

OPINION OF ADVOCATE GENERAL
MENGOZZI

delivered on 10 September 2008¹

I — Introduction

Combined Nomenclature for 2004 ('the 2004 CN'), contained in Regulation No 1789/2003.²

1. In this case, the Court of Justice is asked to answer three questions submitted for a preliminary ruling by the national court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), concerning certain provisions of the Combined Nomenclature. The national court must give a ruling on the rules governing the classification of a liquid crystal display monitor ('LCD' monitor) imported by Kamino International Logistics BV ('Kamino'). It is against that background that the national court asks the Court of Justice to interpret certain provisions of the Combined Nomenclature.

3. Section I of Part One of the 2004 CN, entitled 'General rules' provides that:

...

II — Legislative background

Classification of goods in the Combined Nomenclature shall be governed by the following principles:

A — The provisions of the Combined Nomenclature

2. The version of the Combined Nomenclature applicable to the facts of this case is the

1. The titles of sections, chapters and sub-chapters are provided for ease of reference

1 — Original language: Italian.

2 — Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2003 L 281, p. 1).

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.

character, in so far as this criterion is applicable;

...

- (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

3. When ... goods are ... classifiable under two or more headings, classification shall be effected as follows:

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.'

- (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. ...

- (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

4. Section XVI of the 2004 CN 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'. That section contains Chapter 84 which covers 'Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof', and Chapter 85

which covers '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'.

(b) it is connectable to the central processing unit either directly or through one or more other units;

5. Chapter 84 is prefaced by the following 'Notes':

(c) it is able to accept or deliver data in a form (codes or signals) which can be used by the system.

'...

(C) Separately presented units of an automatic data-processing machine are to be classified in heading 8471.

5. ...

(D) Printers, keyboards, x-y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above are in all cases to be classified as units of heading 8471.

(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph E below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) it is of a kind solely or principally used in an automatic data-processing system;

(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.

...'

7. Chapter 85 of the 2004 CN, however, includes the following headings and subheadings:

6. Chapter 84 of the 2004 CN contains the following headings and subheadings, among others:

'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.

...

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

...

8471 60 — Input or output units, whether or not containing storage units in the same housing:

— Video monitors:

...

8471 60 90 — Other.'

8528 21 — — Colour

— — — With cathode-ray tube:

‘Among the constituent units [of a data-processing system] included are display units of automatic data-processing machines which provide a graphical representation of the data processed. They differ from the video monitors and television receivers of heading 8528 in several ways, including the following:

...

8528 21 90 — — — Other.’

(1) Display units of automatic data-processing machines are capable of accepting a signal only from the central processing unit of an automatic data-processing machine and are therefore not able to reproduce a colour image from a composite video signal whose waveform conforms to a broadcast standard (NTSC, SECAM, PAL, D-MAC etc.). They are fitted with connectors characteristic of data-processing systems (e.g. RS-232C interface DIN or [D-Sub] connectors) and do not have an audio circuit. ...

B — *The Explanatory Notes to the Harmonised System*

8. The Harmonised System, drawn up under the auspices of the World Customs Organisation, is the basis on which the Combined Nomenclature is drafted.³ The Harmonised System is accompanied by explanatory notes. In particular, the explanatory notes to heading 8471, applicable at the time of the facts of the main proceedings, read as follows:

3 — For an explanation of the provisions of the CN and their relationship with the Harmonised System in context, see Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25 and the case-law cited therein.

(2) These display units are characterised by low magnetic field emissions. Their display pitch starts at 0.41 mm for medium resolution and gets smaller as the resolution increases.

(3) In order to accommodate the presentation of small yet well-defined images, display units of this heading utilise smaller dot (pixel) sizes and greater convergence standards than those applicable to video monitors and television receivers of heading 8528. ...'⁴

D — Regulation No 754/2004

10. Commission Regulation (EC) No 754/2004 of 21 April 2004 concerning the classification of certain goods in the Combined Nomenclature⁶ classified under subheading 8528 21 90 two products described as follows:

C — *The Explanatory Notes to the CN*

9. The Explanatory Notes to the CN applicable at the material time, drawn up by the Commission,⁵ provide as follows in relation to subheading 8471 60 90:

'1. A colour plasma screen with a diagonal measurement of the screen of 106 cm (overall dimension 104 (W) x 64.8 (H) x 9.5 (D) cm) with an 852 x 480 pixel configuration.

The device has the following interfaces:

— an RGB connector,

'This subheading includes visual display units which can only be used as output units for an automatic data-processing machine. These units cannot reproduce an image from a coded (composite video) signal.'

— a DVI connector (digital visual interface),

4 — The Explanatory Notes date back to February 2002. They are available in English and French only. [*Omissis* — not relevant to the English text].

5 — Explanatory Notes to the Combined Nomenclature of the European Communities (OJ 2002 C 256, p. 1).

