for the preservation, storage or cultivation of a substance on which research is carried out and which play only a passive role in the scientific research process.

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 26 January 1984.

J. A. Pompe
Deputy Registrar

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 24 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

1. The relevant facts

My views on the question referred to the Court by the Finanzgericht München in its order of 8 March are as follows:

The issue this time is whether glass flasks imported by the plaintiff intended for the preservation and cultivation in a sterile medium of tissue cultures of human cancer cells are scientific instruments or apparatus within the meaning of Article 3 (1) of Regulation (EEC) No 1798/75 of the Council of 10 July 1975 (Official Journal 1975, L 184, p. 1) in its original version.

According to the statements of the Ludwig-Maximilians-Universität München, the glass flasks are manufactured from flint glass, a material which even during long storage discharges no substances into the alkaline medium. The flasks also have a flat bottom, which allows the cells to grow, and a special lip, which is specially constructed for tissue-culture media and enables solutions to be decanted without their running down the side of the flask, which is very important owing to the stringent sterility requirements.

In answering the question submitted to the Court I assume not only that those statements are correct but also that the glass flasks are used exclusively for

1 — Translated from the German.

scientific research on the cancer cells in question. I further assume that it has not been established that similar glass flasks are made in the Community. Otherwise the Finanzgericht München would probably not have raised the question in view of Article 3 (1) (b) of the regulation. As to that point, however, the Commission rightly remarks on page 7 of its written observations that such a finding requires fairly extensive investigations in each individual case and that although it is therefore in the interests of scientific research that the terms "scientific instruments and apparatus" should be construed liberally, any undue extension of those terms is to be avoided. [1]

2. Further considerations

In its judgment of 10 November 1983 in Case 300/82 *Gesamthochschule Essen* v *Hauptzollamt Düsseldorf* the Court stated in paragraph 9 of the decision: "Since, according to the first recital in the preamble to that regulation, it is necessary to allow 'by all possible means' the admission free of customs duties of educational, scientific and cultural materials, the term 'scientific instrument' in Article 3 (1) of Regulation No 1798/75 cannot be given a narrow interpretation." In paragraphs 10 to 14 the Court sets out further grounds for rejecting a narrow interpretation of the term in question. From the Court's actual ruling the following criteria can then be derived for answering the question whether the material at issue in that case may be regarded as a "scientific instrument":

The material (in that case plastic blocks of a specific composition) must:

1. Fulfil an essential function in obtaining certain results;

2. Be used in long-term scientific research; and

3. Be an indispensable means to that end.

At first sight one might easily think that the flasks at issue in this case also satisfy those criteria. The Commission's representative rightly pointed this out a moment ago. The same criteria could therefore be adopted in answering the question now before the Court. Unlike the situation in Case 300/82, in this case it is not disputed that "objects" are involved. *Prima facie* the known facts also indicate that the flasks fulfil an essential function in obtaining certain results from long-term scientific research. Finally, it might at first sight seem possible to let the national court determine whether the flasks are indispensable for that purpose. Nevertheless, the answer I shall propose to the Court is not along those lines.

In order that language may also fulfil its useful rôle as a "scientific instrument" and as an instrument of legislation and judicial decision-making not only will a regulation's purpose and the different factual circumstances of each case have to be considered but also its definitions,

1 — This summary of the relevant observation of the Commission is, I think, a true reflection of its meaning. In the same connection the Commission itself states, less appositely, that any undue extension of *customs exemptions* is to be avoided. Actually, although an excessive amount of work would be involved, that could be achieved through the application of the regulation's restrictive conditions, which are directly related to its objectives of industrial policy. The work involved would indeed be particularly excessive in the case of relatively inexpensive and simple research aids.

the wording of its provisions and its scheme as a whole in order to arrive at a correct interpretation. Many laws, including the regulation to be interpreted in this case are compromises between different aims — in this case between aims of research policy and those of industrial and commercial policy. It is therefore a matter of determining with reference to the above-mentioned criteria of interpretation the precise meaning of the regulation in the relevant group of individual cases.

It might be inferred from paragraph 15 of the Court's judgment in Case 300/82 that *materials* which are not the *means* of conducting scientific research (as was the position in Case 300/82) but the *subject* of such research cannot be regarded as scientific instruments. The question whether that distinction between the means of conducting research and the object on which research is conducted *always* enables a solution to be found does not need to be decided in this case. I have already made some observations on that question in my opinion in Case 300/82. It is, however, undisputed that the present case concerns objects which are not "instruments" for the research itself but are intended for the sterile preservation and cultivation of the matter on which the research is being conducted. In my opinion it would be going too far to treat such purely ancillary aids as "scientific instruments" within the meaning of the regulation. After all, the fact that food is stored in a refrigerator does not make the latter an eating implement. The flasks in question certainly fulfil an important function in an indirect relation with the research and the possibility of conducting the research itself depends on them. But the actual research is not carried out *with* those objects. The Commission rightly observes, however, in the third part of its written observations, that this is the decisive common characteristic of the examples of scientific instruments cited in an official Unesco document. Furthermore, there is no telling where the limits of this customs exemption might end once devices for the preservation of matter on which research is being conducted, and perhaps the next time other indirect aids, used in the manufacture of research instruments for example, came to be treated as scientific instruments. At all events, that approach would no doubt not take sufficient account of the compromise which the regulation seeks to achieve between research policy on the one hand and industrial and commercial policy on the other.

Moreover, it is quite clear from paragraph 16 of the judgment in Case 300/82 that the Court by no means intended to give a general, exhaustive definition of the term "scientific instrument" in that judgment.

On the other hand the considerations I have set out above indicate that in my view the Finanzgericht München was wrong to centre its question on the terms "instruments and apparatus". The crucial question in this case in rather whether it involves a *scientific* instrument (or apparatus) within the meaning of the regulation. The Finanzgericht's question should therefore be interpreted in that sense, as indeed is suggested by the third paragraph of the second part of the grounds of the order making the reference.

My previous observations also indicate that I do not find it possible to agree wholly with the answer which the Commission has proposed in its written observations and in its oral observations

today. In particular, I do not wish to espouse its view that only objects with which certain operations can be performed or certain effects produced on other objects may be considered to be instruments. Even in the circumstances of Case 300/82 such a criterion would have been of little use to the court which made the reference; besides, a criterion of that kind is not to be found in the Court's judgment in that case. For the purposes of the question now before it the Court has no need either, in my view, of the test of "indispensability", which the Commission today derived from the Court's judgment in Case 300/82. However, I do agree with the Commission's view that for the purposes of the interpretation of the regulation no great importance should be attributed to the additional term "Gerät" appearing in the German version of the regulation because a similar term does not appear in the other language versions. Since the criteria I have proposed for establishing the link to the research itself will also apply to a "Gerät", this point has no practical importance in any case.

3. Suggested answer

In view of the observations I have made above, I propose that the Court's answer to the question put to it by the Finanzgericht München should be in the terms set out below. To avoid any unnecessary anticipation of other cases I suggest a negative answer which moreover in its abstract form will apply only to cases similar to that now in question.

"As regards the terms 'scientific instruments and apparatus', the first sentence of Article 3 (1) of Regulation (EEC) No 1798/75 of 10 July 1975 (in its original version) must be interpreted as not including objects which are used only for the preservation or cultivation of the matter on which research is conducted."