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SODIŠČE EVROPSKE UNIJE  
EUROOPAN UNIONIN TUOMIOISTUIN  
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## JUDGMENT OF THE COURT (Second Chamber)

14 April 2011 \*

(Common Customs Tariff – Tariff classification – Combined Nomenclature –  
Digital satellite television receivers and decoders with a recording function –  
Community Customs Code – Article 12(5)(a)(i) and (6) – Period of validity of a  
binding tariff information)

In Joined Cases C-288/09 and C-289/09,

REFERENCES for a preliminary ruling under Article 234 EC from the First Tier  
Tribunal (Tax Chamber) (United Kingdom), made by decisions of 6 July 2009,  
received at the Court on 24 July 2009, in the proceedings

**British Sky Broadcasting Group plc** (C-288/09),

**Pace plc** (C-289/09)

v

**The Commissioners for Her Majesty's Revenue & Customs,**

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Rosas, U.  
Lõhmus, A.Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 December  
2010,

after considering the observations submitted on behalf of:

\* Language of the case: English.

- British Sky Broadcasting Group plc, by D. Anderson QC, and L. Van den Hende, advocaat,
- Pace plc, by J. Grayston, Solicitor, and J. White, Barrister,
- the United Kingdom Government, by S. Hathaway, acting as Agent, and O. Thomas, Barrister,
- the Council of the European Union, by F. Florindo Gijón and R. Liudvinaviciute-Cordeiro, acting as Agents,
- the European Commission, by R. Lyal and L. Bouyon, acting as Agents,

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

gives the following

### **Judgment**

- 1 These references for a preliminary ruling concern the interpretation of subheadings 8521 90 00 and 8528 71 13 of 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 (OJ 1987 L 256, p. 1), as amended by Commission Regulations (EC) Nos 1549/2006 of 17 October 2006 (OJ 2006 L 301, p. 1), and 1214/2007 of 20 September 2007 (OJ 2007 L 286, p. 1) ('the CN'), and the interpretation of Article 12(5)(a)(i) and 6 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, and corrigendum, OJ 1997 L 179, p. 11) ('the Customs Code').
- 2 The references have been made in two sets of proceedings between British Sky Broadcasting Group plc ('Sky') and Pace plc ('Pace') against the Commissioners for Her Majesty's Revenue & Customs ('the Commissioners') concerning, first, the tariff classification of models of set-top boxes with a communication function and a hard disk drive and, second, payment of customs duties for those goods.

## Legal context

### *The tariff classification*

#### The international tariff classification

- 3 The International Convention on the Harmonised Commodity Description and Coding System ('the HS'), concluded at Brussels on 14 June 1983, and its amending protocol of 24 June 1986 ('the HS Convention') were approved on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987 (OJ 1987 L 198, p. 1).
- 4 Under Article 3(1)(a) of the HS Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures will be in conformity with the HS, to use all the headings and subheadings of the HS without addition or modification, together with their related numerical codes, and to follow the numerical sequence of that system. The same provision provides that the contracting party must apply the general rules for the interpretation of the HS and all the section, chapter and subheading notes of the HS, and not modify their scope.
- 5 The Customs Cooperation Council, now the World Customs Organisation, established by the Convention establishing that Council, concluded at Brussels on 15 December 1950, is to approve, under the conditions laid down in Article 8 of the HS Convention, the Explanatory Notes and Classification Opinions adopted by the HS Committee, a body the organisation of which is governed by Article 6 thereof. Under Article 7(1) of the HS Convention, the functions of that committee include proposing amendments to that Convention and preparing Explanatory Notes, Classification Opinions and other advice as guides to the interpretation of the HS.
- 6 The explanatory notes concerning heading 8521 of the HS state, inter alia, as follows:

' ...

#### A.- Recording and combined recording and reproducing apparatus

These are apparatus which, when connected to a television camera or a television receiver, record on media electric impulses (analogue signals) or analogue signals converted into digital code (or a combination of these) ... The method of recording can be by magnetic or optical means and the recording media is usually tapes or discs.

...

The heading excludes:

...

- (c) Reception apparatus for television (whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus) and video monitors and video projectors (heading 85.28).'

7 As regards heading 8528 of the HS, the Explanatory Notes state, inter alia, as follows:

‘...

#### D.- Reception apparatus for television

This group includes apparatus whether or not designed to incorporate a video display or screen, such as:

- (1) Receivers of television broadcasts (terrestrial, cable or satellite) which do not include a display device (CRT, LCD, etc.). These apparatus receive signals and convert them into a signal suitable for display. They may also incorporate a modem for connection to the internet.

These receivers are intended to be used with video recording or reproducing apparatus, monitors, projectors or televisions. However, devices which simply isolate high-frequency television signals (sometimes called video tuners) are to be classified as parts in heading 85.29.

...

