ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

19 February 2008 *

In Case T-82/06,

Apple Computer International, established in Cork (Ireland), represented by G. Breen, Solicitor, P. Sreenan SC, and B. Quigley, Barrister,

applicant,

v

Commission of the European Communities, represented by X. Lewis and J. Hottiaux, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for annulment of Commission Regulation (EC) No 2171/2005 of 23 December 2005 concerning the classification of certain goods in the Combined Nomenclature (OJ 2005 L 346, p. 7),

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

composed of M. Vilaras, President, M. Prek (Rapporteur) and V. Ciucă, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

Combined Nomenclature

1 For the purposes of applying the Common Customs Tariff and facilitating the establishment of statistics of the Community's external trade and other Community policies relating to imports and exports of goods, the Council, by adopting 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; 'the Combined Nomenclature Regulation'), established a complete nomenclature of goods being imported and exported in the Community ('the Combined Nomenclature'). That nomenclature is set out in Annex I to that regulation.

2 In order to ensure the uniform application of the Combined Nomenclature in the Community, the Commission, with the assistance of a committee of representatives of the Member States ('the Nomenclature Committee'), may adopt a number of measures which are set out in Article 9 of the Combined Nomenclature Regulation. Among those measures is the possibility for the Commission to adopt tariff classification regulations for particular goods in the Combined Nomenclature (first indent of Article 9(1)(a) of the Combined Nomenclature Regulation).

3 At the time of the adoption of Commission Regulation (EC) No 2171/2005 of 23 December 2005 concerning the classification of certain goods in the Combined Nomenclature (OJ 2005 L 346, p. 7; 'the contested regulation'), tariff headings 8471 and 8528 of the Combined Nomenclature were worded as follows:

— heading 8528: 'Reception apparatus for television, whether or not incorporating radio-broadcasting receivers or sound video recording or reproducing apparatus: video monitors and video projectors';

— heading 8471: 'Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included'.

Binding tariff information

4 Under Article 11(1) and Article 12 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 (OJ 1997 L 17, p. 1, as corrected by OJ 1997 L 179, p. 11; 'the Customs Code'), economic operators may obtain binding tariff information ('BTI') from customs authorities. That is information on the tariff classification of particular goods which binds those authorities vis-à-vis the applicant for, and/or holder of, the BTI.

5 Article 12 of the Customs Code states:

'…

5. Binding tariff information shall cease to be valid:

(a) in the case of tariff information:

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

…

6. The holder of binding information which ceases to be valid pursuant to paragraph 5(a)(ii) or (iii) or (b)(ii) or (iii) may still use that information for a period of six months from the date of publication or notification, provided that he concluded binding contracts for the purchase or sale of the goods in question, on the basis of the binding information before that 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)(i) and (b)(i), the Regulation or agreement may lay down a period within which the first subparagraph shall apply.

…'

Facts which gave rise to the dispute

6 The applicant, Apple Computer International, is a company incorporated under Irish law, which operates the European business of Apple Computer Inc., established in Palo Alto, California (United States), a designer, manufacturer and seller of computers, software and computer-related goods ('Apple'). The applicant imports and distributes colour Liquid Crystal Display (LCD) monitors in the Community.

7 In September 2004, the applicant applied to the Irish Revenue Commissioners (Irish tax and customs authority, 'the IRC') for BTI for its 'Cinema' range of LCD monitors. Since they were not certain of the correct classification, the IRC forwarded the application to the Nomenclature Committee to obtain its guidance.

8 In January 2005, the applicant demonstrated to the Nomenclature Committee the operation of its 30" (inch) LCD monitor in conjunction with an Apple computer.

9 In July 2005, the applicant applied, to the German customs authorities, for BTI for its 20", 23" and 30" LCD monitors. Those three products were classified in the tariff subheading corresponding to CN Code 8471 60 90.

10 In December 2005, the Nomenclature Committee decided on the tariff classification of a number of monitors, including 20" LCD monitors, which, on account of their technical characteristics and description, corresponded to the applicant's LCD monitors. The Commission then adopted the contested regulation, which was published in the *Official Journal of the European Union* on 29 December 2005. The Annex to the contested regulation consists of a table divided into three columns. Column 1 of that table states the description of the goods, Column 2 their classification in the CN Code and Column 3 the reasons for such classification.

