JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

30 September 2003 *

In Case T-243/01,

Sony Computer Entertainment Europe Ltd, established in London (United Kingdom), represented by P. De Baere, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Wainright, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Regulation (EC) No 1400/2001 of 10 July 2001 concerning the classification of certain goods in the Combined Nomenclature (OJ 2001 L 189, p. 5); corrigendum published in the German, English, Finnish, Portuguese and Swedish editions (OJ 2001 L 191, p. 49),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 13 February 2003,

gives the following

Judgment

Legal framework

General

1 For the purposes of applying the Common Customs Tariff and to facilitate the preparation of statistics on the Community's external trade and other Community policies on the import and export of goods, the Council, through the adoption of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256,

p. 1, hereinafter 'the Combined Nomenclature Regulation'), established a complete nomenclature of goods imported into and exported out of the Community (hereinafter 'the Combined Nomenclature' or 'CN'). That nomenclature is set out in Annex I to that regulation.

2 The Combined Nomenclature is based on the Harmonised Commodity Description and Coding System (hereinafter 'the Harmonised System' or 'HS'), to which it is identical as regards the headings and six-digit subheadings, only the seventh and eighth digits forming subdivisions specific to the CN. The Harmonised System was established under the auspices of the World Customs Organisation ('WCO'), the former Customs Cooperation Council.

3 In order to ensure uniform application of the Combined Nomenclature in the Community, the Commission may adopt certain measures, which are enumerated in Article 9 of the Combined Nomenclature Regulation. Those measures include the possibility for the Commission to adopt regulations for the classification of specific goods in the Combined Nomenclature (Article 9(1)(a), first indent, hereinafter 'the customs classification regulation').

4 In order to provide further explanations on the application of the Harmonised System, the WCO regularly publishes Harmonised System Explanatory Notes (hereinafter 'HSEN'). Likewise, in order to ensure application of the Combined Nomenclature, the Commission draws up Combined Nomenclature Explanatory Notes (Article 9(1)(a), second indent, hereinafter 'CNEN'). Those notes, which are published regularly in the Official Journal, do not replace the HSEN, but rather should be viewed as complementary to those notes and consulted together with them.

General rules for the interpretation of the Combined Nomenclature

5 The general rules of interpretation in Chapter A of Part I of the Combined Nomenclature lay down the principles according to which goods are to be classified in the Combined Nomenclature. General rule 1 provides: '[T]he titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions'.

6 Rule 3 of the 'following provisions' provides:

'3.When by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

...

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable.

...'

7 Rule 6 provides:

'[F]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and *mutatis mutandis* to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.'

Wording of the headings and subheadings and chapter and section notes

Subheading 8471 50 90

8 At the time Commission Regulation (EC) No 1400/2001 of 10 July 2001 concerning the classification of certain goods in the Combined Nomenclature (OJ 2001 L 189, p. 5, hereinafter 'the contested regulation') was adopted, the wording of the headings and subheadings corresponding to CN Code 8471 50 90 was as follows:

'8471 Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data into data media in code form, machines for processing such data, not elsewhere specified or included

8471 50	Digital processing units other than those of Subheading 8471 41 or 8471 49, whether or not containing in the same housing one or two of the following types of unit: storage units, input units, output units:
8471 50 10	For use in civil aircraft
8471 50 90	Other'.

9 Heading 8471 is part of Chapter 84, entitled 'Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof'. This chapter in turn is part of Section XVI of the Combined Nomenclature, entitled 'Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers and parts and accessories of such articles'. In accordance with Note 1(p) to Section XVI, that 'section does not cover... articles of Chapter 95'.

10 Chapter 84 begins with a series of notes, subheading notes and additional notes. Note 5 therein states:

'(A) For the purposes of heading No 8471, the expression "automatic data-processing machines" means:

(a) digital machines, capable of

(1) storing the processing program or programs and at least the data immediately necessary for the execution of the program;

(2) being freely programmed in accordance with the requirements of the user;

(3) performing arithmetical computations specified by the user; and

(4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;

...

(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.'

Subheadings 8524 39 10 and 8524 39 90

11 At the time the contested regulation was adopted, the wording of the headings and subheadings corresponding to CN Codes 8524 39 10 and 8524 39 90 was as follows:

'8524	Records, tapes and other recorded media for sound or other similarly recorded phenomena, including matrices and masters for the production of records, but excluding products of Chapter 37
8524 31	Discs for laser reading systems
...	
8524 39	Other
8524 39 10	For reproducing representations of instructions, data, sound, and image recorded in a machine readable binary form, and capable of being manipulated or providing interactivity to a user, by means of an automatic data-processing machine
8524 39 90	Other'.

12 Chapter 85 is entitled: 'Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles'. Like Chapter 84, it is also part of Section XVI.

Subheading 9504 10 00

13 At the time the contested regulation was adopted, the wording of the heading and subheadings corresponding to CN Code 9504 10 00 was as follows:

'9504	Articles for funfair, table or parlour games, including pin-tables, billiards, special tables for casino games and automatic bowling alley equipment
9504 10 00	Video games of a kind used with a television receiver'.

14 Heading 9504 is part of Chapter 95 of Section XX of the Combined Nomenclature. Section XX is entitled 'Miscellaneous manufactured articles'. Chapter 95 is entitled 'Toys, games and sports requisites; parts and accessories thereof'.

15 Lastly, the HSEN to heading 9504 provides that the following are not covered by that heading:

'...

(b) machines and apparatus fulfilling the conditions of Note 5(A) to Chapter 84, whether or not capable of being programmed for video games (heading 8471)...'.

The Binding Tariff Information

16 Under Articles 11(1) and 12 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1, hereinafter 'the Customs Code'), economic operators may obtain Binding Tariff Information (hereinafter 'BTI') from the customs authorities. This is information on the customs classification of given goods which bind the authorities *vis-à-vis* the applicant for/holder of the BTI.

17 Article 12 of the Customs Code provides as follows:

...

'5. [BTI] shall cease to be valid:

(a) where a Regulation is adopted and the information no longer conforms to the law laid down thereby;

...

6. The holder of [BTI] which ceases to be valid pursuant to paragraph 5(b) or (c) may still use that information six months from the date of publication or notification provided that he concluded binding contracts for the purchases or

sale of the goods in question, on the basis of the binding information before that tariff measure was adopted. However, in the case of products for which an import, export or advance fixing certificate is submitted when customs formalities are carried out, the period of six months is replaced by the period of validity of the certificate.

In the case of paragraph 5 (a), the Regulation may lay down a period within which the previous subparagraph shall apply.'

Facts

Procedure in the United Kingdom

18 Sony Computer Entertainment Europe Ltd (hereinafter 'the applicant'), either directly or through its sister company Sony Logistics Europe N.V., is the sole importer of the PlayStation®2 into the Community.

19 On 28 August 2000, it applied for a BTI from HM Customs and Excise (the United Kingdom Customs authorities) for PlayStation®2 models SCPH-30003 and SCPH-30004. To that end, it proposed a classification under CN Code 8471 50 90 on the grounds that the PlayStation®2 satisfied all criteria listed in Note 5(A) to Chapter 84 of the Combined Nomenclature and that, in view of HSEN(b) to heading 9504 of the harmonised system, a classification under subheading 9504 10 was excluded.

20 On 19 October 2000, the United Kingdom customs authorities issued to the applicant BTI GB 105614503 classifying the PlayStation®2 under CN Code 9504 10 00. They based their decision on the finding that the PlayStation®2 was not freely programmable and therefore did not meet the conditions of Note 5 to Chapter 84 of the Combined Nomenclature.

21 On 22 November 2000, the applicant filed a request with the competent authorities for a formal departmental review of the BTI.

