proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Finanzgericht Hamburg, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Finanzgericht Hamburg by order of 5 November 1976 hereby rules.

Article 3 (1) (a) of Regulation No 803/68 of the Council is to be interpreted as meaning that the normal price of goods includes the value of a patented process where the protected process is inseparably embodied in and constitutes the only economically viable use of the goods.

Donner Mertens de Wilmars Bosco

Delivered in open court in Luxembourg on 14 July 1977.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 22 JUNE 1977

My Lords,

In this case the Court is once again concerned with the interpretation of Council Regulation (EEC) No 803/68 on the valuation of goods for customs purposes. The actual question that calls for decision is however novel. It is as to the inclusion, in the value of goods for customs purposes, of the value of the right to use a patent in respect of them.

The case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of Hamburg. The plaintiff before that Court is Robert Bosch

GmbH, which I shall call 'Bosch'. The defendant is the Hauptzollamt of Hildesheim.

The facts are these.

An American company, Globe-Union Inc., of Milwaukee, which I shall call 'Globe', is the patentee of a process for the manufacture of electric storage battery cell components. The process is one whereby (to quote from the description of it given in paragraph 1.1(a) of an Agreement to which I shall refer more particularly in a moment) 'assemblies of cell plates and spacers are clamped in assembled relationship, portions thereof are fluxed or cleaned while so supported, and molten metal is formed in a mold and solidified to rigidly support and electrically interconnect selected ones of said plates'. The process is called the 'COS process', the letters 'COS' standing for 'cast-on strap'. Globe is also the manufacturer and the patentee of a machine which is described (in paragraph 1.1(b) of that Agreement) as having been 'designed for the express purpose of the practice of the COS Process'. In the Federal Republic of Germany, there are two patents for the machine and one for the process. We have not been told what patents there may be for them in other countries.

The Agreement that I have mentioned was made on 20 May 1965 between Bosch and G-U Overseas Ltd., a British subsidiary of Globe, which I shall call 'G-U O'. The Agreement recited, among other things, that G-U O was for the purposes of the Agreement sufficiently entitled to the technical information and patent rights of Globe with respect to the COS process and machine, and that Bosch desired to acquire the machine and the right commercially to practise the COS process, and to use therefor Globe's technical information and patent rights. (The machine was referred to in the Agreement as 'COS Equipment').

Paragraph 2.1 of the Agreement provided that G-U O should, within 90 days, furnish to Bosch certain technical and other information to enable Bosch to manufacture batteries using the COS process and machine. It continued: 'G-U O will furthermore procure that Globe will furnish to Bosch, upon its request, one or two COS Equipment with such features and at a price and on conditions to be agreed upon between G-U O, Globe and Bosch in advance'. I do not pause to consider whether the obligation thus imposed on G-U O was legally enforceable, although it appears to have been (by virtue of paragraph 9.3 of the Agreement) governed by English law and the general principle of English law is that an agreement to make an agreement is unenforceable.

The other main relevant provisions of the Agreement may be summarized as follows.

Under paragraph 2.2 Bosch was to be provided by G-U O and Globe with engineering and consultancy services, including in particular visits by Globe experts to the Bosch works 'with respect to any detailed engineering for the first COS Equipment and the installation thereof'. Those services were, by virtue of paragraph 5.7, to be charged for on the basis of the actual expense incurred by G-U O or Globe in their provision. Under paragraph 2.3 G-U O was to make available to Bosch throughout the term of the Agreement such of G-U O's and Globe's technical information, whether patented or unpatented, as would be of assistance to Bosch's operations under the Agreement; and under paragraph 2.4 Bosch was given the right to inspect, at any time during the two years following the date of the Agreement, Globe's 'COS Equipment' at any 'suitable' Globe plant. By paragraph 4.1 G-U O granted to Bosch a non-transferable, non-exclusive licence, expressed to be 'under Globe's and G-U O's Technical Information and Patent Rights', (i) to manufacture, use and sell in all countries of Continental Europe batteries embodying, utilizing or resulting directly from the technical

