

JUDGMENT OF THE COURT

21 November 1991 *

In Case C-269/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) for a preliminary ruling in the proceedings pending before that court between

Hauptzollamt München-Mitte

and

Technische Universität München

on the validity of Commission Decision 83/348/EEC of 5 July 1983 establishing that the apparatus described as 'Jeol-Scanning Electron Microscope, model JSM-35 C' may not be imported free of Common Customs Tariff duties (Official Journal 1983 L 188, p. 22),

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler and F. Grévisse (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

- Technische Universität München, by Mr Wachinger, Leitender Regierungsdirektor,
- Commission of the European Communities, by J. Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 11 June 1991,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1991,
gives the following

Judgment

- 1 By order of 17 July 1990, which was received at the Court on 6 September 1990, the Bundesfinanzhof (Federal Finance Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the validity of Commission Decision 83/348/EEC of 5 July 1983 establishing that the apparatus described as 'Jeol-Scanning Electron Microscope, Model JSM-35 C' may not be imported free of Common Customs Tariff duties (Official Journal 1983 L 188, p. 22).
- 2 The question was raised in the course of proceedings between the Technische Universität München and the Hauptzollamt München-Mitte.
- 3 The proceedings concern the grant of customs exemption, for a scientific instrument imported into the Community, under Article 3(1)(b) of Council Regu-

lation (EEC) No 1798/75 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), as amended by Council Regulation (EEC) No 1027/79 of 8 May 1979 (Official Journal 1979 L 134, p. 1) in force since 1 January 1980.

- 4 Between 1 June 1979 and 23 March 1981 the Technische Universität München brought into free circulation a scanning electron microscope, model JSM-35 C, manufactured by Japan Elektron Optics Laboratory Ltd of Tokyo. The instrument was intended to be used in research work in its chemistry, biology and geology departments. It was to be used in investigating electro-chemical processes, geological, mineralogical and food chemistry problems, and research into plastics, photochemical emulsions and biological systems.
- 5 The Hauptzollamt initially admitted it free of customs duty. However, by notices of 14 and 15 April and 22 June 1982 it then demanded customs duties of DM 31 110 plus import turnover tax of DM 3 746.
- 6 Following the objection procedure commenced by the Technische Universität, the Hauptzollamt requested the intervention of the Commission pursuant to Article 7(2) of Commission Regulation (EEC) No 2784/79 of 12 December 1979 laying down provisions for the implementation of Council Regulation (EEC) No 1798/75 (Official Journal 1979 L 318, p. 32).
- 7 On 5 July 1983, the Commission adopted Decision 83/348, referred to above, according to which the electron microscope in question could not be imported free of Common Customs Tariff duties because apparatus of equivalent scientific value, capable of being used for the same purposes, was being manufactured in the Community, in particular, the PSEM 500 X instrument produced by Philips Nederland BV.

- 8 Following this decision by the Commission, the Hauptzollamt rejected the application for duty-free admission. The Technische Universität then began an action.
- 9 The Bundesfinanzhof, to which the case came at last instance, considers that it raises a question of the validity of Commission Decision 83/348, cited above. In its view, the Court of Justice has always held that it has only a limited power of review in relation to disputes concerning the duty-free importation of scientific apparatus. According to its case-law, given the technical nature of the questions which arise, the Court may only declare a decision of the Commission invalid where there has been a manifest error of appraisal or a misuse of power. The Bundesfinanzhof doubts whether that view can be maintained.
- 10 The Bundesfinanzhof considers that the fact-finding and the application of the legal criteria governing the grant of duty-free admission cannot escape judicial review. That requirement for legal protection is not affected by the fact that the comparative examination of the equivalence of scientific apparatus carried out by the competent customs authorities is mainly technical.
- 11 The Bundesfinanzhof therefore asks the Court whether Commission Decision 83/348 is valid.
- 12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written and oral observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 13 It must be stated first of all that, since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks.
- 14 However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.
- 15 The Court must therefore examine whether the disputed decision was adopted in accordance with the principles mentioned above.
- 16 With regard to the first point, it should be borne in mind that Regulation No 1798/75, cited above, implemented in the Community the Florence Agreement of 22 November 1950 (see Official Journal 1979 L 134, p. 14) in which the Contracting States undertake not to apply customs duties and import duties on scientific apparatus intended for educational or research purposes, provided that no apparatus of equivalent scientific value is manufactured in the country of importation.
- 17 According to the first recital of the preamble to Regulation No 1798/75, it is necessary to allow, by all possible means, the admission free of Common Customs Tariff duties of educational, scientific and cultural materials in order to facilitate the free exchange of ideas as well as the exercise of cultural activities and scientific research within the Community.

