meaning of Regulation No 1798/75, and hence its right to exemption from customs duties under that regulation, provided that the other requirements laid down for those purposes are also satisfied.

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 2 February 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 25 JANUARY 1978

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Tariefcommissie of the Netherlands, pending before which is an appeal by the Director of the Universiteitskliniek voor Hart- en Vaatchirurgie van het Academisch Ziekenhuis Utrecht (the University Clinic for Heart and Vascular Surgery of the Utrecht Teaching Hospital) against a ruling of the Inspecteur der Invoerrechten en Accijnzen te Utrecht (the Inspector of Import Duties and Excise of Utrecht) as to the liability for duty under the Common Customs Tariff of a piece of equipment imported on behalf of the Universiteitskliniek. That piece of equipment was manufactured by Beckman Instruments International S.A. of Geneva (which I shall call 'Beckman') and is described as an 'ACTA M-VI ultraviolet spectrophotometer'. It was intended for use in the biochemical laboratory of the Universiteitskliniek for the analysis of blood samples. The question at issue before the Tariefcommissie is essentially whether that piece of equipment is entitled to exemption from duty under the Community legislation relating to the importation free of Common Customs Tariff duties of 'educational, scientific and cultural materials', i.e. Council Regulation (EEC) No 1798/75 of 10 July 1975 and Commission Regulation (EEC) No 3195/75 of 2 December 1975.

The preamble to that Council Regulation refers to the Agreement on the Importation of Educational, Scientific and Cultural Materials, generally known as the 'Florence Agreement', drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). To that Agreement, which entered into force on 21 May 1952, all the Member States of the Community, with the exception of Ireland, are parties. We

were told by the Commission that Ireland was expected to accede to it shortly.

The object of the Florence Agreement as stated by its preamble is to facilitate 'the free flow of books, publications and educational, scientific and cultural materials' so as to further 'the free exchange of ideas and knowledge and, in general, the widest possible dissemination of the diverse forms of self-expression used by civilizations', which are described as 'vitally important both for intellectual progress and international understanding, and consequently for the maintenance of world peace'.

By Article I of the Agreement the contracting States undertake not to apply customs duties or other charges on, or in connexion with, the importation of, among other things, scientific materials listed in Annex D to the Agreement being products of another contracting State, subject to the conditions laid down in that Annex. Annex D is headed 'Scientific Instruments or Apparatus' and is in these terms:

'Scientific instruments or apparatus, intended exclusively for educational purposes or pure scientific research, provided:

(a) That such scientific instruments or apparatus are consigned to public or private scientific or educational institutions approved by the competent authorities of the importing country for the purpose of duty-free entry of these types of articles, and used under the control and responsibility of these institutions;

(b) That instruments or apparatus of equivalent scientific value are not being manufactured in the country of importation.'

It is clear from the preamble and the operative provisions of Council Regulation No 1798/75 that, as the Commission emphasized to us, that Regulation was largely based on the Florence Agreement. The objects of the Regulation included the achievement of uniformity throughout the Community in the duty-free admission of educational, scientific and cultural materials and the treatment of the Community as a single country for the purpose of the proviso that scientific instruments or apparatus need not be accorded duty-free entry if instruments or apparatus of equivalent scientific value were being manufactured 'in the country of importation'. We were told on behalf of the Commission at the hearing that there had been no formal adaptation of the Florence Agreement to deal with the latter point, but that it had been raised by the Commission in the course of negotiations for a new protocol to the Agreement, matters arising out of the Agreement being now dealt with by the Commission on behalf of the Community. It seems indeed that, in view of the contrast between the precise phrase 'contracting States' used throughout the body of the Agreement and the looser phrase 'country of importation' used in Annex D, the treatment of the Community as a single entity for this purpose may be justified under the terms of the Agreement as it stands. At all events I need not pursue the point, because nothing turns on it in the present case.