22 By letter of 5 January 2001, the reviewing officer informed the applicant that he had decided to maintain the BTI classification given under CN Code 9504 10 00. He based his decision on the finding that the PlayStation®2 was not capable of being freely programmed. He also informed the applicant that the Commission had become aware of the BTI issued for the PlayStation®2 and that the matter had been discussed at the 236th meeting of the Statistical Nomenclature Section of the Community Customs Code Committee (hereinafter 'the Nomenclature Committee') on 4 and 5 December 2000.

23 On 31 January 2001, the applicant appealed against the review decision to the VAT and Duties Tribunal (London). During the hearing on 30 May 2001, the United Kingdom customs authorities requested the Tribunal to stay the proceeding on the ground that the classification of the PlayStation®2 was being discussed at that precise moment by the Nomenclature Committee and that a decision was imminent. While this request was being considered by the Tribunal, the customs authorities informed the Tribunal that it had just received by fax a copy of the decision taken by the Nomenclature Committee. That decision was identical to the one contained in the Annex to the contested regulation. Although the Nomenclature Committee had classified the PlayStation®2 under CN Code 9504 10 00, the customs authorities decided not to oppose the appeal brought by the applicant, since the Nomenclature Committee had found in its decision that the PlayStation®2 could be freely programmed and that, therefore, the legal basis

underlying the contested decision, namely that the PlayStation®2 was not freely programmable, was invalid. In the light of the agreement between the parties, on 5 June 2001 the VAT and Duties Tribunal accordingly ordered that the appeal be allowed.

24 Following the appeal, the United Kingdom customs authorities amended BTI GB 105614503 by decision of 12 June 2001. It reclassified the PlayStation®2 under CN Code 8471 49 90 with effect from 19 October 2000.

Procedure before the Nomenclature Committee

25 Following the information from the United Kingdom customs authorities in November 2000, in January 2001 the applicant contacted the President of the Nomenclature Committee. He confirmed the discussions in the Committee on the classification of the PlayStation®2. In addition, in an e-mail of 9 February 2001, he informed the applicant that the classification of the PlayStation®2 was on the agenda of the next meeting of the Nomenclature Committee and that the applicant would be invited to attend to present its product.

26 At the 243rd meeting of the Nomenclature Committee, which took place in Brussels on 26 and 27 February 2001, the applicant demonstrated the PlayStation®2 and answered various questions put by Committee members. It also provided an extra copy of its submission concerning the classification of the PlayStation®2.

27 There was subsequent contact between the applicant and services of the Commission in order to draw up the decision on the classification of the PlayStation®2 and the accompanying CD-ROM.

The contested regulation

28 On 10 July 2001, the Commission adopted the contested regulation. The following day, the regulation was published in the Official Journal.

29 Article 1 of the contested regulation provides that: '[T]he goods described in column 1 of the annexed table are classified within the Combined Nomenclature under the CN Codes indicated in column 2 of the said table'. Article 2 of the regulation provides that BTI issued by the customs authorities of Member States 'which does not conform to the provisions of this Regulation... can continue to be invoked for a period of three months'. Lastly, Article 3 provides that the regulation is to enter into force on the 20th day following its publication in the Official Journal.

30 The Annex to the contested regulation comprises three columns. Column 1 contains the description of the goods, whilst column 2 indicates the tariff classification code applicable to the goods described in column 1. Column 3 gives the reasons for the classification.

31 In addition to a description of a liquid soap dispenser, column 1 of the Annex to the contested regulation contains the following goods description:

'An apparatus (console) presented in a box for retail sale, together with a controller module with connecting cable, a CD-ROM, a cable to connect the console to audio/video device and a power supply cable.

The console includes the following components:

— a central processing unit (CPU),

— a 32 Mbits DRAM main memory module,

— a digital versatile disk (DVD) drive,

— a graphics chip,

— 2 universal serial bus (USB) connector ports,

— 2 controller module ports,

— 2 memory card slots,

— an audio/video connector port (IEEE 1394),

— an optical digital output connector port.

Besides the controller module, several devices can be connected to the console such as a standard keyboard, a mouse, a television receiver, a data monitor or a printer.

A drive bay inside the console allows incorporation of a hard disk drive and an Ethernet adaptor.

The apparatus is capable of:

— processing dedicated software for playing video games,

— converting digital information from DVD video disks or audio CDs into video/audio signals for reproduction by television receivers or audio systems,

— being programmed in "YABASIC".

The controller module has several control buttons, which are mainly used for playing video games.

The CD-ROM includes the programming language "YABASIC" as well as several video games and videos.'

32 At the bottom of column 1 there is also a reference to a photograph annexed to the regulation. The relevant footnote at the bottom of the page states that '[T]he photographs are purely for information.' In addition to a liquid soap dispenser, the annexed photograph shows an apparatus on which the logo PlayStation®2 is clearly visible and the CD drive is open. A module port is connected to the apparatus.

33 Column 2 indicates that the apparatus corresponding to the description in paragraph 31 above is to be classified under CN Code 9504 10 00, whilst the accompanying CD-ROM is to be classified under CN Code 8524 39 90.

34 Column 3 gives the following reasons for the classification in column 2:

'Classification is determined by the provisions of General Rules 1, 3(b) and 6 for the interpretation of the Combined Nomenclature, note 6 to Chapter 85 and the wording of the CN Codes 8524, 8524 39 and 8524 39 90 as well as 9504 and 9504 10 00.

Of the various functions (including playing video games, playback of CD audio, DVD video, automatic data processing, etc.), playing video games gives the apparatus its essential character and determines classification under heading 9504 as a game console.'

Procedure after publication of the contested regulation

35 On 25 July 2001, the United Kingdom customs authorities sent the applicant a revocation decision whereby the applicant was informed that, pursuant to Article 3 of the contested regulation, BTI GB 105614503 would be revoked as from 31 July 2001 (hereinafter 'the revocation decision').

36 On 6 September 2001, the applicant submitted a request for a departmental review of the revocation decision. The applicant considered that the revocation decision was invalid inasmuch as it was made in application of an unlawful Community act, namely the contested regulation. The applicant requested the United Kingdom customs authorities to annul their revocation decision so that BTI GB 105614503 would maintain its full legal effects.

Procedure and forms of order sought

37 By application lodged at the Registry of the Court of First Instance on 3 October 2001, the applicant brought an action to have the contested regulation annulled.

38 The applicant claims that the Court should:

— declare the application admissible;

— annul the contested regulation;

— order the defendant to pay the costs.

39 The defendant contends that the Court should:

— declare the application inadmissible or, in any event, unfounded;

— order the applicant to pay the costs.

40 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, as a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, put written questions to the parties. The defendant and the applicant replied to those questions by letters of 14 and 15 January 2003, respectively.

41 At the hearing on 13 February 2003 the parties presented oral argument and replied to the questions put by the Court.

Law

Admissibility

Arguments of the parties

42 The applicant puts forward three distinct submissions aimed at establishing that its action meets the conditions of admissibility laid down in the fourth paragraph of Article 230 EC. First, it submits that the defendant has adopted, in the form of

a regulation, a decision addressed to it or a decision in the form of a regulation which is of direct and individual concern to it. Second, it submits that, even if the Court were to find the contested regulation to be a true regulation, it is of direct and individual concern to it. Lastly, it submits that its action should be found to be admissible because alternative remedies in the national courts are not adequate.

43 The defendant contends that all of the submissions relied on by the applicant in support of its contention that its action meets the admissibility criteria laid down in the fourth paragraph of Article 230 EC are unfounded and that therefore the application must be dismissed as inadmissible.

44 The defendant contends, first, that the contested regulation is indeed a true regulation because it determines in a general way the customs tariff classification of the goods described in column 1 of its Annex and it is applicable to all imports of the goods in question, without distinction as to the manufacturer or the importer, into all the Member States.