6 — OJ 2004 L 118, p. 32.

— a control connector.

— a control connector.

The RGB connector enables the device to display data directly from an automatic data-processing machine.

The DVI connector enables the device to display signals from an automatic data-processing machine or from another source, such as a DVD player or a video game player via a tuner box.'

The DVI connector enables the device to display signals from an automatic data-processing machine or from another source, such as a DVD player or a video game player via a tuner box.

11. The reasons given for that classification, and they are the same for both the products in question, are as follows:

2. A colour plasma screen with a diagonal measurement of the screen of 106 cm (overall dimension 103 (W) x 63.6 (H) x 9.5 (D) cm) with a 1 024 x 1 024 pixel configuration and detachable loud-speakers.

'Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature, and by the wording of CN codes 8528, 8528 21 and 8528 21 90.

The device has the following interfaces:

— a DVI connector (digital visual interface),

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 to Chapter 84).

Likewise, the product is not classifiable under heading 8531 because its function is not to provide visual indication for signalling purposes (see the HSEN to heading 8531, point D).'

tion must be classified under heading 8471 of the 2004 CN.

III — Main proceedings and questions referred

12. In August 2004, Kamino imported a consignment of model BenQ FP231W colour monitors with the following features: 23 inch (58.4 2 cm) diagonal measurement, maximum resolution 1920 x 1200 pixel points, screen aspect ratio 16:10, brightness 250 cd/m², contrast ratio 500:1, 16.7 million colours, pixel dimension 0.25 8 mm. The monitor has connections for D-Sub (VGA), DVI-D, USB, S-video and composite video, as well as an audio outlet.⁷

13. The Netherlands customs authorities took the view that the monitor in question must be classified under subheading 8528 21 90 of the 2004 CN. Kamino, however, considers that the product in ques-

14. The national court seised of the dispute at last instance considered it necessary to submit to the Court, in that regard, the following questions for a preliminary ruling:

(1) Must Note 5 to Chapter 84 of the Combined Nomenclature in the version of Annex I to Commission Regulation (EC) No 1789/2003 of 11 September 2003 be interpreted as meaning that a colour monitor which can display both signals from an automatic data-processing machine as referred to in heading 8471 of the CN and from other sources is excluded from classification under heading 8471 of the CN?

(2) If classification in heading 8471 of the CN of the colour monitor referred to in the first question above is not excluded, on the basis of which criteria must it then be determined whether it is a unit of the sort that is solely or principally used in an automatic data-processing system?

⁷ — I note, moreover, that even though the presence of this 'audio outlet' appears in the order for reference and is not challenged by the parties, looking at the documentation available on the producer's website (www.benq.com) that 'audio outlet' appears in fact to be a 12 V socket to power two external loudspeakers that can be hooked up to the monitor but need to be connected, as far as the signal is concerned, to an external audio source. In other words, the product does not appear to have an audio circuit.

- (3) Does the scope of application of Commission Regulation (EC) No 754/2004 of 21 April 2004 on the classification of certain goods in the CN extend to the monitor at issue and, if so, in the light of the answers to the first and second questions, is that regulation valid?’
- is capable of displaying images from a variety of sources.⁸

IV — The first question

15. By its first question, the national court asks whether Note 5 to Chapter 84 of the 2004 CN means that a monitor that is capable of displaying signals originating not only from a computer, but from other sources also, is excluded from classification under heading 8471 of Chapter 84. Although the national court does not explicitly mention this in the text of the question, it is clear, including from the grounds of the order for reference, that the allusion is more specifically a reference to Note 5(B).

A — Arguments of the parties

16. Kamino maintains that, generally speaking, monitors capable of operating solely in connection with a computer do not exist, and have never existed, since, if the appropriate connectors are used, any monitor

17. Consequently, the view of the Commission and the Netherlands customs authorities that, if a monitor can be connected to a device other than a computer, then the monitor itself cannot be classified under heading 8471 of the 2004 CN, would imply that no monitor could be classified under that heading, and that would be a nonsensical outcome.

18. Furthermore, classification of the monitors in question under heading 8471 cannot be ruled out on the basis of Note 5(E) to Chapter 84 of the 2004 CN, since the monitors at issue do not perform a specific function other than data processing.⁹

19. Note 5(B) to Chapter 84 does not itself require that, in order to be classified as data-processing apparatus, a computer’s peripherals should be designed solely for use in a computing context. In fact, since the provision in question requires that the peripherals should be ‘of a kind solely or principally used

⁸ — Paragraph 41 of Kamino’s observations.

