1. The person or persons concerned by a decision adopted by the Commission pursuant to Article 4 (6) of Regulation No 3195/75 refusing to allow the importation of a scientific instrument or apparatus free of customs duties who have not brought an action under the second paragraph of Article 173 of the Treaty against that decision may plead the illegality of such a decision before the national court in proceedings against the fixing of customs duty by the competent national authorities and the question of the validity of the decision at issue may therefore be referred to the Court in proceedings for a preliminary ruling.

   The national authority's refusal, based on the Commission's decision, to grant the applicant duty-free admission is in fact the only measure which is directly addressed to it, of which it has necessarily been informed in good time and which the applicant may challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings. According to a general principle of law which finds its expression in Article 184 of the EEC Treaty, in proceedings brought under national law against the rejection of his application the applicant must be able to plead the illegality of the Commission's decision.

2. Given the technical character of the examination carried out under Article 4 of Regulation No 3195/75 by experts from all the Member States meeting in the Committee on Duty-Free Arrangements and having as its object the admission free of customs duties of a scientific instrument or apparatus, the Court cannot, save in the event of manifest error of fact or law or misuse of power, find fault with the contents of a decision which the Commission has adopted in conformity with that committee's opinion.

3. For the purposes of the admission of a scientific instrument or apparatus free of customs duties the question whether the instrument in question and other similar instruments made in the Community are equivalent must not be decided solely on the basis of the technical specifications which the user described in his application as being necessary for his research but primarily on the basis of an objective assessment of their capacity to carry out the experiments for which the user intended to use the imported instrument.

In Case 216/82

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

UNIVERSITÄT HAMBURG [University of Hamburg]

and

HAUPTZOLLAMT [Principal Customs Office] HAMBURG-KEHRWIEDER

on the interpretation of Articles 173 and 177 of the EEC Treaty, Regulation (EEC) No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials (Official Journal 1975, L 184, p. 1) and Regulation (EEC) No 3195/75 of the Commission of 2 December 1975 laying down provisions for the implementation of Regulation No 1798/75 (Official Journal 1975, L 316, p. 17),

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, A. O'Keeffe and U. Everling (Presidents of Chambers), Lord Mackenzie Stuart, T. Koopmans, O. Due, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Applicable rules

The main proceedings concern the grant of exemption from customs duties of a certain scientific instrument imported into the Community. The legal basis for

the importation of scientific apparatus free of duty is Regulation (EEC) No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials (Official Journal 1975, L 184, p. 1) (amended by Regulation No 1027/79 of 8 May 1979, Official Journal 1979, L 134, p. 1) and also Regulation (EEC) No 3195/75 of the Commission of 2 December 1975 laying down provisions for the implementation of Regulation No 1798/75 (Official Journal 1975, L 316, p. 17) (amended by Regulation No 1324/76 of 8 June 1976, Official Journal 1976, L 149, p. 7, and subsequently replaced by Regulation No 2784/79 of 12 December 1979, Official Journal 1979, L 318, p. 32).

The purpose of those regulations is to ensure the implementation by the Community of the Florence Agreement drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization (Unesco).

Article 1 of the Agreement, which entered into force in 1952, states that:

"The contracting States undertake not to apply customs duties or other charges on, or in connexion with, the importation of:

...

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

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

In order to facilitate the free exchange of ideas and scientific research in the Community the Council accordingly made it possible, by Regulation No 1798/75, to import into the Community free of Common Customs Tariff duties specific educational, scientific and cultural materials. Article 1 of Regulation No 1798/75 provides that specific materials are to be admitted free of Common Customs Tariff duties whatever their intended use whilst Article 2 of the same regulation provides that a second category of materials must be intended either for certain public establishments and organizations or for certain other approved establishments or organizations. Article 3 (1) of Regulation No 1798/75 provides that a third category of scientific instruments and apparatus not included in Article 2 and imported exclusively for educational purposes or for pure scientific research may be admitted free of customs duty provided that:

"(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 that:

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

"Equivalent scientific value" must be assessed in accordance with the second indent of Article 3 (3) of Regulation No 1798/75

"by comparing the characteristics and specifications of the instrument or apparatus for which application is made for the exemption referred to in Article 4 with those of the corresponding instrument or apparatus manufactured in the Community to determine whether the latter could be used for the same scientific purposes as those for which the instrument or apparatus for which the application for exemption is intended and whether its performance would be comparable to that expected of the latter."