45 The defendant adds that its contention is confirmed by the case-law of the Court of Justice and the Court of First Instance, in particular the judgment in Case 40/84 *Casteels* v *Commission* [1985] ECR 667; and the orders in Case T-120/98 *Alce* v *Commission* [1999] ECR II-1395, and Case T-49/00 *Iposea* v *Commission* [2001] ECR II-163. In particular, the Court of First Instance has consistently held that customs classification regulations apply to an objectively-determined situation and entail legal effects for persons regarded in a general and abstract manner, including importers of products (see, in particular, *Iposea* v *Commission*, cited above, paragraph 24).

46 The defendant disputes the applicant's assertion that the detailed description of the goods in column 1 of the Annex to the contested regulation is incompatible

with its status as a regulation. It argues that the legal framework of customs classification regulations must be borne in mind, so that when the classification of an individual product is likely to raise a difficulty or is the subject of a discussion, the Commission, after submitting to the Customs Code Committee a draft of the measures to be taken, may, pursuant to Article 9 of the Combined Nomenclature Regulation, adopt a regulation on classification of that product. Although that regulation concerns a specific product, it is of general application, as it does not apply to any one specific operator or any individual operation. The defendant contends that such a regulation applies in the first instance to products which are identical to the products examined by the Customs Code Committee, that is to say, products corresponding to the general description in the Annex to the classification regulation.

47 The defendant acknowledges that in the present case, as indeed in others, the contested regulation was adopted after the Nomenclature Committee had examined the applicant's product, so that, in that sense, the regulation in effect classifies the PlayStation®2. It argues, however, that the contested regulation is not 'aimed at' the PlayStation®2, since it does not apply to that product specifically, but rather to all products corresponding to the description in the Annex. It thus contends that, even if the applicant is currently the sole importer of the PlayStation®2, this does not preclude other importers of identical products from being affected by that regulation. It adds that, according to its information, a BTI has been issued by the United Kingdom customs authorities to another company for the product PlayStation®2.

48 The defendant also objects to the applicant's reference to Commission Regulation (EC) No 1508/2000 of 11 July 2000 concerning the classification of certain goods in the Combined Nomenclature (OJ 2000 L 174, p. 3), under which a product competing with the PlayStation®2 was classified under CN Code 9504 10 00. It states that, by the applicant's own admission, that classification concerned a product 'fundamentally different' from PlayStation®2 in that it concerned a product whose 'game programmes cannot be modified by the user'.

49 Lastly, the defendant contends that the applicant is incorrect in stating that the contested regulation cannot reasonably be applied by analogy. In general, tariff classification regulations constitute the application of a general rule to an individual case and contain indications on the manner in which that rule is to be interpreted by analogy with comparable or similar goods. This approach was adopted (i) to preserve a consistent interpretation of the Combined Nomenclature, (ii) to preserve equality between operators, and (iii) to prevent operators from circumventing the established classification by modifying in a marginal way some characteristics of their product with the sole aim of escaping a classification the consequences of which might prove to be disadvantageous. According to the defendant, the customs authorities, operators or a court seised of a dispute related to a classification regulation may, in reliance on the description of the products in the regulation and on the reasoning contained in the classification, apply reasoning by analogy to the specific product in question. Thus, in the present case, according to information in the defendant's possession, the regulation may also apply to similar products such as the Microsoft X-box and the Nintendo Game Cube.

50 Second, whilst accepting that the contested regulation is of direct concern to the applicant, the defendant does not agree that it is of individual concern to the applicant.

51 First, the defendant contends that Joined Cases T-133/98 and T-134/98 *Hewlett Packard France and Hewlett Packard Europe* v *Commission* [2001] ECR II-613, referred to by the applicant, are clearly distinguishable from the present case in that the applicant in those cases, the holder of a number of BTIs in different Member States for the same product, was obviously individually concerned by the decision by the Commission addressed to those Member States revoking the BTIs which they had granted. It adds that it did not even raise the question of admissibility in those cases.

52 Next, it argues that the applicant is incorrect in referring to the order in *Iposea* v *Commission*, cited in paragraph 45 above. In that order, Iposea's action for annulment of a tariff classification regulation was held to be inadmissible by the Court of First Instance on the basis of settled case-law on the requirement of individual concern with respect to actions for annulment of provisions of a regulation. In that connection, it disagrees with the *a contrario* argument which the applicant attempts to base on the order in that case, namely that all operators in possession of a BTI with respect to products affected by a classification regulation are automatically 'individually concerned' by such a regulation. In the defendant's submission, there is no authority for such a proposition, which would, moreover, be contrary to the requirement of a closed category. As the defendant has already stated, the contested regulation concerns not just the applicant or indeed any other holders of BTI for the product designated in the regulation, but any importer of an identical or similar product.

53 The defendant also disputes that the judgment of the Court of Justice in Case C-390/95 P *Antillean Rice Mills and Others* [1999] ECR I-769 is relevant to the assessment in the present case. It states that that judgment concerned a safeguard clause in Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1), which specifically required the Commission, when it envisaged taking such measures, to inquire into the negative effects which its decision might have on the economy of the overseas countries and territories in question as well as on the undertakings concerned. It observes that there is no such requirement in Article 9 or indeed any other article of the Nomenclature Regulation, which constitutes the legal basis for the regulation at issue in the present case.

54 The defendant contends, moreover, that the applicant's argument is in no way supported by the fact that the contested regulation provides that BTI may continue to be invoked for a period of three months under the provisions of Article 12(6) of the Community Customs Code. It maintains that, whilst a holder of a BTI might have standing to challenge the absence or the insufficiency of such a period in a classification regulation, that does not mean that such a holder has standing to challenge the classification itself.

55 Lastly, the defendant observes that the applicant does not deny that there are alternative remedies through the national courts, nor that those courts could make a reference for a preliminary ruling, but merely states that it is quicker to bring a direct action under the fourth paragraph of Article 230 EC, and that success in these proceedings would put it in a better financial position. The defendant states that the applicant does not even attempt to adduce factual or statistical evidence in support of this argument. Moreover and in any event, even if such evidence had been provided, this would not be a sufficient ground on which to base the applicant's argument. If that argument were accepted by the Court of First Instance, it would be applicable to all cases and would completely undermine the limits on the standing of persons and undertakings directly to challenge the validity of Community regulations, as laid down in the fourth paragraph of Article 230 EC.

Findings of the Court

56 First of all, the Court rejects the applicant's argument that this case should be declared admissible on the ground that dismissal on grounds of inadmissibility would deny it an appropriate legal remedy.

57 As held, in essence, in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 36 et seq., the lack of a judicial remedy under national law does not constitute a circumstance which would justify the Community Courts' declaring admissible actions brought by individuals which do not meet the conditions for admissibility laid down by the fourth paragraph of Article 230 EC. Therefore, in a case such as the present one, where the applicant is not even alleging that there are no legal remedies, but rather merely that those remedies are not appropriate and cause it greater financial loss because of their length, there is all the more reason for the Court not to declare the action admissible when the applicant is not directly and individually concerned by the contested act.

58 Next, the Court notes that, according to the case-law, individuals may not, as a rule, bring actions under the fourth paragraph of Article 230 EC for annulment of tariff classification regulations (*Casteels* v *Commission*, cited in paragraph 45 above, paragraph 10 et seq.; order in *Alce* v *Commission*, cited in paragraph 45 above, paragraph 16 et seq., and in *Iposea* v *Commission*, cited in paragraph 45 above, paragraph 23 et seq.). As the Court held in *Casteels* v *Commission*, '[i]n spite of the apparent specificity of the descriptions contained in the regulation[s], [they are] none the less of entirely general application, since [they] concern[] all products of the type described, regardless of their individual characteristics and origin, and [they] take[] effect, in the interests of the uniform application of the Common Customs Tariff, in relation to all customs authorities in the Community and all importers' (paragraph 11).

59 It is settled case-law, however, that a measure of general application may, in certain circumstances, be of direct and individual concern to some economic operators (see, in particular, Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 5 et seq.; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraphs 11 to 13; Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraphs 13 to 18; and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraphs 19 to 22) and, therefore, may be challenged by them under the fourth paragraph of Article 230 EC.

