treaty

rules on aid granted by States. The possible application of those rules in the circumstances of the present case therefore has no bearing on the validity of Decision 89/688.

13. The French Government sought to defend the validity of Decision 89/688 on the ground that it was based not only on Article 227(2) of the Treaty but also on Article 235. That argument must in my view also be rejected, for it would undermine the fundamental distinction drawn by Article 227(2) itself, and confirmed in the *Hansen* case, between the rules mentioned in the first subparagraph of that provision and those covered by the second subparagraph. If the

Council could in any event derogate under Article 235 from all the provisions of the Treaty in order to promote the economic and social development of the French overseas departments, the structure and language of Article 227(2) would be subverted. The reference to Article 235 in the preamble to the decision, which did not appear in the Commission's proposal, can therefore only be understood as based on the view that the second subparagraph of Article 227(2) of the Treaty did not confer the powers necessary for its adoption. Article 235 cannot be interpreted as authorizing the Council to derogate from provisions of the Treaty where such derogation is prohibited by Article 227(2) itself.

Conclusion

14. I therefore remain of the view that levies such as dock dues must be considered charges having an effect equivalent to customs duties and that Decision 89/688 is invalid in so far as it purports to authorize the maintenance of the current dock dues arrangements. I consider that the Court has jurisdiction in these proceedings to deal with the question of the validity of that decision and that it is desirable in the interests of legal certainty that it should do so. Accordingly, I am of the opinion that the questions referred to the Court should be answered in the terms set out in my Opinion of 21 November 1991.