- (3) Television receivers of all kinds (LCD, plasma, CRT, etc.) used in the home (television sets), whether or not incorporating a radio-broadcast receiver, video cassette recorder, DVD player, DVD recorder, satellite receiver, etc.

...

The heading excludes:

- (a) Video recording or reproducing apparatus (heading 85.21).

...’

The CN

8 The CN is based on the HS, from which it takes the six-digit headings and subheadings, only the seventh and eighth digits forming subdivisions specific to the CN.

9 Under Article 12(1) of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000 (OJ 2000 L 28, p. 16)

(‘Regulation No 2658/87’), the European Commission is required to adopt each year a regulation reproducing the complete version of the CN and the rates of customs duty, as resulting from measures adopted by the Council of the European Union or by the Commission. That regulation is to apply from 1 January of the following year.

- 10 Article 8 of Regulation No 2658/87 states that the committee referred to in Article 247 of the Customs Code may examine any matter referred to it by its chairman, at the request of a representative of a Member State, concerning, inter alia, the CN.
- 11 The version of the CN applicable to Case C-289/09 is that which results from Regulation No 1549/2006, which entered into force on 1 January 2007.
- 12 The version of the CN applicable to Case C-288/09 is that which results from Regulation No 1214/2007, which entered into force on 1 January 2008.
- 13 The general rules for the interpretation of the CN are set out in Part One, Title I A of it. Those rules are identical in the CN versions which result from Regulations Nos 1549/2006 and 1214/2007. They provide:

‘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.

...

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

...

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

...

...

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.’
- 14 Part Two of the CN includes Section XVI. That section includes Chapter 85 on 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.
- 15 Note 3 to Section XVI of the CN states as follows:

‘Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.’
- 16 The wording of headings 8521 and 8528 is identical for the versions of the CN which result from Regulations Nos 1549/2006 and 1214/2007. Moreover, those regulations do not provide for any period after the date of publication or of notification during which the holder of a binding information which ceases to be valid may continue to use it.
- 17 Heading 8521 of the CN is worded as follows:

‘8521 Video recording or reproducing apparatus, whether or not incorporating a video tuner:

8521 10 – Magnetic tape-type:

...

8521 90 00 – Other’.
- 18 Heading 8528 of the CN is worded 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 radiobroadcast receivers or sound or video recording or reproducing apparatus:

8528 71 – – Not designed to incorporate a video display or screen:

...

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”).

The Explanatory Notes to the CN

- 19 Pursuant to the second indent of Article 9(1)(a) of Regulation No 2658/87, the Commission draws up Explanatory Notes for the CN, which it publishes regularly in the *Official Journal of the European Union*. Those published on 7 May 2008 (OJ 2008 C 112, p. 8) stipulate, in regard to headings 8521 and 8528:

‘8521 90 00 Other

This subheading includes apparatus without a screen capable of receiving television signals, so-called “set-top boxes”, which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).

...

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”).

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

- a microprocessor,
- a video tuner.

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

- a modem.

...

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 00).

...’

- 20 At the time of the facts in the main proceedings, the rate of customs duties on importation applicable to devices in subheading 8521 90 00 was 13.9 %, while devices in subheading 8528 71 13 were exempt from duty.

*The General Agreement on Tariffs and Trade of 1994 and the Agreement on trade in information technology products*

- 21 The General Agreement on Tariffs and Trade (GATT) of 1994 (‘the 1994 GATT’), and, in particular, the Understanding on the Interpretation of Article II:1(b) of 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).
- 22 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, 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.
- 23 Under paragraph 2 of the ITA, each party is 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’.
- 24 On 16 November 2000 Council Regulation (EC) No 2559/2000 amending Annex I to Regulation No 2658/87 (OJ 2000 L 293, p. 1) was adopted, for the purposes of applying the ITA, in accordance with recital 2 in the preamble to that regulation.

*The Customs rules*

- 25 The customs rules include the Customs Code and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 12/97 of 18 December 1996 (OJ 1997 L 9, p. 1) (‘the implementing regulation’).



## The Customs Code

26 Article 4 of the Customs Code is worded as follows:

‘For the purposes of this Code, the following definitions shall apply:

...

- (5) “Decision” means any official act by the customs authorities pertaining to customs rules giving a ruling on a particular case, such act having legal effects on one or more specific or identifiable persons; this term covers, inter alia, binding information within the meaning of Article 12.

...’

27 Under Article 12(1) to (6) of the Customs Code:

‘1. The customs authorities shall issue binding tariff information or binding origin information on written request, acting in accordance with the committee procedure.

2. Binding tariff information or binding origin information shall be binding on the customs authorities as against the holder of the information only in respect of the tariff classification or determination of the origin of goods.

...

5. Binding 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;
- (ii) where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6):
  - at Community level, by reason of amendments to the explanatory notes to the combined nomenclature or by a judgment of the Court of Justice of the European Communities,

...

