to the criteria set out in Note 3 A (a) to Chapter 84 of the Common Customs Tariff, are automatic data processing machines within the meaning of tariff heading 84.53 even if they are programmable by a method that is more simple to use than, for example, the programming language BASIC.

REPORT FOR THE HEARING
delivered in Case 234/87 *

I — Legal background

1. The Common Customs Tariff which is reproduced as an annex to Regulation (EEC) No 950/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 275), as amended most recently by Council Regulation (EEC) No 3400/84 of 27 November 1984 (Official Journal 1984, L 320, p. 3) includes in heading 84.52 *inter alia* electronic calculating machines and in heading 84.53 *inter alia* automatic data-processing machines.

2. Chapter 84 of the Common Customs Tariff contains an explanatory note worded as follows:

'3. (A) For the purposes of heading No 84.53, the expression "automatic data-processing machines" means:

(a) Digital machines having storages capable of storing not only the processing program or programs on 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 and which has a capacity at least sufficient to store those parts of the processing and translating programs and the data immediately necessary for the current processing run. 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.'

3. It should also be noted that the Commission, which is empowered by 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 (Official Journal, English Special Edition 1969 (I), p. 12), adopted Regulation (EEC) No 1935/84 of 4 July 1984 on the classification of goods falling within subheading 84.53 B of the Common Customs Tariff (Official Journal

* Language of the case: German.

1984, L 180, p. 10) whereby it classified the electronic machine known as a 'pocket computer' not in subheading 84.52 A but in subheading 84.53 B. The criterion adopted for that classification was based on the nature of the programming language: machines falling within subheading 84.52 A, although programmable, do not use during their employment any data-processing language; however, machines having memories capable of storing a program for translating the formal programming language, such as BASIC, into machine language and which are capable of modifying the implementation of the program during the process run fulfil the conditions set out in Note 3 A (a) of Chapter 84 and are consequently classified under subheading 84.53 B as automatic data-processing machines.

II — Facts and procedure

4. The applicant in the main proceedings, hereinafter referred to as 'Casio', imports programmable calculators, mainly from Japan. These machines, which are made up of a keyboard with 50 keys for figures, letters (lower and upper case) fundamental operations, operating mode selection etc., a printed circuit, a liquid crystal display, an interface and two batteries as power supply, are capable of carrying out the four basic operations and performing multiple functions and mathematical calculations. They can also carry out simple calculations and more complex operations by means of a program entered by means of keyed-in commands. Their dimensions are 11 × 74 × 144 mm and 9.6 × 71 × 141.2 mm respectively.

5. In September 1984 Casio applied to the Oberfinanzdirektion for binding customs tariff rulings for four types of machine described as programmable calculators (Casio programming calculator FX-501P, Casio programming calculator FX-502P, Casio programmable calculator FX-601P and Casio programmable calculator FX-602P).

6. By rulings of 9 and 15 November 1984 the Oberfinanzdirektion classified the goods in question under subheading 84.52 A (calculating machines) of the Common Customs Tariff. Casio brought an administrative appeal against those rulings, submitting that the goods should be classified under tariff subheading 84.53 B (automatic data-processing machines) of the Common Customs Tariff. The Oberfinanzdirektion rejected those appeals on the ground that the calculators could only be classified under tariff heading 84.53 of the Common Customs Tariff if they fulfilled all the conditions set out in Note 3 A (a) of Chapter 84 of the Common Customs Tariff. That was not the case in this instance since calculators with no advanced formal programming language such as BASIC could not translate a processing program written in a formal programming language into machine language by means of their own translating programs.

7. The parties in the main proceedings have produced technical experts' reports, the authors of which agree on the fact that at least the Casio FX-602P fulfils the conditions of Note 3 A (a), although they differ on other points. However, the Oberfinanzdirektion considers that that fact is not decisive because in its view that note does not contain an exhaustive definition of automatic data-processing machines. It takes the view that in addition to the requirements set out in the note reliance must be placed on the 'generally accepted view in the trade' and 'technical usage'.

8. Casio contended that since the two experts confirmed that the models at issue in the dispute met the conditions set out in Note 3 A (a) of Chapter 84 of the Common Customs Tariff, any further inquiry was superfluous. Note 3 contained a legal definition which was binding. Since tariff heading 84.53 of the Customs Tariff was the most specific heading within the meaning of point 3 (a) of the General Rules for the Interpretation of the Nomenclature of the Common Customs Tariff, the machines in question must be classified under that heading.