⁹ — *Ibid.*, paragraph 45.

in an automatic data-processing system', the possibility that they may be used in a context other than a data-processing system is not, in principle, incompatible with classification in Chapter 84.¹⁰

20. Furthermore, according to Kamino, on other occasions, the Commission has explicitly acknowledged the possibility of classifying under heading 8471 some monitors which are theoretically capable of reproducing audio and video signals that do not originate from a computer. It did so in the context of Regulation No 2171/2005 on CN classification, in particular.¹¹

21. It follows that Note 5 to Chapter 84 of the 2004 CN does not exclude the classification under heading 8471 of a colour monitor that is able to display both signals originating from a computer and signals from other sources.

¹⁰ — *Ibid.*, paragraph 55.

¹¹ — 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). In particular, that regulation classifies under heading 8471 an LCD monitor with a diagonal measurement of the screen of 15 inches, a resolution of 1 024 x 768 pixels and a single D-Sub interface. Among the reasons which the Commission gives for that classification is the following: '[t]he intended use of the monitor is that of accepting signals from the central processing unit of an automatic data-processing system. The product is also capable of reproducing both video and sound signals. Nevertheless, in view of its size and its limited capability of receiving signals from a source other than an automatic data-processing machine via a card without video-processing features, it is considered to be of a kind solely or principally used in an automatic data-processing system.'

22. The Netherlands Government maintains that, generally speaking, a monitor that is able to reproduce both signals originating from a computer and signals from other sources, such as a DVD player or a game console, cannot be classified under heading 8471, but must instead be classified under heading 8528 of the 2004 CN.¹²

23. Furthermore, a monitor of the kind in question, which has D-Sub, DVI-D, USB, S-video and composite video connectors, as well as an audio outlet, cannot fall within heading 8471, as it cannot be regarded as solely or principally able to be used in an automatic data-processing system.¹³

24. The Commission first considers the characteristics of the monitors in question, and rules out any possibility that they may be regarded as being 'solely or principally used in an automatic data-processing system', because, as a result of their technical characteristics, they could easily be put to other uses.¹⁴

¹² — Observations of the Netherlands Government, paragraph 34.

¹³ — *Ibid.*, paragraph 36.

¹⁴ — Commission's observations, paragraphs 28 to 36.

25. According to the Commission, classification of the monitors in question in Chapter 84 of the 2004 CN is also ruled out pursuant to Note 5(E) of that chapter, because the monitors also have a 'specific function other than data processing'.¹⁵

26. More generally, the Commission considers that if it is possible for a monitor to reproduce signals originating from sources other than a computer, that monitor cannot be classified under heading 8471 of the 2004 CN.¹⁶

B — *Analysis*

1. Preliminary observations

27. In relation to the first question referred, both the Netherlands Government and the Commission have described at length the specific features of the monitors in question, in support of their contention that those monitors do not possess the characteristics required for classification under heading 8471 of the 2004 CN.

28. However, I would point out that, by its first question, the national court does not ask the Court of Justice to indicate in which tariff heading the products in question should be classified. The question actually turns, more generally, on how Note 5 to Chapter 84 of the 2004 CN is to be interpreted.

29. In my analysis of this question, I shall not, therefore, consider the arguments of the parties concerning the particular characteristics of the products at issue, but shall confine myself to interpreting Note 5. In any event, the arguments of the parties concerning the particular characteristics of the products to be classified may be taken into consideration as part of the examination of the second question, even though, as we shall see, the national court does not ask the Court of Justice to give a ruling on the specific rules governing classification of the products in that question either, but, once again, merely asks it to provide some general guidelines.

2. The substance of the question

30. The approach taken by the Netherlands Government and the Commission in this case, with the clear aim of resolving the dispute solely on the basis of the answer to the first question, consists of claiming that the mere

¹⁵ — *Ibid.*, paragraph 37.

¹⁶ — *Ibid.*, paragraph 39.

fact that a monitor is capable of displaying images originating from sources other than a computer means that the monitor must be excluded from classification in Chapter 84 of the 2004 CN.¹⁷

31. That approach does not, however, seem to me to merit acceptance.

32. The actual wording of Note 5(B) to Chapter 84 of the 2004 CN is in fact clear: for a peripheral to be able to be regarded as an integral part of a data-processing system, and, therefore, to be classified in Chapter 84, the requirement is not that the peripheral should, theoretically, be capable of being used *only* as part of that system. The actual requirement is that the peripheral should be 'of a kind solely or *principally* used in an automatic data-processing system' (emphasis added).

17 — That emerges, more particularly, as I have noted above, from paragraph 34 of the observations of the Netherlands Government and paragraph 39 of the Commission's observations. Moreover, I would point out that those same parties have also put forward arguments which, although this is not made clear, are based on the supposition that the mere possibility of displaying signals that do not originate from a computer is not sufficient to exclude classification in Chapter 84 of the 2004 CN, as that requires that the 'alternative' or 'further' function should not be merely marginal or theoretical (see, for example, paragraph 36 of the observations of the Netherlands Government and paragraph 36 of the Commission's observations). For further details in this connection, see the analysis of the second question referred.