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 ...

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.

...’

28 Article 243 of the Customs Code states as follows:

‘1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.

...

The appeal must be lodged in the Member State where the decision has been taken or applied for.

2. The right of appeal may be exercised:

- (a) initially, before the customs authorities designated for that purpose by the Member States;
- (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.’

29 According to Articles 247 and 247a of the Customs Code, for the implementation of that regulation, the Commission is to be assisted by a Customs Code Committee.

The implementing regulation

30 Article 11 of the implementing regulation provides:

‘Binding tariff information supplied by the customs authorities of a Member State since 1 January 1991 shall become binding on the competent authorities of all the Member States under the same conditions.’

31 Article 12 of that regulation states:

‘1. On adoption of one of the acts or measures referred to in Article 12(5) of the [Customs] Code, the customs authorities shall take the necessary steps to ensure that binding information shall thenceforth be issued only in conformity with the act or measure in question.

- 2. (a) For binding tariff information, for the purposes of paragraph 1 above, the date to be taken into consideration shall be as follows:

...

- for the Regulations provided for in Article 12(5)(a)(ii) of the [Customs] Code concerning amendments to the explanatory notes to the combined nomenclature, the date of their publication in the “C” series of the *Official Journal of the European Communities*,

...’

**The actions in the main proceedings and the questions referred for a preliminary ruling**

*Case C-288/09*

- 32 Sky is a provider of digital satellite television services. It imports to the United Kingdom a model of set-top box with a communication function and a hard disk. That box is called ‘Sky+ box, model DRX 280’ (‘the Sky+ box’).
- 33 The Sky+ box is a satellite television receiver. Such receivers receive and decode digital television signals transmitted over the satellite television platform of broadcasters such as Sky. The signal is decoded only when it is sent to be displayed on a television screen.
- 34 The broadcaster transmits digital television signals by satellite, and they are received by a low-noise block converter located on a satellite dish on the side of the retail consumer’s home. The digital signal is then sent via a cable in the receiver.
- 35 The Sky+ box is specifically designed and programmed to receive and decode only digital television signals made available by Sky’s satellite platform.
- 36 The Sky+ box does not have a video display screen. It contains a modem for internet access and, through that, has a function of interactive information exchange.
- 37 The Sky+ box has a hard disk. Half of the hard disk storage capacity is used by Sky’s services for use of the video on demand service. The other half is for the end user to record television content received from Sky’s satellite television platform. The Sky+ box cannot record video content from any other external source including television receivers, cameras or video recorders. The box cannot play video content from external media such as DVDs or videotapes. Nor is it capable of recording video content onto external media.
- 38 The end user does not need the Sky+ box’s hard disk in order simply to watch television directly. In that case, the box functions solely as a reception apparatus for television. However, the box cannot function using the built-in hard disk alone, without receiving a digital television signal, since even when it is playing

content from the hard disk, it can only work when it is receiving such a signal from the Sky satellite platform.

- 39 On 12 June 2008, Sky applied to the Commissioners for a binding tariff information ('BTI') for the Sky+ box. On 9 July 2008, the Commissioners issued a BTI, in which they classified the Sky+ box under subheading 8521 90 00 of the CN.
- 40 Sky contested the BTI, contending that the product at issue should be classified under subheading 8528 71 13 of the CN as a set-top box with a communication function, that is to say as a 'television [reception apparatus]' under heading 8528.
- 41 The Customs and International Reviews and Appeals Team rejected that objection by a decision of 29 September 2008.
- 42 On 28 October 2008, Sky appealed against that decision before the VAT and Duties Tribunal, London, which on 1 April 2009 became the First Tier Tribunal (Tax Chamber).
- 43 It was in those circumstances that the First Tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
  - '(1) Is a set-top box with the specifications of the [Sky+ box] to be classified under subheading 8528 71 13 of the [CN], as set out in Regulation [No 1214/2007] amending Annex I to Regulation No 2658/87, despite the Explanatory Notes to the CN adopted by the Commission on 7 May 2008 ... concerning subheading 8521 90 00 and subheading 8528 71 13?
  - (2) Does Article 12(5)(a) of [the Customs Code] ... oblige a national customs authority to issue binding tariff informations that are in conformity with the Explanatory Notes to the CN, unless and until those Explanatory Notes have been declared to be in conflict with the wording of the relevant provisions of the CN, including the general rules for the interpretation of the CN, or may the national customs authorities form their own individual view of the matter and disregard the Explanatory Notes in the event they consider there to be such a conflict?
  - (3) In the event that a set-top box with the specifications of the Sky+ ... box ... were to be classified under CN subheading 8521 90 00, would the application of a positive rate of customs duty be unlawful as a matter of [European Union] law, as a consequence of violating the [European Union's] obligations under the [ITA] and Article II:l(b) of [the 1994 GATT] or does classification under heading 8521 entail a conclusion that the product in question falls outside the scope of the relevant part of the ITA?'