information made available to Bosch under the Agreement or any feature or features covered by the patent rights in respect of the COS process or machine and (ii) to use and sell batteries so manufactured in Great Britain and Ireland, and in all countries of Africa and Asia, with certain exceptions. By various provisions of the Agreement (in particular paragraphs 2.5, 3.2 and 4.3) Bosch undertook countervailing obligations as to secrecy and as to the disclosure to G-U O of improvements, whether patented or not, found by Bosch concerning the use of the COS machine or process. By clause 5.1 Bosch was to pay to G-U O an initial sum of US $10 000 within one month of the date of the Agreement. By clause 5.2, as amended by a supplemental Agreement made on 12 December 1968, Bosch was, for the first five years of the life of the Agreement, to pay to G-U O a royalty for each battery sold under the licence, the rates being US $1·15 for each 6-volt battery and US $2·30 for each 12-volt battery, with a minimum annual royalty of US $7 000. Under paragraph 5·3, Bosch was, from the beginning of the sixth year, to pay royalties at half those rates and then only for batteries in the manufacture of which any of the licensed patent rights had been used.

The Finanzgericht has found as a fact that the technical information to be given by G-U O to Bosch under the Agreement included data as to the preparation of the flux, as to the temperature of the lead baths and as to the composition of the lead alloys to be used in the COS process.

On 4 June 1974 Bosch applied to the defendant for customs clearance of a COS machine supplied by Globe. The machine was entered under Heading 85.11 B of the Common Customs Tariff, which comprises 'Electric welding, brazing and soldering machines and apparatus and similar electric machines and apparatus for cutting, for any material'. The (conventional) rate of duty on such goods under the CCT was 7·5 %. The defendant provisionally valued the machine at DM 271 107·25 and, on that basis, assessed the customs duty at DM 20 333, which sum Bosch paid. The defendant also assessed Bosch to German 'import turnover tax' (Einfuhrumsatzsteuer) of DM 32 058·40, but with that this Court is not concerned. The valuation of DM 271 107·25 was, as I understand it, made up of a sum of DM 228 476·25 representing the price paid by Bosch for the machine (US $84 254·95) and a sum of DM 42 631 described as a supplement in respect of royalties payable by Bosch under the Agreement of 20 May 1965 (as amended).

The valuation was challenged by Bosch. I need not take up Your Lordships time with a detailed account of the administrative processes that followed. Suffice it to say that they culminated in a decision (Einspruchentscheidung) of the defendant dated 4 March 1975, under which the supplement of DM 42 631 was reduced to DM 27 099·43 and Bosch was thereby rendered entitled to a reimbursement of DM 1123·40.

Against that decision Bosch now appeals to the Finanzgericht, claiming that there should be no supplement at all and, in the alternative, that, if there should be one, the defendant's computation of it is still excessive.

It appears that, in the argument before the Finanzgericht, an important part has been played by a decision of the Bundesfinanzhof dated 7 August 1962 (Aktenzeichen VII 89/60 U, Bundessteuerblatt III 1962, p. 549). The Bundesfinanzhof there held that, if, in connexion with the purchase and import of a machine manufactured under a patent, the right to a patented process was also assigned or a licence to use that right was granted, the consideration for such assignment or grant formed part of the value of the machine for customs purposes, at any rate if the machine, owing to the special characteristics of its

construction and to the mode of its operation, embodied the patented process so that a person entitled to use the machine could, by operating it, also operate the patented process without taking any further step in order to do so.

