OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 6 June 1990 *

Mr President,
Members of the Court,

1. The Tariefcommissie (administrative court of last instance in revenue matters), Amsterdam, has asked the Court to specify the heading of the Common Customs Tariff [1] under which an 'Aris II COM-Recorder' should be classified. The apparatus in question was imported into the Netherlands in June 1983 by Gerlach & Co. BV ('Gerlach').

In proceedings dealing with a reference for a preliminary ruling it is obviously not competent to the Court to give a ruling on the actual apparatus which is the subject of the main proceedings. It may, however, indicate to the national court the heading of the Common Customs Tariff under which apparatus having the characteristics of an Aris II COM-Recorder ought to be classified. As the Court has consistently held, [2] the decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

2. On the basis of the observations submitted to the Court and of the documents appended thereto, the apparatus in question may be described as follows. It is a COM-Recorder, that is to say, an instrument whereby data stored in a computer or produced by a computer can be preserved by transcribing them in legible form onto microfiches or microfilm (the acronym 'COM' stands for 'computer output microfilm'). The two other processes which may be used to preserve such data rely on recording them on magnetic tape (or, I presume, diskettes) or on printing them on paper. From the point of view of its function, therefore, a COM-Recorder is most akin to a printer, except for the fact that the data which are made legible are fixed not on paper but on photographic film.

At the time when it was imported into the Community, the COM-Recorder at issue in the main proceedings — the Aris II — was one of the most sophisticated types, using an optical laser system (rather than a cathode-ray tube) to transcribe the computerized data in legible form.

According to the order of the national court, the main components of the Aris II COM-Recorder are as follows:

(i) a 'control unit' which transposes the data into a form in which it is legible;

(ii) a micro-computer, which controls the other components of the apparatus;

* Original language: Dutch.

1 — The version in question is that set out in Regulation (EEC) No 950/68 of the Council (OJ, English Special Edition 1968 (I), p. 275, as amended by Council Regulation (EEC) No 3400/84 of 27 November 1984 (OJ L 320, p. 1).

2 — See in particular the judgment in Case 62/77 *Carlsen-Verlag* v *Oberfinanzdirektion Koln* [1977] ECR 2343.

(iii) an optical laser system, which enables the data to be displayed in the form of legible characters;

(iv) a camera, which reduces the data that have been made legible to the desired size and transmits them to a slide device in which the data are projected;

(v) a development unit and a receptacle for receiving the finished microfiches;

(vi) a keyboard/printer for the purpose of communicating with the computer or computer system to which the COM-Recorder is connected and of checking program data;

(vii) a control panel for the user, incorporating a screen for displaying messages relating to the operations carried out by the COM-Recorder or any instructions for the user;

(viii) disk drives to take diskettes holding programs for controlling the COM-Recorder.

3. The national court has identified three possible classifications: subheadings 84.53 B, 84.54 B or 90.07 A of the Common Customs Tariff. Its preference tends towards subheading 84.53 B; Gerlach and the Commission also favour that solution. Heading 84.53 reads as follows:

'Automatic data-processing machines and units thereof: magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:

A. Automatic data-processing machines, and units thereof, for use in civil aircraft . . .

B. Other.'

The notes on Heading 84.53 make it clear that the expression 'automatic data-processing machines' means:

'3. (A) . . . Digital machines having storages capable of storing not only the processing program or programs and the data to be processed but also a program for translating the formal programming language in which the programs are written into machine language. These machines must have a main storage which is directly accessible for the execution of a program . . . They must also be able themselves, on the basis of the instructions contained in the initial program, to modify, by logical decision, its execution during the processing run;

. . .

(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions:

(a) it is connectable to the central processing unit either directly or through one or more other units;

(b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system].

Such units imported separately are also to be classified under Heading 84.53.'

The Explanatory Notes to the Customs Cooperation Council Nomenclature also provide some clarification.[3] It is stated there that digital data-processing machines usually consist of a number of separately housed interconnected units which then form a 'system'. A complete digital data-processing system must comprise at least a central processing unit (main storage, the arithmetical and logical units and the control elements), an input unit (which receives input data and converts them into signals which can be processed by the machine) and an output unit which converts the signals provided by the machine into an intelligible form or into coded data for further use.