60 Accordingly, it is appropriate to examine whether the applicant is directly and individually concerned by the contested regulation.

61 In the present case, it is obvious and indeed common ground amongst the parties that the applicant is directly concerned by the contested regulation.

62 The contested regulation directly affects its legal situation and leaves no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited therein). In particular, the Court notes that the contested regulation in effect invalidates, after the lapse of the three months provided for in Article 2 therein, the BTI issued to the applicant by the United Kingdom customs authorities and subjects the import of the PlayStation®2 into that country to an import duty of 1.7%, instead of the zero rate which was applicable under the BTI.

63 Next, as regards individual concern, it follows from the Court's consistent case-law that a measure of general application such as a regulation can be of individual concern to natural and legal persons only if it affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR II-11355, paragraph 73, and the case-law cited therein).

64 The Court notes, first, that the administrative procedure which led to the adoption of the contested regulation was triggered by the BTI application submitted by the applicant on 28 August 2000 to the United Kingdom customs authorities and that that procedure concerned specifically the tariff classification of the PlayStation®2.

65 As evidenced by the decision of 5 January 2001 sent by the United Kingdom customs authorities to the applicant, following its application for review of the BTI issued on 19 October 2000, it was after that BTI was issued that the question of the tariff classification of the PlayStation®2 was discussed by the Nomenclature Committee. In view of that information, the applicant contacted the competent services of the defendant and, at their request, demonstrated the

PlayStation®2 at the 243rd meeting of the Nomenclature Committee, which took place in Brussels on 26 and 27 February 2001, and answered various questions posed by Committee members about the properties and characteristics of the PlayStation®2. At that time, the applicant also provided a document containing its submissions concerning the classification of the PlayStation®2. After that meeting, there was further contact between the applicant and the defendant. On 6 March 2001, the applicant sent the President of the Committee a report of the meeting, a copy of the PowerPoint presentation made at that meeting, and also various preparation notes and a list of questions and answers from the meeting. In addition, following a telephone request from the defendant's services, the applicant sent a detailed description of all the features of the CD-ROM accompanying the PlayStation®2. The question of the tariff classification of the PlayStation®2 and the adoption of a regulation pertaining thereto was subsequently discussed specifically at the 247th meeting of the Nomenclature Committee, held on 9, 10 and 11 April 2001, and the 252nd meeting of the Nomenclature Committee, held on 30 May 2001. Those discussions finally led to the adoption of the contested regulation on 10 July 2001.

66 It is important to note that at no time did the defendant state that any other identical or similar product had been demonstrated and/or discussed before the Nomenclature Committee as part of the procedure which led to adoption of the contested regulation.

67 It should also be observed that, under the proceedings brought before the VAT and Duties Tribunal against the decision of the United Kingdom customs authorities of 5 January 2001, those authorities had expressly requested that the Tribunal stay the proceedings on the ground that the classification of the PlayStation®2 was being discussed at that precise moment by the Nomenclature Committee.

68 Second, it should be remembered that it was in the light of the final decision taken by the Nomenclature Committee, particularly the finding by the Nomenclature

Committee that the PlayStation®2 could be freely programmed, that the United Kingdom customs authorities decided not to oppose the appeal brought by the applicant before the VAT and Duties Tribunal and that, in the light of the agreement between the parties, on 5 June 2001 the VAT and Duties Tribunal ordered that the appeal be allowed. Following the appeal, the United Kingdom customs authorities, by decision of 12 June 2001, issued to the applicant a BTI classifying the PlayStation®2 under subheading 8471 49 90 with retroactive effect from 19 October 2000. It is common ground amongst the parties that, at the time the contested regulation was adopted, that BTI was the only one classifying the PlayStation®2 under heading 8471.

69 It follows that, since the contested regulation classified the PlayStation®2 under heading 9504, the applicant is the only undertaking whose legal position is affected as a result of adoption of that regulation. Under Article 12(5)(a) of the Customs Code, the adoption of the contested regulation had the effect of invalidating the BTI which had been issued by the United Kingdom customs authorities.

70 Contrary to the defendant's assertions, it is irrelevant in this conxtext that the United Kingdom customs authorities subsequently issued a BTI concerning the tariff classification of the PlayStation®2 to another economic operator. As evidenced by the copy of that BTI produced by the Commission, the Commission had already classified the PlayStation®2 under heading 9504 and not heading 8471, so that that holder's legal position, unlike the applicant's, was not affected in any way by the contested regulation.

71 Third, a number of aspects of this case show that although the contested regulation is worded in a general and abstract manner, it focuses specifically on the classification of the PlayStation®2 because it describes in detail all of the features of that product and because there were no other products with identical features, at least not at the time the contested regulation entered into force.

72 It is noteworthy that, in column 1 of the table in the Annex to the contested regulation, the defendant included a very detailed description of the goods for which it defined the applicable tariff classification in column 2. In particular, in the part of column 1 concerning the game console and the accompanying CD-ROM, it not only described the manner in which that specific apparatus was presented for retail sale, but also the different elements of which it is composed and to which it can be connected, as well as its principal functions. Moreover, the applicant stated, and was not contradicted on this point by the defendant, that that description corresponds exactly to the technical specifications of the PlayStation®2 sent to the defendant and that it is so specific that it could not have applied to any products other than the PlayStation®2, at least not at the time the contested regulation entered into force.

73 Furthermore, on the last page of the Annex to the contested regulation, there is even a photograph of the PlayStation®2, on which the PS2 logo is clearly visible, even though the Sony logo on the right side of the apparatus has been obliterated. As stated by the United Kingdom customs authorities in the letter of 18 October 2001 to the applicant, that photograph leaves no doubt that the contested regulation is specifically aimed at the PlayStation®2.

74 The defendant's argument that the contested regulation should be applied by analogy to similar products must also be rejected. Even if this argument were accepted, it would not preclude the applicant from being individually concerned by the contested regulation. It should also be borne in mind that not only does the application of a tariff classification regulation by analogy to similar products call for great care (see, to that effect, the Opinion of Advocate General Mischo in Case C-119/99 *Hewlett Packard* [2001] ECR I-3981, paragraph 17 et seq.), but it is all the more delicate in cases such as this one, where the regulation at issue determines the classification of a product on the basis of an assessment of the function which gives it its essential character. Such an assessment, if it is to be lawful, must be based at least partly on appraisals specific to that particular case and which cannot easily be applied to other cases.

75 Lastly, it should be noted that, as pointed out above, the applicant is the sole authorised importer of the PlayStation®2 into the Community. Although that fact alone is not sufficient to establish that the applicant is individually concerned by the contested regulation (see, to that effect, *Commission* v *Camar and Tico*, cited in paragraph 63 above, paragraphs 77 to 79), it none the less constitutes a relevant factor for the assessment of the applicant's individual concern, having regard to the other aspects discussed above.

76 It does not matter that, as the defendant points out, the United Kingdom customs authorities issued a BTI concerning the classification of the PlayStation®2 to another economic operator. The applicant is, as it rightly pointed out, entitled to prohibit parallel imports of the PlayStation®2 from countries outside the European Economic Area (EEA) on the basis of its trade mark rights and the fact that there is no international exhaustion of those rights, as has been repeatedly held in the case-law (Case C-355/96 *Silhouette International Schmied* [1998] ECR I-4799, paragraph 26; Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103, paragraph 21; and Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691, paragraph 33). Therefore, even if a competitor of the applicant, such as a parallel importer, obtained a BTI for the PlayStation®2, it could not use it to import the PlayStation®2 into the European Economic Area.

77 In the light of all the foregoing, the Court finds that, in the exceptional circumstances of this case, the contested regulation affects the applicant by reason of certain attributes which are peculiar to it and by reason of circumstances in which it is differentiated from all other persons, and by virtue of these factors distinguishes it individually in the same way as the addressee. Therefore, it is individually concerned by that act.