That decision of the Bundesfinanzhof was however given in interpretation of the German Zolltarifgesetz of 16 August 1951, a statute which antedated not only Regulation No 803/68 but even the entry into force of the Brussels Convention on the Valuation of Goods for Customs Purposes. It is a common feature of the Zolltarifgesetz, of the Brussels Convention and of Regulation No 803/68 that they all based or base the value of goods for customs purposes on the concept of their 'normal price'. But the particular provision of the Zolltarifgesetz that was in point in the case before the Bundesfinanzhof was paragraph 6 (4), the wording of which was wider and less precise than that of the corresponding provisions of the Brussels Convention and of Regulation No 803/68. Paragraph 6 (4) provided, so far as material: 'The normal price shall include the right to use the patent... in respect of the goods if the imported goods are the object of any such right'. ('Im Normalpreis ist einbegriffen das Recht zur Benutzung des Patents... an den Waren, wenn die eingeführten Waren Gegenstand eines solchen Rechtes sind'). It is also to be observed that the reasoning of the Bundesfinanzhof was in large part founded on earlier authorities relating to German customs legislation and to the German law of patents.

So far as German law is concerned the Zolltarifgesetz appears to have been overridden by a Statute of 17 December 1951 providing for three Brussels Conventions on customs matters, including that on the Valuation of Goods, to become applicable in Germany: the 'Gesetz über internationale Vereinbarungen auf dem Gebiete des Zollwesens'.

As Your Lordships know, the Brussels Conventions bind all the Member States of the Community, and a large number of other States besides. The Convention on the Valuation of Goods contains in Annex I the 'Definition of Value' which, by Article II of the Convention, each Contracting Party undertook to introduce into its domestic law and, in Annex II, the 'Interpretative Notes' which, by Article III, each Contracting Party undertook to introduce into its domestic law and, in Annex II, the 'Interpretative Notes' which, by Article III, each Contracting Party undertook to conform to in applying the Definition of Value. I need not read Annex I, because its terms are reflected in those of Regulation No 803/68, to which I shall come. I need only recall that the Definition of Value there set out prescribes, as the measure of the value of imported goods for customs purposes, the price that they would fetch on a sale in the open market between a buyer and a seller independent of each other, and that it then refines on that concept, which it labels 'the normal price'. I must, however, read part of one of the Interpretative Notes in Annex II, namely Note 5. This is as follows:

'The object of the Definition of Value is to make it possible in all cases to calculate the duties payable on the basis of the price at which imported goods are freely available to any buyer on a sale in the open market at the port or place of introduction into the country of importation. It is a concept for general use and is applicable whether or not the goods are in fact imported under a contract of sale, and whatever the terms of that contract.

But the application of the Definition implies an enquiry into current prices at the time of valuation. In practice, when imported goods are the subject of a bona fide sale, the price paid or payable on that sale can generally be considered as a valid indication of the normal price mentioned in the Definition. This being so, the price paid or payable can

reasonably be used as a basis for valuation, and Customs Administrations are recommended, to accept it as the value of the goods in question, subject:

(a) to proper safeguards aimed at preventing evasion of duty by means of fictitious or colourable contracts or prices; and

(b) to such adjustments of that price as may be considered necessary on account of circumstances of the sale which differ from those envisaged in the Definition of Value.'

Article IV of the Convention provides that each Contracting Party may adapt the text of the Definition of Value (a) by inserting therein such provisions of the Interpretative Notes as it may consider necessary and (b), not only by giving the text such legal form as may be essential to render it operative in its domestic law, but also 'by adding complementary provisions clarifying the purport of the Definition'.

As the preamble to Regulation No 803/68 (OJ L 148/6 of 28. 6. 1968) makes abundantly clear, the object of that Regulation is to adapt the Definition of Value and the Interpretative Notes to the needs of the customs union created by the EEC Treaty, so as to ensure the uniform application of the Common Customs Tariff throughout the Member States.

Articles 1 to 8 of the Regulation in part reproduce and in part complement the Definition of Value.

Article 1 (1) provides:

'For the purposes of applying the Common Customs Tariff, the value for customs purposes of the goods imported shall be taken to be the normal price, that is to say, the price which they would fetch, at the time referred to in Article 5 [that is, in general, at the time of importation], on a sale in the open market between a buyer and a seller independent of each other.'

Article 1 (2) and Articles 2 to 8 are devoted to refining on the concept defined by Article 1 (1), by laying down in great detail the terms and other characteristics of the hypothetical sale there postulated.