*Case C-289/09*

- 44 Pace is a manufacturer and importer of set-top boxes with a communication function and a hard disk drive ('STB-HDDs'), which are intended for providers of pay television services. Pace imports STB-HDDs to the United Kingdom, including the TDS 470NB SD PVR model (also called 'Sky+ box') produced for Sky, who call it 'model DRX 280'.
- 45 STB-HDDs have the characteristics described in paragraphs 33 to 38 of this judgment.
- 46 Pace also manufactures numerous models of set-top boxes with a communication function but no hard disk drive. These are, for example, the DS 430NB and DS 250NV models. Those set-top boxes are classified under subheading 8528 71 13.
- 47 On 8 April 2005, the Commissioners issued to Pace a BTI, classifying the Sky+ box under subheading 8528 12 91 of the CN, that is to say the version in Commission Regulation (EC) No 1810/2004 of 7 September 2004, amending Annex I to Regulation No 2658/87 (OJ 1987 L 327, p. 1). After Regulation No 1549/2006 entered into force on 1 January 2007, that subheading became subheading 8528 71 13. The minor differences between the various STB-HDDs in terms of the technical or product specification do not affect their classification.
- 48 By letters of 4 December 2006 and 29 January 2007, the Commissioners informed Pace that, 'with effect from 1 January 2007 the CN would be subject to significant code changes' and that '[a]s a result of the code amendments the BTI [of 8 April 2005] would be revoked with effect from 31 December 2006'. The referring court found that those letters were never received by Pace.
- 49 By letter of 8 August 2008, the Commissioners confirmed that model TDS 460 STB-HDDs, for which there are two models, namely TDS 460NV and TDS 460NS, was also covered by the provisions of the BTI of 8 April 2005 during its period of validity.
- 50 By another letter of 8 August 2008, the Commissioners confirmed that, pursuant to Article 12(5)(a)(i) of the Customs Code, the BTI of 8 April 2005 had ceased to be valid as of 1 January 2007 as a result of the code changes introduced by the changes to the HS and the annual update of the customs tariffs.
- 51 On 17 November 2008, the Commissioners issued to Pace a Post Clearance Demand Note in respect of all the STB-HDDs, including the Sky+ box, which were imported from January 2007 to April 2008. That note was issued on the basis that the STB-HDDs had been classified under an incorrect CN heading, namely subheading 8528 71 13 whereas, according to the Commissioners, those products should be classified under subheading 8521 90 00.

- 52 On 4 December 2008, Pace requested a review of the Commissioners' decision. On 16 January 2009, the Customs and International Reviews and Appeals Team confirmed the decision to classify the STB-HDDs in question under subheading 8521 90 00.
- 53 On 10 February 2009, Pace appealed against the decision of the Customs and International Reviews and Appeals Team to the VAT & Duties Tribunal, Manchester. On 27 March 2009, that appeal was transferred to the First Tier Tribunal (Tax Chamber).
- 54 In its appeal, Pace called into question the compatibility of the CN Explanatory Notes with the CN. Pace submits that the BTI on the boxes in question remained valid for a period of six months after the entry into force of Regulation No 1549/2006 and that Article 12(5)(a)(i) of the Customs Code must be interpreted as meaning that Regulation No 1549/2006 is not a 'regulation' for the purposes of that provision.
- 55 Accordingly, the First Tier Tribunal (Tax Chamber) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Is a set-top box with a communication function ("STB") and a hard disk drive ("HDD") to be classified under [CN] subheading 8528 71 13, as set out in Regulations [Nos 1549/2006 and 1214/2007], despite [the Explanatory Notes to the CN] adopted by the Commission on 7 May 2008 concerning CN subheading 8521 90 00 and subheading 8528 71 13?
  - (2) In the event that a STB with a HDD with the specifications of a STB-HDD were to be classified under CN subheading 8521 90 00, would the application of a positive rate of customs duty be unlawful as a matter of [European Union] law, as a consequence of violating the [European Union's] obligations under the [ITA] and Article II:1(b) of [the 1994 GATT] or does classification under heading 8521 entail a conclusion that the product in question falls outside the scope of the relevant part of the ITA?
  - (3) Are the provisions of Article 12(5)(a)(i) of [the Customs Code] to be understood to mean that the BTI dated 8 April 2005 relied upon by [Pace] automatically ceased to be valid after 31 December 2006 on the basis that it no longer conformed to the law laid down in Regulation No 1549/2006? In particular, is Article 12(5)(a)(i) of the Customs Code to be interpreted in such a way that Regulation No 1549/2006 does not fall within the concept of a "regulation" for the purposes of that article either because it is an annual update to the CN or because it is not a specific classification regulation?
  - (4) Are the provisions of Article 12(6) of the Customs Code to be understood to mean that where an annual CN update is adopted which contains no provision confirming the extent of an available grace period to BTI holders,

that such holders shall not be entitled to a grace period, or should they be entitled to the usual grace period of six months for Commission classification regulations under the principle of legitimate expectation?’

