



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

20 September 2018*

(Reference for a preliminary ruling — Regulation (EEC) No 2658/87 — Customs Union and Common Customs Tariff — Tariff classification — Combined Nomenclature — Subheadings 8528 71 13 and 8528 71 90 — Apparatus capable of receiving, decoding and processing live TV signals transmitted using internet technology)

In Case C-555/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark), made by decision of 18 September 2017, received at the Court on 22 September 2017, in the proceedings

2M-Locatel A/S

v

Skatteministeriet,

THE COURT (Tenth Chamber),

composed of E. Levits, President of the Chamber, A. Borg Barthet (Rapporteur) and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- 2M-Locatel A/S, by T. Gønge and S.E. Holm, advokater,
- the Danish Government, by J. Nymann-Lindegren, acting as Agent, and B. Søes Petersen, advokat,
- the European Commission, by A. Caeiros and S. Maaløe, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Danish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of tariff subheading 8528 71 13 of the Combined Nomenclature ('the CN') set out in Annex I to 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), as amended by Commission Regulation (EC) No 1549/2006 of 17 October 2006 (OJ 2006 L 301, p. 1).
- 2 The request has been made in proceedings between 2M-Locatel A/S and the Skatteministeriet (Ministry of Taxation, Denmark) concerning the tariff classification of apparatus capable of receiving, decoding and processing Live TV signals transmitted using internet technology ('IPTV set-top boxes').

Legal context

The 1994 GATT and the ITA

- 3 The 1994 General Agreement on Tariffs and Trade (OJ 1994 L 336, p. 11; 'the 1994 GATT') and, in particular, the Understanding on the Interpretation of Article II:1(b) of the 1994 GATT are part of the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).
- 4 The Agreement on trade in information technology products, made up of the Ministerial Declaration on trade in information technology products, adopted on 13 December 1996 at the first Conference of the WTO in Singapore, together with its annexes and attachments ('the ITA'), and the Communication on its implementation were approved, on behalf of the Community, by Council Decision 97/359/EC of 24 March 1997 concerning the elimination of duties on information technology products (OJ 1997 L 155, p. 1). The ITA stipulates, in its first paragraph, that each party's trade regime should evolve in a manner that enhances market access opportunities for information technology products.
- 5 Under paragraph 2 of the ITA, each contracting party is required to bind and eliminate customs duties and other duties and charges of any kind, within the meaning of Article II:1(b) of the 1994 GATT, with respect to certain products, including 'set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the internet, and having a function of interactive information exchange.'

EU law

The CN

- 6 The customs classification of goods imported into the European Union is governed by the CN, which is based on the Harmonised Commodity Description and Coding System, which was drawn up by the World Customs Organisation (WCO) and established by the International Convention on the Harmonised Commodity Description and Coding System, concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).
- 7 The CN reproduces that system's six-digit headings and subheadings, with only the seventh and eighth figures creating further subheadings which are specific to it.

- 8 Part One of the CN contains a series of preliminary provisions. In Section I of Part One, which contains general rules, subsection A, entitled ‘General rules for the interpretation of the [CN]’, provides:

‘Classification of goods in the [CN] shall be governed by the following principles:

1. The 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. For 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 requires otherwise.’
- 9 Part Two of the CN is divided into 21 sections. Section XVI, 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’, includes Chapters 84 and 85 of the CN. Chapter 85, 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’, covers CN headings 8501 to 8548.
- 10 CN heading 8528 is structured as follows:

'8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:	
	...	
	– Reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus:	
8528 71	– – Not designed to incorporate a video display or screen:	
	– – – Video tuners:	
8528 71 11	– – – – Electronic assemblies for incorporation into automatic data-processing machines	Free
8528 71 13	– – – – Apparatus with a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange, capable of receiving television signals (“set-top boxes with communication function”)	Free
8528 71 19	– – – – Other	14
8528 71 90	– – – Other	14'

The Explanatory Notes to the CN

- 11 Pursuant to the second indent of Article 9(1)(a) of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16), the European Commission draws up explanatory notes to the CN, which it publishes regularly in the *Official Journal of the European Union*.
- 12 Those published on 28 February 2006 (OJ 2006 C 50, p. 1) state, in respect of CN subheadings 8528 12 90 to 8528 12 95, in the version resulting from Commission Regulation (EC) No 1810/2004 of 7 September 2004 (OJ 2004 L 327, p. 1):

‘Video tuners

These apparatus incorporate selector circuits, which permit tuning to a special channel or carrier frequency, and demodulation circuits. They are generally designed to operate with an individual aerial or a shared aerial (high-frequency cable distribution). The output signal can be used as an input signal for video monitors or for video recording or reproducing apparatus. It consists of the original camera signal (i.e., not modulated for transmission purposes).