Thus, Article 1 (2) prescribes the assumptions to be made as to place of delivery, as to which party to the sale is to bear the costs, charges and expenses incidental to it and to delivery, and as to which is to bear the burden of internal duties and taxes.

Article 2 (1) provides:

'A sale in the open market between a buyer and seller independent of each other presupposes:

(a) that the price is the sole consideration; by consideration is meant not only the fulfilment of a legal or contractual obligation, but also any other form of consideration;

(b) that the price is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller or any natural or legal person associated in business with him and the buyer or any natural or legal person associated in business with him (other than the relationship created by the sale itself);

(c) that no part of the proceeds of any subsequent resale, other disposal or use of the goods will accrue, either directly or indirectly, to the seller or any natural or legal person associated in business with him.'

Article 2 (2), which was one of the provisions in point in the recent case before this Court of *Firma Farbwerke Hoechst AG* v *Hauptzollamt Frankfurt am Main/West* (Case 82/76, not yet reported), defines the circumstances in which two persons are to be deemed to be associated in business with one another.

Article 3, Your Lordships also remember from that case, deals with industrial

property rights. Your Lordships will particularly remember that it deals elaborately with trade marks. In contrast it deals with patents succinctly, by paragraph 1. Unfortunately there are slight differences in the wording of that provision in the texts in the different official languages of the Community. Those differences originate in a discrepancy between the two authentic texts of the Brussels Convention, namely the English and French texts.

The English text (of Article III of Annex I to the Convention) is reflected in the English and German texts of Article 3 (1). It reads so far as material:

'When the goods to be valued... are manufactured in accordance with any patented invention... the normal price shall be determined on the assumption that it includes the value of the right to use the patent... in respect of the goods.'

The French text, which is reflected in the French and Italian texts of Article 3 (1), reads:

'Lorsque les marchandises à evaluer... sont fabriquées d'après un brevet d'invention... la détermination du prix normal se fera en considérant que celui-ci comprend la valeur du droit d'utiliser, pour lesdites marchandises, le brevet...'

Thus, in the English and German texts the goods are referred to as having been manufactured in accordance with the invention, the mention of the patent being adjectival, whereas in the French and Italian texts they are referred to as having been manufactured in accordance with the patent, the mention of the invention being there adjectival. The Danish and Dutch texts of Article 3 (1) go even further in this direction: they refer only to the patent. As Your Lordships will see, in the context of the present case, the English and German texts make rather better sense than the others.

To complete the outline of Articles 1 to 8 of the Regulation: Article 4 provides that, subject to exceptions in the case of goods imported in split consignments, 'The normal price shall be determined on the assumption that the sale is a sale of the quantity to be valued'; Article 5 defines the material time for valuation; Articles 6 and 7 contain definitions relevant for the purposes of Article 1 (2); and Article 8 deals with transport costs.

Article 9 *et seq.* of the Regulation give effect to the intimation in Interpretative Note 5 of the Brussels Convention that, in practice, when imported goods are the subject of a bona fide sale, the price paid or payable on that sale can generally, subject to proper safeguards and adjustments, be taken as a valid indication of the 'normal price'.

Article 9 provides:

'1. The price paid or payable may be accepted as the value for customs purposes if:
   (a) the contract of sale is executed within the period specified in Article 10,
   (b) the price corresponds, at the time it is agreed upon, to prices on a sale in the open market between a buyer and a seller independent of each other, and
   (c) that price is adjusted, if necessary, to take account of circumstances of the sale which differ from those on which the normal price is based.
2. Adjustments under paragraph 1 (c) may in particular be required with reference to:
   (a) the costs, charges and expenses mentioned in Article 1 (2),
   (b) reductions in price granted in favour of sole agents or sole concessionaires or any other person operating in comparable circumstances,
   (c) abnormal rebates and any other reduction from the ordinary competitive price.'

(Article 10 provides in effect that, subject to exceptions, Article 9 is to apply only where the date of the contract does not precede the material time for valuation by more than six months).

