In Case 294/81

CONTROL DATA BELGIUM NV SA, a limited liability company governed by Belgian law having its registered office at 50 Rue de la Fusée, 1130 Brussels, represented by Ian S. Forrester, of the Scots Bar, instructed by Oppenheimer, Wolff, Foster, Shepard & Donnelly, attorneys-at-law, Minneapolis and St Paul, Minnesota, United States of America, and of Brussels, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Richard Wainwright, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 81/692/EEC of 10 August 1981 (Official Journal 1981, L 252, p. 36) establishing that the apparatus described as "Control Data-Cyber 170-720; Cyber 170-750" may not be imported free of Common Customs Tariff duties is void,

THE COURT (Second Chamber)

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

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — The legislative background

The contested decision was adopted within the framework of 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, L 184, p. 1), as amended by Council Regulation (EEC) No 1027/79 of 8 May 1979 (Official Journal, L 134, p. 1), and of Commission Regulation No 2784/79 of 12 December 1979 laying down provisions for the implementation of Regulation No 1798/75 (Official Journal, 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), as supplemented by the Nairobi Protocol, approved by Council Decision 79/505/EEC of 8 May 1979 (Official Journal, L 134, p. 13).

According to Article 1 (1) of that Agreement, which entered into force on 21 May 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 initially included, subject to certain reservations, "scientific instruments or apparatus, intended exclusively for educational purposes or pure scientific research".

The first recital in the preamble to Regulation No 1798/75 states that "... in order to facilitate the free exchange of ideas as well as the exercise of cultural activities and scientific research within the Community, it is necessary to allow, by all possible means, the admission free of Common Customs Tariff duties of educational, scientific and cultural materials ...". Various materials which are of such a nature are listed in Annexes I and II to the regulation, Article 3 of which provides that "Scientific instruments and apparatus not included in Article 2 imported exclusively for educational purposes or for pure scientific research may be admitted free of Common Customs Tariff duties ..." (subject to certain conditions).

The Nairobi Protocol amended Annex D to read as follows:

"(i) Scientific instruments or apparatus, provided:

(a) that they are consigned to public or private scientific or educational institutions ap-

proved by the competent authorities by the importing country for the purpose of duty-free entry of these types of articles, and used for non-commercial purposes . . ."

The Guide to the Operation of the "Florence Agreement" and its Protocol, drawn up by Unesco, contains the following remarks with regard to Annex D:

"The governmental experts attach considerable importance to the free circulation of scientific equipment, particularly for the developing countries. They stressed that this annex to the Agreement should be administered in the most liberal manner consonant with the great progress made in science and technology since the Agreement was drafted. Accordingly, they recommended that the notion of pure scientific research should be interpreted so as to exclude only those instruments and apparatus intended for commercial purposes.

. . .

Considerable diversity of national practice is evident in the determination of the categories of scientific instruments or apparatus which should be given the privileges of Annex D to the Agreement. Any list would be subject to frequent revision in response to the changing requirements of scientific research. . . . However, among the categories of scientific instruments or apparatus to which some countries accord the privilege of Annex D, the following may be cited as examples (it should be understood that this list is merely illustrative, and is not intended to be restrictive in any way):

Astronomical instruments, (e.g. coelostats, spectroheliographs, spectrohelioscopes, telescopes, transit instruments).

Balances, analytical, chemical and other precision balances.

Compound optical microscopes, whether or not provided with means of photographing or projecting the image.

Electrical measuring, checking and analysing instruments and apparatus (e.g. ammeters, ohmmeters and voltmeters, frequency meters, measuring bridges, oscilloscopes and oscillographs, phase meters, potentiometers and synchroscopes).

Geophysical instruments (e.g. seismographs and seismometers). Hydrological instruments (e.g. bucket-wheel current meters, rain gauges and indicators, level recorders, swell and tide recorders).

Instruments and apparatus for measuring or checking quantities of heat, light or sound (e.g. calorimeters, luxmeters, photometers).

Instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or similar radiations (e.g. dosimeters, geiger counters, scintillation counters).

Instruments and apparatus for physical or chemical analysis or research (e.g. colorimeters, polarimeters, refractometers, saccharimeters, spectrophotometers, spectrometers, spectroscopes).

Machines and appliances for testing mechanically the hardness, strength, compressibility, elasticity and the like properties of industrial materials (e.g. metals, wood, textiles, paper or plastics).

Meteorological instruments (e.g. actinometers, anemometers, nephoscopes, sunshine recorders).

Microscopes and diffraction apparatus, electron and proton.

Nuclear physics equipment.