The provision with the interpretation of which the present case is concerned is Article 3 (1) of Regulation No 1798/75 (OJ L 184 of 15. 7. 1975). This reads:

'Scientific instruments and apparatus ... imported exclusively for educational purposes or for pure scientific research may be admitted free of Common Customs Tariff duties provided:

(a) they are intended for:

— either public establishments principally engaged in education or scientific research, including

those departments of public establishments which are principally engaged in education or scientific research;

— or private scientific or educational establishments authorized by the competent authorities of the Member States to receive such articles duty-free

and provided:

(b) instruments or apparatus of equivalent scientific value are not being manufactured in the Community.'

Article 3 (2) deals with the duty-free admission of components, spare parts and accessories of instruments or apparatus qualifying for duty-free admission under Article 3 (1).

Article 3 (3) defines 'pure scientific research' as meaning 'research carried out for non-commercial purposes'. It also contains elaborate definitions, with which I need not trouble Your Lordships, of 'equivalent scientific value' and of the circumstances in which an instrument or apparatus is to be regarded as being manufactured in the Community.

Article 3 (4) is in these terms:

'Normal equipment shall in all cases be excluded from duty-free admission unless it has certain characteristics not found in equipment manufactured in the Community.'

Article 3 (4) is not easy to interpret. The Commission appears to interpret it as meaning that 'scientific' instruments and apparatus are to be contrasted with 'normal equipment' but that even the latter may be granted exemption if having 'certain characteristics not found in equipment manufactured in the Community'. An alternative interpretation would be that 'scientific' instruments and apparatus may themselves be either 'normal' or 'exceptional' and that only the latter kind are to be considered for exemption. A third view, which I prefer, is that Article 3 (4) is intended as an aid to the interpretation of Article 3 (1) and that it does not itself add anything to, or subtract anything from, the content of that provision.

Your Lordships thus see that, as indeed was submitted by the Commission, a piece of equipment, in order to qualify for duty-free admission under Article 3, must satisfy four conditions:

(1) It must be a 'scientific instrument or apparatus'.

(2) It must be imported exclusively for educational purposes or for pure scientific research, meaning thereby research carried out for non-commercial purposes.

(3) It must be intended for an establishment of one of the kinds described in Article 3 (1) (a).

(4) It must be such that no instrument or apparatus of equivalent scientific value is being manufactured in the Community.

It will be convenient, I think, if I state at once that, as a result of the findings of the Tariefcommissie, this Court may take it as established that conditions (2), (3) and (4) are satisfied in this case. The Tariefcommissie's only doubt is as to condition (1).

Before I turn to consider the nature of that doubt and the actual questions referred to the Court by the Tariefcommissie, I should, I think, refer to the fact that, by Articles 7 and 8 of Regulation No 1798/75, there was set up a 'Committee on Duty Free Arrangements' consisting of representatives of the Member States, with a representative of the Commission as chairman, charged with the duty of examining 'such matters relating to the implementation of this Regulation as are put to it by its chairman'. By Article 9 a procedure was laid down, analogous to the familiar 'Management Committee procedure', for the adoption of the

provisions necessary for the implementation of certain Articles of the Regulation, among them Article 3. It was under that procedure that Commission Regulation No 3195/75 was adopted.

Articles 4 and 5 of that Regulation lay down an elaborate procedure for deciding, in the case of an application for exemption under Article 3 of the Council Regulation, the questions whether in fact conditions (1) and (4) are satisfied, where the information at the disposal of the competent authority of the Member State concerned is insufficient to enable it to decide those questions, or either of them, itself. That procedure culminates, in the most difficult and borderline cases, in a reference to a group of experts composed of representatives of all Member States, meeting within the framework of the Committee on Duty Free Arrangements, following which the Commission gives a decision. (It is left to the competent authority of the Member State to decide in every case whether conditions (2) and (3) are satisfied.) I need not, I think, take up Your Lordships' time with an account of the reasons why that procedure was not adopted in the present case. They are sufficiently apparent from the Tariefcommissie's Order for Reference. The relevance here of the existence of that procedure is that the Tariefcommissie refers in that Order to two of the Decisions taken by the Commission thereunder and that the Commission referred us to the same two and to others, submitting that they afforded guidance as to the criteria according to which the question whether a particular piece of equipment was or was not a scientific instrument or apparatus ought to be resolved – though the Commission did not of course suggest that those Decisions were in any way binding on this Court.

