JUDGMENT OF THE COURT (First Chamber)
21 January 1987 *

In Case 13/84

Control Data Belgium Inc., 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, Advocate of the Scots Bar, instructed by Messrs Oppenheimer, Wolff, Foster, Shepard and Donnelly, Attorneys-at-law, Minneapolis and St. Paul, Minnesota, USA, and 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 Jörn Sack, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION under Article 173 of the EEC Treaty for a declaration that Decision No 83/521/EEC of 12 October 1983 establishing that the apparatus described as 'Control Data — Cyber 170-720 and Cyber 170-750' may not be imported free of Common Customs Tariff duties is void,

THE COURT (First Chamber)

composed of: R. Joliet, President of the Chamber, G. Bosco and T. F. O'Higgins, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

having regard to the Report for the Hearing and further to the hearing on 23 January 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 June 1986,

* Language of the Case: English.

gives the following

Judgment

1 By an application lodged at the Court Registry on 10 January 1984 Control Data Belgium Inc. brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 83/521/EEC of 12 October 1983 establishing that the apparatus described as 'Control Data — Cyber 170-720 and Cyber 170-750' may not be imported free of Common Customs Tariff duties (Official Journal 1983, L 293, p. 24) is void.

2 This is the second time that the Court has had to consider whether the apparatus known as 'Control Data — Cyber 170-720 and 170-750' may be classified as 'scientific instruments and apparatus' within the meaning of Article 3 (3) 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 1975, L 184, p. 1), as amended by Council Regulation (EEC) No 1027/79 of 8 May 1979 (Official Journal 1979, L 134, p. 1). In its judgment of 17 March 1983 (Case 294/81 *Control Data Belgium NV SA* v *Commission* [1983] ECR 911) the Court held that the Commission, in adopting Decision No 81/692/EEC of 10 August 1981 establishing that the apparatus in question could not be imported free of Common Customs Tariff duties (Official Journal 1981, L 252, p. 36), had failed to apply clear criteria which were in accordance with the Community rules and that it had not taken sufficient account of the objective technical characteristics of the two computers in question. The Court also stated that it was not established that the Commission had applied a classification criterion based on the difference between hardware and software, although such a difference might be a valid criterion. Consequently, the Court declared the contested decision void and referred the matter back to the Commission for reconsideration.

3 Pursuant to that judgment the Commission adopted Decision No 83/521 on 12 October 1983, in which it stated once again that the computers in question could not be imported free of Common Customs Tariff duties.

4 That is the decision which Control Data Belgium Inc., the successor of Control Data Belgium NV SA, is requesting the Court to declare void. It does so on three grounds:

(i) the decision was adopted out of time;

(ii) the Commission's examination of the objective technical characteristics of the computers in question was inadequate; and

(iii) the Commission's examination of the general uses to which the instruments are put in the Community was erroneous.

5 Reference is made to the Report for the Hearing for the relevant Community provisions and the arguments of the parties, which are mentioned or disussed hereinafter only in so far as is necessary for the reasoning of the Court.

The Commission's alleged failure to adopt the decision in due time

6 The applicant relies on Article 7 (7) of Commission Regulation (EEC) No 2784/79 of 12 December 1979 laying down provisions for the implementation of Council Regulation No 1798/75 (Official Journal 1979, L 318, p. 32), which provides as follows: 'If, on the expiry of a period of six months from the date on which the application was received by the Commission, the latter has not adopted any decision under paragraph 6, the instrument or apparatus in question shall be deemed to fulfil the conditions required for duty-free admission'. The applicant emphasizes that, since Commission Decision No 83/521 was adopted on 12 October 1983, it was adopted nearly seven months after the Court delivered its judgment in the first Control Data case (17 March 1983). Consequently, it maintains that the decision must be declared void inasmuch as the Commission failed to adopt it within six months of that judgment.

7 That argument cannot be accepted. As was pointed out by the Commission, Belgium requested the Commission, by a letter dated 7 April 1983, to institute the procedure provided for by Article 7 of Regulation No 2784/79. After the Commission had consulted a group of experts it adopted the decision definitively on 7 October 1983, that is to say six months after the date on which it received the new Belgian request. Consequently, it must be held that Decision No 83/521 was adopted within the period laid down by Article 7 (7) of Regulation No 2784/79 and hence that it was not adopted out of time.

Substance

8 In essence the applicant puts forward two submissions:

(i) that the assessment of the objective technical characteristics was mistaken; and

(ii) that the examination of the general uses to which the instruments in question are put in the Community was erroneous.