4. If those instruments are applied to a COM-Recorder such as the 'Aris II' the following result is obtained. According to the explanatory notes on Heading 84.53, such a COM-Recorder is not an automatic data-processing machine because it cannot store a processing program. The machine does not a have program for translating the formal programming language in which the programs are written into machine language. Neither does it have the capability to modify, by logical decision, the execution of the program during the processing run. Nevertheless, such a COM-Recorder does constitute an output unit (within the meaning of the Explanatory Notes to the Customs Cooperation Council Nomenclature quoted above) by which data stored in an automatic data-processing machine or produced by such a machine can be transposed into legible form and recorded on microfiche. According to note 3(B) on Heading 84.53, such an output unit is a unit which is to be regarded as being part of the complete system in so far as it is (a) connectable to the central processing unit and (b) specifically designed as part of that system. It therefore appears correct to classify it under subheading 84.53 B.

5. There would be no difficulty in answering the national court's question were it not for Commission Regulation (EEC) No 551/81,[4] which classifies under Heading 90.07 of the Common Customs Tariff apparatus whose characteristics and components greatly resemble those of the Aris II COM-Recorder. According to Article 1 of that regulation, it is concerned with the classification of apparatus

'for transferring to microfilm information recorded on magnetic tape, consisting of:

3 — See the explanatory notes on subheading 84.53, point I(A).

4 — Commission Regulation (EEC) No 551/81 of 25 February 1981 on the classification of goods within subheading 90.07 A of the Common Customs Tariff (OJ 1981 L 56, p. 20).

(i) a tape deck for playing the magnetic tape,

(ii) a processing unit for transcribing the data recorded on the tape into legible characters to be displayed on a cathode-ray tube and for controlling the operation of a camera and flashlight which are used to photograph those characters. If desired, this part of the operation may be performed by the central processing unit of an automatic data-processing machine instead of the processing unit which forms part of the apparatus,

(iii) a cathode-ray tube for displaying the characters,

(iv) a flashlight apparatus,

(v) a camera for photographing the characters on microfilm,

(vi) a unit for developing and printing the film in the form of microfiches . . . '.

It appears from the preamble to Regulation No 551/81 that classification in Heading 84.53 was considered but rejected on the grounds that: (a) Heading 84.53 does not cover apparatus incorporating or working in conjunction with an automatic data-processing machine and performing a specific function and (b) the processing unit in the said apparatus cannot be regarded as the principal element of the apparatus since it may not even be used in its operation, the central processing unit of an automatic data-processing machine being used instead. [5]

It is also stated in the preamble to the regulation that 'cameras for copying data and recording on microfilm' must also be classified under Heading 90.07 and that the apparatus in question is essentially a photographic camera. [6] That is the reason why the regulation classifies the apparatus in Heading 90.07, which reads as follows:

'Photographic cameras; photographic flashlight apparatus and flashbulbs . . . '

6. According to the national court's order and the observations submitted by Gerlach, that regulation resulted in the French, Belgian and Dutch customs authorities' classifying the Aris II COM-Recorder under subheading 90.07 A of the Common Customs Tariff, whilst the British and German customs opted for subheading 84.53 B.

The question is therefore whether Regulation No 551/81 does in fact mean that a COM-Recorder such as the Aris II must be classified under subheading 90.07 A. The Commission considers that this is not the case. At the hearing, the Commission representative stated that the regulation did not set out to formulate general criteria for the customs classification of COM-Recorders: its scope was limited to the apparatus described therein. Moreover, the Commission pointed out that the regulation was issued in 1981, more than two years before the apparatus at issue was imported. Such a lapse of time was significant in the case of products which,

5 — See the fourth recital in the preamble to Regulation No 551/81.

6 — See the sixth and seventh recitals in the preamble.

from the technical point of view, rapidly became out of date.