The guidance they afford is in fact, to my mind, limited. They are all *ad hoc* decisions, each of them taken on the facts of a particular case. In each of them the reasons for it are very succinctly stated.

In the case of favourable decisions those reasons consist, at their most precise, in the use of such formulae as that the equipment in question is 'specifically adapted to scientific research', or 'specially adapted to scientific research', or 'obviously intended for application in the field of scientific research', or 'specially adapted for use in teaching and scientific research' in a particular field. Those formulae, whilst no doubt accurately descriptive of the pieces of equipment in question in the cases where they were used, cannot be regarded as embodying a definition of what constitutes a 'scientific' instrument or apparatus. Their adoption as such a definition would render condition (1) pointless, for it would then achieve nothing that was not achieved by condition (2).

The adverse decisions are fewer. One of them explains that the apparatus concerned 'consists of an injection press of common usage, clearly capable of use for all commercial purposes requiring injection moulding' and that 'it has no particular intrinsic device to allow of its specific use for scientific purposes' (Decision 76/545/EEC of 1 June 1976); another explains that the absence from the apparatus there in question 'of any special device to allow of its specific use for scientific purposes does not permit it to be distinguished from standard laboratory equipment used for commercial and industrial purposes' (Decision 76/811/EEC of 5 October 1976); a third explains that the apparatus 'does not in itself consist of special equipment intended to be used specifically for scientific purposes' but that 'on the other hand, this apparatus is evidently able to be used for commercial or industrial purposes' (Decision 77/61/EEC of 22 December 1976). The unreliability of the reasons

stated in those Decisions, even as a guide to the Commission's own views, is shown by the fact that, before this Court, the Commission emphasized that it did not regard the mere circumstance that a piece of equipment was capable of commercial or industrial use as necessarily meaning that it was not a scientific instrument or apparatus. At most, said the Commission, the circumstance that an instrument or apparatus was widely used for industrial or commercial purposes might indicate that it was probably designed for other than scientific purposes, a matter that must however in the end be judged by reference to its objective characteristics. There again that must be so because otherwise condition (1) would merely duplicate condition (2).

Before the Tariefcommissie the Respondent Inspector submitted that the spectrophotometer here in question could not be regarded as a scientific instrument or apparatus because it was capable of 'more general use'. In support of that submission he referred to a brochure issued by Beckman. A copy of that brochure has conveniently been included among the papers sent by the Tariefcommissie to this Court. It relates to three kinds of spectrophotometer made by Beckman, the 'ACTA M-IV', the 'ACTA M-VI' and the 'ACTA M-VII'. Of all three it states that they are 'designed for the sophisticated experimenter and researcher in industry, education, forensics, bio-medicine, and water quality'. Of the 'ACTA M-VI', the one here in question, the brochure states: 'In industrial and quality control laboratories the ACTA M-VI finds significant use in analysis of chemicals, pharmaceuticals, water and air pollutants, synthetic materials, and most other materials. Hospitals and biomedical laboratories will find the ACTA M-VI particularly useful in protein and nucleic acid studies, specimen analysis, and other sophisticated medical applications not requiring near-infrared operation'. Those are, I imagine, the passages that were relied on by the Inspector.

As I have already indicated, I agree with the Commission that the circumstance that an instrument or apparatus is capable of being used for purposes other than education or pure scientific research does not mean that it does not qualify for the epithet 'scientific', so as to satisfy condition (1). It is implicit in the very existence of condition (2) that a 'scientific' instrument or apparatus may be capable of use for purposes other than those. I therefore think that the Tariefcommissie's doubts as to the validity of the Inspector's submission were fully justified.

