On those grounds,

THE COURT (Second Chamber)

in answer to the question submitted to it by the Tariefcommissie by order of 31 December 1982, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Commission Decision 81/843 of 8 October 1981.

Due Pescatore Bahlmann

Delivered in open court in Luxembourg on 25 October 1984.

For the Registrar

H. A. Rühl
Principal Administrator

O. Due
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 30 MAY 1984 [1]

Mr President,
Members of the Court,

1. Introduction

1.1. The basic issue which has led the Tariefcommissie to refer a question to the Court for a preliminary ruling concerns the refusal to grant exemption from import duties for an apparatus called a "JEOL electron microscope, model JEM-200 CX", which has been imported into the Community from Japan. The fact that it is a scientific apparatus is not in dispute. Nor is it contested that the apparatus is exclusively intended for educational purposes or for pure scientific research in a public establishment or establishment

1 — Translated from the Dutch.

of public utility. Pursuant to Article 3 (1) (a) of Regulation (EEC) No 1798/75, adopted in implementation of the Florence Agreement drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization (Unesco), familiar to the Court from previous proceedings, as amended by Article 1 of Regulation (EEC) No 1027/79, the apparatus thus satisfies that branch of the conditions for duty-free admission. However, Article 3 (1) (b) of Regulation No 1798/75 lays down a second condition for such exemption, namely that "instruments or apparatus of equivalent scientific value are not being manufactured in the Community". That second condition and the procedural provisions regarding the exemption laid down in Commission Regulation (EEC) No 2784/79 (Official Journal 1979, L 318, p. 2) are central to the main proceedings.

1.2. Pursuant to Article 7 (1) of Regulation No 2784/79, the competent Netherlands authority was entitled in the circumstances to make an independent decision on the above-mentioned application of the Interfacultair Instituut Electronenmicroscopie [Interfaculty Institute for Electron Microscopy, hereinafter referred to as "the Institute"] of the University of Groningen. On 23 January 1981 the Institute appealed to the Tariefcommissie against the decision of the competent administrative authority rejecting its application; after discussing the matter with the Institute, the Netherlands Government asked the Commission on 3 April 1981 to examine once again — with particular reference to the importation of the apparatus in question — whether apparatus of equivalent value was manufactured in the Community. That request was clearly prompted by the fact that the rejection of the application by the competent Netherlands authorities was based on Commission Decision 80/772/EEC of 18 July 1980 (Official Journal 1980, L 221, p.20). That decision concerned the same apparatus but related to another application. Since such applications are considered in the light of the specific research for which the apparatus in question is intended, it was conceivable that the specific research purpose of the apparatus concerned by the Institute's application might justify an exemption. In particular it might have appeared that the apparatus manufactured in the Community, the Philips "EM 400", was not "of equivalent scientific value" to the imported Japanese apparatus. On 25 May 1981, this time at the request of Belgium, the Commission adopted Decision 81/415/EEC (Official Journal 1981, L 158, p. 24) in which the duty-free admission of the apparatus in question was refused for the same reasons as those given in Decision 80/772 of 18 July 1980. On 8 October 1981, after consulting the group of experts referred to in Article 7 (5) of Regulation No 2784/79, the Commission adopted Decision 81/843/EEC, to which the question referred to the Court for a preliminary ruling relates.

The question referred to the Court is as follows: "Has the Commission in its decision of 8 October 1981 (81/843/EEC) correctly interpreted and applied the term 'of equivalent scientific value' contained in Article 3 of Regulation (EEC) No 1798/75?" In the grounds for its order the Tariefcommissie drew attention *inter alia* to the fact that the Institute had stated, without being challenged on this point, that its research required an electron microscope with an acceleration capacity of 200 kV, and that the Philips apparatus did not meet that requirement. It considered moreover that no further reasons were given in

the decision for the view taken by the Commission which is disputed by the Institute, while the defendant (the Inspector of Customs and Excise, Groningen) took the view that his only task was to implement the decision.

1.3. For further details of the relevant provisions, the facts and the procedure before the national court, and of the written observations submitted by the Italian Government, the Netherlands Government and the Commission, I shall here generally confine myself to making reference to the Report for the Hearing. With regard to the written observations submitted, in the first place I attach some importance to the view expounded by the Italian Government that the decision must contain adequate information regarding the reasons for the approval or refusal of exemption, so that they can serve as guidance for the decision of other similar cases and also so that in each particular case it can be seen whether the decision was taken on the correct basis. Secondly, I share the Commission's view that the important point with regard to the question before the Court is not whether or not Article 3 of Regulation No 1798/75 has been correctly interpreted or applied, but whether the decision in question is valid, taking into account the way in which the Commission interpreted and applied the concept of "equivalent scientific value".

