# OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 17 July 1997 *

1. The principal question raised in these proceedings is whether ladies' underwear, comprising matching brassière and briefs, imported and put up for sale as a set should be classified for the purposes of the application of the Common Customs Tariff as two separate items or as a set. The answer depends on which of a variety of rules, of both Community and non-Community origin, apply.

## I — Factual and procedural background

2. The facts of the present case are relatively simple. The applicant in the main proceedings (hereinafter 'the applicant') is a German mail-order company. Amongst the items it offers for sale is a set of ladies' undergarments, comprising a brassière and briefs; these are made of the same material and are decorated with the same type of lace. On 19 August 1994, the applicant applied to the national authority responsible for the tariff classification of textiles, the Oberfinanzdirektion (Principal Revenue Office), Frankfurt-am-Main (hereinafter 'the defendant'), for a binding tariff notice on the classification of the set under the combined nomenclature. On 24 August 1994, the defendant issued two binding tariff notices, classifying the brassière and briefs under separate codes in the combined nomenclature (hereinafter 'CN'). In so doing, the defendant relied on Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature (hereinafter 'the Regulation'). [1]

3. Item 6 of the Annex to the Regulation provides that a 'Set up for retail sale [2] comprising:

— a brassière, knitted (65% polyamide, 35% cotton) with adjustable straps and body-supporting reinforcements at the bottom; parts are in raschel lace,

— briefs, knitted (80% cotton, 20% polyamide) and elasticated at the waist

* Original language: English.

1 — OJ 1994 L 198, p. 103.

2 — Presumably 'Set put up for retail sale' was intended.

and the leg; parts are also in raschel lace'

is to be classified as two separate items, to wit, the brassière under CN code 6212 10 00, and the briefs under CN code 6108 21 00. The following reasons are given: '[Classification] is determined by the provisions of the general rules 1 and 6 for the interpretation of the combined nomenclature and by the wording of CN codes 6108, 6108 21 00, 6212 and 6212 10 00'.

4. The applicant has sought to challenge the validity of the classification decision before the Hessisches Finanzgericht (Hessen Finance Court, hereinafter 'the national court') on the grounds that the underlying Regulation is invalid. In its order for reference of 7 March 1996, the national court has expressed doubts, which are shared in principle by the responsible German administrative authority, as to the compatibility of the Regulation with the General Rules for the Interpretation of the CN, and in particular with Rule 3(b); it takes the view that, under this Rule, the goods at issue should be classified as a set, and that, as the brassière is the component which gives the set its essential character, they should be classified under code 6212 10 00. The national court referred the following questions to the Court:

'(a) Where goods put up in sets for retail sale, comprising a brassière and briefs, are classified individually pursuant to Point 6 of the Annex to Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature (OJ 1994 L 198 of 30 July 1994, p. 103), is that classification valid, inasmuch as it thereby conflicts with Rule 3(b) of the general rules for the interpretation of the combined nomenclature?

(b) If the answer to Question (a) is in the negative:

Is a set put up for retail sale, comprising a knitted brassière and knitted briefs, covered by code number 6212 10 00 because the brassière falls to be regarded, in accordance with Rule 3(b) of the said general rules, as the component which gives the goods their essential character?'

## II — Analysis

### *(a) Admissibility of the request for a preliminary ruling*

5. At the oral hearing, the Commission raised, for the first time, a question regarding the admissibility of the request for a prelimi-

nary ruling on the ground that Item 6 of the Annex to the Regulation only classified brassières composed of 65% polyamide and 35% cotton, while those at issue in the main proceedings are composed of 90% polyamide and 10% thanelast. It therefore suggested that the Regulation did not apply to the facts of the present case.

6. The Court has consistently held that 'it is solely for the national courts before which the dispute has been brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court ... since the questions submitted by the national courts concern the interpretation of Community law, the Court is in principle obliged to give a ruling'. [3] Moreover, 'a request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action'. [4]

7. Clearly, the defendant relied upon the Regulation in issuing that classification. It is hardly surprising, in the light of the letter from the services of the Commission to the Federal Ministry of Finance of 4 October 1994, which describes the contested measure as a 'Framework Regulation', and the legislative history of the Regulation set out in the letter, that the national authorities should have taken this view, notwithstanding the apparently limited terms of Item 6 of the Annex thereto. The issue underlying the reference is, in reality, the correctness of the binding classifications provided by the national authority, as appears from a close reading of the first question. In these circumstances, although the Court has not been informed of the precise reasons which led the national authorities to rely upon the Regulation, I am of the opinion that the questions referred are relevant and admissible, and that in dealing with them it is appropriate to examine the validity of the Regulation.

8. Should the Court decide that it is not competent to examine the validity of the Regulation, the goods at issue would, in any case, fall to be classified in accordance with the relevant provisions of the General Rules of Interpretation, which is the object of the second question from the national court, the admissibility of which the Commission does not contest.

3 — Case C-130/95 *Giloy* [1997] ECR I-4291, paragraphs 20 and 21 of the judgment; Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraphs 25 and 26; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 34 and 35.

4 — Case C-62/93 *BP Supergas* v *Greek State* [1995] ECR I-1883, paragraph 10 of the judgment.