That however is not the end of the case. The Appellant did not appear and was not represented before the Tariefcommissie, but the Tariefcommissie took the point of its own motion that, perhaps, Article 3 of the Council Regulation was to be interpreted as meaning that only conditions (2), (3) and (4) needed to be satisfied, in the case of a particular importation, for exemption from duty on that importation to be secured. The Tariefcommissie described that interpretation as involving the application of a 'subjective criterion'.

It is thus that it comes about that the questions referred to this Court by the Tariefcommissie are (shortly stated) these:

'1. Is the provision in Article 3 of Regulation No 1798/75 solely based on a subjective criterion in respect of the scientific use of scientific apparatus?

2. If not, does the mere fact that apparatus is used in industry, or at least elsewhere, for commercial purposes exclude the right to exemption as described above?

3. If not, do there exist different or additional criteria in the above-mentioned regulations on the basis

of which the right to the exemption described above should be examined?'

As to question 1 I would say first that, in my opinion, the use, in such a context as this, of the terms 'subjective' and 'objective', is perilous, because, unless carefully explained, they may mean different things to different people. Secondly, there can in my opinion be no doubt that, for the exemption to be obtained, condition (1) must be satisfied as well as the other three. As was pointed out by the Commission, not every piece of equipment used in a laboratory is a 'scientific' instrument or apparatus. One may instance pencils, writing-pads, water heaters, batteries, white coats, filing cabinets, etc. Moreover, what was yesterday's scientific instrument or apparatus may have been developed into to-day's industrial machine or even into a product available in every home, just as to-day's scientific instrument or apparatus may become tomorrow's industrial machine or consumer good. That process is a continuing one. Admittedly the application of condition (4) would in the majority of cases prevent the grant of duty-free entry for such humdrum articles. But Article 3 of the Council Regulation, consistently with the Florence Agreement, does not confer exemption from duty on non-scientific equipment, even though imported for use in education or in pure scientific research by an establishment of a kind described in Article 3 (1) (a), and even though of a kind not manufactured in the Community.

I would therefore answer question 1 by saying that the exemption conferered by Article 3 of Regulation No 1798/75 does not extend to any instrument or apparatus that is not 'scientific'.

With question 2 I have, I think, already amply dealt. The answer to it must be 'No'.

The difficult question is question 3. On the face of them neither the Florence Agreement nor the Community Regulations lay down any criterion whereby it may be judged whether a particular instrument or apparatus is or is not 'scientific'. A possible view is that the question must be, in every case, one of fact or degree, to be answered by the light of common sense. Undoubtedly that is so to a large extent, but I do not think it is the complete answer. Nor do I find satisfactory the answer suggested by the Commission: that by 'scientific instrument or apparatus' there should be understood an instrument or apparatus having special characteristics making it appropriate for scientific research. Not only is that answer rather vague, and difficult for administrative and judicial authorities to apply, but it overlooks the fact that Article 3 of Regulation No 1798/75 refers to educational purposes as well as to scientific research.

It seems to me that what characterizes a 'scientific' instrument or apparatus is that it is such as to be capable of being used only by or under the direction of scientists. One has but to read Beckman's brochure in the present case to see that the spectrophotometers to which it relates are not designed for use by laymen. A scientist may be engaged in education, or in pure research, or in both. Or he may be engaged in other activities such as government, industry, agriculture, etc. If the latter, an importation for his use will be excluded by virtue of condition (2), but it will nonetheless be an importation of a 'scientific' instrument or apparatus if that instrument or apparatus is of such a kind that only a scientist could use it. The test that thus suggests itself has the twin advantages of being comprehensive and of being sufficiently concrete for application by the administrative authorities and the courts and tribunals of Member States.

In the result I am of the opinion that, in answer to question 3, Your Lordships should rule that a 'scientific' instrument or apparatus within the meaning of Article 3 is one the use of which requires scientific knowledge.