1.4. In its judgment of 27 September 1983 in Case 216/82 *(Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771), which is not however comparable in all material respects with this case, the Court has already held that it "cannot, save in the event of manifest error of fact or law or misuse of power, find fault with the contents of a decision" adopted by the Commission in conformity with the opinion of (the group of experts within the framework of) the Committee on Duty-Free Arrangements (paragraph 14 of the decision). The main material differences between Case 216/82 and this case seem to me to be the following: in the first place, in Case 216/82 it appears from the account of the meeting of the Committee on Duty-Free Arrangements given in the judgment that it was considered at that time that the users contested the equivalent value of the Netherlands apparatus alleged to be of equivalent value but *not* that of the French apparatus that was also alleged to be of equivalent value. The equivalent value of the French apparatus was only challenged by the University of Hamburg after the Commission's decision, before the German court hearing the matter. It also appears from the judgment, however, that even the report of 1 February 1982 of an independent expert cast doubt not so much on the equivalent value as on the availability of the French apparatus at the time of the purchase. In this case, on the contrary, the equivalent value of the available Philips apparatus has consistently been disputed since the application was made. Secondly, there are two procedural differences between Case 216/82 and this one, and their significance must be examined more closely. On the one hand, in this case various reports on the question of equivalent value prepared by the Community producer concerned play an important role, but those reports were not the subject of adversary proceedings. According to information given by the Commission at the hearing, during the meeting in question of the Committee on

Duty-Free Arrangements an independent opinion on the question of equivalent value was given orally by an expert from the Joint Research Centre in Ispra, but the report on the meeting makes no mention of that. A second procedural difference between this case and Case 216/82 which may be relevant lies in the fact that in this case the procedure prescribed in Article 7 (3) to (7) of Regulation No 2784/79 was applied in a situation to which Article 7 (2) is clearly not intended to apply. Article 7 (2) applies to a situation where "the competent authority of the Member State in which is situated the establishment or organization to which the goods are consigned is unable to take a decision as provided in paragraph 1" (in this instance, a decision on the question of equivalent value). In this case not only did the competent Netherlands authority consider itself entirely capable of making the decision, but it was also in a position to do so from an objective point of view, since the manufacturer of the product alleged to be of equivalent value was established in the Netherlands. Finally, the authority did take a decision in the matter, in which it based itself in the main on Commission Decision 80/772/EEC, mentioned above, concerning a case which was at first sight comparable. The Netherlands Government's request to the Commission for a decision in connection with the appeal brought by the Institute before the competent court was, therefore, in those circumstances clearly intended to elicit further examination of the question whether the specific research purpose of the apparatus in this case might justify a departure from Decision 80/772/EEC. The question therefore arises whether the procedure laid down in Article 7 (3) to (7) of Regulation No 2784/79 is in fact appropriate for a "quasi-appeal procedure" of this kind.

1.5. In order to assess the Commission decision at issue in the light of the criteria laid down in the judgment of the Court in Case 216/82 (paragraph 14) I shall examine successively the following matters: 2. the application of the Rijksuniversiteit Groningen; 3. the procedure followed by the Commission; and 4. the applicability of Article 7 (3) to (7) of Regulation No 2784/79 to this case. In the final part of my opinion I shall give my conclusions on the matter.

2. The application

In its application of 20 August 1980 for the duty-free admission of the apparatus in question, the Institute described its intended use as follows: "scientific research on metals and materials; instruction of students reading applied physics and, subsidiarily, students of pure physics". The application form hardly gave room for any more extensive description of the intended use. Somewhat more room was however available for the answer to the question regarding the reasons for which an instrument or apparatus obtainable in the Community could not be used for the intended research. The Institute's answer to that question was as follows: "comparative tests, carried out in Philips' and JEOL's research laboratories in Eindhoven and London respectively show that the JEM-200 CX manufactured by JEOL is far superior to the EM 400 manufactured by Philips. The main reason for that superiority appeared to lie in the acceleration capacity, 200 kV in the case of the JEM-200 CX as opposed to 120 kV in the case of the EM 400. As regards the field of application referred to, namely the study of metals and alloys, the only

possible choice appears to be the JEM-200 CX. When asked whether it could supply an EM 400 with an acceleration capacity of 200 kV, Philips replied that it was unable to do so. In spring 1980 exemption on grounds similar to those given above was granted to the Mechanical Engineering Department of the Technische Hogeschool /Technical College/, Twente."