33. The interpretation proposed by the Netherlands Government and the Commission would be tantamount to removing from the text of the provision the parenthetical 'or principally', and it is, therefore, unacceptable. Even a unit designed to be used 'principally', although not solely, in connection with a computer may, therefore, be classified as a data-processing product.

34. In all probability, the idea underlying the approach of the Netherlands Government and the Commission is linked to the practical difficulties involved in determining the actual scope of the adverb 'principally', particularly in the light of the Court's case-law, which very much focuses on products' specific and objectively verifiable characteristics, for the purposes of customs classification.¹⁸

35. However, the fact that the practical application of the abovementioned provision is potentially problematic cannot lead to a substantial element of the provision being ignored. Resolving those problems is actually

18 — See, for example, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-396/02, *DFDS* [2004] ECR I-8439, paragraph 27; and Case C-445/04 *Possehl Erzkontor* [2005] ECR I-10721, paragraph 19. See also point 75 of this Opinion.

a matter that arises at a subsequent stage, and may be discussed, in so far as the Court is asked to rule in this case, in the context of the examination of the second question referred.

which is an entirely secondary, if not irrelevant, function.¹⁹

3. The possible relevance of Note 5(E) to Chapter 84 of the 2004 CN

36. I consider that it is worth commenting only briefly on the Commission's argument that classification of the monitors in question under Chapter 84 of the 2004 CN is excluded on the basis of Note 5(E) to that chapter also.

37. I would first of all point out in that connection that the national court has not asked the Court to assess the applicability in this case of the provision in question.

38. In any event, I consider that Note 5(E) may not exclude a device from being classified in Chapter 84 of the CN unless the 'specific function other than data processing' is the only function the device in question performs. Otherwise, certain products might be classified on the basis of a function they possess

39. It does not, therefore, seem to me that Note 5(E) can be applied in this case. On the one hand, in fact, the Court has already held that the activity of a monitor consisting in the reproduction of images from a computer cannot constitute a 'specific function' as defined above.²⁰ On the other hand, even though the parties are in dispute as to the uses to which the monitors in question may be put, none of them claims that uses unrelated to data processing (or, in other words, 'non-computer' uses) are the only possible uses.

4. The Explanatory Notes to the Harmonised System and the CN

40. It remains to be established whether, in this case, classification of the monitors in question under Chapter 84 of the 2004 CN must be ruled out on the basis of the Explanatory Notes to the Harmonised System and the CN.

¹⁹ — For a more detailed exposition of the problem, I would refer to points 50 to 69 of my Opinion delivered on 17 July 2008 in Joined Cases C-362/07 and C-363/07 *Kip Europe and Others* (judgment pending before the Court).

²⁰ — Case C-11/93 *Siemens Nixdorf* [1994] ECR I-1945, paragraph 16.

(a) The explanatory note to heading 8471 of the Harmonised System

processing machines’, could still be classified under heading 8471.

41. It should first be pointed out that, according to settled case-law, although an important aid, the Explanatory Notes do not, in any event, have legally binding force, and must not be inconsistent with the provisions of the Harmonised System and the CN.²¹

42. As regards the explanatory note to heading 8471 of the Harmonised System, I would point out that since that note, which, moreover, pre-dates the facts of the main proceedings by more than two years (long enough, as far as information technologies are concerned, for there to be significant changes to the range of products marketed), it could also be interpreted as meaning that it does not indicate *all* of the monitors that are caught by heading 8471, but only some of them. The beginning of the note itself makes provision to that effect, stating that ‘included’ [a]mong the constituent units’ of a data-processing system ‘are display units of automatic data-processing machines’. In that case, there could be other display units which, although not able to be defined as ‘display units of automatic data-

43. If, however, it is accepted that the explanatory note in question in fact seeks to provide an exhaustive list of the monitors to be classified under heading 8471, the following must be pointed out. Interpreted in that way, the explanatory note is based on the assumption, which I have already stated to be incorrect, that only monitors that may be connected *solely* to a computer can be classified under heading 8471. In other words, the explanatory note does not envisage even the possibility, although this is clearly provided for in the text of the Harmonised System, of a monitor able to be classified under heading 8471, even though it can also be used, albeit not principally, in contexts other than ‘computing’.²² Consequently, if construed in that way, the note could not be applied, for it would conflict with the wording of the Harmonised System itself.

44. I would point out, moreover, that as regards the other technical characteristics which the note in question lists for monitors falling within heading 8471, the product at issue in this case appears fully to comply with them.

21 — See, for example, Case C-229/06 *Sunshine Deutschland Handelsgesellschaft* [2007] ECR I-3251, paragraph 27; Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 31 and the case-law cited therein; and Case C-312/07 *JVC France* [2008] ECR I-4165, paragraph 34.