78 Since all of the conditions laid down by the fourth paragraph of Article 230 EC have been satisfied, this case must be declared admissible.

Substance

General presentation of the arguments

79 The applicant submits, first, that the Commission infringed the Combined Nomenclature Regulation by adopting the contested regulation. At this stage of the proceedings and especially in view of the fact that the parties agree that the PlayStation®2 meets the conditions laid down by Note 5(A) to Chapter 84 to be considered an automatic data-processing machine and, therefore, may be classified under heading 8471, this plea is essentially in two parts.

80 Under the first part of this plea, the applicant submits that, since the PlayStation®2 is an automatic data-processing machine coming under heading 8471, it cannot be classified under heading 9504. In the second part, the applicant maintains that, even if the PlayStation®2 could be classified under heading 9504, the Commission committed an error of law by determining that classification on the basis of general rule 3(b).

81 Second, the applicant submits that the defendant infringed its obligation to state reasons.

82 The defendant contends that all of the applicant's arguments are unfounded and that the action must therefore be dismissed.

Infringement of the Combined Nomenclature Regulation

Arguments of the parties

— First part: the alleged impossibility of classifying an automatic data-processing machine like the PlayStation®2 under heading 9504

83 The applicant submits that the PlayStation®2 is a data-processing machine coming under heading 8471 and cannot be classified under heading 9504.

84 It states that this feature means the PlayStation®2 is capable of processing different categories of data files, including video game software. It submits that the classification of an automatic data-processing machine cannot vary depending on the type of data file which is being processed; to hold the contrary would lead to the absurd result that a PC used mainly to make mathematical calculations would have to be classified as a calculator, a PC used for listening to audio CDs as a CD player, and a PC used for playing video games as a video game console. Furthermore, from a legal standpoint, it would also lead to the introduction of an unjustifiable limitation on the scope of heading 8471 because it would introduce a new rule which would effectively broaden the 'specific function' test in Note 5(E) to Chapter 84 to encompass all functions covered by any other heading or subheading of the Common Customs Tariff.

85 It adds that the fact that automatic data-processing machines cannot be classified according to the type of data files they process has been expressly confirmed by the Harmonised System Committee of the WCO. It states that HSEN(b) to

heading 9504 of the Harmonised System provides that that heading does not cover 'machines and apparatus fulfilling the conditions of Note 5(A) to Chapter 84, whether or not capable of being programmed for video games'. It maintains that that note simply confirms that the fact that an apparatus can be used as a video game console does not constitute a specific function which precludes an automatic data-processing machine like the PlayStation®2 from being classified under heading 8471.

86 The applicant disputes all the arguments put forward by the defendant to demonstrate that HSEN(b) to heading 9504 is not applicable to this case. First, it contends that the defendant has not replied to the substantive arguments advanced by it in that connection, namely that freely-programmable data-processing machines cannot be classified according to the types of data files which are processed by their CPU. Second, it argues that its position on this point is confirmed by the drafting history of HSEN(b) to heading 9504 because it is apparent from the original version of the HSEN that heading 9504 is intended only to cover apparatuses dedicated exclusively to video games, for example, apparatuses which are able only to run dedicated video game programs and which are thus not freely programmable. According to the applicant, the background documents relating to the adoption of this explanatory note clearly show that it was intended to ensure that freely-programmable apparatuses are not classified as video game machines. Third, the applicant contends that the fact that the PlayStation®2 did not exist at the time when HSEN(b) to heading 9504 was adopted is irrelevant because the defendant must apply the law as it stands at the moment and cannot invoke unforeseen technological developments in order to exclude certain products from a heading. On the contrary, according to the applicant, there is case-law to the effect that if technical developments in the industrial sector in question justify the drawing-up of a new customs classification, it is for the Community institutions to take account of it by amending the Common Customs Tariff. Failing such amendment, the interpretation of the tariff cannot be adapted to changing processes (Case 122/80 *Analog Devices* [1981] ECR 2781; Case 234/87 *Casio Computer* [1989] ECR 63; and Case C-67/95 *Rank Xerox* [1997] ECR I-5401). Thus, according to the applicant, HSEN(b) remains valid as long as it has not been amended or repealed (Case C-120/90 *Post* [1991] ECR I-2391, paragraphs 22 and 23). Fourth, the applicant submits that the information supplied by the defendant concerning the discussions within the Harmonised System Committee is misleading for the Court and in fact proves

that there are several misunderstandings about certain features of the PlayStation®2. It claims in particular that, contrary to what is indicated in the decision of 28 November 2001 of the Harmonised System Committee supplied by the defendant, the PlayStation®2 can easily be connected to an ADP monitor (and not just to a television receiver) and its CPU can run programs written in BASIC and LINUX, which are widely-used programming languages. Furthermore, according to the applicant, the decision of 28 November 2001 must be viewed in its proper context, that is, one in which the defendant, having sent a copy of the contested regulation to the Harmonised System Committee, put forward the argument that the PlayStation®2 should be classified under heading 9504 and in which there had not yet been informed discussion among all delegates on the basis of a complete set of data. Lastly, the applicant states that the defendant has not clarified why HSEN(b) to heading 9504 should not be regarded as persuasive. It submits that the mere fact that HSENs are not legally binding is not conclusive because it is established case-law that the HSENs, although not legally binding, are important tools for the interpretation of the Combined Nomenclature and may only be set aside under precisely determined circumstances.

87 The applicant takes issue with the defendant's assertion that classification of the PlayStation®2 under CN Code 9504 is all the more justified because it would not be user-friendly for users wishing to use it for programming or word-processing applications (for example, because it is impractical to type with the controller). The applicant maintains that this line of argument is irrelevant because the PlayStation®2, through its USB connector ports, can easily be connected to a standard computer keyboard, a mouse and an ADP monitor in order to make up a complete automatic data-processing system. It adds that, pursuant to Note 5(C) to Chapter 84, heading 8471 also covers separately presented units of automatic data-processing machines and that the PlayStation®2 is an automatic data-processing machine which, contrary to what the defendant alleges, is as easy to

operate as any other automatic data-processing system. Lastly, the applicant claims that the defendant has failed to demonstrate how the fact that the PlayStation®2 is an automatic data-processing unit, rather than a complete system, would mean that the PlayStation®2 is 'essentially a video game'.

88 Finally, the applicant contends that the defendant is incorrect in arguing that the product description of CN Code 9504 10 00 is in itself functional and that therefore the video game function of the PlayStation®2 is in itself an objective characteristic and property of the product. It submits that the description of CN Code 9504 10 00 is not purely functional because the term 'video games of a kind used with a television receiver' expressly refers only to the use of the video game with a television receiver and, if the defendant's line of argument were followed, this subheading should have been entitled 'apparatus used for playing video games'. The applicant argues that, consequently, the product description of subheading 9504 10 cannot be invoked as an argument for bringing within its scope any apparatus which can be used for playing video games. It adds that the defendant itself agrees that not all apparatuses which can be used for playing video games should be classified under subheading 9504 10. To have such a classification, the applicant argues, the function must be inherent in the apparatus, for example inasmuch as the apparatus is capable of running only dedicated video game programmes or inasmuch as the user can choose only between a limited number of fixed games programmed into the apparatus.

89 The applicant submits, moreover, that this is clear from the case-law, since the Court of Justice has held that the intended use of a product may itself constitute an objective criterion for classification only if it is inherent in the product, and that that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (Case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381; and Case C-309/98 *Holz Geenen* [2000] ECR I-1975), that a classification based on the intended use must be a method of 'last resort', and that, in the interests of legal certainty (Case C-338/95 *Wiener SI* [1997] ECR I-6495) and ease of verification, preference should be given to criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained (Case 38/76 *Luma* [1976] ECR 2027, paragraph 7). The intended use of a product is

relevant only if classification cannot take place on the sole basis of the objective characteristics and properties of the product (Opinion of Advocate General Jacobs in *Wiener SI*, cited above, paragraph 34). The applicant further submits that, since it is not disputed that the objective characteristics and properties of the PlayStation®2 correspond to the wording of heading 8471 and the text of the relevant chapter notes, there is clearly no need to invoke subjective criteria such as the intended use or trade usage of the product in order to arrive at a possible classification option under heading 9504. Lastly, the applicant states that the defendant has not submitted any evidence that, were heading 9504 to be found to constitute a prima facie classification option, it would have preference over heading 8471 on the basis of general rule 3(b).