In order to obtain duty-free admission under Article 3 (1) of Regulation No 1798/75 the establishment or organization must submit an application, in accordance with Article 3 of Regulation No 3195/75, to the competent authority setting out *inter alia* the following information:

"...

(c) the intended destination of the instrument or apparatus and the use to which it will be put;

...

(g) the name or business name and address of the Community firm or firms which have been approached with a view to the supply of an instrument or apparatus of a scientific value equivalent to that for which duty-free admission is requested, the outcome of these approaches and where appropriate the reasons why an instrument or apparatus which is available in the Community would not be suitable for the particular research to be undertaken.

Documentary evidence providing all relevant information on the characteristics and technical specifications of the instrument or apparatus shall be furnished with the application."

Article 4 (1) of Regulation No 3195/75 provides that the competent national authority is to give a direct decision on applications in all cases where the information at its disposal after any necessary consultation within the trade sources concerned enables it to assess whether or not there exist instruments or apparatus of equivalent scientific value which are currently manufactured in the Community. Otherwise the application for exemption from customs duty must be forwarded to the Commission which must then seek the opinions of the Member States and, in the event of an unfavourable response, notify a group of experts so that they can examine the matter.

If the Commission's examination reveals that equivalent apparatus is manufactured in the Community, the Commission must adopt a decision declaring that the conditions for duty-free admission of the apparatus in question are not fulfilled. In the converse case it must adopt a decision declaring that such conditions are fulfilled. All the Member States must be notified of the Commission's decision within two weeks.

II — Facts and procedure under national law

In August 1976 the plaintiff in the main action, the University of Hamburg (hereinafter referred to as "the plaintiff"), imported into the Federal

Republic of Germany an electronic testing and measuring instrument originating in the USA called a Packard 2425 Tri-Carb Spectrometer.

In the customs declaration dated 15 August 1976 the plaintiff described the research project as follows: "Measurement of radioactivity in the tissues and body fluids of laboratory animals as part of experimental anatomical research to localize and quantify chemical metabolic processes in mammals".

For the instrument's scientific, educational or training value the plaintiff gave the following description: "Detection to an accuracy of picomols of metabolic substances in the organism following the administration of radioactively-labelled elements by determining and measuring the radioactive decay of the radioactive traces, photo-electric impulse multiplication of the radioactive decay phenomena."

The goods were initially cleared through customs and put into circulation free of customs duty but by a notice of corrected assessment of 16 August 1977 the competent customs office levied customs duty of DM 5 698.38 on the ground that apparatus of equivalent scientific value were manufactured in the Community.

The plaintiff lodged an objection against that assessment founded on the expert evidence of Professor Garweg of the University of Hamburg. In his report dated 13 October 1977 Professor Garweg examined, in nine respects, the capabilities required of the apparatus in question.

The customs authorities referred the question of exemption to the Commission which in its turn submitted it to the Member States. France and the Netherlands replied unfavourably and attached to their opinions literature on Community-made apparatus which they considered to be of equivalent scientific value as well as observations and comparisons between such apparatus and the instrument which the plaintiff had imported.

The summary of the minutes of the meeting of the Committee on Duty-Free Arrangements, to which the Commission referred the matter, contains the following information:

"5. Case 015/78: Tri-Carb Liquid Scintillation Spectrometer, Model 2425.

5.1. For the instrument in question in Case 015/78 Germany refused to grant exemption ... but the user appealed against that decision.

5.2. The French delegation reports that the company Intertechnique ... makes equivalent apparatus. That delegation points out that Intertechnique has put forward unassailable arguments as to the equivalent value of its instruments.

5.3. The Netherlands delegation reports that the following instruments of equivalent value exist:

The Isocap 300 made by Searle and the

PW 4540 made by Philips

...

5.4. The German delegation reports that the users contest the equivalent value of the Netherlands apparatus.

5.5. Conclusion:

Type of decision to be taken:

Recognition of scientific character;

Decision ... (no exemption from duty because of products made in the Community, especially the apparatus of Intertechnique)."

Consequently, in its Decision 78/851 of 5 October 1978 (Official Journal 1978, L 293, p. 30) addressed to the Member States, the Commission declared that the conditions for admission free of customs duty of the imported goods were not fulfilled. The crucial recitals in the preamble to that decision state:

"...

by the Decision of 23 May 1977 the Commission excluded from the benefit of admission free of the Common Customs Tariff duties of the scientific apparatus described as 'Packard 2425 Tri-Carb Spectrometer' with teletype, because apparatus of equivalent scientific value and capable of being put to the same use was manufactured in the Community;

...