Turning now to the Protocol to the Agreement, its Annex D extends duty-free entry to all scientific instruments and apparatus, whether or not they are intended for educational purposes or pure scientific research. The Protocol excludes, however, instruments or apparatus intended for commercial purposes, since it maintains the condition regarding consignment to approved scientific or educational establishments and to use under the control of these establishments."

Following the conclusion of the Protocol the Council amended, by means of the above-mentioned Regulation No 1027/79, *inter alia* Article 3 of Regulation No 1798/75, which now reads as follows:

"Article 3

(1) Scientific instruments and apparatus not included in Article 2 and imported exclusively for non-commercial purposes may be admitted free of Common Customs Tariff duties provided that:

...

(3) For the purposes of this article:

a scientific instrument or apparatus shall mean any instrument or apparatus which, by reason of its objective technical characteristics and the results which it makes it possible to obtain is mainly or exclusively suited to scientific activities . . .."

Regulation No 2784/79 laying down provisions for the implementation of Regulation No 1798/75 contains in Title III the following specific provisions with regard to Article 3 of the latter regulation:

"Article 5

(1) For the purposes of the first indent of Article 3 (3) of Regulation (EEC) No 1798/75, the 'objective technical characteristics' of a scientific instrument or apparatus shall be understood to mean those characteristics resulting from the construction of that instrument or apparatus or from adjustments to a standard instrument or apparatus which make it possible to obtain high-level performances above those normally required for industrial or commercial use.

Where it is not possible to establish clearly on the basis of its objective technical characteristics whether an instrument or apparatus is to be regarded as a scientific instrument or apparatus, reference shall be made to the general uses in the Community of instruments or apparatus of the type for which duty-free admission is requested. If this examination shows that the instrument or apparatus in question is used mainly for scientific purposes, it shall be deemed to be of a scientific nature."

According to Article 7 of Regulation No 2784/79 the decision on duty-free importation is to be taken by the competent national authority if the infor-

mation at its disposal enables it to assess whether or not the instrument or apparatus is scientific. In the absence of such decision the application for exemption is to be forwarded to the Commission which must then seek the view of the Member States and, in the event of objection, refer the matter to a group of experts composed of representatives of the Member States who meet within the framework of the Committee on Duty-Free Arrangements in order to examine the application.

The Committee on Duty-Free Agreements drew up on 12 February 1980 a working document which, in its explanatory notes on the meaning of "scientific instruments or apparatus", provides the following information:

"1.3.1. The following are normally considered to be outside the scope of the description of scientific apparatus or instruments:

(a) apparatus and instruments normally used for production, commercial applications of production, routine analyses or other non-scientific processes (engines, machine-tools, computers, graphic recorders, etc.).

...

1.3.2. Certain instruments or apparatus referred to under point 1.3.1 above may, in certain circumstances, be considered as being scientific instruments or apparatus if there have been additions or substantial modifications which have the effect of rendering them specifically suitable for research or educational purposes.

1.3.3. Lastly, certain instruments or apparatus referred to under point 1.3.1 above may be admittet duty-free if they are integrated into a unit which, taken as a whole, can be considered to be a scientific instrument or apparatus, provided that this instrument or apparatus is essential for the operation of the whole unit under consideration (for example, a microprocessor integrated into a spectrophotometer)."

II — Facts and written procedure

Since the Free Universities of Brussels wished to import Control Data-Cyber 170-720 and Cyber 170-750 computers free of duty, they submitted, together with the applicant, an appropriate application to the Belgian customs authorities which referred the matter to the Commission, the defendant in these proceedings. The Commission received the following objections from Member States:

The Netherlands: "These computers are used to handle both scientific and commercial information. That means that they do not display objectives characteristics rendering them particularly adapted to scientific research."

United Kingdom: "No scientific characteristics."

Ireland: "The Irish Technical Authority has expressed the view that this system should not be regarded as scientific for the purpose of EEC Regulation No 1798/75 as computers are 'general purpose machines'."

The summary minutes of the meeting of the Committee on Duty-Free Agree-

ments to which the point was subsequently referred contain the following information:

"8. File 023/81: Control Data CD Cyber 170-720 and 170-750

8.1. The file concerns importation of computer equipment under a leasing contract. The importer has taken legal advice and set out in a compendious report the reasons why such equipment must be considered as scientific. In view of the considerable importance of the matter the Belgian State has submitted it for examination by the Committee.

...

8.3. The expert from Ispra states that the particular technical characteristics put forward by the importer as justification for the scientific nature of the apparatus are all normal characteristics of computer equipment. Since the software used has not been specially designed in any way for scientific purposes and is interchangeable it must be denied categorically that the equipment in question is of a scientific nature.