More specifically as regards the apparatus referred to in Regulation No 551/81, the Commission considers that it differs considerably from a machine having the characteristics of an Aris II COM-Recorder. It maintains in particular that the apparatus referred to in the regulation is capable of functioning completely independently, because it has its own tape deck, whilst the Aris II could not operate independently but has to be connected to a server. I construe this claim as meaning that the microprocessor of the apparatus referred to in Regulation No 551/81 enables magnetic tape containing computer data to be played back and hence enables such data to be transcribed *without the apparatus being connected to a server.* In view of that characteristic, the Commission maintains that such an apparatus does not constitute a component which was specifically designed as part of an automatic data-processing system.[7]

7. Gerlach disagrees with that reasoning and at the hearing its representative stated that if it is allowed that a COM-Recorder *equipped with* a tape deck (such as the apparatus referred to in Regulation No 551/81) no longer constitutes an output unit on the ground that it can operate independently, it is all the more clear that such a piece of apparatus must be regarded as an automatic data-processing machine and not a photographic camera.

Gerlach argues that the photographic camera is no more the essential element of the apparatus described in Regulation No 551/81 that it is of COM-Recorders generally. The photographic function of such machines is entirely subordinate to their main function, which is a much broader one, namely to make legible and fix physically data produced by a computer. In other words, the fact that a COM-Recorder includes a photographic installation distinguishes that apparatus from other output devices, such as printers; however, it is not sufficient to make them into photographic cameras.

On this subject, it was further stated in the order for reference and in Gerlach's observations that soon COM-Recorders will even be able to operate entirely without any photographic installation, in so far as the characters produced by the control unit and the laser system will be able to be fixed *directly* on microfiches or microfilm. In the light of the principle that technical developments cannot change the scope of Heading 84.53 of the Common Customs Tariff,[8] this expected development constitutes, as I interpret the argument, an additional reason for not classifying a COM-Recorder under Heading 90.07.

8. I take Gerlach's argument to mean that, for the purpose of determining what is a unit which is part of a system within the meaning of note 3(B) on Heading 84.53, there is no essential difference between a COM-Recorder equipped with a tape deck and a COM-Recorder which is not so

7 — See the explanatory note on Heading 84.53 quoted in Section 3 above.

8 — See the judgment of the Court in Case 234/89 *Casio Computer* v *Oberfinanzdirektion München* [1989] ECR 63, paragraphs 11 to 13.

equipped. From this point of view, the fact that the apparatus referred to in Regulation No 551/81 is fitted with a tape deck is only relevant to the manner in which the computer-produced data are *introduced* into the machine. Whatever technique is used, an 'independent' tape deck or connecting the COM-Recorder to a computer server, this has no bearing on the fact that, as an output device, the apparatus serves only to transpose data produced by a computer — whether or not they be introduced into the recorder 'independently' — into legible characters (and to fix those characters on microfilm), and is hence in fact 'specifically designed' as a part of an automatic data-processing system.

In any event, the Court does not have to rule in this case on the characteristics of the apparatus referred to in Regulation No 551/81 by comparison with the characteristics of an Aris II COM-Recorder. Indeed, for the reasons set out by the Commission (see Section 6 above) it is doubtful whether Regulation No 551/81 should be given any weight as a precedent in this case. However, above all the analysis of the particular features of an Aris II COM-Recorder (see Section 4 above) shows that such a machine constitutes in any event a unit of an automatic data-processing machine and, as such, must be classified under Heading 84.53 and that, having regard, too, to the expected development of technology (see Section 7 above), the machine should not be classified as a photographic camera under Heading 90.07. Regulation No 551/81 cannot alter that assessment; indeed, that regulation was adopted on the basis of Regulation (EEC) No 97/69,[9] which means that it can specify, but not amend, the scope of headings of the Common Customs Tariff.

9. I therefore propose that the Court should answer the question of the Tariefcommissie, Amsterdam, in the following terms:

'Apparatus which enables data coming from an automatic data-processing machine to be transposed into legible form and subsequently to be fixed on microfilm or microfiche must, whether or not it uses a photographic technique to that end, be classified under subheading 84.53 B of the Common Customs Tariff.'

9 — Regulation (EEC) No 97/69 of the Council of 16 January 1969 on measures to be taken for uniform application of the nomenclature of the Common Customs Tariff (OJ, English Special Edition 1969 (I), p. 12); see in particular the second recital in the preamble.