... the Government of the Federal Republic of Germany asked the Commission to invoke the procedure laid down in Article 4 (3) to (7) of Regulation (EEC) No 3195/75 in order to determine whether apparatus of a scientific value equivalent to the apparatus described as 'Packard 2425 Tri-Carb Spectrometer' was currently and in accordance with the Decision of 23 May 1977 being manufactured in the Community, having regard to its particular uses based on the measuring of radioactivity in the tissues and liquids of the bodies of laboratory animals in the framework of experimental anatomical research;

...

on the basis of information received from Member States, apparatus of scientific value equivalent to the said apparatus capable of use for the same particular purpose is currently manufactured in the Community."

In the end the plaintiff's objection was dismissed as unfounded by a decision of 7 May 1979 of the Hauptzollamt Hamburg-Kehrwieder.

The plaintiff then appealed from that decision to the Finanzgericht [Finance Court] Hamburg, contending that the Netherlands and French apparatus referred to in the verification procedure for the purposes of exemption, namely the Isocap 300 made by G. D. Searle Nederland, the PW 4540 made by Philips of Eindhoven and the SL 4000 made by Intertechnique of Plaisir (France), are not equivalent. The research programme could not be carried out with such instruments. The plaintiff doubted whether the Commission had taken sufficient account in its decision of all the research in progress. It pointed out that the decision contained only a general description of applications of the instrument and that the Commission had not given more detailed reasons.

With reference to the Commission's decision the Hauptzollamt observed that, as the decision was addressed to all the Member States, it was also binding on the Administration, hence the Hauptzollamt had no power to verify whether it was well founded.

The Finanzgericht requested opinions from two experts in order to compare the imported apparatus with the products made in the Community.

In the first expert's report of 23 April 1980 Professor H. C. Heinrich of the University of Hamburg said:

"In the expert's report which I am asked to give 'on the question whether liquid scintillation spectrometers of similar quality, in particular in terms of efficiency, manner of operation and applications, to the Packard 2425 Tri-Carb Spectrometer imported from the USA are manufactured in the European Community', that question cannot be answered by a simple 'yes' or 'no'.

The scientific value of a particular radiation-measuring instrument (in this case the liquid scintillation spectrometer) depends on the performance data (specifications) of each type of instrument and the particular application to which the instrument is put by the scientist using it.

... Since 1954 the instruments made by Packard have set the standard for the performance attainable in the given state of technology and thus for the scientific value of this measuring principle.

The many imitators making liquid scintillation spectrometers have not in general attained a comparable scientific value for their instruments since about 1960. That is why nearly all the scientists at Eppendorff University Hospital for example have opted independently of one another for the Packard Tri-Carb ...

One essential reason why the Isocap 300 and PW 4540 instruments were not bought or used was their lower scientific value and the bad reputation of the few instruments of these two types which were installed as regards attainable specifications and the absence of an efficient local service organization.

Our institute was able to convince itself in concrete terms of the low scientific value of Searle's SS-Isocap 300 when a test run was carried out at the beginning of 1975. The measuring tests conducted by Dr Eckstein produced an unacceptable number of unusable results and non-reproducible count statistics ...

A sure and definitive assessment of the scientific value of the instruments in question, the Packard 2425 Tri-Carb, the Searle Isocap 300 and the Philips PW 4540, is possible only if the user measures the typical samples, labelled ^{3}H and ^{14}C, arising in the given scientific application he is pursuing, using optimal energy channel settings on all instruments, and if he calculates the normal performance figures. This direct comparison will then reliably show whether the above-mentioned instruments have the same scientific value and can be used for the same purpose or not.

..."

In the second expert's report of 1 February 1982 (corrected on 4 February 1982) Mr Dau, of the Institut für Reine und Angewandte Kernphysik [Institute of Pure and Applied Nuclear Physics] made, amongst others, the following observations:

"Comparability

... A comparison of the scientific value of instruments can be made only in the light of the user's specifications. As a rule a sure assessment can be obtained only by using the instruments which are to be compared to carry out the same specific measurements and comparing their performance. However, this kind of experimental comparison does not take into account:

(a) how an instrument is imported on the market;

(b) the quality of maintenance and repair service; and

(c) whether or not a number of instruments of the same type are already installed.

Those aspects are often decisive in the purchase of apparatus.

