OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 8 October 1987 *

Mr President,
Members of the Court,

1. Once again the Court is called upon to interpret the Community legislation on the exemption of scientific instruments and apparatus from Common Customs Tariff duties. In proceedings brought by Nicolet Instrument GmbH (hereinafter referred to as 'Nicolet') against the Hauptzollamt (Principal Customs Office) Berlin-Packhof, the Finanzgericht (Finance Court) Berlin has requested a ruling on whether the exemption may be refused where an instrument capable of being used for a particular research project is manufactured in the Community but can achieve performances so far superior to the imported instrument that it substantially exceeds the project's objective requirements.

The facts are these. Nicolet imported from the United States of America a Fourier-Transform infra-red spectrometer system model MX-1 E with accessories in order to re-sell it to the Robert Koch Institute of the Bundesgesundheitsamt (Federal Health Board) in West Berlin, which was to use it for research on bacteria. Nicolet requested an exemption from import duty on the ground that instruments of equivalent scientific value were not manufactured in the Federal Republic of Germany or in other Community countries. The Hauptzollamt, however, refused the request and stated that at least two equivalent instruments were available, both of which were manufactured by Bruker Analytische Meßtechnik GmbH. Against that decision (dated 23 February 1982), Nicolet lodged an objection which was rejected, whereupon it brought an action before the Finanzgericht Berlin.

Before that court, it argued that the two German instruments (designated by the code numbers IFS 110 and IFS 85) could not be regarded as equivalent to the United States instrument because they were capable of performances far superior, and hence disproportionate, to those required for the Robert-Koch Institute's experiments. Whereas those experiments required a power of resolution of two to four units, the resolution offered by the much more expensive IFS 110 and IFS 85 models was as much as 0.2 to 0.5 units. For its part, the Hauptzollamt based its defence on the wording of the Community legislation according to which the fact that an instrument's performance is superior to research requirements is irrelevant in determining equivalent scientific value.

By an order of 27 June 1986, the Seventh Senate of the Finanzgericht stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Is an instrument "of equivalent scientific value" within the meaning of Regulation (EEC) No 1798/75 of the Council if, although it may be used in carrying out the intended research, its performance is so disproportionate that on objective consideration it cannot reasonably be considered for use in such research?

* Translated from the Italian.

In these proceedings written observations were submitted by Nicolet, the Netherlands Government and the Commission of the European Communities. Only the Commission submitted argument at the hearing.

2. As the Court knows, the criteria for determining whether scientific instruments are equivalent were laid down by Regulation (EEC) 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 was later amended by Council Regulation No 1027/79 of 8 May 1979 (Official Journal 1979, L 134, p. 1) and supplemented by Commission Regulation No 2784/79 of 12 December 1979, which entered into force on 1 January 1980 (Official Journal 1979, L 318, p. 32).

According to the third indent of Article 3 (3) of Regulation No 1798/75 (as amended), equivalent scientific value is to be assessed 'by comparing the essential technical characteristics of the instrument ... in respect of which application is made for the exemption ... with those of the corresponding instrument ... manufactured in the Community in order to determine whether the latter could be used for the same scientific purposes as those for which (the former) is intended and whether its performance would be comparable'. Article 5 (2) of Regulation No 2784/79 adds the proviso that 'in making the comparison ... only such technical characteristics as have a decisive influence on the outcome of the specific work planned may be regarded as "essential"' and that no account is to be taken of the fact that an instrument is able to 'achieve performances superior to those which are necessary for a proper execution of (that) work'.

3. It is that last provision which is at the heart of the present dispute. The Finanzgericht unequivocally comes to the conclusion that the principle of proportionality cannot be disregarded in determining equivalent scientific value. Nicolet endorses that view and adds that to carry out research with inappropriate means — even if they are excessive — is to do violence to the rules of economics and of scientific method. The Netherlands Government and the Commission, on the other hand, take the view that the validity of that argument requires legislation to give it effect. As matters stand at present, the relevant provision makes it impossible to take into account the 'superior performances' of which an instrument, whether it be of Community manufacture or imported, is considered capable; that in their view is sufficient to warrant an affirmative answer to the Finanzgericht's question.

