JUDGMENT OF THE COURT (SECOND CHAMBER)
26 JANUARY 1984 [1]

Ludwig-Maximilians-Universität München v Hauptzollamt München-West (reference for a preliminary ruling from the Finanzgericht München)

(Common Customs Tariff — Exemption for scientific apparatus — Glass flasks)

Case 45/83

Common Customs Tariff — Importation free of customs duties — Scientific instruments and apparatus — Concept — Definition — Criteria — Receptacles intended for the preservation or cultivation of the matter on which research is conducted — Exclusion
(Regulation No 1798/75 of the Council, Art. 3 (1))

The exemption from customs duty provided for in Article 3 (1) of Regulation No 1798/75 for scientific instruments and apparatus can be granted only in relation to items which, by virtue of their particular technical structure and functioning, themselves serve directly as a means of scientific research. An item which is used not as a means but only as an object of scientific research cannot be described as a scientific instrument or apparatus; indeed, where research is carried out not by means of that item but on it, the item plays only a purely passive rôle in the research process.

A fortiori, receptacles which are used only to preserve, store or cultivate a substance on which research is carried out cannot be described as scientific instruments or apparatus.

In Case 45/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München [Finance Court, Munich] for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN [Ludwig-Maximilian University of Munich]

and

HAUPTZOLLAMT MÜNCHEN-WEST [Principal Customs Office, West Munich]

on the interpretation of Regulation No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific and cultural materials (Official Journal 1975, L 184, p. 1),

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Legal context

The dispute in the main proceedings relates to the grant of an exemption from customs duty for glass flasks, imported by the applicant and intended for the preservation and cultivation in a sterile medium of tissue cultures of human cancer cells, which it is claimed should be classified as scientific instruments or apparatus. The legal basis for the importation of those instruments and apparatus is Regulation No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific and cultural

materials (Official Journal 1975, L 184, p. 1).

That regulation is intended to give effect in the Community to the Florence Agreement which was drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization. According to Article 1 of that agreement, which entered into force in 1952,

"The Contracting States undertake not to apply customs duties or other charges on or in connection with the importation of:

...

(b) ... scientific ... materials, listed in Annexes ... D ...".

Annex D to the agreement includes, subject to certain reservations, "scientific instruments or apparatus intended exclusively for educational purposes or for pure scientific research".

Consequently, in order to facilitate the free exchange of ideas and scientific research within the Community, the Council adopted Regulation No 1798/75 by virtue of which certain educational, scientific or cultural materials may be imported into the Community free of Common Customs Tariff duties. Whereas under Article 1 of Regulation No 1798/75 certain of those materials are admitted free of Common Customs Tariff duties whatever their intended use and under Article 2 of the same regulation other materials must be intended either for certain public establishments and organizations or for certain other duly approved establishments and organizations, by virtue of Article 3 (1) of the regulation a third category of scientific instruments and apparatus not referred to in Articles 1 and 2 thereof may be admitted free of customs duties provided that they are imported exclusively for educational purposes or for pure scientific research. That provision concerns instruments and apparatus which:

"(a) ... 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 that:

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

In order to qualify for duty-free importation under Article 3 (1) of Regulation No 1798/75, the establishment or organization for which the articles are intended must therefore establish that the import in question relates to a scientific instrument or apparatus intended exclusively for educational purposes or for pure scientific research.

2. *Facts and procedure before the national court*

The plaintiff in the main proceedings, Ludwig-Maximilians-Universität München, imported glass flasks into the Federal Republic of Germany on 24 February 1977. According to the information furnished by the plaintiff, the flasks are made of flint glass, a material which even during long storage discharges no substances into the alkaline medium. The flasks also have a flat base, which enables the cells to grow, and a special lip, constructed specifically for tissue culture media and making it possible to pour out the solutions without their running down the side of the flask, which is very important on account of the stringent requirements regarding sterility.

When applying for clearance to release the goods into free circulation, the plaintiff asked the customs office to grant exemption from customs duty for them. The Hauptzollamt München-West initially exempted the goods from customs duty as research material, subject to subsequent verification. On the strength of an examination conducted by the Zolltechnische Prüfungs- und Lehranstalt (Customs Laboratory and Training College) in Munich as to whether the conditions in Regulation No 1798/75 for duty-free importation were satisfied, however, the defendant served a notice of re-assessment dated 27 June 1977, making a retroactive demand for customs duty amounting to DM 357.20, together with the proportionate import turnover tax payable thereon, amounting to DM 39.20. The reason stated was that the glass flasks in question did not have the characteristics of instruments, apparatus or utensils (the latter word — "Geräte — appears in the German version of Regulation No 1798/75). The plaintiff lodged an objection with the Hauptzollamt München-West, the defendant in the main proceedings, against the imposition of customs duty and, after that objection was rejected, brought an action against the defendant before the Finanzgericht München.