22 — The current version of the Explanatory Notes to the Harmonised System, which dates from 2007, is, however, more open. According to the note relating to heading 8528, under which all monitors are now classified, monitors designed to be used solely or principally in connection with a computer (to be classified under subheading 8528.41) ‘include’ monitors able to be connected only to a computer. The classification of other monitors also under that heading is not, therefore, excluded.

(b) The explanatory note to subheading 8471 60 90 of the 2004 CN 5. The role of the WTO agreement on the trade in information technology products

45. Nor does the explanatory note applicable to subheading 8471 60 90 of the 2004 CN permit classification of the monitors in question under that same subheading to be excluded.

47. The observations set out thus far are further confirmed in the light of the WTO agreement on the trade in information technology products.

46. In point of fact, the explanatory note in question is illustrative/inclusive, and not exhaustive, in nature. In other words, it identifies a specific group of products that are caught by that subheading, but does not preclude the classification under that subheading of different products, other than those thus identified. That is quite apparent from the wording of the note itself.²³

48. It must not be forgotten that, in the final analysis, the essential difficulty in classifying the products in question resides in the fact that, depending on the CN heading under which those products are classified, they may, or may not, be subject to an import duty.

23 — In some language versions of the Explanatory Notes, the presence of an adverb indicates that the note in question is not exhaustive in character. The Italian text, for example, states that the heading covers 'specialmente' monitors able to function only when hooked up to a computer; the French text uses the word 'notamment' and the Spanish the word 'especialmente'. The adverb does not, however, appear in other language versions, even though the wording of the sentence seems, in any event, to suggest, in such cases also, that this is not an exhaustive list of the range of products caught by subheading 8471 60 90 of the 2004 CN. In particular, the English version states that '[t]his subheading includes visual display units which can only be used as output units for an automatic data-processing machine'; the German version that '[h]ierher gehören Datensichtgeräte, die nur als Ausgabeeinheiten von automatischen Datenverarbeitungs-maschinen verwendet werden können', and the Dutch version that '[d]eze onderverdeling omvat beeldscherm-eenheden die uitsluitend kunnen worden gebruikt als uitvoer-eenheid voor een automatische gegevensverwerkende machine' (emphasis added).

49. More particularly, information technology products are generally exempt from the imposition of duties, pursuant to an agreement to that effect reached within the World Trade Organisation (WTO) and based on the Ministerial Declaration on Trade in

Information Technology Products of 13 December 1996. That agreement was put into effect by the Council by Decision 97/359/EC of 24 March 1997 concerning the elimination of duties on information technology products.²⁴

Community law in a manner compatible with the agreement,²⁶ the fact that the latter clearly favours the free movement of information technology products without the imposition of duties must be taken into account when interpreting the CN.²⁷

50. As a rule, the Commission and some Member States tend to interpret that agreement restrictively, limiting as far as possible the range of products on which the agreement confers exemption from duties.

6. The voluntary unilateral suspension of the duties on certain types of monitor

51. However, even if the direct applicability in Community law of the WTO agreement is very problematic,²⁵ I consider that, in accordance with the obligation to interpret

52. The Community legislature has itself recognised the difficulty of unequivocally classifying LCD monitors. As of 2005 in fact, all colour LCD monitors with a diagonal measurement of 48.5 cm or less (about 19 inches) and a screen aspect ratio of 4:3 or 5:4 have been exempt from duty.²⁸ That unilateral decision was taken in response to the practical difficulties in ascertaining the principal use of the products in question, as well as based on the finding that '[t]rade data indicate that currently monitors using liquid crystal tech-

24 — OJ 1997 L 155, p. 1. In May 2008, the United States of America formally challenged at the WTO Community customs practice in relation, among other things, to monitors of the type at issue in this case. At the time of the drafting of this Opinion, only general media accounts were available, making it impossible to make a precise analysis of the issue. Media reports also indicate that the action by the United States has been followed by similar steps by Japan and Taiwan.

25 — The Court has repeatedly held that the possibility of using a WTO agreement as a criterion for assessing the legality of a Community act is subject to very strict conditions: see, by way of illustration, Case C-94/02 P *Biret & Cie v Council* [2003] ECR I-10565, paragraphs 55 and 56 and the case-law cited therein. On that occasion, the Court held that, to be able to assess the legitimacy of a Community act on the basis of a WTO agreement, it is necessary that 'the Community has intended to implement a particular obligation assumed in the context of the WTO, or ... the Community measure refers expressly to the precise provisions of the WTO agreements'. Neither of those conditions appears to be met in the case of the CN.

26 — See, generally, in relation to that obligation, Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52; and Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20. With specific reference to the TRIPS Agreement, which falls within the WTO system and has the same features, see Case C-53/96 *Hermès International* [1998] ECR I-3603, paragraph 28; Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 47; and Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989, paragraph 55.