I need not, I think, trouble Your Lordships with any of the subsequent Articles of the Regulation. The problem with which the Finanzgericht is confronted in this case is whether, and if so to what extent, the price paid by Bosch under its contract for the purchase of the machine (US $84 254·95 or DM 228 476·25) should be adjusted pursuant to Article 9 (1) (c) of the Regulation 'in order to take account of circumstances of the sale which differ from those on which the normal price is based'. The question referred to this Court by the Finanzgericht is 'whether Article 3 (1) of Regulation (EEC) No 803/68 of the Council... is to be interpreted as meaning that the normal price also includes the value of a patented process embodied in an appliance within the meaning of the judgment of 7 August 1962 of the Bundesfinanzhof No VII 89/60 U, Bundessteuerblatt III 1962, p. 549'.

The Finanzgericht explains in its Order for Reference that, if, as it is inclined to think, that question is to be answered in the negative, it will accept Bosch's contention that no supplement is to be added to the price of the machine in respect of the royalties payable by Bosch under the 1965 Agreement. This is because, in the view of the Finanzgericht, no part of those royalties was attributable to the use by Bosch of the patents for the machine. In the light of the parties' submissions, the Finanzgericht has come to the conclusion that those royalties were wholly attributable to other rights acquired by Bosch under the 1965 Agreement, so that the price it paid for the machine must be taken to have included the consideration for the use of the patents for the machine. This Court is not of course concerned with the question whether the Finanzgericht is right, in fact, as to that. The Finanzgericht adds that, if the question it has referred to this Court is to be answered in the affirmative, it will reduce the supplement as assessed by the Defendant. This is because the Finanzgericht takes the view, on the facts, that the COS process is only partly 'embodied' in the COS machine in the sense of the rule laid down by the Bundesfinanzhof. In order to manufacture batteries according to that process, it is necessary to have, not only the machine and the directions for its use, but also the further technical data relating to the preparation of the flux, the temperature of the lead baths and the composition of the lead alloys, none of which are 'embodied' in the machine.

In my opinion, my Lords, the question referred by the Finanzgericht cannot be answered by a simple 'Yes' or 'No'. I leave aside the obvious point that this Court, whose rulings on Community law have to be applied by the Courts and Tribunals of all the Member States, and so applied uniformly, would be rendering the task of those Courts and Tribunals more difficult than it need be if it were to formulate a ruling by reference to a Judgment of a Court, however eminent, of one of the Member States. The substantial difficulty is that the Bundesfinanzhof's Judgment of 7 August 1962 was given in interpretation, not of Regulation No 803/68, but of an earlier, and differently worded, national statute, and in the context of its own national system of customs legislation and patent law. It would be surprising to find that a rule thus established could be transposed, without any modification, into Community law, but equally surprising to find that nothing akin to it existed in Community law.

So I think that this Court must approach the interpretation of Regulation No 803/68, so far as regards the problem posed by the present case, with a proper respect for the thinking of the

Bundesfinanzhof, but with an awareness too that the problem is not quite the same as that with which the Bundesfinanzhof was confronted. In particular this Court cannot overlook that the interpretation that it places on Regulation No 803/68 must be capable of practical application in all the Member States, despite any divergences between their respective patent laws. A Community lawyer's natural instinct, when faced with such a requirement, is to resort to a comparative study of the relevant laws of the Member States. I have however come to the conclusion that, in the present instance, the uncertainties are so many that such a study would be fruitless. To give but one example, it remains an open question in English law whether a patent for a process is infringed by the sale of a machine that cannot be used except in a manner infringing the patent (see per Clauson J. in *Cincinnati Grinders Inc.* v *B.S.A. Tools Ltd.* (1930) 48 R.P.C. at p. 58, Terrell on the Law of Patents (12th Ed.) § 360 and Blanco White on Patents for Inventions (4th Ed.) § 3 – 210). Moreover, it may be that Regulation No 803/68 in so far as it reproduces the Definition of Value in the Brussels Convention (and, as I have indicated, the relevant words of Articles 3 (1) are intended to do so) should be interpreted also in the light of the laws of those States which, whilst not being Members of the Community, are Contracting Parties to the Convention. Their number however is such that I do not think that a meaningful comparative study of their laws would be a practical possibility. I suspect that the authors, not only of the Brussels Convention, but also of Regulation No 803/68, came to the same conclusion and that that is why they sought to frame the provisions both of the Convention and of the Regulation in terms both non-technical and precise. The task of this Court is to interpret those terms and, in my opinion, that task will best be performed by adhering strictly to them. I observe that there is an indication in the Order for Reference that the Finanzgericht takes the same view.