...

Assessment, scientific value

The comparison covered the Packard 2425, the Philips PW 4540, the Berthold BF 5000, the Intertechnique SL 4000 and the Searle Isocap 300 instruments.

I believe that the Isocap 300 is an instrument which was made in America and not in the Member States of the Community.

The SL 4000 was on the market from 1977 but I cannot say whether it was already being marketed in 1975 or 1976 (when the decision to purchase an instrument had to be taken). Investigations have so far not indicated that this instrument was already on the market.

...

In a comparison of the instruments, taking into account user specifications, the Packard 2425 was, in 1976, superior to the others and therefore had greater scientific value.

..."

In a report dated 7 June 1982 Mr Dau stated *inter alia:*

"Assessment

Taking into account user specifications the Packard 2425 was, in 1976, superior to the Isocap 300 and therefore had greater scientific value."

The Finanzgericht stayed the proceedings and submitted the following questions to the Court for a preliminary ruling:

"1. Is a decision that the conditions laid down by Article 3 (1) (b) of Regulation (EEC) No 1798/75 of the Council of 10 July 1975 concerning the duty-free importation of a specific instrument or apparatus are not fulfilled, which the Commission addresses to the Member States in accordance with the first sentence of Article 4 (6) of Regulation (EEC) No 3195/75 of the Commission of 2 December 1975, of direct and individual concern to the person who imported the instrument or apparatus which is the subject of the decision, so that he may bring an action against the Commission and, if so, from what time and within which period?

2. May a person concerned by a decision adopted by the Commission in accordance with the first sentence of Article 4 (6) of Regulation (EEC) No 3195/75 contest the decision's legality only by instituting proceedings against the Commission within the two-month period laid down by the third paragraph of Article 173 of the EEC Treaty or can the decision's legality also be contested before a national court in an appeal against the assessment to customs duty, so that the national court may, if necessary, submit the question of the decision's validity to the Court of Justice of the European Communi-

ties in the form of a request for a preliminary ruling?

3. If the decision's legality can be contested in proceedings before a national court, is Commission Decision 78/851/EEC of 5 October 1978 on the Packard 2425 Tri-Carb Spectrometer invalid bacause, even though similar types of apparatus, as the Commission describes in its decision, are made in the Community, they were inferior in performance to the imported instrument, especially when the user's specifications are considered?"

In its order for reference the Finanzgericht observes that Commission Decision 78/851/EEC is addressed to the Member States. It adds, however, that it also directly concerns the person who imported the goods in question. Consequently the Finanzgericht is inclined to think that such a person must be entitled to institute proceedings under Article 173. On the question of the period for instituting proceedings, it adds that Article 81 (1) of the Rules of Procedure of the Court provides that the period is to run from the 15th day after the publication of the measure in the *Official Journal of the European Communities* but it thinks it doubtful whether the period for instituting proceedings also applies to persons not expressly stated to be addressees of the Commission's decision.

The Finanzgericht considers that decisions of the Commission may not be challenged once the period for instituting proceedings has expired. It would be different in the event of nullity, of which there is no evidence in this case. However, the fact that the Commission's decision was not expressly addressed to the plaintiff, which could not therefore obtain knowledge of it, tells against the view that the plaintiff must challenge that decision. The relationship between the procedure for instituting proceedings under Article 173 of the Treaty and the procedure for obtaining a preliminary ruling under Article 177 must be defined so as to preclude proceedings for a preliminary ruling if the relevant question could have been decided in proceedings under Article 173.

The Finanzgericht takes the view that, if the decision's validity may not be contested before the national court, that court must dismiss the action for the annulment of an assessment to customs duty provided that there is no evidence to suggest that the Commission's decision was unlawfully adopted. If there is evidence of illegality, however, the national court may or, depending on the case, must request a preliminary ruling from the Court under Article 177 of the EEC Treaty. The Finanzgericht considers that it is itself prevented from declaring the Commission's decision to be unlawful or invalid. That decision is one for the Court, irrespective of the procedure followed.