27 — See also my Opinion in *Kip Europe and Others*, cited in footnote 19, points 67 to 69.

28 — That is to say as of Council Regulation (EC) No 493/2005 of 16 March 2005 amending Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclatures and on the Common Customs Tariff (OJ 2005 L 82, p. 1). The provision is, consequently, retained in the subsequent versions of the CN: in the version in force for 2008, contained in Commission Regulation (EC) No 1214/2007 of 20 September 2007 (OJ 2007 L 286, p. 1), the reference subheading is 8528 59 90.

nology with a diagonal measurement of 48.5 cm or less and a screen aspect ratio of 4:3 or 5:4 are mainly used as output units of automatic data-processing machines'.²⁹

53. That voluntary suspension of duties had yet to enter into force at the time of the facts of the main proceedings, and, in any event, the technical characteristics of the monitors at issue in these proceedings do not correspond to the characteristics of the products which benefit from that suspension of duties (their dimensions are in fact slightly larger and they have a different screen aspect ratio).

54. I would, however, point out that Regulation No 493/2005 clearly shows that it is impossible to classify monitors in a simplistic way and, above all, that it must be accepted that some monitors that are potentially capable of reproducing signals from sources other than a computer may, in any event, actually be used primarily in a 'computing' context.

7. Conclusion on the first question

55. In conclusion, I consider that the first question referred must be answered to the effect that Note 5 to Chapter 84 of the 2004

CN must be interpreted as meaning that a colour monitor, which is capable of reproducing both signals from an automatic data-processing machine and signals from other sources, is not, solely for that reason, excluded from classification under heading 8471 of the 2004 CN.

V — The second question

56. By its second question, the national court asks, if classification of the monitor in question under heading 8471 of the 2004 CN is not excluded, on the basis of what criteria is it possible to ascertain whether monitors of that kind satisfy the requirements set out in Note 5(B) to Chapter 84 of the 2004 CN for classification among data-processing products.

A — *Arguments of the parties*

57. Kamino maintains that, in order to ascertain whether a monitor is of the sort that is solely or principally used in an automatic data-processing system, it is necessary to take account of the sole or principal use for which the product is intended.

²⁹ — Recital 3 in the preamble to Regulation No 493/2005.

58. In this case, according to Kamino, a number of objective factors make it possible to establish that the monitors in question must be classified in Chapter 84 of the 2004 CN. Those factors include, in particular, the pixel dimension ('dot pitch'), the resolution, the screen aspect ratio of 16:10, the presence of VGA and DVI connectors, the absence of a remote control, SCART connector, a TV tuner and push buttons for changing channel.³⁰

59. For their part, however, both the Netherlands Government and the Commission consider that, in the light of the answer that they propose to the first question, it is not necessary to answer the second.

60. Notwithstanding that position of principle, however, those parties have also put forward, in the context of the dispute in relation to the first question, a number of considerations which appear actually to be logically connected to the second question.

61. In particular, the Netherlands Government has stated that, in its view, a monitor with the specific characteristics of the moni-

tors at issue here cannot be regarded as being of the sort designed to be used solely or principally in connection with an automatic data-processing system, especially bearing in mind the connectors which the apparatus possesses (D-Sub, DVI-D, USB, S-video, composite video, audio outlet).³¹

62. According to the Netherlands Government, which stated this in response to the Court's questions, for a monitor to be classified under heading 8471 of the 2004 CN, its possible 'non-computer-related' uses must be 'strictly theoretical'.

63. The Commission has stated that the expression 'of a kind solely or principally used in an automatic data-processing system', contained in Note 5(B) to Chapter 84 of the 2004 CN, must be regarded as referring not to the type of use of the apparatus but to the functions which it performs.³² Furthermore, the technical characteristics of the monitor in question, and, in particular, its dimensions, resolution and brightness make it perfectly suited for use in contexts other than computing, with the result that the conditions under Note 5(B)(a) are not satisfied.³³

30 — Kamino's observations, paragraphs 81 to 99.

31 — Observations of the Netherlands Government, paragraph 36.

32 — Commission's observations, paragraph 35.

33 — *Ibid.*, paragraph 36.

B — *Analysis*

meaning of the word ‘principally’ is very much less unambiguous.

64. This question too, which is probably the most difficult of the three questions referred, requires the Court to provide some general guidelines on how the Combined Nomenclature is to be interpreted. In particular, the Court is asked to indicate the exact meaning of the provision under Note 5(B)(a) to Chapter 84 of the 2004 CN and, more specifically, which criteria must be taken into account in order to determine whether or not a product satisfies the conditions laid down by Note 5(B)(a).