In those proceedings, the plaintiff claimed that the imported glass flasks should be regarded as "scientific instruments, apparatus or utensils" within the meaning of the German version of Regulation No 1798/75, since they should be considered to be research instruments or utensils. "Instrument" is defined in specialized dictionaries as a means, utensil or precision tool and consequently applies to the imported glass flasks. Moreover, the goods in question are utensils ("Geräte") within the meaning of Regulation No 1798/75 since that word is understood to refer to tools, items of equipment or articles for everyday use, machine, accessories and utensils ("Utensilien").

Before the national court the defendant denied that the glass flasks in question were of the scientific nature referred to in Article 3 of Regulation No 1798/75. It referred to the " Der Neue Herder" dictionary which defines instruments as "tools (Werkzeuge) serving technical, scientific or artistic purposes" whereas tools are defined as working utensils ("Arbeitsgeräte") by means of which an activity or job is performed. The Großer Duden foreign language dictionary also describes an instrument as a "means, utensil or precision tool (for technical or scientific work)".

Consequently — again according to the defendant — an instrument is a product having the characteristics of a tool with which a job or an activity may be performed, during which the instrument must in some way actively affect the article or material to be treated. Such is

not the case with glass flasks which serve in a merely passive manner for the growth and preservation of culture media in sterile conditions. Neither are they utensils of the kind with which Article 3 (1) of Regulation No 1798/75 is concerned but at the most are equipment ("Gerätschaften") which is not covered by the provisions in question. Those provisions are not intended to grant outright exemption from customs duty for "articles" but only for scientific instruments, apparatus and utensils. Moreover, only scientific instruments or apparatus ("instruments et appareils scientifiques") are mentioned in the French and English versions of the article in question. In the German version, the word utensils ("Geräte") is therefore only a linguistic expedient for supplementing and rounding off the terms "Instrumente" and "Apparate".

By order of 8 March 1983 the Finanzgericht München stayed the proceedings and decided to submit the following question to the Court for a preliminary ruling:

"How is the first sentence of Article 3 (1) of Regulation (EEC) No 1798/75 of 10 July 1975 (in its original version) to be interpreted as regards the terms 'instruments' and 'apparatus'? Do they include goods of every kind or only those articles having a mechanism or other devices by means of which a material may be worked on, processed or otherwise treated, or whereby given physical or chemical conditions or phenomena (for example, temperature or vacuum) may be either produced and controlled or perceived and measured? What other criteria, if any, serve to define such terms?"

In the statement of grounds of its order, the Finanzgericht points out that the most important question is whether the phrase "scientific instruments, apparatus" is merely a circumlocution for the broad concept of "article" or whether it refers to a particular type of goods, characterized by specific distinctive features and characteristics. The latter interpretation is supported by the fact that the term "article" is employed in the regulation not only in Article 3 (1) but also elsewhere; moreover Article 3 (2) contains specific rules for components and accessories and the phrase mentioned above corresponds to the terminology used in the Common Customs Tariff which attributes a narrower meaning to that phrase than to "goods" or "articles". It is difficult to perceive, from the spirit and purpose of Regulation No 1798/75, any valid reason for making the grant of a customs concession for goods dependent on additional features over and above the requirement of particular suitability for scientific research implied by the adjective "scientific".

If, in consequence, "instruments or apparatus" is to be taken to mean goods which are distinguished from other articles by their specific nature, the additional problem arises of definition of the particular criteria on which the distinction is to be based. In these circumstances, regard should be had to the fact that the English and French versions of Article 3 (1) of Regulation No 1798/75 refer only to "instruments or apparatus" and "instruments et appareils" respectively and that therefore no independent meaning is to be attributed to the extra word "utensil" ("Gerät") which appears only in the German version of the regulation in question.

In the light of the terminology used in the Common Customs Tariff and on the basis of the connection between the double term "instruments and apparatus" and the adjective "scientific", the principal feature to be taken into account as conferring upon goods the nature of apparatus or instruments is the existence of a mechanism or other devices by means of which a substance may be worked on, processed or otherwise treated or whereby certain physical or chemical states or phenomena (for example temperature or vacuum) may be produced and controlled or else perceived and measured.

On the other hand, it cannot be regarded as sufficient that an item of goods serving only as a receptacle is, in the light of the objective to be attained and by virtue of the properties of the material of which it is made, capable of eliminating interference from ambient factors whilst a substance is being treated or a process is going on. Articles of that kind can be classified as instruments or apparatus only if they are equipped with devices by means of which the nature and intensity of such interference can be determined and controlled or measured.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Commission, represented by Jörn Sack, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By order of 5 October 1983, the Court assigned the case to the Second Chamber.