11 Thus, item 2 in Column 1 of the table annexed to the contested regulation contains the following description of the goods:

'2. A colour monitor of the liquid crystal device (LCD) type with a diagonal measurement of the screen of 50.8 cm (20") with overall dimensions of 47.1 (W) × 40.4 (H) × 17.4 (D) cm (aspect ratio 16:10) with:

— a screen pixel density of 100 dpi,

— a pixel size of 0.25 mm,

— a maximum resolution of 1 680 × 1 050 pixels,

— a fixed band width of 120 MHz.

The product is designed for use in the development of sophisticated graphics (CAD/CAM systems) and video film editing and production.

The product is equipped with a DVI interface enabling the product to display signals received from an automatic data-processing machine via a graphic card capable of processing video signals (for example for purposes of video film editing and production).

The product can also display texts, spread sheets, presentations and the like.'

12 Column 2 of the table annexed to the contested regulation classifies the goods thus described in CN Code 8528 21 90.

13 Column 3 of the table gives the following reasons for the classification stated in Column 2:

'Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature, Note 5(B) and 5(E) to Chapter 84 and by the wording of CN codes 8528, 8528 21 and 8528 21 90.

Classification under subheading 8471 60 is excluded as the monitor is not of a kind solely or principally used in an automatic data-processing system (see Note 5(B) to Chapter 84).

The product is not classifiable under heading 8531 because its function is not to provide visual indication for signalling purposes (see the HS Explanatory Notes to heading 8531, point D).

The intended use of the product is that of displaying video signals for development of graphics or video film editing and production in a CAD/CAM system or a video editing system (see Note 5(E) to Chapter 84).'

14 In accordance with Article 12(5)(a)(i) of the Customs Code, the BTI notified by the German Customs authorities for the applicant's 20" LCD monitor ceased to be valid, because it no longer conformed to the classification established by the contested regulation.

Procedure and forms of order sought by the parties

15 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 14 March 2006.

16 By separate document, lodged at the Registry of the Court of First Instance on 2 June 2006, the Commission raised, pursuant to Article 114 of the Rules of Procedure of the Court of First Instance, an objection of inadmissibility.

17 On 18 July 2006, the applicant lodged at the Court Registry its written observations in response to that objection.

18 In its application, the applicant claims that the Court of First Instance should:

— declare that the classification contained in item 2 of the table annexed to the contested regulation in fact represents a decision, which, although in the form of a regulation, is of direct and individual concern to the applicant;

— annul the contested regulation in so far as it classifies under CN Code 8528 21 90 the LCD monitor described in item 2 of the table annexed to that regulation;

— declare that monitors meeting the technical specifications contained in item 2 of the table annexed to the contested regulation should properly be classified in heading 8471 of the Combined Nomenclature;

— order the Commission to pay the costs.

19 In its objection of inadmissibility, the Commission contends that the Court of First Instance should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

20 In its observations on the objection of inadmissibility, the applicant contends that the Court should:

— dismiss the Commission's objection of inadmissibility;

— alternatively, reserve its decision on the objection of inadmissibility to the final judgment;

— order the Commission to pay the costs.

Law

21 Under Article 114 of the Rules of Procedure, if a party so applies, the Court of First Instance may give a decision on admissibility without going into the substance of the case. Under Article 114(3), the remainder of the proceedings on the objection of inadmissibility is to be oral, unless the Court decides otherwise. In the present case, the Court considers itself to be sufficiently informed by the documents in the Court file and decides that there is no need to open the oral procedure.

Arguments of the parties

22 First, the Commission submits that the action is, in part, inadmissible because it seeks annulment of all four items, and not of item 2 alone, in the table annexed to the contested regulation, whereas all the applicant's arguments concern the 20" LCD monitor which it markets. Consequently, the action should be dismissed as inadmissible in so far as it seeks annulment of items 1, 3 and 4 in the table annexed to the contested regulation.