I should say at once that I find the first view preferable. I think that even as matters stand it is possible to apply the Community legislation without departing from the letter or the spirit of it and at the same time without conflicting with the requirements of research or the budgets of scientific establishments.

I shall begin with an obvious point. No one would argue that the mere superiority of the performance offered by an instrument is sufficient to negate its equivalent scientific value, even if it is the instrument manufactured in the Community which is excessively powerful (the Court's judgment of 25 October 1984 in Case 185/83 *University of Groningen* v *Inspecteur der Invoerrechten en Accijnzen* [1984] ECR 3623, at paragraph 33, deals with the opposite case). In any event that conclusion is supported not only by the wording of Article 5 (2) but by an unanswerable argument *a contrario*: if the Community

apparatus were not covered by that provision, 'essential' characteristics for the purposes of the comparison would also include characteristics not having 'a decisive influence on the outcome' of the research, with the result that the number of cases of instruments which are not of equivalent scientific value would be increased enormously.

That is not therefore the point which the Finanzgericht wishes to have settled. What it is in fact seeking to establish is whether the rule that superior performances are irrelevant is limited by the lack of comparability of instruments offering performances so disproportionate that their use cannot 'reasonably be considered'. In fact it seems to me that there is such a limit and that this is borne out by at least two passages in the legislation.

The first indication is provided by the first recital in the preamble to Regulation No 1798/75, which states that the regulation is intended to 'facilitate . . . scientific research within the Community'. The preference for Community products must therefore be tempered by the interests of science, and it is evident that those interests are not properly protected where the refusal to grant an exemption is based on the existence of instruments which no researcher would conceive of using in order to carry out a particular project. The other indication is contained in the third indent of Article 3 (3) of the regulation, where, as I have said, it is stated that the imported instrument is to be compared with the '*corresponding* instrument' manufactured in the Community in order to determine whether its 'performance would be *comparable*'. Those adjectives, it seems to me, clearly imply that the two instruments must belong to the same category or analogous categories, that is to say they must be such that a comparison between their respective characteristics does at least make some sense.

The principle enunciated in Article 5 (2) must therefore be interpreted in the light of those criteria. In other words, the fact that the performances offered by one or other of the instruments may be superior is indeed irrelevant, but only in so far as one of the instruments is merely more refined or more powerful than the other. But where the greater degree of refinement or power means that the instruments cannot be compared or that one cannot be substituted for the other that fact cannot be said to be irrelevant. Where that is the case the very premises of the determination of equivalent value are lacking; indeed, the two instruments are not merely not equivalent but they cannot even be weighed against each other.

I would add that the reading I am proposing is in keeping with the importance which has always been attached to the criterion of proportionality in the Court's judgments. Moreover, it is the only interpretation which makes it possible to avoid paradoxical results whose absurdity is made patent by leaving the sometimes bewildering sphere of legal concepts and drawing on analogies taken from everyday life. For example what is to be made of the argument that a BMW 735 is 'equivalent' to a horse merely because both make it possible to cover the distance from one end of the Kurfürstendamm to the other?

4. In the light of all the considerations I have set out I propose that the Court reply as follows to the question put by the Seventh Senate of the Finanzgericht Berlin by order of 27 June 1986 in the proceedings before that court between Nicolet Instrument GmbH and the Hauptzollamt Berlin-Packhof:

'Regulation No 1798/75 of the Council and Commission Regulation No 2784/79 are to be interpreted as meaning that for the purposes of the assessment referred to in the third indent of Article 3 (3) of Regulation No 1798/75 the mere superiority in performance of an instrument, including an instrument manufactured in the Community, in comparison with the specific work to be carried out, is irrelevant. However, an instrument cannot be regarded as being of equivalent scientific value if it appears on objective examination to be so disproportionate in regard to a specific research project as to rule out any reasonable possibility of its being used for that project.'