II — Written observations submitted to the Court

The *Commission* emphasizes in the first place that in its opinion the German version of Regulation No 1798/75 goes further than the other versions and further than the English and French versions in particular. The latter are of particular importance because Regulation No 1798/75 implements the Florence Agreement of 21 May 1952 in the Community and that agreement is drawn up in English and French. Whilst in all cases the German text refers to "Wissenschaftliche Instrumente, Apparate und Geräte" (scientific instruments, apparatus, and utensils), the other versions mention only "instruments and apparatus" ("instruments et appareils"). The Commission considers that the plaintiff in the main proceedings cannot therefore rely upon a single version of the regulation in question which is less restrictive than the other language versions. And that version is not confirmed either by the Florence Agreement or by the instructions given for the implementation thereof or by practice in the signatory States or by that of the Community itself. It should be added that in the meantime the German version has been brought into line with the other versions by article 140 (1) (d) of Regulation No 918/83 of the Council of 28 March 1983 setting up a Community system of reliefs from customs duty (Official Journal 1983, L 105, p. 1), by removal of the word "Geräte" (utensils) from the original text of the regulation.

In the opinion of the Commission there can be no doubt that the glass flasks the subject-matter of these proceedings

cannot be regarded as instruments or apparatus. Quite apart from any dictionary definition, it is certain that only articles having a particular form enabling certain operations to be performed or certain effects on other articles to be produced can be classified as such. On the other hand, articles which serve simply for the preservation, storage or even the "cultivation" of a substance are not instruments and still less are they apparatus. The distinction between those terms and the "articles" mentioned in Articles 1 and 2 makes sense only if it is based on the functional meaning of those terms. That meaning cannot be based on the purpose of the goods, since all the goods covered by Regulation No 1798/75 have a common purpose.

The Commission maintains that the German word "Geräte" (utensils) is less restrictive than the words "instrument" and "apparatus". The word "Gerät" could be used to describe any article of a particular form which fulfils a certain function in connection with the performance of an activity and does not necessarily enable an activity to be performed or another article to be acted upon, as is the case with instruments and apparatus. Thus, articles used for the preservation and storage of a substance may be termed "Geräte" in German because they fulfil certain functions but do not enable an operation to be carried out or an effect to be produced.

Moreover, as regards the definition of "instruments and apparatus", the Commission refers to the examples given in the Unesco official guide for the operation of the Florence Agreement and its Protocol, the common feature of which is that the articles described are used for specific tasks, specific research or the production of specific effects, and are not therefore merely useful accessories for the performance of such activities.

Furthermore, the Commission refers to the observations submitted by it in Cases 294/81 (judgment of 17 March 1983, *Control Data Belgium* [1983] ECR 911) and 300/82 (judgment of 9 November 1983, *Gesamthochschule Essen* [1983] ECR 3655). The essential feature to be noted in those cases is that the scientific use for which an article is intended is not sufficient, either in general or in specific cases, to provide a basis for the application of Article 3 of Regulation No 1798/75.

Consequently, the only support for the view put forward by the plaintiff in the main proceedings is the assertion that it is in harmony with the spirit of that regulation for it to be interpreted as broadly as possible. However, the Commission objects to that argument in so far as the intention of the legislature to impose certain restrictions is not in doubt, since those restrictions are clearly expressed in the text of the regulation. Nor are they vitiated by arbitrariness, in so far as they are in conformity with international practice in this field. Moreover, account must be taken of the fact that even if a liberal interpretation were in the interest of scientific research, the concern to protect manufacturers established in the Community would require the avoidance of any excessive extension of customs exemptions. The legislature certainly intended to confine itself to the importation of articles of particular importance, a characteristic which instruments and apparatus display in general. The word

"Geräte" could perfectly well embrace ordinary articles of very simple design. That view is moreover confirmed by Article 3 (4) of Regulation No 1798/75 which in any event excludes the application of paragraph (1) to "normal equipment", even where such equipment comprises instruments or apparatus.

For the above reasons, the Commission proposes that the question submitted for a preliminary ruling should be answered as follows:

"The words 'instruments and apparatus' (in German: 'Instrumente, Apparate und Geräte') used in Regulation (EEC) No 1798/75 of the Council must be interpreted as meaning that only articles of a particular form enabling certain operations to be carried out or certain effects to be produced on other articles, and not those serving only for the preservation or cultivation of an inert or living material, may be regarded as such".

III — Oral procedure

At the sitting on 24 November 1983, oral argument was presented and questions asked by the Court were answered by Jörn Sack, of the Commission's Legal Department, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the same sitting.

Decision

1 By an order of 8 March 1983 which was received at the Court on 24 March 1983, the Finanzgericht München [Finance Court Munich] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 3 of Regulation No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific and cultural materials (Official Journal 1975, L 184, p. 1), adopted in order to implement the Florence Agreement (United Nations Treaty Series Vol. 131, 1952, No 1734, pp. 26 et seq.).

