REPORT FOR THE HEARING
in Case C-218/89 *

I — The relevant Community provisions

The Combined Nomenclature in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (Official Journal 1987 L 256, p. 1) defines Heading 9030 as covering 'oscilloscopes, spectrum analysers and other instruments and apparatus for measuring or checking electrical quantities . . . ; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations'. In particular the heading covers the following:

(i) instruments and apparatus for measuring or detecting ionizing radiations;

(ii) cathode-ray oscilloscopes and cathode-ray oscillographs;

(iii) other instruments and apparatus, for measuring or checking voltage, current, resistance or power, without a recording device;

(iv) other instruments and apparatus, specially designed for telecommunications (for example, cross-talk meters, gain measuring instruments, distortion factor meters, psophometers);

(v) other instruments and apparatus: where they are without a recording device and are not intended for use in civil aircraft, the latter are classified in subheading 9030 81 90.

The Combined Nomenclature annexed to Regulation No 2658/87 also included a subheading 8471 20 covering 'digital automatic data-processing machines, containing in the same housing at least a central processing unit and an input and output unit, whether or not combined'. According to Note 1(m) on Section XVI, the section in which subheading 8471 20 appears, that section does not cover 'Articles of Chapter 90'.

II — Facts and procedure

1. The Oberfinanzdirektion Berlin issued to Shimadzu Europa GmbH (hereinafter referred to as 'Shimadzu') six binding customs tariff rulings relating to apparatus described by Shimadzu as 'data processors (data-processing machines)' or 'computer incorporated' machines. According to the product description, four of the pieces of apparatus each consist of a data processor with a control panel, processor, converter, electrical interfaces and electronic components and a printer/plotter linked to the device by cable, whilst the other two

* Language of the case: German.

pieces of apparatus each consist of an integrator with control panel, central processor, converter, printer/plotter, electrical interfaces and electronic components. According to the description in the customs tariff rulings, all the pieces of apparatus are used to measure electrical signals from external analysers and convert them into digital signals which are compared with pre-programmed data and further processed.

The Oberfinanzdirektion classified the products as 'apparatus for measuring electrical quantities with a recording device, not for use in aircraft' under subheading 9030 81 90 of the Combined Nomenclature.

Following unsuccessful objections to the Oberfinanzdirektion, Shimadzu appealed to the Bundesfinanzhof for the annulment of the tariff rulings and to have the apparatus classified under subheading 8471 20 of the Combined Nomenclature. It claimed that the apparatus is used in chromatography. The detectors used in chromatography detect as analytical results physical data which are fed into the apparatus to be classified in the form of a particular electrical voltage and digitalized in its processor. The central processing unit processes the data using pre-programmed mathematical formulae. In processing the signals it is not the absolute value of the electrical transfer which counts but the change in the physical data over time. The digitalized data are placed in intermediate storage in the write/read storage unit. Because it operates in that way, the apparatus is not suitable for the measurement of an electrical quantity, since the electrical quantity, voltage, is used merely to transfer the physical data which are actually of interest. The pieces of apparatus should be classified under subheading 8471 20 of the Combined Nomenclature, since they possess a central processing unit, an input unit and an output unit plus a write/read storage unit and hence satisfy all the criteria for such classification.

2. In its order for reference, the Bundesfinanzhof inclines to the view that the pieces of apparatus in question cannot be classified in Heading 9030. That heading covers only apparatus for 'measuring', that is to say apparatus intended to measure certain quantities and indicate the values. The mere fact that an apparatus operates on the basis of a measurement technique does not cause it to be a measurement apparatus. The pieces of apparatus in question do indeed measure electrical quantities, but they are not intended to indicate those quantities, that is to say to 'measure'.