67. Since it is quite obviously not possible to interpret that adverb in mathematical or percentage terms (for instance, by setting a percentage use in connection with a computer equivalent to 80% of total use), I propose to the Court that it should interpret the concept of ‘principal use’ as equivalent to the concept of ‘normal use’.

65. Since the Court is not asked to indicate under which specific heading of the Combined Nomenclature the monitors in question must be classified, that particular decision remains a matter for the national court, which will have to decide in accordance with the Court’s guidelines.

68. It in fact seems to me that the concept of ‘normal use’ can be applied to the specific cases with less risk of ambiguity.

66. The key problem raised by this question is how to define the adverb ‘principally’.³⁴ While the preceding adverb ‘solely’ is not open to particular doubts as to its interpretation, the

69. Moreover, I consider that the word ‘principally’, contained in the provision, refers not to an apportionment of the periods of time for which the product is used but, rather, to its most frequent use. In other words, the person interpreting ‘principally’ is asked to ascertain not the percentage accounted for by each different use of the product, if it is used in different contexts, but, more straightforwardly, the product’s ‘typical’ or ‘normal’ use.

34 — The various language versions of Note 5(B) to Chapter 84 of the 2004 CN do not display significant differences on that point: the Italian ‘esclusivamente o principalmente’ is, for example, mirrored by the French ‘exclusivement ou principalement’, the English ‘solely or principally’, the German ‘ausschließlich oder hauptsächlich’, the Spanish ‘exclusiva o principalmente’, and the Dutch ‘uitsluitend of hoofdzakelijk’.

70. In the individual case, the person making the interpretation will have, therefore, to determine, in relation to the product at issue at any given time, the use for which that product must reasonably be regarded as being intended.

71. Furthermore, again in accordance with the interpretation that I have suggested, and seeking, therefore, to consider the normal use of the product in question, there is still the problem of establishing the actual criteria that should be applied to the conduct of that analysis.

72. In my view, there is no doubt that the technical characteristics of the product constitute the fundamental criterion to be taken into account in that connection. In the case of the monitors at issue, it will plainly be characteristics like the resolution, the screen aspect ratio (the width of the screen in relation to its height), the available connectors,³⁵ the possibility of adjusting the height and screen tilt angle, the presence of certain specific ergonomic features designed to facilitate close 'desktop' use and so forth, which the national court will have to analyse in order to determine whether or not the product is

normally used in connection with an automatic data-processing system.

73. The possibility of taking account of the product's intended commercial use, in other words its 'target' use, in order to determine its normal use, seems to me to be more problematical. In my view, that option should be excluded.

74. It is in fact clear that if significance is attached to elements such as the product's declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. In a variety of fields, instances of products which are surreptitiously presented as being intended for uses other than their real use, in order, for example, to circumvent sales bans or rule out producer liability, are in fact anything but infrequent, even though the relevant public is actually perfectly well aware of the real intended use of the products in question.

75. The position set out above seems to me, moreover, to be consistent with the case-law of the Court which, while in principle

³⁵ — I would point out in that connection that, in my view, and contrary to what the Netherlands Government and the Commission appear to argue, the presence of a DVI connection does not of itself make it possible to exclude primary use being for 'computing' purposes. That is because, in recent years, an ever-increasing number and now, probably, the majority of computers are equipped with a DVI outlet which has in fact taken the place of the VGA outlet.

accepting the possibility of taking a product's intended use into account in order to determine its customs classification, has, nevertheless, stressed that that intended use must be based on specific and objective criteria.³⁶

meaning of Note 5(B)(a) to Chapter 84 of the 2004 CN, it is necessary to determine whether the product's normal use is in connection with an automatic data-processing system. For that purpose, it is necessary to take into account all of the objective characteristics of the product in question as part of an assessment on an individual case basis.

76. I do not consider to be well founded the argument, particularly emphasised by the Commission at the hearing, that a product's intended use is irrelevant for the purposes of its classification. On the one hand, I would point out that Note 5(B) itself to Chapter 84 of the 2004 CN refers to the product's 'use' (where it mentions products 'of a kind solely or principally *used* in an automatic data-processing system'; emphasis added). On the other hand, I would point out that what is under discussion here is the use of a product on the basis of its objective characteristics: that itself is an objective criterion, therefore, and not a variable that is subjective or linked to the methods of marketing the product itself.

VI — The third question

78. By its third and final question, the national court asks whether the monitors in question fall within the scope of Regulation No 754/2004, and, if so, whether that regulation is valid.