On the question of equivalent scientific value the Finanzgericht observes that the two experts, namely Mr Heinrich and Mr Dau, arrived at the conclusion, which differed from the Commission's, namely that considering user specifications no instrument made in the Community is equivalent in value to the

Packard Model 2425. According to the Court's judgment of 2 February 1978 in Case 72/77 *Universiteitskliniek Utrecht* v *Inspecteur de Invoerrechten en Accijnzen* [1978] ECR 189, the scientific value of goods depends exclusively on their objective characteristics. There can be no doubt that scientific value has nothing to do with differences in price or mere convenience of design or ease of operation. But it appears doubtful whether the Community-made product is of equivalent value if it does not provide measurements as accurate as those furnished by the imported apparatus. It must be remembered that the instruments in question are acquired for carrying out highly specialized research projects. In the view of the Finanzgericht the rule laid down in Regulation No 1798/75 that scientific equipment is in principle to be exempted from customs duty would be reduced to a nullity if, in view of the Community's generally high technical standards, the clause protecting Community interests were to be construed too liberally in favour of Community products of inferior performance.

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 Danish Government, represented by L. Mikaelsen, Legal Adviser at the Ministry of Foreign Affairs and by the Commission, represented by its Legal Adviser, A. Prozzillo, assisted by J. Grunwald, 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 after asking the Commission certain questions.

III — Written observations

1. On the first and second questions

As regards the first question, the *Danish Government* agrees that the plaintiff is directly concerned by the contested decision since the Commission's adverse decision allows the Member State no discretion; on the contrary, it requires it to adopt a decision of specific purport with regard to the plaintiff. As it is clear from the background to the case that the Commission's decision was adopted after the plaintiff had made a specific application to the German authorities, the Danish Government further considers that for that reason the plaintiff is concerned individually. The fact that the decision is addressed to all the Member States does not, however, detract from its individual character in relation to the plaintiff because, in the first place, the assessment to be undertaken changes as time goes by and, secondly, it must be made on the basis of the precise needs which the apparatus in question is expected to satisfy. A reservation is necessary, however, namely that the first question can be answered definitively only in proceedings brought before the Court under Article 173 of the Treaty.

On the second question the Danish Government observes first of all that Article 177 of the Treaty confers jurisdiction on the Court to decide by way of a preliminary ruling whether or not measures of the Community institutions are valid and lays down no restriction in this respect. Article 177 assumes that the question of the validity of measures of Community institutions may be raised at any time before a court

of a Member State and a decision on that issue may be necessary to enable the national court to give judgment. That circumstance, as well as the fact that the procedure laid down by Article 177 of the Treaty is meant to meet the needs of national courts, was mentioned by the Court in its judgment of 12 October 1978 in Case 156/77 *Commission* v *Belgium* [1978] ECR 1881. On that ground alone the Danish Government believes that it is possible to conclude that the plaintiff may contest the validity of the decision in question.

In addition, the decision in question is framed in such a way that only the Member States which took part in the deliberations of the group of experts are able to judge whether the decision is valid. The Danish Government therefore thinks that it is reasonable that the institution which applied to import goods free of duty may await the decision of the national authorities, which in this instance was not adopted until several months after the expiry of the period for bringing an action for a declaration of nullity before the Court.

The Danish Government accordingly proposes that the Court should reply to the second question by ruling that the decision's validity may also be contested before the national court so that the latter may submit the question of the decision's validity to the Court in the form of a request for a preliminary ruling.

The *Commission* considers that an express answer to the first two questions would serve no purpose. In so far as they concern the admissibility of the reference those questions will be answered incidentally when the substance of the case comes to be examined. In so far as the questions go beyond the present case, inasmuch as they apply to the question of admissibility *in abstracto,* they do not need to be answered since they are not necessary for the decision in the case in point, as required by Article 177 of the Treaty. The Commission observes, however, that there may be some doubt as to the admissibility of a request for a preliminary ruling under Article 177 since in substance the national court is seeking a decision on the validity of a Community measure which may perhaps only be open to challenge in an action for a declaration of nullity brought under the second paragraph of Article 173 of the Treaty. The Commission believes, however, that, even if such an action had been admissible at the time, the fact that no action was brought under Article 173 does not cast doubt on the admissibility of this request for a preliminary ruling. To claim the contrary would be to treat Article 177 as subordinate to Article 173; such a relationship would not only have no support in the language of those provisions but would also compel the national court, before requesting a preliminary ruling under Article 177, to examine in the main proceedings the preliminary question whether one of the parties to the dispute could or ought to have challenged the Community measure pursuant to the second paragraph of Article 173. In order to decide that initial question the national court might use the procedure laid down by Article 177 and the Court would then only have to decide a hypothetical question arising from the past, a procedure which would be contrary to all the principles of the efficient administration of justice. To avoid that "intermediate" procedure

under Article 177, the national court might consider submitting to the Court of Justice in the same reference under Article 177 first the question of admissibility and then, in the event of an affirmative answer to that question, the substantive issue. The result would still be the same, however, for the Court would again have to consider the substance of the case in order to be able to decide whether an action for a declaration of nullity under Article 173 could have been brought.