8.4. The Committee concurs in that view."

The Commission then adopted the contested decision of 10 August 1981 addressed, as provided for in Regulation No 1027/79, to the Member States and containing a refusal to consider the equipment in question as scientific. The decisive recitals in the preamble to the decision are worded as follows:

"... in accordance with the provisions of Article 7 (5) of Regulation (EEC) No 2784/79, a group of experts composed of representatives of all the Member States met on 23 June 1981 within the framework of the Committee on Duty-Free Arrangements to examine the matter;

... this examination showed that the apparatus in question are computers;

... they do not have the requisite objective characteristics making them specifically suited to scientific research; ... moreover, apparatus of the same kind are principally used for non-scientific activities; ... their use in the case in question could not alone confer upon them the character of scientific apparatus; ... they therefore cannot be regarded as scientific apparatus; ... the duty-free admission of the apparatus in question is therefore not justified."

By application received at the Court Registry on 23 November 1981 the applicant instituted these proceedings. 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 14 July 1982 the Court decided to assign the case to the Second Chamber.

III — Conclusions of the parties

Following the explanations given during the oral proceedings the *applicant* now claims that the Court should:

Declare Commission Decision 81/692/EEC void.

Order the Commission to pay the costs.

The *defendant* contends that the Court should:

Dismiss the application as inadmissible and, in any event, unfounded.

Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

Admissibility

The *Commission* states that the contested decision, which is addressed to the Member States and is of unlimited duration, is general in nature. The applicant is directly concerned by the decision in so far as it gives no margin of discretion to the national authorities but the decision is not of individual concern to the applicant which, as a limited company, has a legal personality separate from the parent company and its subsidiaries in the other Member States. The applicant does not belong to a closed and restricted class whose number and identity had become fixed and ascertainable before the date of the decision. The applicant is the importer for Belgium only whilst the importer for the Community is the Control Data Group. There is nothing to prevent the parent company from effecting imports into the Community through companies other than the present members of the Group, particularly in a Member State in which no Control Data company has yet been established.

The *applicant* replies that it is the sole importer for Belgium and that, like all the other importers of the apparatus in question, it belongs to the Control Data Group, all the members of which are wholly-owned subsidiaries or branches of the Control Data Corporation, the sole manufacturer of the apparatus. The decision accordingly affects an ascertainable and unchanging category, namely the companies which are members of the Control Data Group in the Community, by reason of certain attributes which are specific to them or of circumstances in which they are differentiated from all other persons.

The substance of the case

First submission: failure to appreciate the concept "scientific instrument or apparatus"

The *applicant* claims that the Commission, in merely asserting in its decision that it is concerned with computers, has failed to appreciate not only certain distinctive features which render Cyber computers particularly suitable for scientific use but also the flexible nature of the Florence Agreement and the Nairobi Protocol. The above-mentioned Guide and the submissions of the Commission itself in Case 72/77 (*Universiteitskliniek Utrecht*, judgment of 2 February 1978 [1978] ECR 189) show clearly that the Agreement, and thus the Community rules relating to it, must be applied as liberally as possible. This contention is in no way contradicted by the fact that the Guide provides, by way of illustration, a list of scientific instruments which does not include computers, since that "list ... is not intended to be restrictive in any way". The same applies to the explanatory notes in the working document of the Committee on Duty-Free Arrangements which merely rule out computers from *normally* being considered as scientific instruments or apparatus.

Furthermore, the Commission has failed to take into account the judgment in Case 72/77, *Universiteitskliniek Utrecht*, mentioned above, in which the Court ruled that the words "scientific instruments or apparatus" within the meaning of Regulation No 1798/75 "refer to an instrument or apparatus possessing objective characteristics which make it particularly suitable for pure scientific research". That judgment, together with the adoption of the Nairobi Protocol, was directly responsible for the recasting in 1979 of Article 3 of Regulation No 1798/75.

The applicant points out with a number of examples that scientists engaged in advance research in nuclear physics and other fields use computers to perform complex mathematical operations or experiments, which may involve millions of steps. The volume and complexity of these operations make the use of a computer indispensable. Some branches of research became feasible only when computers were available. For example, mathematical "models" are used to simulate physical conditions which cannot be created experimentally. The scientist's computer must perform mathematical operations with extreme accuracy in the case of both very large and very small numbers, and the results must be available quickly enough to make the research worthwhile. Scientific research in certain fields is therefore inconceivable without the availability of suitable computers, which are thus to be regarded as instruments used by scientists in their research.

Whether a computer is adapted particularly to scientific or to commercial needs is a function of the physical structure or "architecture" of the machine's "hardware", and not of its "software". Software "programmes" are the detailed instructions, inserted into the computer by the user, which communicate the specific steps by which the computer will effect the required computation by the user. Although certain software programmes are used by scientists, the insertion of a scientific software programme into a commercial computer cannot modify the physical attributes of the machine.