However, the Bundesfinanzhof notes that in Regulation (EEC) No 2334/83 of 11 August 1983 (Official Journal 1983 L 224, p. 14) and Regulation (EEC) No 1368/87 of 18 May 1987 (Official Journal 1987 L 130, p. 5) concerning the classification of goods under subheading 90.28 A II (a) of the Common Customs Tariff the Commission decided that pieces of apparatus comparable to those in question here were to be classified as 'apparatus for measuring electrical quantities' on the grounds that 'the comparison of analytical results (converted to electrical quantities with pre-programmed data) constitutes a measuring operation'. Thus the term 'measurement', according to the interpretation of the Commission, does not include

indication of the magnitude measured. It follows, according to the Bundesfinanzhof that Regulations Nos 2334/83 and 1368/87, as well as Commission Regulation (EEC) No 646/89 of 14 March 1989 replacing the codes established on the basis of the Common Customs Tariff nomenclature in force on 31 December 1987 with those established on the basis of the combined nomenclature in certain regulations concerning the classification of goods (Official Journal 1989 L 71, p. 20), will be invalid if the term 'measurement' in Heading 9030 of the Combined Nomenclature has the meaning which the Bundesfinanzhof inclines to ascribe to it.

3. Accordingly, by order of 16 June 1989, the Bundesfinanzhof stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is Heading 9030 of the Combined Nomenclature to be interpreted as covering *inter alia* microprocessor-controlled analysis apparatus for chromatography whose characteristics are as described in this request for a preliminary ruling?'

The Bundesfinanzhof's order was received at the Court Registry on 13 July 1989.

4. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Commission of the European Communities, represented by Jörn Sack, Legal Adviser, assisted by Renate Kubicki, official of the Ministry of Justice of the Federal Republic of Germany, seconded to the Commission's Legal Department in the context of the exchange scheme with national civil servants.

5. On 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.

6. By decision of 13 June 1990 the Court assigned the case to the Third Chamber.

III — Summary of written observations submitted to the Court

Only the Commission has submitted written observations.

The Commission points out that the question is whether microprocessor-controlled analysis apparatus for chromatography is to be regarded as 'instruments and apparatus for measuring or checking electrical quantities' falling within Heading 9030 of the Combined Nomenclature.

According to the Commission that question should be answered in the affirmative if one follows the interpretation of tariff subheading 90.28 A II (a) ('. . . other apparatus for measuring electrical quantities') of the Common Customs Tariff in force until 31 December 1987 given by the Commission itself in Regulations Nos 2334/83, 1368/87 and 646/89 and in Regulation (EEC) No 2054/83 of 20 July 1983 on the classification of goods within subheading 90.28 A II (a) of the Common Customs Tariff (Official Journal 1983 L 202, p. 7) and in the decision on the tariff classification of goods published in Official Journal 1986 C 102, p. 5.

However, the Commission is uncertain whether its legal view can be maintained in the light of the judgment of the Court of Justice in Case 19/88 *ICT and Others* v *Direction général des douanes et droits indirects* [1989] ECR 577. In that judgment the Court ruled that only apparatus whose function was to measure electrical quantities was to be regarded as 'apparatus for measuring electrical quantities' and that category did not include apparatus which performed other functions (namely in Case 19/88, checking electronic components) even if, to that end, it determined and measured electrical quantities.

The Commission points out that the pieces of apparatus at issue in the main proceedings essentially carry out measurement of electrical quantities, but do not merely display the electrical quantities measured; in fact they operate by recording (and thus measuring) electrical signals according to their intensity and then by comparing those signals with memorized values in order to evaluate them. According to the judgment in Case 19/88, that would suffice in this instance to place them outside the category of measuring instruments.

The Commission, while pointing out that the interpretation which it had hitherto adopted was cogent, presumes that the Court of Justice will follow its earlier judgment, since the structure and wording of the Combined Nomenclature is no different from that of the former nomenclature to which the judgment in Case 19/88 related.

Clearly the judgment in Case 19/88 was concerned with distinguishing between measuring instruments and instruments for checking whereas the present case is concerned with determining whether the pieces of apparatus in question may not subsidiarily be regarded as apparatus for checking electrical quantities. But according to the Commission the spirit of the Court's judgment is to construe as 'checking instruments' only those whose function is simply to check the existence of electrical quantities and possibly to record their characteristics. The pieces of apparatus at issue in the main proceedings use electrical signals and quantities to determine phenomena other than those relating to electrical quantities, in particular relating to the composition of substances.

The Commission concludes that the Court will probably give an answer in the negative. Once the Court has ruled, the Commission, for its part will not fail to take the necessary consequential steps in the exercise of the powers conferred on it.

F. Grévisse
Judge-Rapporteur