- 56 By order of 22 September 2009 the President of the Court of Justice ordered that Cases C-288/09 and C-289/09 be joined for the purposes of the written and oral procedures.
- 57 In view of the connection between these cases, it is appropriate to join them for the purposes of the judgment in accordance with Article 43 of the Rules of Procedure, in conjunction with Article 103 thereof.

### **Questions submitted for preliminary ruling**

*The first question in Case C-288/09 and the first question in Case C-289/09*

- 58 By those questions, the referring court asks the Court whether the CN must be interpreted as meaning that set-top boxes with a communication function and a hard disk drive, such as the Sky+ box, are to be classified under subheading 8528 71 13, despite the Explanatory Notes to the CN published on 7 May 2008, according to which those set-top boxes come under subheading 8521 90 00.
- 59 The general rules for the interpretation of the CN state that classification of goods is to be determined first according to the terms of the headings and section or chapter notes, and that the titles of sections, chapters and sub-chapters are provided for ease of reference only.
- 60 In that regard, it should be borne in mind that, according to settled case-law, in the interests of legal certainty and for 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 the notes to the sections or chapters (see, in particular, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 9; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 16; and Case C-376/07 *Kamino International Logistics* [2009] ECR I-1167, paragraph 31).
- 61 The Explanatory Notes to the CN published on 7 May 2008 state that set-top boxes which incorporate a device performing a recording or reproducing function (for example, a hard disk) are excluded from subheading 8521 71 13 and are to be classified under subheading 8521 90 00.
- 62 The explanatory notes to the HS in force at the time of the facts of the dispute in the main proceedings stated, however, that reception apparatus for television, whether or not incorporating recording apparatus, are excluded from heading 8521 and should be classified under heading 8528.

- 63 It should be recalled that, according to the Court's case-law, the explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the World Customs Organisation may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (see Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, paragraph 21; Case C-400/05 *B.A.S. Trucks* [2007] ECR I-311, paragraph 28; and Case C-403/07 *Metherma* [2008] ECR I-8921, paragraph 48).
- 64 The content of the Explanatory Notes to the CN, which do not take the place of those of the HS but should be regarded as complementary to them (see, to that effect, Case C-486/06 *Van Landeghem* [2007] ECR I-10661, paragraph 36), and consulted jointly with them, must accordingly be consistent with the provisions of the CN and may not alter their scope (see, in particular, *Kamino International Logistics*, paragraph 48).
- 65 Accordingly, where it is apparent that they are contrary to the wording of the headings of the CN and the section or chapter notes, the Explanatory Notes to the CN must be disregarded (see Case C-229/06 *Sunshine Deutschland Handelsgesellschaft* [2007] ECR I-3251, paragraph 31; Case C-312/07 *JVC France* [2008] ECR I-4165, paragraph 34; and *Kamino International Logistics*, paragraphs 49 and 50).
- 66 Subheading 8521 90 00 covers, according to its wording, video recording or reproducing apparatus, whether or not incorporating a video tuner, and where the method of recording is by a medium other than magnetic tape. Apparatus for which the method of recording is by magnetic tape come under subheading 8521 10.
- 67 Heading 8528 covers, inter alia, reception apparatus for television, whether or not incorporating sound or video recording apparatus. Subheading 8528 71 13 covers apparatus for television, whether or not incorporating sound or video recording apparatus, which are not designed to incorporate a video display or screen, with a microprocessor incorporating a modem for gaining access to the internet, and having a function of interactive information exchange, capable of receiving television signals.
- 68 It should be noted that, as the Commission acknowledged at the hearing, the expressions 'video reception' and 'television reception' refer to two identical concepts.
- 69 It is clear from those definitions that goods under those two headings can both receive and record television signals. What differentiates the two subheadings is the main or ancillary character of those functions. Subheading 8521 90 00 covers recording apparatus with an ancillary function of television reception whereas subheading 8528 71 13 covers television apparatus with an ancillary recording function.