The applicant further contends that there is a small, but distinct and well-recognized, class of specialized computers designed for the scientific market. The physical features of the Cyber computers which render them particularly suitable for scientific application as opposed to commercial applications are the following:

(a) Architecture

The central processor performs computational tasks at very high speeds. The central processor has no contact with external equipment. There are no "data channels" linking the central processor other than to the computer memory. The only function of the processor is to process data which are supplied directly from the memory. The Cyber processor is thus not designed to perform the shifting and comparison of data typically required of commercial computers.

(b) Orientation to unusually long "words"

Information is recorded in any computer in "bits". Bits are grouped in clusters which constitute the smallest unit of information which the computer is capable of "addressing".

In Cyber computers, the smallest addressable unit of information is a "word" consisting of 60 bits. Words of this length, which are only to be found in scientific computers, are necessary for accurate and rapid recording and handling of the long or complex numbers of values encountered in scientific research. The Cyber computers can handle such numbers or values in a single operation.

The basic word which the Cyber computer addresses contains 60 bits. When it operates in so-called "double precision", 120 bits are available to record a single number or value. Thus, a number consisting of perhaps 200 digits could be recorded. Such a large number would be irrelevant in commercial use. In a commercially-orientated computer, the normal maximum number of bits available to record a single number is 32 or, in double precision, 64. A number requiring more bits cannot be accurately recorded or manipulated in a commercially-orientated computer. The availability in Cyber computers of "floating-point arithmetic", when coupled with the unusually long word-length of Cyber computers, permits the performance of operations on very large and very small numbers consisting of many digits with many zeroes before or after the decimal point.

The applicant stresses that these features are a function of the physical construction of the machine, which cannot be modified, and which are constant regardless of the type of software used.

(c) Non-orientation to characters

Commercially-orientated computers usually record and address information in basic units of 8 bits known as "characters" or "bytes". An 8-bit character can contain a simple number or a letter or a punctuation mark. Ability to handle such easily recorded short units of information is important for the businessman, and such computers are said to be character-orientated. Cyber computers are orientated to addressing words and cannot, without special modification, address individual characters. This represents a serious hindrance to commercial users. In Cyber computers, characters consist of only 6 bits. Commercial computers with 8-bit characters can therefore handle up to four times as many representations (for example, letters, numbers, punctuation marks, or symbols) as Cyber computers.

The commercial user needs a wider range of representations than the scientist.

(d) Instruction set

Any computer can perform a "set" or range of "instructions" or basic commands, and no other instructions. The instruction set of a Cyber computer is very different from that of commercially-orientated computers. The Cyber computers supplied to the Free Universities of Brussels can perform only 64 "instructions"; a commercial computer's instruction set can have up to 256 instructions. The majority of the available instructions in a Cyber computer deal with operations on values (that is, typical scientific computing steps) rather than the manipulation and comparison of characters within the computer. The converse is true for commercially-orientated computers. Cyber computers are extremely efficient in handling Fortran, the principal scientific programming language which is mainly concerned with mathematical operations, and are broadly incompatible with Cobol, the principal commercial programming language which is mainly concerned with the movement of data in text form. The converse is again true for commercially-orientated computers.

(e) Speed

A Cyber computer performs scientific computing operations at very high speed. Its external rhythm or operating cycle is extremely fast; the central processor is insulated from the external equipment; and the instruction set of the computer is limited to the performance of arithmetical and logical operations on numbers or values recorded in very long words, each of which can contain a large or complex value. These features combine to permit rapid and accurate results in extremely complex mathematical operations. According to the applicant, speed is not a matter of mere convenience for the scientist: it can in fact determine whether a given piece of research is undertaken or not.

By reason of these characters Cyber computers are eminently suited to the requirements of certain scientific fields where speed and precision are a precondition for the very commencement of research.

The *Commission* concedes that hitherto it has not conferred scientific status on computers unless they are incorporated into equipment classified as a scientific instrument. It considers that it is incorrect to classify computers as instruments, since it is impossible to measure, reveal, transform or process any physical dimension or characteristic with a computer. However, it does not rule out the possibility, which is indicated in the explanatory notes of the Committee on Duty-Free Arrangements, of so classifying computers if there have been additions or substantial modifications which have the effect of rendering them specifically suitable for research or educational purposes. Hitherto this possibility has not been used and the Commission is unable to furnish more precise criteria in this respect.