- 18 Article 3(1) of the regulation provides that scientific instruments and apparatus imported exclusively for non-commercial purposes are to be admitted free of Common Customs Tariff duties if no instruments or apparatus of equivalent scientific value are being manufactured in the Community.
- 19 The grant of customs exemption for scientific apparatus imported into the Community can therefore only be refused, on the grounds that apparatus of equivalent scientific value exists in the Community, if the investigation carried out by the authorities responsible for applying Regulation No 1798/75 has established that fact for certain.
- 20 In the procedure laid down by Regulation No 2784/79 the Commission consults the Member States and, if necessary, a group of experts. If this group's examination shows that an equivalent apparatus is manufactured in the Community, the Commission adopts a decision establishing that the conditions for duty-free importation of the apparatus are not met.
- 21 The Commission has admitted that it has always followed the opinions of the group of experts because it has no other sources of information concerning the apparatus being considered.
- 22 In those circumstances, the group of experts cannot properly carry out its task unless it is composed of persons possessing the necessary technical knowledge in the various fields in which the scientific instruments concerned are used or the members of that group are advised by experts having that knowledge. Neither the minutes of the meeting of the group of experts nor the oral proceedings before the Court have shown that the members of the group themselves possessed the necessary knowledge in the fields of chemistry, biology and geographical sciences or that they sought advice from experts in those fields in order to be able to

address the technical problems raised by the examination of the equivalence of the scientific instruments in question. Consequently, the Commission has infringed its obligation to examine carefully and impartially all the relevant aspects of the case in point.

- 23 Secondly, it must be stated that Regulation No 2784/79 does not provide any opportunity for the person concerned, the importer of scientific apparatus, to explain his position to the group of experts or to comment on the information before the group or to take a position on the group's recommendation.
- 24 However, it is the importing institution which is best aware of the technical characteristics which the scientific apparatus must have in view of the work for which it is intended. The comparison between the imported apparatus and the instruments originating in the Community must, consequently, be made according to the information about the intended research projects and the actual intended use of the apparatus provided by the person concerned.
- 25 The right to be heard in such an administrative procedure requires that the person concerned should be able, during the actual procedure before the Commission, to put his own case and properly make his views known on the relevant circumstances and, where necessary, on the documents taken into account by the Community institution. This requirement was not met when the disputed decision was adopted.
- 26 Thirdly, and finally, with regard to the statement of reasons required by Article 190 of the Treaty, the Court has consistently held (see, in particular, its judgment in Case 205/85 *Nicolet Instrument v Hauptzollamt Frankfurt am Main-Flughafen* [1986] ECR 2049) that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned

aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction.

- 27 In the instant case, it must be stated that the Commission's decision does not contain a sufficient statement of the scientific reasons capable of justifying the conclusion that the instrument manufactured in the Community is equivalent to the imported instrument. The disputed decision merely reproduces the wording of one of the Commission's previous decisions, Decision 82/86/EEC of 23 December 1981 (Official Journal 1982 L 41, p. 53). It is therefore impossible for the person concerned to ascertain whether the decision is vitiated by an error of appraisal. The decision does not therefore satisfy the requirements laid down by Article 190 of the Treaty.
- 28 It follows from all the considerations set out above that the decision in question was adopted pursuant to an administrative procedure in which the obligation of the competent institution to examine carefully and impartially all the relevant aspects of the individual case before it, the right to be heard and the obligation to provide an adequate statement of reasons for the decision subsequently adopted were infringed.
- 29 Accordingly, the answer to be given to the national court is that Commission Decision 83/348 of 5 July 1983 establishing that the apparatus described as 'Jeol-Scanning Electron Microscope, model JSM-35 C' may not be imported free of Common Customs Tariff duties is invalid.

Costs

- 30 The costs incurred by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Bundesfinanzhof, by order of 17 July 1990, hereby rules:

Commission Decision 83/348/EEC of 5 July 1983 establishing that the apparatus described as 'Jeol-Scanning Electron Microscope, model JSM-35 C' may not be imported free of Common Customs Tariff duties is invalid.

Due	Slynn	Joliet	Schockweiler	Grévisse
Mancini	Kakouris	Moitinho de Almeida		
Rodríguez Iglesias	Díez de Velasco	Zuleeg		

Delivered in open court in Luxembourg on 21 November 1991.

J.-G. Giraud
Registrar

O. Due
President