- 70 Note 3 of Section XVI of the CN, which contains the subheadings at issue, states that ‘composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function’.
- 71 The Sky+ box forming the subject of the disputes in the main proceedings, the functioning of which is described in paragraphs 33 to 38 of this judgment, clearly has both the function of recording and of receiving television signals. It is therefore a machine adapted for the purpose of performing two or more complementary or alternative functions, within the meaning of note 3 of Section XVI of the CN.
- 72 It must therefore be ascertained which of the two functions of recording and reception of television signals is the principal one and which is ancillary.
- 73 At the outset, the Commission’s suggestion in its written observations that the classification under one or another of the subheadings could be determined according to the number of hours of programming that can be stored on the hard disk of Sky+ boxes must be rejected. That duration is not clearly defined in the CN or in its Explanatory Notes and so that criterion of differentiation is not consistent with the principle of legal certainty.
- 74 Similarly, the fact that the Sky+ box cannot function using its hard disk alone and that the hard disk is not needed for viewing television programmes, so that the reception of television signals is indispensable in order for the box to function, does not allow any conclusions to be drawn as to the principal function of the apparatus. As the Commission correctly submits, the fact that a function of an apparatus is indispensable does not, by itself, mean that it is the principal function since a function may be indispensable whilst remaining secondary or ancillary.
- 75 It appears from the order for reference that the Sky+ box cannot record video content from any other external source including television receivers, cameras or video recorders, it cannot play video content from external media such as DVDs or videotapes, and nor is it capable of recording video content onto such external media. Whilst those elements are not objective characteristics and properties of the box, within the meaning of the case-law cited in paragraph 60 of this judgment, but pertain rather to the interaction between the functions of recording and of receiving television signals, they shed some useful light on the intended use of Sky+ boxes.
- 76 It should be recalled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see Case C-309/98 *Holz Geenen* [2000] ECR I-

1975, paragraph 15; Case C-201/99 *Deutsche Nihimen* [2001] ECR I-2701, paragraph 20; and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36).

- 77 In that regard, as the Commission acknowledged at the hearing, it is necessary to take into account what consumers would consider to be ancillary or principal.
- 78 It appears, both from the orders for reference and the observations submitted to the Court, that set-top boxes such as the Sky+ box are sold to television service-providers such as Sky, who make them available to their customers to enable them to access the programmes they offer.
- 79 It therefore seems that consumers subscribe to service-providers such as Sky principally in order to be able to access the television programmes offered and that, in order to do so, they must obtain a set-top box such as a Sky+ box. The television programme recording function which is, in addition, available on that model, is merely an additional service that it offers.
- 80 The interaction between the functions of the Sky+ box described in paragraph 75 of this judgment, which makes the recording function dependent on the reception of television signals, shows that consumers who choose that product are seeking, primarily, not a recording function, but rather a function of decoding television signals, although their choice may be influenced by the fact it has a recording function or the number of hours of programming that can be recorded.
- 81 It follows from all those considerations that the Sky+ box is principally intended to be used to receive television signals and that function is inherent to that apparatus. It therefore constitutes its principal function and the recording function is only secondary.
- 82 Consequently, since the Explanatory Notes to the CN contradict the CN on that point, they must be disregarded, in accordance with the case-law referred to in paragraphs 63 to 65 of this judgment.
- 83 Furthermore, it should be borne in mind that, according to settled case-law, even though the provisions of a treaty such as the ITA are not such as to create rights upon which individuals may rely directly before the courts under European Union law, where the European Union has legislated in the field in question, the primacy of international agreements concluded by the European Union over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (see, to that effect, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52, and Case C-428/08 *Monsanto Technology* [2010] ECR I-0000, paragraph 72).
- 84 It follows from all those considerations that the CN must be interpreted as meaning that set-top boxes with a communication function and a hard disk drive,

such as the Sky+ box, are to be classified under subheading 8528 71 13 despite the Explanatory Notes to the CN.

*The third question in Case C-288/09 and the second question in Case C-289/09*

- 85 In view of the answer given to the first question in each of the two cases, there is no need to answer the third question in Case C-288/09 and the second question in Case C-289/09.

*The second question in Case C-288/09*

- 86 By that question, the referring court asks the Court, in essence, whether Article 12(5)(a) of the Customs Code must be interpreted as meaning that national customs authorities are obliged to issue BTIs that are in conformity with the Explanatory Notes to the CN, at least so long as those Explanatory Notes have not been declared to be in conflict with the wording of the CN, or, conversely, as meaning that those authorities need not comply with those notes if they consider them to be incompatible with the CN.
- 87 Article 12(5)(a)(ii), first indent, of the Customs Code states that a BTI is to cease to be valid where, following an amendment to the Explanatory Notes to the CN, it is no longer compatible with the interpretation of the CN.
- 88 That provision does not strictly speaking concern the obligations of the customs authorities as regards the issuing of BTIs, but the circumstances in which those documents will cease to be valid.
- 89 It should be noted that, according to settled case-law, even though, strictly speaking, the national court has directed its reference to the interpretation of Article 12(5)(a)(ii), first indent, of the Customs Code concerning the behaviour of customs authorities in the event that there is a change to the Explanatory Notes to the CN, the Court is not thereby precluded from providing the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see, *inter alia*, Case C-321/03 *Dyson* [2007] ECR I-687, paragraph 24; Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64 and case-law cited; and Case C-229/08 *Wolf* [2010] ECR I-0000, paragraph 32). It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of European Union law which require interpretation, having regard to the subject-matter of the dispute (see *Wolf*, paragraph 32).
- 90 The question must therefore be understood as meaning that the referring court wishes to know if the fact that BTIs cease to be valid following an amendment to the Explanatory Notes to the CN entails an obligation on the part of the customs authorities to issue BTIs that are consistent with them.