The Commission does not deny the contribution of computers to scientific research or, with regard to the particular

characteristics of the Cyber computer, that it is an excellent multi-purpose computer capable of carrying out complex calculations and thus well suited to scientific calculations. Nevertheless that computer is also well suited for use in other fields requiring complex, accurate and swift calculation.

With regard to the characteristics listed by the applicant the Commission makes the following comments:

"(a) *Word-orientated hardware and precision*

All advanced computers use this method of address, by words rather than characters. This method of address and the precision which it permits are therefore not specific to the Cyber computer, but on the contrary a common characteristic.

(b) *Floating-point arithmetic*

At the present time nearly all computers are capable of floating-point arithmetic. This technique is so common that it is even incorporated into certain pocket calculators.

(c) *Instruction set and programming*

All computers operate as a result of their particular instruction set and programme. In the case of the Cyber computer it is true that it is basically better adapted to carrying out scientific calculations rather than administrative tasks. However the manufacturer has provided that the Cyber computer can be used with different programming languages — including Fortran (formula translation) which is adapted to scientific calculations and Cobol (common business oriented language) which is designed for commercial use. This shows that the Cyber computer, like all computers, is of universal application depending on the programming language used."

Second submission: failure to provide an adequate statement of the reasons on which the decision is based

The *applicant* claims that the statement of reasons on which the decision is based does not meet the requirements of the Treaty with regard to the adequacy of the statement of the reasons for decisions. The Commission has merely asserted that the apparatus in question is a computer, adding a stereotyped text which is succinct and identical to a dozen other decisions. The previous decisions led the applicant to believe only that computers as such were not yet acknowledged as having scientific status; this has, however, not discharged the Commission from its duty of informing the applicant by means of the decision, the more so since the applicant maintains that its computers are different from those of the majority of other manufacturers. The Commission could, through its regulation or through the statement of reasons set out in a previous decision, have informed the parties concerned of the reason why it did not consider that computers were eligible for exemption from customs duty, defending its policy in the light of the letter and the spirit of the Agreement and of its Protocol and of Community legislation. In justifying its terse statement of reasons by the fact that the decision is addressed to the Member States which participated in the

procedure and which are accordingly acquainted with the policy pursued by it, the Commission disregards the role of the applicant as a a party directly and individually concerned.

The *Commission* concedes that the reasoning is brief but maintains that it is sufficient. The Member States, to which the decision is addressed, participated in the procedure and were fully informed of the reason for the Commission's attitude. With regard to the applicant it is clear from the application itself that the applicant was perfectly aware of the Commission's policy although it does not accept that its computers should be treated as ordinary computers.

Third submission: procedural defect

The *applicant* claims that the procedure prescribed by Regulation No 2784/79 is entirely different from that which applies, for example, in competition matters, inasmuch as it does not allow any exchange of views, provide for the opportunity of being heard on any matters in dispute or even of furnishing additional information before the adoption of the decision.

The Commission's reply to this is that all the procedural rules laid down in the regulations were complied with and that the applicant, which submitted an application for duty-free admission, lodged a voluminous file and thus had ample opportunity to make known its point of view.

V — Oral procedure

At the sitting on 16 December 1982 oral argument was presented and answers were given to the questions submitted by the Court by the following: Ian S. Forrester, assisted by C. Jackson, as technical expert, for the applicant; R. Wainwright, assisted by Mr Barbera of the Joint Research Centre, Ispra, as technical expert, for the Commission.

The Advocate General delivered his opinion at the sitting on 3 February 1983.

Decision

1 By application lodged at the Court Registry on 23 November 1981 Control Data Belgium NV SA brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 81/692/EEC of 10 August 1981 establishing that the apparatus (computers) described as "Control Data Cyber 170-720; Cyber 170-750" may not be imported free of Common Customs Tariff duties (Official Journal, L 252, p. 36) is void.

2 That decision was adopted within the framework of 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, L 184, p. 1), as amended by Council Regulation (EEC) No 1027/79 of 8 May 1979 (Official Journal, L 134, p. 1), and of Commission Regulation No 2784/79 of 12 December 1979 laying down provisions for the implementation of Regulation No 1798/75 (Official Journal, L 318, p. 32). The purpose of those regulations is to ensure the implementation by the Community of the Agreement on the Importation of Educational, Scientific and Cultural Materials drawn up on the initiative of the United Nations Educational, Scientific and Cultural Organization (Unesco) adopted at Florence in July 1950 (United Nations Treaty Series, Vol. 131, p. 25), as supplemented by the Nairobi Protocol, adopted on 26 November 1976, and approved by Council Decision 79/505/EEC of 8 May 1979 (Official Journal, L 134, p. 13).