2 The question arose in an action brought before the national court by Ludwig-Maximilians-Universität München (Ludwig-Maximilian University of Munich) for the annulment of the decision of the Hauptzollamt München-West [Principal Customs Office, West Munich) refusing to grant an exemption from customs duties on the importation of glass flasks, designed for the preservation and cultivation of tissue cultures of human cancer cells in sterile conditions, on the ground that they were not scientific instruments or apparatus within the meaning of the above-mentioned regulation.

3 It appears from the documents before the Court that the glass flasks at issue are made of flint glass, a material which even during long storage discharges no substances into the alkaline medium, and in addition have a flat base which enables the cells to grow and a special lip; they are bottles made specifically for research into tissue culture media which enable the solutions to be poured without their running down the side of the flask, thus meeting the strictest requirements regarding sterility.

4 The plaintiff in the main action claimed before the national court that the articles in question should be regarded as "scientific instruments or apparatus" within the meaning of the above-mentioned regulation, since the word "instrument" is defined in specialized dictionaries as a means, utensil or precision tool, and the glass flasks were utensils ("Geräte") within the meaning of the regulation.

5 The Hauptzollamt, on the other hand, contended that the flasks were not instruments, on the ground that an instrument in some way actively affects the article or material to be treated whereas the glass flasks serve in a merely passive manner, nor were they utensils, but were instead equipment.

6 Consequently, the Finanzgericht München referred to the Court the following question:

"How is the first sentence of Article 3 (1) of Regulation (EEC) No 1798/75 of 10 July 1975 (in its original version) to be interpreted as regards the terms 'instruments' and 'apparatus'? Do they include goods of every kind or only those articles having a mechanism or other devices by means of which a material may be worked on, processed or otherwise treated, or whereby given physical or chemical conditions or phenomena (for example, temperature or vacuum) may be either produced and controlled or perceived and measured? What other criteria, if any, serve to define such terms?"

7 It is clear from the papers before the Court that this question asks in substance whether the terms "instruments" and "apparatus" in the first sentence of Article 3 (1) of Regulation No 1798/75 must be interpreted as including materials such as receptacles intended for the preservation, storage

or cultivation of a substance on which research is carried out and which plays a merely passive rôle in the scientific research process.

8 First, it should be stated that neither the Florence Agreement nor Regulations No 1798/75 contains a definition of the terms "instruments" an "apparatus" for the purposes of Article 3 (1) of the regulation. However, as the Court has already stated, it follows in particular from the first recital in the preamble to that regulation, which provides that it is necessary to allow, "by all possible means", the admission free of customs duties of educational, scientific and cultural materials, that the terms "instruments" and "apparatus" in Article 3 (1) of Regulation No 1798/75 cannot be given a narrow interpretation.

9 Nevertheless, the terms in question must be defined in such a way that the exemption from customs duties covers only items possessing objective characteristics which make them particularly suitable for pure scientific research (cf. judgment of 2 February 1978 in Case 72/77, *Universiteitskliniek Utrecht* v *Inspecteur der Invoerrechten en Accijnzen*, [1978] ECR 189).

10 Such suitability must therefore be inherent in the item for which exemption is requested. It follows that exemption from duty can be granted only in relation to items which, by virtue of their particular technical structure and functioning, themselves serve directly as a means of scientific research.

11 On the other hand, an item which is used not as a means but only as an object of scientific research cannot be described as a scientific instrument or apparatus; indeed, where research is carried out not by means of that item but on it, the item plays only a purely passive role in the research process.

12 *A fortiori*, receptacles which are used only to preserve and store a substance on which research is carried out cannot be described as scientific instruments or apparatus. Even the fact that they are suitable for the preservation and cultivation of tissue in a sterile medium cannot confer upon them the

character of scientific instruments or apparatus; that circumstance does not alter the essential characteristic of a receptable, that is to say the fact that its use is passive.

13 As regards the fact that the German version of Article 3 (1) of Regulation No 1798/75 contains not only the words "instruments" and "apparatus" but also the word "Geräte" (utensils), it should be noted that that cannot confer upon that linguistic version a wider meaning that that implied by the other versions which do not contain that word. Therefore no special significance should be attributed to the word "Geräte" in the German text.

14 The answer to the question asked by the Finanzgericht München should therefore be that the first sentence of Article 3 (1) of Regulation No 1798/75 must be interpreted as not including items such as receptacles which are intended for the preservation, storage or cultivation of a substance on which research is carried out and which play only a passive rôle in the scientific research process.

Costs

15 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Finanzgericht München by order of 8 March 1983, hereby rules:

The first sentence of Article 3 (1) of Regulation No 1798/75 must be interpreted as not including items such as receptacles which are intended

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.