Apart from those considerations, there would be a danger that the preclusion of the procedure under Article 177 would lead to a wave of precautionary actions, most of them inadmissible and unfounded. Secondly, if the question whether or not the validity of a measure may be examined under Article 177 is made dependent on whether an action for a declaration of nullity is possible, then proceedings under Article 177 must *a fortiori* be inadmissible if a measure is not open to challenge even under Article 173. Otherwise persons on whom Article 173 expressly confers a right of action would have that right for only two months whereas those persons who are not even entitled to bring proceedings under Article 173 could refer the matter to the Court under Article 177 without any time-limit. It therefore appears that a theory which attempts to link Articles 173 and 177 in the way described leads to inconsistencies, even assuming that its premises are correct.

Besides, assuming that the theory of subordination is correct, the inadmissibility of a direct action would have to be examined by the Court of its own motion in accordance with Article 92 of its Rules of Procedure as a negative condition for the admissibility of a reference for a preliminary ruling. As far as the Commission is aware, however, the Court has never entered upon such an examination in proceedings for a preliminary ruling or even indicated that it is necessary.

2. The third question

The *Commission* observes that it is clear from the third indent of Article 3 (3) of Regulation No 1798/75 that the test of equivalence does not consist of an abstract technical comparison of the instruments with one another but is based solely on the question whether an instrument can do the scientific work required and whether its performance is comparable with that expected of an appliance made in a non-member country.

The plaintiff's criticism is in fact directed solely at the performance of Community-made instruments which, according to the expert's report of 13 October 1977 furnished by the plaintiff, are inferior in nine respects to that of the Packard. Thus the competing Community instruments are criticized on the ground that they cannot provide services comparable to those expected of the instrument imported by the plaintiff. The Commission cannot, however, accept the method used to examine equivalence because it does not take account of the criteria laid down in the third indent of Article 3 (3) of Regulation No 1798/75 for assessing equivalent scientific value. Instead of comparing the competing instruments in the light of the scientific work to be accomplished and then determining how they perform in relation to one another, the report of 13 October 1977 attempts to give the impression that the technical data and capabilities of the Packard 2425 Tri-

Carb spectrometer are, so to speak, inherent in the physical phenomena to be studied. The Commission's decision, on the other hand, was taken having regard to the use and the particular purpose intended in this case. All those taking part in the decision-making process were aware of the intended use of the instrument and the plaintiff's objections to competing products made in the Community.

The Commission states that the decision of 5 October 1978 was adopted after the plaintiff's case had been heard and in the light of the unanimous opinion of the competent group of experts. It adopted its decision on the basis of the experts' technical assessments, after weighing up all the arguments and observing all the procedural rules. As a decision on the equivalent scientific value of technical instruments the Commission's decision represents, once all the data, information and opinions have been obtained, an act of assessment. The making of that assessment was imposed on the Commission under Community law; it cannot delegate it or divest itself of it in any other way. Such an assessment is, however, only possible if the Commission has a certain margin of discretion, albeit very limited. There would be a misuse of powers on the part of the Commission if it came to a decision on the basis of incorrect or incomplete data, if it entertained extraneous considerations or if it failed to comply with the procedural rules. However, none of the factors required for there to be a misuse of powers exists in this case.

The validity of the decision of 5 October 1978 is not therefore susceptible of any legal objection.

The Commission observes in addition that, contrary to what Dr Dau supposes, namely that the Isocap 300 is made in the USA, a competent expert of the former manufacturer, Searle, has confirmed that the instrument is made in the Community (The Netherlands) as well as in the United States.

For the reasons set out above the Commission proposes that the third question should be answered as follows:

"Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of the Commission's decision of 5 October 1978 (No 78/851/EEC)."

IV — Oral procedure

At the sitting on 17 May 1983 the Commission, represented by J. Grunwald, a member of its Legal Department, assisted by M. Naezer, in the capacity of expert, presented oral argument and replied to the questions put by the Court.

The Commission stated that its observations on the two first questions put by the national court must be understood as relating only to the situation in the present case in which the plaintiff is not the addressee of the Commission's decision and in which that decision was followed by a national decision.