3 Article 3 of the above-mentioned Regulation No 1798/75 of the Council, as amended by Regulation No 1027/79, provides that subject to certain conditions "scientific instruments and apparatus" may be admitted free of Common Customs Tariff duties provided that they are imported exclusively for non-commercial purposes. According to Article 3 (3) the words quoted above mean "any instrument or apparatus which, by reason of its objective technical characteristics and the results which it makes it possible to obtain, is mainly or exlusively suited to scientific activities".

4 When the Commission laid down provisions for the implementation of Council Regulation No 1798/75 in Commission Regulation No 2784/79, it provided further clarification of the criteria set out above. According to Article 5 of that regulation "the 'objective technical characteristics' of a scientific instrument or apparatus shall be understood to mean those characteristics resulting from the construction of that instrument or apparatus or from adjustments to a standard instrument or apparatus which make it possible to obtain high-level performances above those normally required for industrial or commercial use." Where it is not possible to establish clearly the character of an instrument or apparatus on the basis of these objective technical characteristics the article provides that an examination of the general uses in the Community of instruments or apparatus of that type must

be carried out. If that examination shows that the instrument or apparatus for which duty-free admission is requested is used mainly for scientific purposes it is deemed to be of a scientific nature.

5 According to Article 7 of the implementing regulation the decision on duty-free importation is to be taken by the competent national authority if the information at its disposal enables it to assess whether or not the instrument or apparatus is scientific. In the absence of such decision the application for exemption is to be forwarded to the Commission which must then seek the view of the Member States and, in the event of objection, refer the matter to a group of experts composed of representatives of the Member States who meet within the framework of the Committee on Duty-Free Arrangements in order to examine the application. When that examination is completed the Commission is to take a decision which must be notified to all Member States.

6 The file on the case shows that the two Free Universities of Brussels concluded a "leasing contract" with the applicant concerning the acquisition of two computers of the Cyber 170-720 and Cyber 170-750 types, both manufactured in the United States. In order to import the computers free of duty the applicant, acting in the name of the universities, submitted an appropriate application dated 6 August 1980 to the Belgian customs authorities. It appended to its application a very detailed file which was further supplemented after conversations with the authorities.

7 In pursuance of Article 7 of Regulation No 2784/79 the Belgian authorities transmitted the application, together with the file, to the Commission. Since three Member States challenged the scientific nature of the two computers the Commission referred the matter to the Committee on Duty-Free Arrangements and, in accordance with the opinion of the latter, adopted the decision at issue.

8 That decision is based entirely on the non-scientific nature of the two computers. The decisive recitals in the preamble to the decision are worded as follows:

"... this examination showed that the apparatus in question are computers,

... they do not have the requisite objective characteristics making them specifically suited to scientific research; ... moreover, aparatus of the same kind are principally used for non-scientific activities; ... their use in the case in question could not alone confer upon them the character of scientific apparatus; ... they therefore cannot be regarded as scientific aparatus; ... the duty-free admission of the apparatus in question is therefore not justified."

The admissibility of the application

9 The Commission raises the objection that the application is inadmissible on the ground that the decision which is addressed to the Member States does not concern the applicant individually within the meaning of the second paragraph of Article 173 of the Treaty. In this connection it emphasizes the general nature of the decision. The decision does not concern only the importation into Belgium of the two computers in question. It concerns the importation of all computers of the two types anywhere in the Communty. Accordingly only the manufacturer of those computers or the Control Data Group in its capacity as sole importer in the Community is entitled to institute proceedings under the second paragraph of Article 173. That remedy is not available to any individual member of the Group.

10 The objection cannot be upheld. The applicant is the wholly-owned subsidiary of the manufacturing undertaking, Control Data Corporation of Minneapolis. It is the sole importer for Belgium and itself submitted the application which led to the decision at issue. In those circumstances, to insist that the parent company must institute the proceedings before the Court or that the applicant must act jointly with the other subsidiaries which are importers in the Community would constitute an excessive degree of formalism.

The substance of the case

11 The applicant puts forward, in substance, two submissions:

(a) infringement of an essential procedural requirement;

(b) infringement of the Community rules defining the scientific nature of an instrument or apparatus.

(a) Infringement of an essential procedural requirement

12 In the first place the applicant claims that the reasons on which the decision is based have not been adequately stated. The recitals in the preamble which have been cited above merely contain, according to the applicant, a stereotyped formula employed in all the decisions concerning computers which the Commission has adopted since the entry into force of the regulations of 1979. That terse statement of reasons completely disregards the particular characteristics of the computers in question in respect of which the applicant lodged a comprehensive file which was largely based on technical analyses.