23 Secondly, it submits that in this case the applicant is not individually concerned by the contested regulation. The regulation concerns an objectively determined situation and produces legal effects with respect to categories of persons envisaged generally and in the abstract, namely, importers of the products it describes. The Commission submits in particular that, according to settled case-law, operators are not individually concerned by tariff classification regulations for goods in the Combined Nomenclature

24 In support of its arguments, it cites, in particular, two orders of the Court of First Instance, namely the order of 29 April 1999 in Case T-120/98 *Alce* v *Commission* [1999] ECR II-1395 and the order of 30 January 2001 in Case T-49/00 *Iposea* v *Commission* [2001] ECR II-163, in which the Court dismissed the actions as inadmissible in relation to tariff classification.

25 In addition, the action which gave rise to the judgment of the Court of First Instance in Case T-243/01 *Sony Computer Entertainment Europe* v *Commission* [2003] ECR II-4189 is the only case in which an operator has been held to be individually concerned by a tariff classification regulation and that was in the light of a combination of four factors which are not present here.

26 Indeed, the 'exceptional circumstances' of the case which gave rise to the judgment in *Sony Computer Entertainment Europe* v *Commission* are not sufficiently established in this case to permit the same conclusion. In particular, the IRC's request to the Nomenclature Committee for guidance concerning the classification of the product in question could have carried but little or no weight, since the procedure leading to the adoption by the Commission of a tariff classification regulation is always

triggered by difficulties relating to a product's classification. Furthermore, the applicant did not demonstrate the operation of its product in its personal capacity, but as a member of the European Information and Communications Technology Industry Association (EICTA). In that regard, the product thus presented was a 30" monitor, whereas the product in question is a 20" monitor which, consequently, was never examined by the Nomenclature Committee.

27 In addition, the Commission is not aware of any decision of national courts concerning the classification of the product in question, a decision whose outcome would depend on the contested regulation.

28 The applicant is not the only undertaking to be affected, actually or potentially, by the contested regulation. That regulation contains no photographs of its products or any reference to any logo, trade mark or other proprietary right held by it. That lack of any exclusive rights to import LCD monitors with the same technical characteristics as those set out in item 2 in Column 1 of the table annexed to the contested regulation was also confirmed by the applicant itself in its application for tariff suspension and in its covering letter to the Irish authorities after the adoption of the contested regulation.

29 Finally, the applicant has not asserted that it was the only authorised importer of the product in question.

30 The applicant submits that the classification contained in item 2 in the table annexed to the contested regulation, although in the form of a regulation, in fact represents a decision which is of direct and individual concern to it.

31 It notes that it is settled case-law that a measure of general application may, in certain circumstances, be of direct and individual concern to some economic operators and therefore may be challenged by them under the fourth paragraph of Article 230 EC (see *Sony Computer Entertainment Europe* v *Commission*, paragraph 59, and the case-law cited). In the applicant's submission, the so-called Plaumann criteria are met in the present case.

32 The applicant asserts that the contested regulation directly affects its legal situation and leaves no discretion to those who are entrusted with the task of implementing the measure, such implementation being purely automatic and resulting from Community rules without the application of any other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43).

33 As regards individual concern, the applicant submits that the contested regulation affects it by reason of certain attributes peculiar to it, or by reason of a factual situation which differentiates it from all other persons and distinguishes it individually in the same way as the addressee of a decision.

34 In that regard, the applicant argues that the administrative procedure which led to the adoption of the contested regulation was triggered by its application in September 2004 to the IRC for BTI which they forwarded to the Nomenclature Committee for guidance. In January 2005, the applicant, at its request and with the support of EICTA, also demonstrated the use of its 30" LCD monitor to the members of that committee. In addition, a draft tariff classification regulation referring to 'Apple type' monitors was circulated to the Member States annexed to the Commission's working document TAXUD/573/2005.

35 In the applicant's submission, no other identical or similar product was demonstrated or discussed before the Nomenclature Committee as part of the procedure which led to the adoption of the contested regulation. Moreover, it is the only undertaking holding BTI for that product under heading 8471.

36 It submits, in addition, that the contested regulation focuses specifically on the classification of Apple's 20" LCD monitor, since item 2 in the table annexed to that regulation describes in detail all the features of that product and because there is no other product with identical features on the market. Accordingly, the applicant is the only undertaking whose legal position is, or could be, affected by the adoption of the contested regulation.