90 The defendant disputes that, as an automatic data-processing machine coming under heading 8471, the PlayStation®2 cannot be classified under heading 9504.

91 The defendant contends that the applicant's argument based on HSEN(b) to heading 9504 is not as solid as the applicant alleges. The defendant acknowledges that that explanatory note states that 'machines and apparatus fulfilling the condition of Note 5(A) to Chapter 84, whether or not capable of being programmed for video games (heading 8471)' are not covered by heading 9504. It contends, however, that it is settled case-law that whilst HSENs may be regarded as a valuable aid to the interpretation of the CN and even be persuasive, they do not have legally binding force, so that it is necessary, where appropriate, to examine whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of those provisions (see, for example, Case C-280/97 *ROSE Elektrotechnik* [1999] ECR I-689). It adds that, in any event, HSEN(b) to heading 9504 dates from 1985, a time when apparatuses like the PlayStation®2 did not exist. The defendant states, furthermore, first, that the Harmonised System does not contain the terms 'computer' or 'personal computer', so that HSEN(b) therefore makes reference to Note 5 to Chapter 84, which defines automatic data-processing machines for the purposes of heading 8471, second, that HSEN(b), by its reference to Note 5(A),

underlines that the products concerned are true data-processing machines even though they may, as an auxiliary function, also be programmed for video games, and, third, that HSEN(b) did not pose any problem when it was discussed by the Harmonised System Committee, since that committee considered that the capacity to run games programmes was one of the normal features of any computer, including an office computer. The explanatory note was therefore, according to the defendant, useful for the purpose of avoiding the risk of all computers being classified as game machines.

92 The defendant contends, moreover, that the question of the classification of PlayStation®2 is still under active discussion in the Harmonised System Committee, with that committee leaning at present towards classification under heading 9504. It observes that, in November 2001, a proposal was submitted to the Harmonised System Committee to classify PlayStation®2 as a 'video game' under heading 9504 and that most of the delegates were in favour of the proposal. According to the defendant, it was only because of the position of the Japanese delegate that the matter was put off to be re-examined at the next meeting (see Annex G/9 to Document NC0510E2 (HSC/28/Nov. 2001) in particular paragraphs 7 to 9).

93 The defendant objects to the applicant's argument that it is mistaken in determining the 'essential character' of the apparatus solely on the basis of its functions rather than on its materials or components. It argues that, in the case of a subheading such as 9504 10 00, the description itself is functional ('video games...'). It submits, therefore, that the apparatus was correctly classified under subheading 9504 10 00 on the basis of its function as a video game, since that is its objective characteristic and property as defined in that subheading.

94 The defendant contends that its position on this is corroborated by the case-law cited by the applicant. Thus, in paragraph 15 of *Holz Geenen* (cited in paragraph

89 above), the Court of Justice confirmed that the intended use of a product may constitute an objective criterion for classification if it is inherent in the product. Furthermore, in Case C-219/89 *WeserGold* [1981] ECR I-1895, paragraph 9, the Court also pointed out that the intended use of a product may be taken into account for the purpose of its tariff classification if the wording makes an express reference to that criterion. Moreover, if one substitutes the word 'function' for 'intended use', then it can be seen from that case-law that the description under CN Code 9504 10 00 ('video game') expressly defines the goods under that subheading by reference to their function.

— Second part: incorrect application of general rule 3(b) for the purpose of tariff classification of the PlayStation®2

95 The applicant observes that, according to column 3 of the Annex to the contested regulation, the PlayStation®2 was classified under CN code 9504 10 00 because '[o]f the various functions (including playing video games, playback of CD audio, DVD video, automatic data processing, etc.), playing video games gives the apparatus its essential character and determines classification under heading 9504 as a game console'. It contends that general rule 3(b) could be applied to determine the 'essential character' of the PlayStation®2 on the basis of its functions. It maintains that an automatic data-processing machine cannot be classified according to its function where such function results from the nature of the data files being processed by the machine.

96 In particular, the applicant submits that the function for which a product is used may be taken into account only where that function is the result of the objective characteristics and properties of the product itself; in other words, the function must be traceable to a physical characteristic of the product such as a material or component. Moreover, the wording of the heading must make an express reference to that function or use. According to the applicant, it follows that where a product performs several functions, its essential character may not be

determined on the basis of those functions unless the different functions correspond to different materials or components. In that connection, it refers to the wording of general rule 3(b): '[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable'.

97 The applicant states that all the functions of the PlayStation®2 are performed by the same components carrying out the same processing operations, so that it is not possible to identify for each function a separate component or material performing such function to the exclusion of other functions. The PlayStation®2 is not a combination of components or machines performing two or more complementary or alternative functions whereby the different functions can be linked to different constituent machines, materials or components because, as is apparent from the factual description, the PlayStation®2 does not contain separate components to play video DVDs, to process video game software, or to run BASIC or LINUX applications. All such data files are processed by the CPU.

98 According to the applicant, it follows that the contested regulation incorrectly applies general rule 3(b) by determining essential character solely on the basis of the functions of the PlayStation®2 rather than on the basis of the materials or components in which those functions must be inherent.

99 The defendant disagrees that it incorrectly applied general rule 3(b) in determining the tariff classification of the PlayStation®2.

100 First, whilst stating that it does not dispute that the PlayStation®2 fulfils the conditions set out in Chapter Note 5(A) and that Chapter Note 5(E) is not applicable to this case, the defendant draws the attention of the Court to Note 1(p) to Section XVI, which concerns Chapters 84 and 85 of the Combined Nomenclature. Note 1(p) makes it clear, according to the defendant, that Section XVI does not cover the articles falling under Chapter 95, which concerns toys, games, and other entertainment articles, and contains CN Code 9504 10 00 ('video games'), which is used in the contested regulation. It follows, the defendant argues, that when an apparatus is both a game (heading 9504 — Chapter 95) and an automatic data-processing machine (heading 8471 — Chapter 84 — Section XVI), it is excluded from Section XVI and is automatically classified under heading 9504. That being so, it submits that it is necessary to examine whether in the present case the apparatus, even if it has the characteristics of an automatic data-processing machine, is, essentially, a video game (see *Rank Xerox*, cited in paragraph 86 above, paragraph 18), so that the classification of an article under Chapter 95 would exclude the application of Chapters 84 and 85 as a result of the application of Note 1(p) to Section XVI.

101 Next, it observes that, according to the general interpretation rules for the Combined Nomenclature, classification is to be determined according to the terms of the headings, subheadings and section or chapter notes (general rules 1 and 6) and that, when goods are prima facie classifiable under two or more headings, the heading which provides the most specific description is to be preferred to headings providing a more general description (general rule 3(a)). It adds that, under general rule 3(b), composite goods which cannot be classified under the 'specific description' rule are to be classified according to the material or component which gives them their 'essential character'. It is this 'essential character' rule which is applied by the Annex to the contested regulation when the reasons given therein state that the capacity to run video games gives the apparatus its essential character and determines the classification under heading 9504 as a video game console.