- 91 Article 12(1) and (2)(a), third indent, of the implementing regulation states that, following an amendment to the Explanatory Notes to the CN, the customs authorities are to take the necessary steps to ensure that BTIs are thenceforth to be issued only in conformity with those notes as of the date of their publication in the *Official Journal of the European Union*.
- 92 However, as was observed in paragraph 63 of this judgment, the Explanatory Notes to the CN, whilst they constitute an important means of ensuring the uniform interpretation of the CN by the customs authorities of the Member States, do not have legally binding force (see *Develop Dr Eisbein*, paragraph 21, and Case C-259/97 *Clees* [1998] ECR I-8127, paragraph 12).
- 93 Those considerations lead to the conclusion that when an application is made to the customs authorities for the issuing of a BTI, those authorities must comply with the Explanatory Notes to the CN in order to ensure the uniform application of customs law in the European Union. If there is a disagreement between those authorities and economic operators as to whether those notes are consistent with the CN and on the classification of goods, it is incumbent on economic operators to bring proceedings before the competent authority.
- 94 It is for the court seised of a dispute on the tariff classification of a product under Article 243 of the Customs Code to classify it in accordance with the provisions of the CN, if necessary after making a preliminary reference to the Court as provided in Article 267 TFEU.
- 95 In addition, as the Commission observed, where a Member State's customs authorities encounter a situation in which applying the Explanatory Notes appears to lead to a situation that is incompatible with the CN, that Member State can then refer the matter to the committee provided for in Article 247 of the Customs Code, in accordance with the procedure referred to in Article 8 of Regulation No 2658/87.
- 96 The answer to the second question in Case C-288/09 is, therefore, that Article 12(5)(a) of the Customs Code and Article 12(1) and (2)(a), third indent, of the implementing regulation must be interpreted as meaning that national customs authorities are required to issue BTIs that are in conformity with the Explanatory Notes to the CN. If a disagreement arises between those authorities and economic operators as to the compatibility of those notes with the CN and on the classification of goods, it is for the economic operators to bring proceedings before the competent authority pursuant to Article 243 of the Customs Code. The court seised is to rule on the classification of the product, if necessary after making a preliminary reference to the Court as provided in Article 267 TFEU. Furthermore, the Member State to which those authorities belong may call upon the committee provided for in Article 247 of the Customs Code, in accordance with the procedure referred to in Article 8 of Regulation No 2658/87.

*The third question in Case C-289/09*

- 97 By that question, the referring court is asking the Court, in essence, whether Article 12(5)(a)(i) of the Customs Code must be interpreted as meaning that Regulation No 1549/2006 must be considered a regulation within the meaning of that provision. More specifically, that court asks whether or not a BTI which no longer conformed to the CN because of the entry into force of Regulation No 1549/2006 ceased to be valid after the date of entry into force.
- 98 According to Article 12(5)(a)(i) of the Customs Code, a BTI is to cease to be valid where, as a result of the adoption of a regulation, the information no longer conforms to the law laid down.
- 99 As the Commission correctly observed, Article 12(5)(a)(i) of the Customs Code covers not only regulations which, like Regulation No 1549/2006, are adopted in order to apply Article 12(1) of Regulation No 2658/87, but also all regulations affecting or determining the classification of goods in the CN.
- 100 As of 1 January 2007, Annex I to Regulation No 2658/87, which contains the CN, was replaced by the provisions in the Annex to Regulation No 1549/2006, in accordance with Article 1 of that regulation.
- 101 Recital 4 of Regulation No 1549/2006 states that, in accordance with Article 12 of Regulation No 2658/87, Annex I to that regulation should be replaced, with effect from 1 January 2007, by the complete version of the CN.
- 102 The wording of the CN contained in the Annex to Regulation No 1549/2006 no longer mentions subheading 8528 12 91. Therefore, a BTI classifying a good in that subheading no longer conformed to the CN and thus automatically ceased to be valid as of 1 January 2007, in accordance with the provisions of Article 12(5)(a)(i) of the Customs Code.
- 103 It follows from those considerations that the answer to the third question in Case C-289/09 is that Article 12(5)(a)(i) of the Customs Code is to be interpreted as meaning that Regulation No 1549/2006 must be considered a regulation within the meaning of that provision. A BTI which no longer conformed to the CN because of the entry into force of Regulation No 1549/2006 ceased to be valid after that date of entry into force.