In Commission Decision 81/843 of 8 October 1981 at issue here the intended use of the apparatus is described, on the basis of further information provided by the Institute as "microstructural research into the transformation and deformation of metallic materials and alloys".

On the basis of the original application the competent Netherlands authority certainly had grounds for holding that Commission Decision 80/772 of 18 July 1980, referred to above, was applicable. In that case the intended use was described in practically the same way as in the Institute's application. The description of the intended use eventually adopted by the Commission in this case is somewhat more specific than that given in Decision 80/772, but considerably less specific than the description of the intended use given in the Belgian application to which Decision 81/415/EEC of 25 May 1981 (Official Journal 1981, L 158, p. 24) referred.

All other things being equal, having regard to the text of the application and to the second indent of Article 5 (2) of Regulation No 2784/79, the Commission could certainly consider that in this case there was no reason to make a decision different from that in the two previous cases mentioned above. In particular, the Institute's mere reference to the superiority of the Japanese apparatus did not constitute grounds for the Commission to make a different decision since the Institute had not shown in accordance with Article 5 (2) that the superior performance was "necessary for a proper execution of the specific work to be carried out". During the procedure before the Court, the Institute acknowledged that at the time of its application it had not adequately recognized the importance of a more specific description of the intended use of the apparatus.

3. The procedure followed in this case by the Commission

As has been observed, in this case the Commission applied Article 7 (3) to (7) of Regulation No 2784/79. It appears from the report on the discussion of the matter in the Committee on Duty-Free Arrangements on 9 and 10 July 1981, which has been submitted to the Court, and from the explanations in that regard furnished by the Commission at the hearing that:

1. The Netherlands delegation informed the meeting that Philips had drawn up a general report on the question of equivalent value, in which it contested the Institute's arguments. That report was to be sent to the Commission as quickly as possible (paragraph 14.1 of the report). According to information given by the Commission at the hearing the contents of that report were however presented orally to the meeting.

2. Taking into account the previous decisions regarding the apparatus in question the Committee confirmed that it was a scientific apparatus (paragraph 14.2).

3. It was held that apparatuses of corresponding scientific value were available in the Community (para-

graph 14.2, as elucidated by the Commission at the hearing).

4. The report makes no mention of the opinion of the expert from the Joint Research Centre in Ispra who was present. The Commission stated at the hearing that at the meeting the representative from the Joint Research Centre gave his opinion orally which was unfavourable to the Institute's application.

5. Representatives of the ministries with responsibility for customs matters of nine Member States were present at the meeting. At the hearing the Commission conceded however that those representatives were not scientific or technical experts.

6. The purpose of the discussions of the Committee (as appears from the Commission's replies to the questions put to it by the Court) is exclusively the exchange of information between Member States and in particular there is no attempt to make a scientific or technical assessment of the question of equivalent value.

7. The Commission considers (as appears from its answers to the questions put to it by the Court at the hearing), that since the findings of the Committee and the Commission decisions based on them concern questions of fact, the scientific or technical correctness of its finding that apparatuses of equivalent scientific value are produced within the Community may be challenged before the competent national court, for instance where the Commission relied on an incorrect description of the research, as compared with the description given by the University of Groningen.

8. The Institute's application was the basis of the discussion in the Committee.

On the basis of the text of Article 7 of Regulation No 2784/79 and of the procedure followed, summarized above, I conclude that the consultation procedure was exclusively directed towards exchange of factual information, and incorporated no institutional guarantees of the scientific or technical evaluation of the question of equivalent value other than the fact that an expert from the Joint Research Centre at Ispra was present, although that is not provided for in Regulation No 2784/79. Neither the statement of reasons for the decision nor the report of the meeting attribute any decisive significance to his opinion, which would moreover not be in keeping with the objective, as explained by the Commission, of exchanging factual information. That is also confirmed by the letter of 22 October 1982, which is in the file, with which the Institute received the Philips report from the Netherlands Ministry of Finance, in which it is stated that "in particular the information provided by Philips ... contributed to the decision in question". Nor does it appear that the exceptional "quasi appeal" nature of the consultation in question, not expressly provided for in Article 7 (2), or procedural considerations regarding the desirability of holding adversary proceedings on such a quasi appeal, led to any departure from the normal procedure followed in application of Article 7 (3) to (7).