The Advocate General delivered his opinion at the sitting on 22 June 1983.

Decision

1 By order of 20 July 1982, which was received at the Court on 20 August 1982, the Finanzgericht [Finance Court] Hamburg referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of, first, Articles 173 and 177 of the EEC Treaty and, secondly, Regulation (EEC) No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials (Official Journal 1975, L 184, p. 1) and Regulation (EEC) No 3195/75 of the Commission of 2 December 1975 laying down provisions for the implementation of Regulation No 1798/75 (Official Journal 1975, L 316, p. 17).

2 Those questions were raised in an action brought by the University of Hamburg against the refusal of the German customs authorities to grant the exemption on the occasion of the importation of an electronic testing and measuring instrument called a Packard 2425 Tri-Carb Spectrometer which came from the United States of America and which the university intended to use for the "measurement of radioactivity in the tissues and body fluids of laboratory animals as part of experimental anatomical research to localize and quantify chemical metabolic processes in mammals".

3 According to the documents before the Court, the German authorities referred the university's application to the Commission in accordance with the provisions of the aforesaid regulations. In its Decision No 78/851 of 5 October 1978 (Official Journal 1978, L 293, p. 30) addressed to all the Member States the Commission declared that the conditions for admission free of customs duty set out in Article 3 (1) (b) of Regulation No 1798/75 were not fulfilled because apparatus of equivalent scientific value and capable of being put to the same particular use were manufactured in the Community. As a result of that decision on 7 May 1979 the German authorities finally rejected the university's application.

4 In the proceedings before the Finanzgericht Hamburg the university contended that, in view of the specific needs of the research described in its application, the instruments manufactured in the Community were not equivalent to the American instrument. These were the circumstances in which the Finanzgericht Hamburg submitted the following questions to the Court:

"1. Is a decision that the conditions laid down by Article 3 (1) (b) of Regulation (EEC) No 1798/75 of the Council of 10 July 1975 concerning the duty-free importation of a specific instrument or apparatus are not fulfilled, which the Commission addresses to the Member States in accordance with the first sentence of Article 4 (6) of Regulation (EEC) No 3195/75 of the Commission of 2 December 1975, of direct and individual concern to the person who imported the instrument or apparatus which is the subject of the decision, so that he may bring an action against the Commission and, if so, from what time and within which period?

2. May a person concerned by a decision adopted by the Commission in accordance with the first sentence of Article 4 (6) of Regulation (EEC) No 3195/75 contest the decision's legality only by instituting proceedings against the Commission within the two-month period laid down by the third paragraph of Article 173 of the EEC Treaty or can the decision's legality also be contested before a national court in an appeal against the assessment to customs duty, so that the national court may, if necessary, submit the question of the decision's validity to the Court of Justice of the European Communities in the form of a request for a preliminary ruling?

3. If the decision's legality can be contested in proceedings before a national court, is Commission Decision 78/851/EEC of 5 October 1978 on the Packard 2425 Tri-Carb Spectrometer invalid because, even though similar types of apparatus, as the Commission describes in its decision, are made in the Community, they were inferior in performance to the imported instrument, especially when the user's specifications are considered?"

The first two questions

5 By these questions the national court in substance seeks to ascertain whether, by not having brought proceedings under the second paragraph of Article 173 against a decision of the Commission of the type in question within the periods stipulated in the third paragraph of that article, the person or persons concerned by that decision are, according to Community law, precluded from relying upon the invalidity of that decision in proceedings before a national court. For the purpose of resolving that issue the procedure established by the aforesaid regulations should be considered.

6 Article 3 of Regulation No 3195/75 requires an application for duty-free admission to be submitted to the competent authority of the Member State in which the scientific establishment in question is situated. Article 4 requires that national authority to give a direct decision on applications in all cases where the information at its disposal enables it to decide whether or not there exist apparatus of equivalent scientific value which are currently manufactured in the Community. Only if the national authority considers that it is unable to decide that question for itself is it therefore bound to refer it to the Commission and Community law does not require the applicant to be informed of that reference.

7 The decision adopted by the Commission is addressed to all the Member States. By virtue of Article 191 of the Treaty it must therefore be notified to the Member States and it takes effect upon such notification. However, it does not have to be notified to the person applying for exemption from customs duty and it is not one of the measures which the Treaty requires to be published. Even if in practice the decision is in fact published in the *Official Journal of the European Communities,* its wording does not necessarily enable the applicant to ascertain whether it was adopted in relation to the procedure which he initiated.