9. The Bundesfinanzhof, before which the case was brought, took the view that neither the Common Customs Tariff nor the theory and practice of computer science offered any specific criteria to enable the distinction to be drawn between calculating machines and automatic data-processing machines. In the view of the national court the meaning and purpose of the distinction in the Customs Tariff were also not very clear. Although in the abovementioned Regulation No 1935/84 of 4 July 1984 the Commission took the view that the programming language used (BASIC) was conclusive for the tariff classification of a pocket computer, the experts' reports produced in this case cast doubt as to whether the criterion used by the Commission to make the distinction was to be the sole one. Depending on the circumstances, other criteria could be relied on, such as the machine's characteristic functions, its normal use, the way in which it was normally described in the trade, the manner in which the machines were operated, or their design and the functional orientation of their programming language. The Bundesfinanzhof continued: 'Finally, consideration might also be given to the possibility that in the light of the rapid development in the area of computers the statement in the explanatory notes to the effect that programmable calculators are also to be classified as calculating machines under tariff heading 84.52 should be regarded as no longer consistent with the wording of the Common Customs Tariff' and asks whether 'all electronic calculating machines which are programmable should not be classified as automatic data-processing machines'.

10. Taking the view that the dispute raised a question concerning the interpretation of the relevant Community rules the Bundesfinanzhof decided, by Order of 30 April 1987 and pursuant to Article 177 of the EEC Treaty, to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'Where is the distinction to be drawn between the terms "calculating machines" in tariff heading 84.52 and "automatic data-processing machines" in tariff heading 84.53 of the Common Customs Tariff?

Are electronic devices which are intended principally for calculating but also for other operations and are programmable by a method which is more simple to use than, for example, the programming language BASIC calculating machines covered by tariff heading 84.52 or automatic data-processing machines covered by tariff heading 84.53 of the Common Customs Tariff?'

11. The order of the Bundesfinanzhof was registered at the Court on 30 July 1987.

12. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations

were submitted on 28 October 1987 by the Commission of the European Communities, represented by its Legal Adviser, Jörn Sack, acting as Agent.

13. 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. Pursuant to Article 95(1) and (2) of the Rules of Procedure the Court decided to assign the case to the Fourth Chamber.

III — Observations submitted to the Court

14. Only the Commission submitted observations on the questions raised in this case. It relies on General Rule No 1 for the interpretation of the nomenclature of the Common Customs Tariff which provides that for legal purposes classification is determined according to the terms of the headings and any relative section or chapter notes and, providing the headings or notes do not otherwise require, according to the general rules.

15. In the Commission's view, the wording of the tariff headings is of no assistance in resolving the question in this case and the distinguishing criteria suggested by the Bundesfinanzhof do not seem to be appropriate for tariff classification if their purpose is to derogate from a sufficiently clear provision. Consequently, the Commission takes the view that the decisive factor in distinguishing the two tariff headings is Note 3 A (a) of Chapter 84 of the Common Customs Tariff, but that that is not sufficient to resolve the question submitted in this case.

16. In order to interpret that note the very rapid technical development in this field and the fact that the customs provisions cannot keep pace with that development must be borne in mind. Consequently, the Commission considers that in order to do justice to its purpose Note 3 A (a) should not be interpreted rigidly, adhering too strictly to its wording, but dynamically in order to allow adaptation to technical progress. The criteria set out in that provision are still decisive but the classification as an automatic data-processing machine must guarantee a certain level of technical progress in relation to other machines.

17. In this respect the Explanatory Notes on the Brussels Nomenclature are particularly appropriate as an aid for interpreting that provision. It is apparent from Section A on heading 84.52 of those explanatory notes that not every programmable electronic pocket calculator must automatically be considered to be an automatic data-processing machine. Although the calculator in question fully satisfies the criterion in Note 3 A (a) of Chapter 84 (program for translating the formal programming language into machine language) it uses an extremely simple programming language which allows only very simple programs (arithmetical functions, small music or learning programs) to be stored in the machine. In the Commission's view, such simple programming language, which requires only a very small memory, cannot, in the context of the dynamic interpretation which must be given to Note 3 A (a), be regarded as sufficient to meet the criteria which that provision impliedly imposes as regards the level of technical progress.

18. The argument put forward by the expert relied on by the applicant in the main proceedings to the effect that the programming language BASIC (which was regarded as the decisive factor in Regulation No 1935/84) is not an advanced programming language either, is not convincing. Even if that assertion were correct — which in the Commission's view is by no means certain — the result would still be that Regulation No 1935/84 interpreted Note 3 A (a) of Chapter 84 too literally. Machines with a language which is even simpler than BASIC and which are technically of a lower category cannot, in the Commission's view, be regarded as automatic data-processing machines.

19. Furthermore, the development of such simple programming languages was not foreseeable at the time when Note 3 A (a) was adopted, but a continual amendment of the wording of certain headings of the Common Customs Tariff to take account of technical progress, however desirable it might be, would run counter to the principle of legal certainty.

20. Consequently, the Commission proposes that the question submitted by the Bundesfinanzhof should be answered as follows:

'The distinction between heading 84.52, calculating machines, and heading 84.53, automatic data-processing machines, of the Common Customs Tariff should be made on the basis of Note 3 A (a) of the Common Customs Tariff. However, in interpreting that provision account is to be taken of the speed of technical progress in this field, with the result that pocket calculators which use extremely simple programming languages and which therefore, in the present state of the art, need only a very limited memory cannot be regarded as automatic data-processing machines for the purposes of that provision.'

C. N. Kakouris
Judge-Rapporteur