37 As regards *Sony Computer Entertainment Europe* v *Commission*, the applicant maintains that the factual circumstances which gave rise to that case are not the only 'exceptional circumstances' which could render an undertaking individually concerned. Rather, the overriding principle which implicitly emerges from that judgment is that all the factual circumstances of the case, whatever they may be, must be viewed cumulatively and in context in order to assess whether a particular tariff classification, although worded in a general and abstract manner, is in fact targeted at an individual product.

38 There exist striking similarities between *Sony Computer Entertainment Europe* v *Commission* and the present case, particularly the fact that both classifications were triggered by an application for BTI by the respective applicants and that in both cases the Commission was contacted because of a classification problem encountered by the national authorities. Furthermore, the national procedures for applications for classification to the IRC for the applicant's 20", 23" and 30" LCD monitors were all affected by the contested regulation.

39 The applicant demonstrated the operation of the product in question under the EICTA umbrella solely because of the Commission's insistence on the presence of a representative of that trade association and because of the impossibility of finding other dates for such presentation. In addition, the use of a 30" LCD monitor simply reflects the fact that the presentation took place in a large room and that such a monitor enabled the Nomenclature Committee's members to see it better, the two products being identical except for their size.

40 Next, the applicant submits that, even though the contested regulation contains no photographs of the Apple logo, there is no doubt that the Nomenclature Committee's members were aware that they were discussing the appropriate classification for the Apple LCD monitor, which is confirmed by the fact that it is mentioned, by way of example, in a statement of the IRC to the Nomenclature Committee.

41 As regards the applicant's application for tariff suspension, it plainly makes no reference to the Apple 20" LCD monitor, since the description which it contains is generic, as required by the Commission's guidelines.

42 Finally, the fact that, in *Sony Computer Entertainment Europe* v *Commission*, Sony was the only authorised importer of the product in question in the Community was not important in establishing that it was individually concerned. Further, it would, in reality, be impossible to be the sole importer of such a product because of the possibility of direct sales by means of the Internet.

43 As regards the subject-matter of its application, the applicant makes clear that it is asking the Court of First Instance to annul item 2 in the table annexed to the contested regulation, without annulling the measure in its entirety.

Findings of the Court

44 According to the fourth paragraph of Article 230 EC, the admissibility of proceedings brought by a natural or legal person for annulment of a regulation is subject to the condition that the provisions of the regulation at issue in the proceedings in reality constitute, in their substance, a decision of direct and individual concern to that person. According to settled case-law, the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the measure in question. A measure is of general application if it applies to objectively determined situations and produces its legal effects with respect to categories of persons envisaged generally and in the abstract (see the order of the Court of First Instance of 11 September 2007 in Case T-35/06 *Honig-Verband* v *Commission* [2007] ECR II-2865, paragraph 39, and the case-law cited).

45 Thus, according to settled case-law, natural and legal persons may not, as a rule, bring actions under the fourth paragraph of Article 230 EC for annulment of tariff classification regulations. In spite of the apparent specificity of the descriptions which they contain, such measures 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 (see Case 40/84 *Casteels* v *Commission* [1985] ECR 667, paragraph 11, and *Sony Computer Entertainment Europe* v *Commission*, paragraph 58, and the case-law cited).

46 In this case, item 2 in the table annexed to the contested regulation provides that goods with the characteristics described in column 1 are to be classified, in the Combined Nomenclature, under CN Code 8528 21 90. The provision applies to all products of the type described regardless of their individual characteristics and origin (see, to that effect, *Casteels* v *Commission*, paragraph 11).

47 That provision is therefore to be seen as a measure of general application within the meaning of the second paragraph of Article 249 EC. It concerns an objectively determined situation and produces legal effects with respect to persons envisaged generally and in the abstract, namely, importers of the products it describes (see, to that effect, *Iposea* v *Commission*, paragraph 24, and the case-law cited).

48 However, even a measure of general application may, in certain circumstances, be of direct and individual concern to some economic operators and therefore may be challenged by them under the fourth paragraph of Article 230 EC, provided, however, that it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and which distinguish them individually in the same way as the addressee of a decision (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107, and Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853, paragraph 20).