Sometimes, the apparatus are also equipped with decoding device (colour) or separator circuitry for synchronisation.’

- 13 According to the explanatory notes to the CN published on 7 May 2008 (OJ 2008 C 112, p. 8), relating to CN subheadings 8528 71 13 to 8528 71 90:

‘8528 71 13 ...

– This subheading covers apparatus without a screen, so-called “set-top boxes with communication function”, consisting of the following main components:

...

– a video tuner.

The presence of an RF connector is an indicator that a video tuner may be present.

– a modem.

Modems modulate and demodulate outgoing as well as incoming data signals. This enables bidirectional communication for the purposes of gaining access to the Internet. Examples of such modems are: V.34–, V.90–, V.92–, DSL or cable modems. ...

Devices performing a similar function to that of a modem but which do not modulate and demodulate signals are not considered to be modems. Examples of such apparatus are ISDN-, WLAN- or Ethernet devices. ...

...

Set top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive) are excluded from this subheading (subheading 8521 90 90).

...

8528 71 90 ...

– This subheading includes products without a screen which are reception apparatus for television but which do not incorporate a video tuner (for example, so-called “IP-streaming boxes”).’

- 14 The Explanatory Notes to the CN published on 30 May 2008 (OJ 2008 C 133, p. 1) state, in respect of CN subheadings 8528 71 11 to 8528 71 19:

‘These subheadings cover apparatus incorporating a video tuner which converts high-frequency television signals into signals usable by video recording or reproducing apparatus or monitors.

These apparatus incorporate selector circuits, which permit tuning to a special channel or carrier frequency, and demodulation circuits. They are generally designed to operate with an individual aerial or a shared aerial (high-frequency cable distribution). The output signal can be used as an input signal for monitors or for recording or reproducing apparatus. It consists of the original camera signal (i.e., not modulated for transmission purposes).

Sometimes, the apparatus are also equipped with decoding device (colour) or separator circuitry for synchronisation.’

The dispute in the main proceedings and the question referred for a preliminary ruling

- 15 During the period between 21 October 2007 and 8 July 2010, 2M-Locatel imported IPTV set-top boxes from China. IPTV set-top boxes are not capable of receiving, decoding and processing television signals transmitted via antenna, cable or satellite.
- 16 IPTV set-top boxes incorporate an Ethernet device and the parties to the main proceedings agree that they incorporate a ‘modem’ for the purposes of the CN.
- 17 At the time of importation, the product at issue in the main proceedings was declared by 2M-Locatel as coming under CN subheading 8528 71 13 and was thus released into free circulation exempt from customs duties.
- 18 Taking the view that that product should be classified under CN subheading 8528 71 90 on the ground that it does not incorporate a ‘video tuner’ for the purposes of the CN, on 20 October 2010 the Danish tax and customs authority issued a notice of additional assessment providing for the a posteriori recovery of customs duties on the importation of the IPTV set-top boxes at issue in the main proceedings at a rate of 14% plus interest.
- 19 Following receipt of a complaint from 2M-Locatel, the Landsskatteretten (National Tax Tribunal, Denmark) amended the decision of the Danish tax and customs authority by decision of 15 May 2014 and cancelled the recovery order on the ground that the IPTV set-top boxes came under CN subheading 8528 71 13.
- 20 The Ministry of Taxation brought an appeal against that decision which was upheld by a judgment of the Byretten, Retten i Glostrup (District Court, Glostrup, Denmark) of 15 July 2015.
- 21 2M-Locatel appealed against that judgment before the referring court.
- 22 It is common ground between the parties to the main proceedings that the IPTV set-top boxes at issue in the main proceedings meet the descriptive requirements of CN subheading 8528 71 13. Those parties also agree that, under the 1994 GATT and the ITA, the European Union is bound not to levy import duties on set-top boxes with a communication function, such as the product at issue in the main proceedings.
- 23 According to the referring court, their dispute concerns the question whether those IPTV set-top boxes must be regarded as incorporating a ‘video tuner’ for the purposes of the CN.
- 24 As it took the view that that concept is not defined by the CN or by the Explanatory Notes thereto, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘In the [CN], are

- (a) the subdivision “Video tuners” of heading 8528,
- (b) subheading 8528 71 13 and
- (c) subheading 8528 71 90

to be interpreted as meaning that a product matching the product description in subheading 8528 71 13 and capable of receiving, decoding and processing live TV television signals transmitted via internet technology, but not capable of receiving, decoding and processing live TV television signals transmitted via antenna, cable TV or satellite, is to be classified under subheading 8528 71 13, under subheading 8528 71 90 or under a third subheading?’