13 The Commission concedes that the statement of reasons on which the decision is based is brief but considers that it is sufficient. The addressees of the decision, namely the Member States, participated in the procedure and were fully informed of the reason for the Commission's attitude. With regard to the applicant, it is clear from its own arguments that it is perfectly aware of the Commission's policy although it does not accept that its computers should be treated as ordinary computers.

14 In this connection it should be recalled, as the Court has already emphasized on numerous occasions, that by imposing upon the Commission the obligations to state reasons for its decision, Article 190 is not taking mere formal considerations into account but seeks to give an ooportunity to the parties of defending their rights, to the Court of exercising its power of review, and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.

15 Thus it is not sufficient that the Member States as addressees of the decision, are aware of the reasons as a result of their participation in the preliminary procedure and that the applicant the person directly and individually concerned, is able to deduce these reasons by comparing the decision in question with similar earlier decisions. It is further necessary that the applicant should be enabled in practice to defend its rights and the Court should be able effectively to exercise its power of review on the basis of the statement of reasons. The question whether the statement of reasons is sufficient in these respects may best be examined in this case in conjunction with the submission considered under heading (b).

16 Secondly the applicant claims that having regard above all to the stereotyped statements of reasons employed by the Commission the latter's procedural practice in this area is distinctly inadequate in so far as it does not permit either an exchange of opinions or allow the parties concerned to give their views on any matters at issue or even give them the opportunity to provide additional explanations before the decision is taken.

17 That part of the first submission cannot be upheld. As the applicant itself admits, the Commission followed the procedure laid down by the relevant Community rules. It is also not in dispute that that procedure enabled the applicant to state in full its argument concerning the scientific nature of the computers in question in the file lodged with the Belgian authorities and that the file was made available both to the Committee on Duty-Free Arrangements and to the Commission.

(b) Infringement of the Community rules defining the scientific nature of an instrument or apparatus

18 In this connection the applicant maintains that the Commission has entirely disregarded the particular characteristics of the two computers which wholly justify their classification as scientific instruments or apparatus for the purposes of the Community rules. It therefore asks the Court not only to declare the contested decision void but also to make a finding establishing the scientific nature of the computers in question.

19 Although it is not for the Court to make such a finding within the framework of an application for a declaration that a measure is void it must on the other hand ascertain whether the criteria applied by the Commission are in accordance with the Community rules and whether in applying those criteria the Commission took account of the objective characteristics of the computers referred to by the decision. It is therefore necessary to examine both the criteria emanating from the decision itself and those which were stated by the Commission in the course of the proceedings before the Court.

20 The decision finds that the apparatus in question are computers and states that they do not have the requisite objective characteristics making them specifically suited to scientific research and that apparatus of the same kind are principally used for non-scientific activities. The decision does not make clear whether those statements relate to computers in general or whether they refer specifically to the two types of computer in question. In the course of the procedure before the Court however, the Commission contended that at least the last of these statements concerned computers in general and that, in its view, no computer may be regarded as being scientific in nature unless it is incorporated in equipment which, considered as a whole, has that nature.

21 The Commission has stated that a computer is not a scientific "instrument" because it is impossible to measure, reveal, transform or process any physical dimension or characteristic with a computer. Likewise it may not be classified as a "scientific" instrument or apparatus because calculation as such does not constitute a scientific activity.

22 The applicant considers that these definitions have been rendered completely obsolete by modern science. In a number of fields, in particular in theoretical physics and chemistry, the computer constitutes the only effective tool for the scientist and the extremely complicated equations which only a computer can solve within a reasonable period form the basis of the results of research.

23 These arguments of the applicant must be upheld. The language of the above-mentioned provisions of the Community regulations provides no support for the restrictive interpretation put forward by the Commission. Neither the etymology of the words "instrument" and "apparatus" nor the usage of those words in everyday language justifies the narrow definitions adopted by the Commission.

24 The Commission further contends that, if it is possible to classify a computer as a scientific apparatus this is because of its application software and not of its hardware or of its system software. It draws a comparison with a rocket.

An empty rocket can never be considered a scientific apparatus. Only when scientific instruments are placed in the rocket does its purpose become scientific. The application software is interchangeable, like the instruments in the rocket. For that reason, too, a computer as such can never be classified as a scientific apparatus.

25 The applicant replies that Cyber computers are, from the very nature of their hardware, intended for scientific use. They are constructed in order to solve very complex mathematical equations with an accuracy and speed which is not required by a typical commercial user. On the other hand the design of such computers is particularly unsuited to the handling or comparison of a large amount of recorded information, that is to say, to the work which a commercial user most often requires. With regard to the application software Cyber computers are largely compatible with the principal scientific programming language, Fortran. A part of each computer is indeed reserved exclusively for such programmes. On the other hand the computers are broadly incompatible with the principal commercial programming language, Cobol. Finally, the construction of Cyber computers is such that the programme cannot be interrupted in course to record new information, an important facility for the commercial user. For all these reasons the applicant disputes the view that the application software alone renders these computers suitable for scientific purposes.