9 With regard to the examination of the general uses to which such apparatus is put, provided for by Article 5 of Regulation No 2784/79, it must be stated that such an examination is to be carried out only as an alternative, where the objective technical characteristics of the imported apparatus are insufficient to clearly establish its nature. It follows that, if the Commission failed to examine the objective technical characteristics of the apparatus in question correctly, it could not base its decision on the second ground concerning the use of such apparatus in industry.

10 With regard to the objective technical characteristics of the computers, the applicant maintains that they were incorrectly assessed by the Commission. In particular it states that there was a manifest error in relation to the computers' ability to handle long words. In the Cyber computers the smallest possible unit of information capable of being processed is a 'word' of 60 bits; this makes them primarily suitable for scientific use, particularly since, when they operate with double precision, even words of 120 bits can be recorded. Words of that length enable complex scientific calculations to be carried out more rapidly and efficiently. In addition, the applicant considers that the statement in the fifth recital in the preamble to the contested decision, according to which the minimum length of the words which may be handled (and also floating point arithmetic) 'are in no way specific to the computers in question but are found in all advanced computers', is inaccurate since only the type of computer manufactured by Control Data is orientated towards words of 60 bits.

11 In the course of the proceedings the Commission accepted that a word length of 60 bits, giving 14-decimal-digit accuracy from single length operation, is a distinctive feature of the Cyber computers and clearly shows that the latter were designed for high-precision numerical computation. In addition, the Commission stated at the hearing that it had failed to appreciate the applicant's argument regarding the length of the words that could be handled and that, consequently, it

had not dealt with it in the contested decision. It also observes that the inability of the hardware to handle units of less than 60 bits could be overcome by the use of appropriate software.

12 It must be pointed out in the first place that, as the Court has already stated in its judgment of 27 September 1983 (Case 216/82 *Universität Hamburg* v *Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771), it may not find fault with the contents of a decision which the Commission has adopted in conformity with the opinion of the Committee on Duty-Free Arrangements, save in the event of manifest error of fact or law or misuse of power.

13 It is clear from the wording of the fifth recital in the preamble to the contested decision that, as the Commission itself has recognized, it proceeded on an erroneous basis by failing to take proper account of the applicant's argument concerning the 60-bit word length. It was only *ex post facto* that the Commission raised the point that the use of appropriate software largely enabled that obstacle to commercial use to be overcome.

14 The Commission also stated in the fifth recital that 'neither the use of individual functional units nor the performance of complex operations at high speed can be considered as being requirements specific only to scientific computation'. In addition, at the hearing, it contested the applicant's argument that the ability to handle long words constituted an advantage exclusively or mainly in relation to scientific activities and contended that complex numerical functions also had to be performed in numerous industries such as the motor and aerospace industries. The Commission seems therefore to have adopted the view that apparatus cannot be suitable for scientific purposes if it is capable of use for both research and industrial purposes.

15 In that regard the Court has already held in its judgment of 29 January 1985 (Case 234/83 *Gesamthochschule Duisburg* v *Hauptzollamt München-Mitte* [1985] ECR 327) that the concept of the scientific nature of instruments or apparatus is not to

be interpreted restrictively. That follows from the objectives of Regulation No 1798/75 as stated, in particular, in the first and second recitals in the preamble thereto. The regulation was intended to favour, not hamper, the implementation of the Florence Agreement of 1952 on the importation of educational, scientific and cultural materials, drawn up under the auspices of the United Nations Educational, Scientific and Cultural Organization.

16 The criterion of being 'mainly or exclusively suited' provided for by Article 3 (3) of Regulation No 1798/75, as amended by Regulation No 1027/79, therefore requires only that the instrument or apparatus must be primarily suitable for scientific activities and does not exclude the possibility that the instrument or apparatus might also be suitable, secondarily, for other purposes, such as, for example, industrial use.

17 Consequently, the Commission adopted an approach which was too narrow by proceeding on the basis that the mere fact that a computer was designed for handling long words and was therefore capable of being used in certain industrial undertakings was sufficient to prevent it from qualifying for duty-free admission. It should have considered whether the computers were primarily suitable for scientific activities in view of the unusual length of the words which they could handle and their ability to carry out complex operations at high speed and, if they were, it should have admitted them duty-free even if they could also be used in industrial undertakings.

18 Consequently, without it being necessary to give a ruling on the other grounds of invalidity put forward by the applicant, it must be concluded that Decision No 83/521 should be declared void.

Costs

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

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Declares that Commission Decision No 83/521 of 12 October 1983 establishing that the apparatus described as 'Control Data — Cyber 170-720 and 170-750' may not be imported free of Common Customs Tariff duties (Official Journal 1983, L 293, p. 24) is void;

(2) Orders the Commission to pay the costs.

Joliet Bosco O'Higgins

Delivered in open court in Luxembourg on 21 January 1987.

P. Heim
Registrar

R. Joliet
President of the First Chamber