It was conceded in argument on behalf of Bosch that there was one case where a patent for a process could, for the purposes of Article 3 (1) of Regulation No 803/68, be assimilated to a patent for a machine. This was where the machine was so constructed that its use automatically entailed the carrying out of the patented process and where there was technically no way of carrying out that process otherwise than by using the machine. Bosch distinguished that case from other cases where, for instance, the process could be carried out otherwise than by using the machine, or the machine could be used otherwise than for carrying out the process, or where the use of the machine was only part of the process, or where the machine could not be used to carry out the process without other knowledge covered by a patent for the process. The present case, said Bosch, was of the last kind, since the machine here in question could not effectively be used for the process without knowledge of the data as to the preparation of the flux, the composition of the lead alloys and the temperature tolerances within which the work must be performed.

In my opinion that concession was rightly made. As was pointed out by Bosch, where the carrying out of a process involves nothing more and nothing less than the use of a particular machine, no genuine commercial purpose is served by taking out a patent for the process in addition to the patent for the machine. In such a case, the invention of the machine and the invention of the process are one and the same invention. A patent for that invention cannot be excluded from the scope of Article 3 (1) simply because it is in form a patent for a process. The invention remains, despite the form of the patent, one 'in accordance with' which the machine has been manufactured, within the terms of Article 3 (1).

The Commission told us, in its written Observations, that, under the German law of patents, it is not possible to take out a patent for a process having the same content as a patent for a machine. In a helpful paper that it submitted after the hearing at the request of the Court, the Commission examined the position as to that under the legal systems of the other Member States. The conclusion to be drawn from that examination was that the rule was substantially the same in all the Member States, so that, in theory at least, cases of such double-patenting should be rare. There are however variations in the detailed application of the rule as between the Member States, and one knows, of course, that, particularly in this field, what happens in practice does not always coincide with what the law envisages. Indeed, were it otherwise, there would never be litigation in which the validity of a patent was challenged on the ground of 'prior claim'; or, at all events, such a challenge would never succeed. In truth, the application of the rules against double-patenting gives rise to such complexities that it would be unrealistic to suppose that there can never be overlap between a patent for a machine and a patent for a process. (As to that I need perhaps refer only to the position in England, which is discussed in Terrell, op. cit., §§ 256 — 264 and Blanco White, op. cit., §§ 4 — 301 — 312. In the latter, §§ 4 — 304 & 4 — 309 are particularly in point).

Although the concession made by Bosch was thus, in my opinion, rightly made, I do not think that it went far enough, because it did not cover a case where the invention protected by a patent for a process includes the use of a particular machine and something else. In such a case, it seems to me, in so far as the invention is of the machine, it is not excluded from Article 3 (1). The Commission submitted that, in such a case, the value of the right to use the patent in respect of the machine must be segregated from the value of the right to use the patent in other respects. I agree.

Where I disagree with the Commission is in the reasoning according to which it reaches that conclusion. The Commission's view is on the one hand that Article 3 (1) is to be given a narrow interpretation, excluding all patents for processes, unless they be processes by which the imported goods themselves have been manufactured, but, on the other hand, that it is implicit in Article 1 (1) of the Regulation that where a patented process covers the use of a particular machine the value of the right so to use the machine forms part of its 'normal price'.