77. I therefore propose that the Court should answer the second question by declaring that, in order to be able to ascertain that a product is 'of a kind solely or principally used in an automatic data-processing system', within the

A — Arguments of the parties

79. Kamino, reversing the order of the issues raised by the national court, begins by contending that Regulation No 754/2004 is unlawful since, by indicating the Commission's clear intention of, in any case, preventing the classification under heading 8471 of the CN of any monitor capable of reproducing video signals from sources other

36 — See, for example, Case 309/98 *C-Holz Geenen* [2000] ECR I-1975, paragraph 15; Case C-201/99 *Deutsche Nüchimen* [2001] ECR I-2701, paragraph 20; Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 30; and *Olicom*, cited in footnote 21, paragraph 18. I would also point out that in its judgment in Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 24, the Court in any event referred, albeit purely as an aid, to the methods of commercially promoting a product.

than a computer, the regulation is incompatible with the CN itself and, more generally, with the Harmonised System and the obligations entered into by the Community as a party to that system.³⁷

B — *Analysis*

83. I consider that Commission Regulation No 754/2004 cannot be applied to the monitors at issue for the following reasons.

80. In any event, even if it were lawful, the regulation in question is not applicable to this case, since it relates to products of a completely different kind from the products at issue here.³⁸

84. First of all, direct application of the regulation itself has to be ruled out because of the significant technical differences between the monitors at issue here and the display units forming the subject-matter of classification in the regulation.

81. The Netherlands Government, however, considers that the regulation in question is valid and may also apply to the monitors at issue, directly or, if necessary, by analogy.³⁹

85. Regulation No 754/2004 in fact takes into consideration, with a view to their classification for customs purposes, two plasma screens with a diagonal measurement of 106 cm (equivalent to about 42 inches) and a resolution of 852 x 480 and 1 024 x 1 024 pixels respectively.

82. However, according to the Commission, in the light of the answer to the first question, it is unnecessary to answer the third question.

86. Solely on that basis, those two aspects clearly demonstrate that these products are completely different from the products forming the subject-matter of these proceedings: it must in fact be recalled that, although they have a far smaller diagonal measurement (23 inches, that is to say 58.42 cm), the monitors at issue in this case have a far higher resolution (1 920 x 1 200 pixels). That, however, seems consistent with the different technologies on which the products under

37 — Kamino's observations, paragraphs 100 to 106.

38 — *Ibid.*, paragraph 107.

39 — Observations of the Netherlands Government, paragraphs 38-42.

comparison are based: whereas, in fact, a liquid crystal screen may be suitable for different uses, depending on its technical characteristics, plasma screens are typically used to reproduce, at relatively lower resolutions in relation to their dimensions, television and film signals and presentations.

monitors at issue here not directly but by analogy.

87. Nor is it possible to accept the argument of the Netherlands Government, set out in paragraph 41 of its observations in particular, that the plasma technology which characterises the monitors to which Regulation No 754/2004 relates is not a relevant criterion and does not preclude the applicability of that regulation to the monitors at issue in this dispute. I actually consider that this is precluded by the objective consideration consisting in the differences that exist between plasma and LCD technology, and the fact, acknowledged at the hearing by the Netherlands Government itself, that plasma screens are not generally used as output peripherals for data-processing machines. In other words, the products in question are not interchangeable.

88. It remains to be established whether, as the Netherlands Government suggests, again in paragraph 41 of its observations, Regulation No 754/2004 may be applicable to the

89. Here again, however, I consider that the answer must be that it is not.

90. Even though the Court has generally accepted the possibility of applying a classification regulation by analogy, it did so making clear that this may be done in relation to products 'similar' to those mentioned in the regulation, since this 'facilitates a coherent interpretation of the CN and the equal treatment of operators'.⁴⁰ In this case, however, as we have seen, the LCD monitors at issue cannot be regarded as in any way similar to the plasma screens which formed the subject-matter of Regulation No 754/2004.

91. It is, therefore, my view that the third question must be answered to the effect that the monitors at issue are not caught by Regulation No 754/2004. Consequently, there is no evidence to suggest that the regulation is unlawful.

⁴⁰ — *Krings*, cited in footnote 36, paragraph 35.

VII — Conclusion

92. In the light of the above considerations, I propose that the Court should give the following answers to the questions referred by the Hoge Raad der Nederlanden:

- (1) Note 5 to Chapter 84 of the Combined Nomenclature for 2004 contained in Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff must be interpreted as meaning that a colour monitor, which is capable of reproducing both signals from an automatic data-processing machine and signals from other sources, is not, solely for that reason, excluded from classification under heading 8471 of the Combined Nomenclature for 2004.

- (2) In order to be able to ascertain that a product is 'of a kind solely or principally used in an automatic data-processing system', within the meaning of Note 5(B)(a) to Chapter 84 of the Combined Nomenclature for 2004, it is necessary to determine whether the product's normal use is in connection with an automatic data-processing system. For that purpose, it is necessary to take into account all of the objective characteristics of the product in question as part of an assessment on an individual case basis.

- (3) The monitors at issue are not caught by Commission Regulation EC No 754/2004 of 21 April 2004 concerning the classification of certain goods in the Combined Nomenclature.