Nevertheless I should be unwilling to conclude on those grounds alone that

there has been a "manifest error of fact or law" as referred to in paragraph 14 of the Court's judgment in Case 216/82.

4. The applicability in this case of Article 7 (3) to (7) of Regulation No 2784/79

It is clear in particular from Article 7 (2), in conjunction with Article 7 (4), of Regulation No 2784/79 that the procedural provisions of Article 7 (3) to (7) are intended exclusively for cases in which a national authority has not yet taken a decision, or has taken only a provisional decision on exemption. It appears from the explanations given by the Commission during the proceedings and from the Court's experience in other cases regarding such exemption from customs duties that the rationale for the consultation procedure lies in particular in the fact that neither the national administrations nor the Commission are always aware of the manufacture of instruments or apparatus of equivalent scientific value in one of the ten Member States. On the other hand, each national administration can easily ascertain whether such an instrument or apparatus is manufactured in its country. Since it appears from the procedural rules referred to that in the application of the consultation procedure the country of importation is assumed to be a country other than the Member State where the apparatus considered to be of equivalent value is manufactured, paragraphs (5) and (6) of Article 7 contain to this extent adequate procedural guarantees of an adversary procedure. The summary of the procedure followed in Case 216/82 given in the Court's judgment seems to bear out the correctness of that conclusion. In that case it is clear that the country of importation did in fact bring into the discussion the point of view of the user of the apparatus and the reports of experts.

Conversely, Article 7 provides absolutely no guarantee that both sides of the question will be heard in a case such as this, where the Community producer concerned is established in the Member State which has submitted the matter to the Commission for decision. It is clear from the file on the case and from the information provided at the hearing that no such adversary proceedings in fact took place. It even appears from the file that it was not until *after* the decision that the Institute managed to obtain access to the reports drawn up by Philips and that it was itself, therefore, unable to submit any reply. In those circumstances I am of the view that important procedural errors were committed in the preparation of the decision in question. On the basis of those procedural errors I am of the view that the decision must be declared void. I should not like to go so far as to suggest that there has been misuse of power as well on the ground that the procedure laid down in Article 7 (3) to (7) was applied for a purpose for which that procedure was clearly not intended. I do consider it desirable in itself that, should the Commission decide to provide further possibilities for the submission of such "quasi appeals", it amend Regulation No 2784/79 so as to include in particular procedural guarantees for such cases. In addition to guarantees of scientific and technical expertise on the part of the group of experts to be consulted, those amendments should provide for a form of adversary proceedings. I also consider it conceivable, however, that in future

the Commission leave the hearing of such quasi appeals entirely to the competent national courts, which itself guarantees an adversarial procedure.

5. Conclusion

Having regard to the conclusions set out above, I do not consider it necessary to deal separately and in detail with a possible deficiency in the statement of reasons for the decision. The decisive recital in the preamble to the decision states that "on the basis of information received from Member States, apparatus of scientific value equivalent to the said apparatus, capable of being used for the same purposes, are currently being manufactured in the Community; ... this applies, in particular, to the apparatus 'EM 400', manufactured by Philips Nederland BV, Boschdijk 525, NL-Eindhoven".

That recital confirms that only factual information from the Member States and not any independent scientific or technical opinion regarding equivalent value was the decisive reason for the decision. The statement of reasons given also confirms that the reports on the equivalent value of its product drawn up by the manufacturer concerned after the submission of the application referred to in the decision were not considered in adversary proceedings. Indeed, it is established, as has been stated above, that the Institute was not able to examine those reports before the Commission made its decision. In this case it seems therefore that the inadequate statement of reasons, with regard to which the Italian Government made some noteworthy general observations, only confirms that important procedural errors, referred to above, were committed in the preparation of the decision.

On the basis of my previous conclusions I therefore propose that the Tariefcommissie's question be answered as follows:

"Commission Decision 81/843/EEC of 8 October 1981 is void because important procedural errors were committed in the course of the preparation of the interpretation and application of Article 3 of Regulation (EEC) No 1798/75 given therein."

Since the previous decisions regarding the apparatus in question covered only the specific applications therein referred to and since the Commission has confirmed at the hearing that for certain types of research the Community Research Centres do not consider the Philips apparatus to be of equivalent value, if such an answer is given, the matter can in my view be settled by the Tariefcommissie itself.