102 The defendant contends, moreover, that this assessment of the 'essential character' of the product is supported by some of the information produced by the applicant and attached to the application. It refers first to Attachment A.1 to

the information package used when the PlayStation®2 was presented to the Nomenclature Committee, in which the following is stated: 'The introduction of PlayStation®2 will once again see Sony Computer Entertainment reinvent the nature of video games and push back the boundaries of our expectations'. Second, it states that the transcript of a series of questions and answers raised during the meeting of the Nomenclature Committee shows that the PlayStation®2 is used essentially to play video games, that the presentation puts it clearly in the category of video games (in particular because it would not be user-friendly to write a text using the controller to choose each letter on a screen) and that, even if it is an automatic data-processing machine for the purposes of Note 5(A) to Chapter 84, it remains essentially a video game. Lastly, the defendant refers to a copy of an advertising brochure, attached to its defence, which in its view shows clearly that the essential characteristic of the PlayStation®2 is that of a video game.

Findings of the Court

103 It must be recalled that the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures mentioned in Article 9(1)(a), (b), (d) and (e) of the Combined Nomenclature Regulation does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the Harmonised System established by the Convention whose scope the Community has undertaken not to modify under Article 3 thereof (see Case C-267/94 *France* v *Commission* [1995] ECR I-4845, paragraphs 19 and 20; and *Holz Geenen*, cited in paragraph 89 above, paragraph 13).

104 Next, it is settled case-law that the decisive criterion for the customs classification of goods must be sought generally in their objective characteristics and qualities, as defined in the relevant heading of the Common Customs Tariff and in the

notes to the sections or chapters (see, in particular, Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, paragraph 11; Case C-382/95 *Techex* [1997] ECR I-7363, paragraph 11; Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 9; and *Hewlett Packard France and Hewlett Packard Europe* v *Commission*, cited in paragraph 51 above, paragraph 24).

105 It is in the light of those principles that it must be ascertained whether the defendant committed an error of law by classifying, pursuant to the contested regulation, the console whose description is reproduced in column 1 of the table in the Annex to that regulation under subheading 9504 10 00 and the accompanying CD-ROM under subheading 8524 39 90, as the applicant contends.

106 It should be recalled, as a preliminary point, that it is common ground between the parties that the PlayStation®2 satisfies the conditions laid down by Note 5(A) to Chapter 84 and may thus be considered to be an automatic data-processing machine. Therefore, that product may be classified under heading 8471, which is defined as covering: '[a]utomatic data-processing machines and units thereof, magnetic or optical readers, machines for transcribing data into data media in code form, machines for processing such data, not elsewhere specified or included'. Likewise, the parties agree that the PlayStation®2 does not perform any 'specific function other than data processing' as that concept has been interpreted by the Court of Justice (see, especially, *Peacock*, cited in paragraph 103 above, paragraphs 16 and 17).

107 The parties do not agree, however, on the possibility of classifying the PlayStation®2 under heading 9504, more specifically under subheading 9504 10. The applicant takes the view that because the product satisfies the conditions laid down by Note 5(A) to Chapter 84 and does not perform any specific function within the meaning of Note 5(E) to that chapter, it is not capable of being classified under subheading 9504 10 because, according to it, the classification of

an automatic data-processing machine cannot depend on the type of data file which is being processed by that machine.

108 At the time the contested regulation was adopted, heading 9504 was defined as covering: 'Articles for funfair, table or parlour games, including pin-tables, billiards, special tables for casino games and automatic bowling alley equipment'. Subheading 9504 10 was defined as covering: '[v]ideo games of a kind used with a television receiver'.

109 It should be noted in this case that neither the subheading 9504 10 nor the section and chapter notes define 'video games'. The only requirement provided for is that it must be apparatuses 'used with a television receiver', a requirement which is, as is apparent from the contested regulation, undoubtedly satisfied in this case. The same conclusion holds true regarding the HSENs and the CNENs, which do not define 'video games'.

110 Moreover, in a similar case where neither the Combined Nomenclature nor the HSENs or the CNENs gave a definition of the goods in question, the Court of Justice found that it was appropriate to look for the objective characteristic of those goods which tended to distinguish them from others in the use for which those goods were intended. That case involved pyjamas, and the Court found that, according to their objective characteristic, they were to be worn in bed and that, if that objective characteristic could be established at the time of customs clearance, the fact that it might also be possible to envisage another use for the garments did not preclude them from being classified for legal purposes as pyjamas. It found that not only sets of two knitted garments which, according to their outward appearance, were to be worn exclusively in bed but also sets used mainly for that purpose had to be considered to be 'pyjamas' within the meaning of tariff heading 6108 (Case C-395/93 *Neckermann Versand* [1994] ECR I-4027, paragraph 6 et seq.; and *Wiener SI*, cited above in paragraph 89, paragraphs 13 and 14).

111 Such reasoning can also be applied to a case such as this one. Thus, in the absence of a definition of 'video games' for the purposes of subheading 9504 10, it is appropriate to consider as video games any products which are intended to be used, exclusively or mainly, for playing video games, even though they might be used for other purposes.

112 It is, moreover, undeniable that, both by the manner in which the PlayStation®2 is imported, sold and presented to the public and by the way it is configured, it is intended to be used mainly for playing video games, even though, as is apparent from the contested regulation, it may also be used for other purposes, such as playing video DVDs and audio CDs, in addition to automatic data processing.

113 This finding is corroborated by numerous documents, in particular the brochures and other promotional information relating to the PlayStation®2 which the parties have produced in these proceedings. Those documents show clearly that the PlayStation®2 is marketed and sold to consumers mainly as a video game console, even though it may also be put to other uses. In addition, the various answers given by the applicant during the presentation of the PlayStation®2 to the Nomenclature Committee on 27 February 2001 show that consumers perceive the PlayStation®2 mainly as a game console. Also, the description of the product contained in column 1 of the table in the Annex to the contested regulation shows that the PlayStation®2 is packaged for retail sale as a video game console, since it is presented with a 'controller module [with] several control buttons, which are mainly used for playing video games', as well as connector cables. On the other hand, the other units, such as standard keyboard, mouse and ADP monitor to which it can be connected are sold separately, a point confirmed by the applicant.

114 In addition, neither the wording of subheading 9504 10 nor the section and chapter notes pertaining thereto contain any indications, much less limitations, as

to the operation and/or the composition of the products coming thereunder. It follows that, contrary to what the applicant maintains, the mere fact that the PlayStation®2 may operate as an automatic data-processing machine and that video games are only one type of file that it can process does not by itself preclude its being classified under subheading 9504 10, since it is quite clear that it is intended mainly to be used to run video games.

115 Contrary to what the applicant maintains, this finding is not affected by HSEN(b) to heading 9504, which provides that that heading does not cover 'machines and apparatus fulfilling the conditions of Note 5(A) to Chapter 84, whether or not capable of being programmed for video games (heading 8471)'.

116 It is true that, according to settled case-law, the HSENs constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered a valid aid to the interpretation of the tariff. However, those notes do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions (Case C-35/93 *Develop Dr. Eisbein* [1994] ECR I-2655, paragraph 21).

117 Moreover, if HSEN(b) to heading 9504 were to be interpreted as not covering all products which fulfil the conditions of Note 5(A) to Chapter 84, including products intended to be used mainly for playing video games, as advocated by the applicant, that note would in effect modify and, more specifically, limit the scope of that heading and subheading 9504 10; this cannot be accepted.

118 Lastly, the Court does not accept the applicant's argument that the classification of an automatic data-processing machine according to the type of file processed would place an undue limitation on the scope of heading 8471 because it would introduce a new rule expanding the 'specific function' requirement of Note 5(E) to Chapter 84 to include all functions covered by any other heading or subheading of the Combined Nomenclature. It is true that, as found in paragraph 106 above, the PlayStation®2 does not perform any 'specific function other than data processing' and that the playing of video games is not one of its specific functions per se. However, the mere fact that an apparatus fulfils the conditions of Note 5(A) to Chapter 84 and does not perform any specific function other than data processing for the purposes of Note 5(E) to that chapter does not by itself preclude such an apparatus from being classified under another heading.