In approaching the interpretation of Article 3 (1) the Commission focusses its attention on the reference to the goods having been 'manufactured in accordance with' a patented invention. From this the Commission deduces that Article 3 (1) is not concerned with any use of the goods after their manufacture and importation. But this approach seems to me, with all respect to the Commission, to confuse the use of a patent in respect of goods (which is what Article 3 (1) refers to) and the use of the goods themselves. Take the simple case of a patented machine. The unlicensed manufacture of the machine would be an infringement of the patent. But so would the unlicensed sale or hire of the machine after its manufacture, and its unlicensed use then in the commercial production of other goods. So there is a use of the patent in respect of the machine, not only when it is manufactured, but when it is subsequently sold, hired, or put into production. The reference in Article 3 (1) to 'the right to use the patent... in respect of the goods' must be intended to cover all these. The situation in the type of case with which these proceedings are concerned differs from that only inasmuch as, the patent being one for a process, it is necessary to enquire to what extent, if any, the invention that it protects is really that of the machine.

To seek to solve that problem by reference to Article 1 (1) of the Regulation is open to two major objections.

The first is that it ignores the structure of Articles 1 to 8 of the Regulation. Article 1 (1), as I have pointed out, only gives a general definition of the concept of the 'normal price'. Articles 1 (2) and 2 to 8 refine on that definition, working out the details of its application in relation to specific matters. The matter of industrial property rights, and in particular of patents, is dealt with by Article 3. That being so there is no room for implying anything further about patents in Article 1 (1) itself. Of course each of the provisions of the Regulation must be interpreted in the light of the others, but that is not to say that any of them can be interpreted as implicitly dealing with a matter which is the express province of another.

The second and graver objection is that Regulation No 803/68 is fiscal legislation. Its purpose and its effect are to define fiscal liabilities. It would be contrary to all principle to hold that such liabilities could be imposed or increased by implication.

The very argument of the Commission evinces a difficulty inherent in its approach. The Commission naturally realized that it was not enough to say that this case was implicitly covered by Article 1 (1). It must propound a principle from which that could be deduced. The principle it propounded was that the acquisition of goods at their 'normal price' implied that the purchaser would acquire them free from restrictions on their user. Since we are avowedly in the realm of implication it is, perhaps, neither here nor there to point out that no such principle is expressed in Article 1 (1). It is however, I think, even on that footing, a valid criticism that the principle so propounded is inconsistent with the Commission's own conclusions, for the Commission accepts that there are circumstances in which the existence of a patent for a process will restrict the freedom of a purchaser of a machine to use it, without the value of the right to use that patent forming part of the 'normal price' of the machine. The truth is that there is nothing in the concept of the 'open market', and it is on that, I think, that the Commission mainly relied, that connotes that a purchaser of goods in that market will acquire them free from restrictions on their user. For instance the rule of English law is that a sale of a patented article by the patentee, in any market, is presumed to carry with it the right for the purchaser to use the article in any way he chooses, but that that presumption is rebutted if at the time of the sale the purchaser has notice of restrictions on its use imposed by the patentee, whether by contract or otherwise (see *National Phonograph Co. of Australia, Ltd.* v *Menck* [1911] A.C. 336, *Goodyear Tyre and Rubber Co. (G. B.) Ltd.* v *Lancashire Batteries Ltd.* [1958] 1 W.L.R. at p. 861 and *Dunlop Rubber Co. Ltd.* v *Longlife Battery Depot,* ibid., at p. 1037). Of course, where and in so far as Article 3 (1) applies, it requires such restrictions to be ignored in computing the 'normal price' of the article. But nothing to the same effect can legitimately be read into Article 1 (1) taken by itself or, for that matter, into any other provision of the Regulation.

In the result I am of the opinion that Your Lordships should answer the question referred to the Court by the Finanzgericht by saying that Article 3 (1) of Regulation No 803/68 is to be interpreted as meaning that the normal price of an appliance includes the value of the right to use a patent for a process if and to the extent to which the scope of the patent is such as to protect the invention of the appliance itself.