49 In that regard, the applicant submits, in particular, that the classification in question was triggered by its application to the IRC for BTI, that no other similar product was demonstrated to the Nomenclature Committee and that, on the basis of the demonstration of the operation of the product in question, a draft tariff classification regulation referring to 'Apple type' monitors was circulated to the Member States.

50 However, such circumstances cannot distinguish the applicant individually for the purposes of the fourth paragraph of Article 230 EC. The fact that a person is involved in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to that measure only if the applicable Community legislation grants him certain procedural guarantees (see the order of the Court of First Instance of 14 December 2005 in Case T-369/03 *Arizona Chemical and Others* v *Commission* [2005] ECR II-5839, paragraph 72, and the case-law cited). Such is not the case here.

51 In addition, while similar circumstances were taken into account to declare the action in *Sony Computer Entertainment Europe* v *Commission* admissible, they could not, above all in the light of the case-law cited above, have been the decisive factor. It was only '[i]n the light of all [that preceded and] in the exceptional circumstances of [that] case', that the applicant was, in that case, held to be individually concerned (*Sony Computer Entertainment Europe* v *Commission*, paragraph 77).

52 The same is true as regards the fact that the applicant is the only undertaking holding BTI for the product in question under heading 8471. First, the limited validity of BTI is prescribed by Article 12 of the Customs Code itself. Second, it should be recalled that, according to settled case-law, the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies by no means entails that the measure in question must be regarded as being of individual concern to them provided that it applies to them by virtue of an objective legal or factual situation defined by the measure in question (Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 64, and *Iposea* v *Commission*, paragraph 31).

53 It must, however, be made clear that the single fact that the applicant is or is not the sole authorised importer of the product concerned into the Community constitutes a relevant factor for the assessment of the applicant's individual concern 'having regard to the other aspects discussed above', but it is not sufficient, in itself, to establish

that the applicant is individually concerned by the contested regulation (see, to that effect, *Sony Computer Entertainment Europe* v *Commission*, paragraph 75). In that regard, the applicant does not claim to be the exclusive importer of the LCD monitors in question and makes no mention of any right entitling it to have imports of those products into the European Economic Area prevented. It is concerned by the contested regulation solely in its objective capacity as an actual or potential importer of the 20" LCD monitors.

54 As regards the description of the product which is the object of the classification in question, it is a very general description. In addition, no photography, no logo nor any other sign of an Apple trade mark appears in the table annexed to the contested regulation.

55 That conclusion is not undermined by the fact that there is a reference to the Apple monitors in a statement of the IRC to the Nomenclature Committee or by the alleged, but unproven, circulation to the Member States of a draft tariff classification regulation referring to 'Apple type' monitors. That is a reference, in the course of the procedure which led to the adoption of the contested regulation, to a generic reference product and not an identification of the specific product.

56 In summary, the applicant emphasises the alleged adoption of the contested regulation on the basis of its application for BTI and demonstration of the operation of the product in question to the Nomenclature Committee, the circulation of a draft tariff classification regulation for 'Apple type' monitors and the fact that it is the sole holder of BTI under heading 8471.

57 It follows from all the foregoing that none of those factors is sufficient, by itself, to conclude that the contested regulation is of individual concern to the applicant. It

is none the less necessary — in the light of *Sony Computer Entertainment Europe* v *Commission* — to analyse whether, 'in the exceptional circumstances of this case' the contested regulation distinguishes the applicant individually in the same way as the addressee of a decision.

58 Such is not the case. The rather general description of the goods concerned as well as the absence of any visual or textual factor clearly referring to a specific economic operator excludes the applicant, in this case, from being affected individually.

59 It follows that the applicant is concerned by the contested regulation only in its objective capacity as an importer of LCD monitors such as those referred to in the table annexed to that regulation, in the same way as any operator, actually or potentially, in an identical situation.

60 It follows from all the foregoing considerations that the contested regulation is not of individual concern to the applicant and that the action must therefore be dismissed as inadmissible.

Costs

61 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 in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. Apple Computer International shall pay the costs.

Luxembourg, 19 February 2008.

E. Coulon — Registrar

M. Vilaras — President