Consideration of the question referred

- 25 By its question, the referring court asks, in essence, whether the CN must be interpreted as meaning that apparatus, such as the IPTV set-top boxes at issue in the main proceedings, come within CN subheading 8528 71 13 or CN subheading 8528 71 90.
- 26 As a preliminary point, it must be pointed out that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to effect the classification in question (judgment of 12 April 2018, *Medtronic*, C-227/17, EU:C:2018:247, paragraph 33).
- 27 According to the Court’s settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the corresponding section or chapter notes (see, inter alia, judgments of 14 April 2011, *British Sky Broadcasting Group and Pace*, C-288/09 and C-289/09, EU:C:2011:248, paragraph 60, and of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 27).
- 28 Under the general rules for the interpretation of the CN, for legal purposes, the classification of goods in the subheadings of a heading is to be determined according to the terms of those subheadings and any related subheading, section or chapter notes, with the wording of section, chapter and subchapter titles being considered to be provided for ease of reference only.
- 29 Furthermore, the Explanatory Notes to the CN drawn up by the Commission may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (see, inter alia, judgments of 14 April 2011, *British Sky Broadcasting Group and Pace*, C-288/09 and C-289/09, EU:C:2011:248, paragraph 63, and of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 33).
- 30 In the present case, CN subheading 8528 71 covers television receivers that are not designed to incorporate a video display or screen.
- 31 It draws a distinction between ‘video tuners’, referred to in CN subheadings 8528 71 11, 8528 71 13 and 8528 71 19, and ‘other’, coming under CN subheading 8528 71 90. Being a residual category, that latter subheading therefore covers reception apparatus for television not incorporating a ‘video tuner’.
- 32 In that regard, it must be noted that the expressions ‘video reception’ and ‘television reception’ refer to two identical concepts (judgment of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 29).

- 33 In the case in the main proceedings, it is not disputed that IPTV set-top boxes are appropriate for the purpose of receiving television signals. On the other hand, 2M-Locatel and the Ministry of Taxation are in dispute as to whether those apparatus must be regarded as incorporating a ‘video tuner’ for the purposes of CN subheading 8528 71.
- 34 According to the findings of the referring court, IPTV set-top boxes receive digital signals and perform channel decoding by decoding the internet protocol address, whereas set-top boxes for television broadcast via antenna, cable or satellite receive analogue signals and channel decoding takes place through frequency decoding.
- 35 In order to give an answer to the referring court, it is therefore necessary to determine what is covered by the concept of ‘video tuner’ for the purposes of CN subheading 8528 71.
- 36 Failing any definition of that concept in the CN, it must be recalled that, according to settled case-law, the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the objectives of the rules of which they are part (judgment of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 38).
- 37 A ‘video tuner’, or a ‘television tuner’, within the usual meaning of those terms, covers apparatus which convert high-frequency television signals into signals usable by video recording or reproducing apparatus or monitors. It also makes it possible to select television signals transmitted at a specific frequency.
- 38 That definition is supported by the Explanatory Notes to the CN in force at the time of the imports at issue in the main proceedings.
- 39 According to the Explanatory Notes to the CN published on 28 February 2006, ‘these apparatus incorporate selector circuits, which permit tuning to a special channel or carrier frequency, and demodulation circuits. They are generally designed to operate with an individual aerial or a shared aerial (high-frequency cable distribution). The output signal can be used as an input signal for monitors or for recording or reproducing apparatus. It consists of the original camera signal (i.e., not modulated for transmission purposes)’.
- 40 According to the Explanatory Notes to the CN published on 7 May 2008, CN subheading 8528 71 13 ‘covers apparatus without a screen, so-called “set-top boxes with communication function”, consisting of the following main components: ... a video tuner. The presence of an RF [radio frequency] connector is an indicator that a video tuner may be present’.
- 41 Finally, the Explanatory Notes to the CN published on 30 May 2008 provide that CN subheadings 8528 71 11 to 8528 71 19 ‘cover apparatus incorporating a video tuner which converts high-frequency television signals into signals usable by video recording or reproducing apparatus or monitors. These apparatus incorporate selector circuits, which permit tuning to a special channel or carrier frequency, and demodulation circuits. They are generally designed to operate with an individual aerial or a shared aerial (high-frequency cable distribution). The output signal can be used as an input signal for monitors or for recording or reproducing apparatus. It consists of the original camera signal (i.e., not modulated for transmission purposes)’.
- 42 It follows from the foregoing considerations that, in order to come under CN subheadings 8528 71 11 to 8528 71 19, the apparatus must incorporate a video tuner or a ‘television tuner’, namely, apparatus making it possible to select channels or carrier frequencies and to convert high-frequency television signals into signals usable by video recording or reproducing apparatus or monitors.