26 Confronted with these conflicting points of view, the Court does not consider that it can exclude the possibility that a criterion based on the difference between the hardware and the software of a computer may be in conformity with the Community rules on the duty-free importation of scientific instruments and apparatus. However, it has not been established either in the statements of the reasons on which the decision at issue is based or in the proceedings before the Court that a precise criterion of that nature was in fact applied by the Commission for the purpose of adopting the decision. Nor, furthermore, is there anything to show that if the Commission did apply such a criterion it took sufficient account of the objective characteristics of the two computers, both with regard to their hardware and to their system software.

27 The Commission claims, in the event of the Court's holding that a computer as such may be classified as a scientific instrument or apparatus, that the specific characteristics of Cyber computers are insufficient for that purpose. As a general rule computers are multi-purpose machines. They are as suitable for business use as for work of a scientific nature and in practice they are chiefly used for business purposes. By reason of their capacity accurately and swiftly to effect complicated computations Cyber computers are certainly very well suited to scientific computing but they are equally suited to commercial purposes, in particular in the sphere of advanced technology. Although they are less suited to commercial work of an administrative nature they are still capable of performing such work and thus remain multi-purpose machines.

28 In the Commission's opinion that appraisal is confirmed by the fact that the computers imported for the Free Universities of Brussels have also been used for administrative purposes. Furthermore, of the 13 Cyber computers hitherto imported into France only four are used mainly for research, six are used for technical administration and for scientific calculations whilst three are used for various purposes, including accounting, invoicing and salaries.

29 In order to appraise these additional arguments of the Commission the relevant Community provisions cited above should be recalled. Apart from the distinction between scientific research and work in the field of advanced technology, which the Commission has indicated but has entirely failed to clarify, it does not appear that those arguments preclude the recognition of the computers in question as apparatus "mainly ... suited to scientific activities" (Article 3 of Regulation No 1798/75) or "which make it possible to obtain high-level performances above those normally required for industrial or commercial use" (Article 5 of Regulation No 2784/79).

30 With regard to the examination of the general uses of an apparatus of that type which is prescribed by Article 5 of Regulation No 2784/79 in cases

where it is not possible to establish clearly on the basis of the objective technical characteristics of the imported apparatus whether it is to be regarded as a scientific instrument or apparatus, it should be recalled that the examination must cover the Community as a whole and not merely one Member State. In addition, according to the article, it is sufficient, in order to establish the scientific nature of the equipment, that the examination should show "that the instrument or apparatus in question is used mainly for scientific purposes".

31 It must therefore be concluded that neither the statement of the reasons on which the decision at issue in based nor the Commission's arguments before the Court have made it possible for the Court to find that when the Commission adopted the decision it applied clear criteria which were in accordance with the Community regulations and that in doing so it had sufficient regard for the particular objective characteristics of the two computers in question.

32 For that reason the decision adopted by the Commission should be declared void and the matter should be referred back to the Commission for reconsideration.

Costs

33 According to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Declares that Commission Decision 81/692/EEC of 10 August 1981 establishing that the apparatus described as "Control Data-Cyber 170-720; Cyber 170-750" may not be imported free of Common Customs Tariff duties (Official Journal, L 252, p. 36) is void;**

2. Orders the Commission to pay the costs.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 17 March 1983.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 3 FEBRUARY 1983

My Lords,

Control Data Belgium NV SA ("the applicant") is a wholly-owned subsidiary of Control Data Corporation, an American company which with its affiliates manufactures computers. The applicant has the exclusive right to import those computers into Belgium for re-sale or leasing. In 1980 the Université Libre de Bruxelles and the Vrije Universiteit Brussel agreed to hire two computers, known respectively as Control Data-Cyber 170-720 and 170-750, from the applicant for what was considered to be their normal useful life.

An application was made by the universities on 6 August 1980 to the Belgian customs authorities for these two computers (between which no distinction is made for present purposes) to be admitted free of duty pursuant to Council Regulation (EEC) No 1978/75 (Official Journal, L 184 of 15 July 1975, p. 1, as amended by Regulation (EEC) No 1027/79 (Official Journal, L 134 of 31 May 1979, p. 1) and Commission Regulation No 2784/79 (Official Journal, L 318 of 13 December 1979, p. 32). The Belgian authorities were unable to decide whether these computers were scientific instruments or apparatus or whether there existed instruments or apparatus of equivalent scientific value currently manufactured in the Com-