119 Since it has been established that, contrary to what the applicant maintains, the PlayStation®2 can be classified under heading 9504, it is appropriate at this point to examine whether, as the applicant submits in the second part of its argument, the defendant committed an error of law by determining, on the basis of general rule 3(b), the classification of the PlayStation®2, having regard to the function which gives it its essential character.

120 The Court finds, as is apparent from the reasons given in column 3 of the table in the Annex to the contested regulation, that the defendant determined the classification of the PlayStation®2 on the basis of the finding that '[o]f the various functions (including playing video games, playback of CD audio, DVD video, automatic data processing, etc.), playing video games gives the apparatus its essential character'. In its written pleadings and at the hearing, the defendant confirmed that it had applied general rule 3(b).

121 According to its wording, general rule 3(b) applies only '[w]hen by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings'.

122 General rule 3(b) also provides: '[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable'.

123 It is clear from the wording of that rule that it covers only the classification of '[m]ixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale'.

124 Moreover, according to the clear terms of general rule 3(b), it provides for the classification of mixtures and composite goods according to the material or component which gives them their essential character. It does not provide for the possibility of classifying mixtures or composite goods according to the function which gives them their essential character.

125 This interpretation of general rule 3(b) is confirmed by the HSEN to that rule, which provides that 'the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods'.

126 It is also supported by the case-law of the Court of Justice, according to which, in accordance with general rule 3(b), 'it is necessary, in carrying out the tariff classification of a product, to identify, from among the materials of which it is composed, the one which gives it its essential character. This may be done by

determining whether the product would retain its characteristic properties if one or other of its constituents were removed from it' (Case 253/87 *Sportex* [1988] ECR 3351, paragraph 8; Case C-288/99 *VauDe Sport* [2001] ECR I-3683, paragraph 25; and Case C-276/00 *Turbon International* [2002] ECR I-1389, paragraph 26; see also to that effect Case 60/83 *Metro* [1984] ECR 671, paragraph 15; Case C-121/95 *VOBIS Microcomputer* [1996] ECR I-3047, paragraphs 19 to 25; and Case C-105/96 *Codiesel* [1997] ECR I-3465, paragraph 22 et seq.).

127 It is true that the defendant, in reply to a question from the Court, stated that the component which gives the PlayStation®2 its essential characteristic is the component called 'Emotion Engine'. That statement, however, is at odds with the reasons given in column 3 of the table in the Annex to the contested regulation, according to which it is the video game function which gives the apparatus its essential characteristic. The defendant also confirmed that the 'Emotion Engine' is in fact nothing other than the CPU of the PlayStation®2. The CPU is the central component of all automatic data-processing machines and, accordingly, cannot justify its being classified under the heading for 'video games'.

128 It follows that the defendant was incorrect in using general rule 3(b) as the basis for the contested regulation.

129 The Court also rejects the defendant's argument that it also applied Note 1(p) to Section XVI, which states that Section XVI does not cover 'articles of Chapter 95', for the purposes of classifying the PlayStation®2.

130 Although, contrary to what the applicant maintains, the possibility cannot be excluded that that note could be applied to determine the tariff classification of

the PlayStation®2, it should be borne in mind that, according to the reasons given in column 3 of the table in the Annex to the contested regulation, in the present case classification is determined 'by the provisions of General Rules 1, 3(b) and 6 for the interpretation of the Combined Nomenclature, note 6 to Chapter 85 and the wording of the CN Codes 8524, 8524 39 and 8524 39 90 as well as 9504 and 9504 10 00'.

131 It is clear from those reasons that the classification of the console described in column 1 was not determined on the basis of Note 1(p) to Section XVI. Contrary to the defendant's assertions in reply to a question from the Court, as well as at the hearing, it is not possible to infer from the mere mention of general rule 1 in the reasons that Note 1(p) to Section XVI was used to determine the tariff classification. General rule 1, which provides that, for legal purposes, classification is to be determined according to the terms of the headings and any relative section or chapter notes and that the other general rules can apply only where such headings or notes do not otherwise require, is far too imprecise to allow those concerned to understand that the classification in this case was determined on the basis of Note 1(p) to Section XVI, as the defendant maintains. Furthermore, the obligation to state reasons which is incumbent on the defendant when it adopts a tariff classification regulation requires the Commission to state clearly the legal basis for the classification, in order to inform the persons concerned of the justification for the measure adopted and to enable the Community Court to exercise its powers of review (see, to that effect, Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 16; Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, paragraph 19; and Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany* v *Commission* [1997] ECR I-645, paragraph 44). A simple reference to general rule 1 did not fulfil that obligation.

132 The Court also notes that, even if headings 8471 and 9504 were the only headings under which the PlayStation®2 could have been classified, it would not have been possible to apply Note 1(p) to Section XVI and general rule 3(b) jointly to determine its final classification. In that scenario, Note 1(p) to Section XVI

alone would have sufficed to classify the PlayStation®2 under heading 9504, thereby excluding the application of the general rules, especially general rule 3(b) which, in accordance with general rule 1, applies only when headings or section notes do not otherwise require.

133 In the light of all the foregoing, the Court finds that the defendant committed an error of law in determining the classification of the game console described in column 1 on the basis of general rule 3(b). In addition, since it is common ground between the parties that a possible error in the classification of the console automatically entails the invalidity of the classification of the accompanying CD-ROM, the Court finds that the defendant also committed an error in that regard.

134 Accordingly, without its being necessary to examine the plea alleging failure to state reasons, the contested regulation must be annulled in so far as it classifies the console described in column 1 of the table in the Annex to that regulation under CN Code 9504 10 00 and the accompanying CD-ROM under CN Code 8524 39 90.

Request for measures of inquiry

Arguments of the parties

135 By separate document lodged at the Registry of the Court of First Instance on 3 October 2001, the applicant requested the Court to order the Commission to produce the following documents:

— the minutes of the meetings of the Nomenclature Committee held on 27 February 2001, 9, 10 and 11 April 2001 and 30 May 2001;

— the correspondence between the Legal Service of the Commission and the services of the Directorate-General for Taxation and Customs Union, when consulted on the legality of the contested regulation, prior to its adoption.

136 As regards the legal opinion from its Legal Service, the applicant agreed to its being provided solely to the Court.

137 In response to the request for production of documents formulated by the applicant, the defendant produced as annexes to its defence copies of the following documents:

— the report of the conclusions of the 243rd meeting of the Nomenclature Committee, held on 27 February 2001;

— the report of the conclusions of the 247th meeting of the Nomenclature Committee, held on 9, 10 and 11 April 2001;

— the report of the conclusions of the 252nd meeting of the Nomenclature Committee, held on 30 May 2001; and

— the interservice consultation note of 16 May 2001, signed by the Director-General for Taxation and Customs Union.

138 However, the defendant refused to produce the written opinion given by its Legal Service as part of the interservice consultation process for reasons relating to 'the stability of the Community legal order and the proper functioning of the institutions'. It none the less agreed to provide a copy of that opinion to the Court on a confidential basis if requested to do so.

Findings of the Court

139 The Court finds that the defendant complied with all of the requests for production of documents submitted by the applicant, except for the written opinion given by its Legal Service as part of the interservice consultation process. Accordingly, those requests have become devoid of purpose except as regards the legal opinion. The Court finds in this regard that, in addition to the confidential nature of that opinion, it is of no relevance for the outcome of this case and it is, therefore, unnecessary to order that it be produced.

Costs

140 Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the defendant has been unsuccessful and the applicant made application in that regard, the defendant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls Commission Regulation (EC) No 1400/2001 of 10 July 2001 concerning the classification of certain goods in the Combined Nomenclature (OJ 2001 L 189, p. 5) in so far as it classifies the console described in column 1 of the table in the Annex to that regulation under CN Code 9504 10 00 and the accompanying CD-ROM under CN Code 8524 39 90;

2. Dismisses the request for production of the defendant's legal opinion;

3. Orders the defendant to pay all the costs.

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung

Registrar

K. Lenaerts

President

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