- 43 In accordance with the case-law recalled in paragraph 26 of the present judgment, it will therefore be for the referring court to assess whether the IPTV set-top boxes at issue in the main proceedings have those characteristics. Failing that, they will have to be classified under the residual CN subheading 8528 71 90 and, consequently, be subject to a customs duty of 14%.
- 44 That interpretation is not called into question by paragraph 2 of the ITA, according to which each contracting party is required to eliminate customs duties applicable to, inter alia, ‘set-top boxes which have a communication function: a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange’, regardless of whether or not those set-top boxes incorporate a television tuner.
- 45 Admittedly, it follows from the Court’s settled case-law that the primacy of international agreements concluded by the European Union over provisions of secondary legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements (judgments of 14 April 2011, *British Sky Broadcasting Group and Pace*, C-288/09 and C-289/09, EU:C:2011:248, paragraph 83, and of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 39).
- 46 However, it must be noted that such an interpretation, which would involve endorsing the view that set-top boxes which have a communication function must be classified under CN subheading 8528 71 13, even those which do not make it possible to select channels or carrier frequencies or to convert high-frequency television signals into signals usable by video recording or reproducing apparatus or monitors, is not possible since, as is apparent from paragraph 42 of the present judgment, it would run counter to the wording of the CN and, consequently, to the intention of the EU legislature.
- 47 Moreover, it should be recalled that, for the period prior to the expiry date of the reasonable period granted to the European Union in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes to comply with the recommendations or decisions of the WTO Dispute Settlement Body, the EU Courts cannot conduct a review of the lawfulness of the EU measures in the light of the WTO rules, without rendering that reasonable period ineffective (judgment of 17 January 2013, *Hewlett-Packard Europe*, C-361/11, EU:C:2013:18, paragraph 58 and the case-law cited).
- 48 In that regard, it must be noted that, under the ITA, a WTO Panel published its reports in Cases WT/DS375/R, WT/DS376/R and WT/DS377/R (European Communities and their Member States — Tariff treatment of certain information technology products) on 16 August 2010, which were adopted by the WTO Dispute Settlement Body on 21 September 2010.
- 49 Those reports indicate, inter alia, what is meant by ‘set-top box’. A set-top box is ‘an apparatus or device that processes an incoming signal from an external signal source in a manner that can be presented on a display unit, such as a video monitor or television set’. They state that a set-top box ‘may handle one or several functionalities, including: receiving and decoding television broadcasts, whether from a satellite, cable or Internet source’.
- 50 The reasonable time period granted to the European Union to implement those reports adopted by the WTO Dispute Settlement Body expired on 30 June 2011 and the Commission took them into account in adopting Implementing Regulation (EU) No 620/2011 of 24 June 2011 amending Regulation No 2658/87 (OJ 2011 L 166, p. 16). Under Article 2 thereof, that regulation entered into force on 1 July 2011 and has no retroactive effect.
- 51 It follows that the validity of Regulation No 1549/2006 cannot, in any event, be called into question on the ground that it classifies set-top boxes with a communication function which do not incorporate a television tuner under CN subheading 8528 71 90.

- 52 In the light of all the foregoing considerations, the answer to the question referred is that the CN must be interpreted as meaning that apparatus, such as the IPTV set-top boxes at issue in the main proceedings, capable of receiving, decoding and processing live TV signals transmitted using internet technology must be classified under subheading 8528 71 90 thereof, provided that they do not incorporate a video tuner or a ‘television tuner’, this being a matter for the referring court to ascertain.

Costs

- 53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

The Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1549/2006 of 17 October 2006, must be interpreted as meaning that apparatus capable of receiving, decoding and processing live TV signals transmitted using internet technology, such as the apparatus at issue in the main proceedings, must be classified under subheading 8528 71 90 thereof, provided that they do not incorporate a video tuner or a ‘television tuner’, this being a matter for the referring court to ascertain.

[Signatures]