*The fourth question in Case-289/09*

- 104 By that question, the referring court asks the Court whether Article 12(6) of the Customs Code may be interpreted as meaning that where, pursuant to Article 12 of Regulation No 2658/87, a regulation updating the CN is adopted and that regulation does not set a time-period during which the holder of a BTI which has ceased to be valid can none the less continue to use it, that holder may no longer use that BTI or whether, on the contrary, it can use it, by reason of the principle of

legitimate expectations, for a period of six months, which is usual for tariff classifications.

- 105 Article 12(6), second subparagraph, of the Customs Code provides that when a BTI ceases to be valid pursuant to Article 12(5)(a)(i) of that code, the regulation referred to in that provision may lay down a period within which the holder of that BTI may still use that information under the conditions set out in Article 12(6), first subparagraph, of the Customs Code.
- 106 The BTI issued to Pace on 8 April 2005 did not cease to be valid as a result of one of the causes set out in Article 12(5)(a)(ii) or (iii) of the Customs Code.
- 107 Regulation No 1549/2006 did not lay down a period within which the holders of BTIs which had ceased to be valid as a result of its entry into force could use those BTIs.
- 108 As regards the principle of legitimate expectations, which economic operators may rely on as a reason for allowing them a period of time in which they can continue to use a BTI that has ceased to be valid under Article 12(5)(a)(i) of the Customs Code, it should be noted that Article 12 of Regulation No 2658/87 states that the Commission is required to adopt each year a regulation reproducing the complete version of the CN. That regulation is to be published in the *Official Journal of the European Union* not later than 31 October, to apply from 1 January of the following year.
- 109 The possibility of an amendment to the wording or the content of the headings and subheadings of the CN and the risk of BTIs ceasing to be valid in consequence is therefore foreseeable and conscientious economic operators would be aware of it.
- 110 Regulation No 1549/2006, which is in the class of regulations referred to in Article 12 of Regulation No 2658/87, was published in the *Official Journal of the European Union* on 31 October 2006 and entered into force on 1 January 2007, in accordance with the provisions of that article.
- 111 Economic operators may not, therefore, argue that, pursuant to the principle of legitimate expectations, they are entitled to a period of time in which they may be allowed to continue using a BTI that has ceased to be valid under Article 12(5)(a)(i) of the Customs Code, in the event that the regulation referred to under that provision does not provide for such a time-period.
- 112 In light of those considerations, the answer to the fourth question in Case C-289/09 is that Article 12(6) of the Customs Code must be interpreted as meaning that, where, pursuant to Article 12 of Regulation No 2658/87, a regulation updating the CN is adopted and that regulation does not set a time-period during which the holder of a BTI which has ceased to be valid can none the less continue to rely on it, that holder is not entitled to continue relying on that BTI.

## Costs

- 113 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 (Second Chamber) hereby rules:

1. **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 and Commission Regulation (EC) No 1214/2007 of 20 September 2007, must be interpreted as meaning that set-top boxes with a communication function and a hard disk drive, such as the Sky+ box, model DRX 280, are to be classified under subheading 8528 71 13 despite the Explanatory Notes to the Combined Nomenclature.**
2. **Article 12(5)(a) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996, and Article 12(1) and (2)(a), third indent, of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 12/97 of 18 December 1996, must be interpreted as meaning that customs authorities are obliged to issue binding tariff informations that are in conformity with the Explanatory Notes to the Combined Nomenclature. If a disagreement arises between those authorities and economic operators as to whether those notes are in conformity with the Combined Nomenclature and on the classification of goods, it is for the economic operators to bring proceedings before the competent authority pursuant to Article 243 of Regulation No 2913/92, as amended. The court seised shall rule on the classification of the product, if necessary after making a preliminary reference to the Court of Justice as provided in Article 267 TFEU. Furthermore, the Member State to which those authorities belong may call upon the committee provided for in Article 247 of Regulation No 2913/92, as amended, in accordance with the procedure referred to in Article 8 of Regulation No 2658/87, as amended by Council Regulation (EC) No 254/2000 of 31 January 2000.**
3. **Article 12(5)(a)(i) of Regulation 2913/92, as amended by Regulation No 82/97, is to be interpreted as meaning that Regulation No 1549/2006 must be considered a regulation within the meaning of that provision. A**

**binding tariff information which no longer conformed to the Combined Nomenclature because of the entry into force of Regulation No 1549/2006 ceased to be valid after that date of entry into force.**

- 4. Article 12(6) of Regulation No 2913/92, as amended by Regulation No 82/97, is to be interpreted as meaning that, where, pursuant to Article 12 of Regulation No 2658/87, as amended by Regulation No 254/2000, a regulation updating the Combined Nomenclature is adopted and that regulation does not set a time-period during which the holder of a binding tariff information which has ceased to be valid can none the less continue to rely on it, that holder is not entitled to continue relying on that binding tariff information.**

[Signatures]