8 Since the decision is binding on the Member States, the national authority must reject the application for duty-free admission in the event of a negative decision on the part of the Commission; however, Community law does not require it to refer to the Commission's decision in its own decision rejecting the application. Furthermore, as this case demonstrates, the national authority's decision may be adopted some time after the notification of the Commission's decision.

9 Finally, as the Finanzgericht rightly points out, for the purpose of bringing an action under the second paragraph of Article 173 of the Treaty against the Commission's decision, the scientific establishment in question must demonstrate that the decision is of direct and individual concern to it.

10 In those circumstances the rejection by the national authority of the scientific establishment's application is the only measure which is directly addressed to it, of which it has necessarily been informed in good time and which the establishment may challenge in the courts without encountering any

difficulty in demonstrating its interest in bringing proceedings. According to a general principle of law which finds its expression in Article 184 of the EEC Treaty, in proceedings brought under national law against the rejection of his application the applicant must be able to plead the illegality of the Commission's decision on which the national decision adopted in his regard is based.

11 That statement is sufficient to provide an answer capable of dispelling the doubts expressed by the national court without there being any need to consider the wider issue of the general relationship between Articles 173 and 177 of the Treaty or to give a separate answer to the first question.

12 The answer to the first two questions of the Finanzgericht should therefore be that the person or persons concerned by a decision adopted by the Commission pursuant to Article 4 of Regulation No 3195/75 may plead the illegality of the decision before the national court in proceedings against the fixing of customs duty and that the question of the validity of the decision may therefore be referred to the Court in proceedings for a preliminary ruling.

The third question

13 In this question the Finanzgericht asks whether Decision 78/851 is invalid on the ground that the performance of the similar apparatus manufactured in the Community is lower than that of the imported apparatus, having regard in particular to the user's specifications.

14 In this regard it must be stressed first of all that the regulations in question are meant to ensure that applications which are referred to the Commission and on which one or more Member States have given an unfavourable opinion receive a thorough examination. Article 4 of Regulation No 3195/75 requires that examination to be carried out by experts from all the Member States meeting in the Committee on Duty-Free Arrangements; they have at their disposal not only the application but also the relevant technical documents and they compare the instruments in question taking into account

the particular use to which the importer intends to put the imported instrument. Given the technical character of that examination the Court cannot, save in the event of manifest error of fact or law or misuse of power, find fault with the contents of a decision which the Commission had adopted in conformity with the committee's opinion.

15 A further point to be made is that the question whether the instruments in question are equivalent must not be decided solely on the basis of the technical specifications which the user described in his application as being necessary for his research but primarily on the basis of an objective assessment of their capacity to carry out the experiments for which the user intended to use the imported instrument. The experts' reports which the national court ordered in the present case are based, however, on the technical specifications stipulated by the university and they do not consider whether these are justified with reference to the intrinsic needs of the planned research; they contain the express reservation that it is not possible to arrive at a reliable judgment of the scientific value of the instruments in question except by using them for the scientific object in view and comparing their performance. It follows that those experts' reports are not sufficient to demonstrate the existence of a manifest error which would render the decision in question invalid.

16 Since there is no other evidence before the Court to prove the existence of such an error or a misuse of power, the answer to the third question must be that consideration by the Court has disclosed no factor of such a kind as to affect the validity of Commission Decision 78/851 of 5 October 1978.

Costs

17 The costs incurred by the Danish Government and by the Commission of the European Communities, which 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 pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Finanzgericht Hamburg by order of 20 July 1982, hereby rules:

1. **The person or persons concerned by a decision adopted by the Commission pursuant to Article 4 of Regulation No 3195/75 of the Commission of 2 December 1975 laying down provisions for the implementation of Regulation No 1798/75 of the Council on the importation free of Common Customs Tariff duties of educational, scientific or cultural materials may plead the illegality of that decision before the national court in proceedings against the fixing of customs duty and the question of the validity of the decision may therefore be referred to the Court in proceedings for a preliminary ruling.**

2. **Consideration by the Court has disclosed no factor of such a kind as to affect the validity of Commission Decision No 78/851 of 5 October 1978 excluding the scientific instrument called a "Packard 2425 Tri-Carb Spectrometer" with teleprinter from exemption from Common Customs Tariff duties.**

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Koopmans Due Bahlmann Galmot

Delivered in open court in Luxembourg on 27 September 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President