*(b) Legal background*

9. The Regulation cited by the national court was adopted in accordance with Article 9 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (hereinafter 'Regulation No 2658/87'). [5] Article 9(1)(a) enables the Commission, acting under the management committee procedure laid down in Article 10, [6] to adopt, *inter alia*, measures concerning the 'application of the combined nomenclature ... concerning in particular ... the classification of goods ... .'

10. According to the third recital in the preamble to Regulation No 2658/87, the combined nomenclature 'must be established on the basis of the harmonised system', which had been laid down by the International Convention on the Harmonised Commodity Description and Coding System (hereinafter 'the International Convention'), done at Brussels on 14 June 1983. The International Convention was approved on behalf of the Community by Council Decision 87/369/EEC of 7 April 1987. [7] Article 3(1)(a)(ii) of the Convention provides that, subject to certain exceptions which are not relevant here, '[Each Contracting Party undertakes] to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonised System'.

11. The Court has consistently recognised that by virtue of Article 9 of Regulation No 2658/87 the Commission enjoys 'a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods'. [8] It follows from both the third recital in the preamble to that Regulation and Article 3(1)(a)(ii) of the International Convention that in exercising its discretion the Commission may not 'alter the subject-matter of the tariff headings which have been defined on the basis of the harmonised system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify'. [9]

12. By the same token, in adopting the contested Regulation, where the wording of the relevant tariff headings and subheadings do not determine the classification of the goods at issue, the Commission was bound to

5 — OJ 1987 L 256, p. 1.

6 — This corresponds to procedure II(b) of Article 2 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ 1987 L 197, p. 33. This decision was interpreted by the Court in Case C-417/93 *Parliament* v *Council* [1995] ECR I-1185.

7 — OJ 1987 L 198, p. 1; the text of the Convention is annexed to the Decision.

8 — Case C-267/94 *France* v *Commission* ('corn gluten feed') [1995] ECR I-4845, paragraph 19 of the judgment; Case C-401/93 *Goldstar Europe* [1994] ECR I-5587, paragraph 19; and Case C-265/89 *Vismans Nederland* [1990] ECR I-3411, paragraph 13.

9 — Case C-267/94, cited in preceding footnote, paragraph 20 of the judgment.

respect the classification which would result from the General Rules and the Section, Chapter and Subheading Notes. Indeed, in its observations in the present proceedings, the Commission expressly acknowledges its duty to respect the General Rules. A failure to respect these provisions would render the Regulation *ultra vires*, and, in line with the approach of the Court in 'corn gluten feed', [10] and the wording of the questions referred to the Court, I propose to examine this matter first, rather than the other grounds of invalidity which have been raised, and in particular the adequacy of the statement of reasons. To decide on the validity of the Regulation, it will be necessary to come to a view on the classification of the goods under the General Rules, and, hence, to deal with the second question referred simultaneously with the first.

*(c) Proposed justification of the Regulation: Note 13 to Section XI*

13. At the time of the facts giving rise to the main proceedings, the combined nomenclature was that set out in Commission Regulation (EEC) No 2551/93 of 10 August 1993 amending Annex I to Regulation No 2658/87. [11] The following provisions of Section XI (Textiles and Textile Articles) of the CN are relevant:

'6108 Women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles, knitted or crocheted:

...

Briefs and panties:

6108 21 00 — Of cotton

...

6212 Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted:

6212 10 00 — Brassières.'

14. A general memorandum appended to the Section and Subheading Notes to Section XI explains that, unlike Chapters 50 to 55, Chapters 56 to 63, with the exception of headings 58.09 and 59.02, '[cover] products without distinction, at heading level, as to the nature of the textile'. At

10 — Case C-267/94, cited above, paragraph 15 of the judgment.
11 — OJ 1993 L 241, p. 1.

the material time, goods classified under CN code 6108 21 00 attracted duty at a conventional rate of 13%, while the corresponding figure for goods under 6212 10 00 was 6.5%.

15. In accordance with Rule 1 of the General Rules for the Interpretation of the Harmonised System [12] of the Customs Co-operation Council (hereinafter 'CCC'), [13] '[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, providing such headings or notes do not otherwise require, according to the following provisions'. Rule 6 contains an equivalent rule for the classification of goods in the subheadings of a heading. For classification purposes, therefore, account must be taken first of the terms of the headings, and then of section or chapter notes, before the remaining general rules can come into play.

16. In the present case, no heading or subheading of the combined nomenclature specifically covers matched sets of ladies' underwear such as the goods at issue in the main proceedings. As regards Section Notes, the Commission has argued that it was bound by Note 13 to Section XI to classify the goods separately. This Note provides that '[Unless] the context otherwise requires, textile garments of different headings are to be classified in their own headings even if put up in sets for retail sale'; an Additional Note to this section [14] explains that '[For] the application of Note 13 to this section, the term "textile garments" means garments of heading Nos 6101 to 6114 and 6201 to 6211'.

17. It follows from the Additional Note that Note 13 only applies to goods comprising two or more 'textile garments' which fall within the headings specified. This is clearly not the case here, as a brassière on its own would be classified under CN 6212 10 00, which is not within the headings to which the term 'textile garments' applies. The Commission has further argued that Note 13 must be applied even if one of the elements, such as the brassière, is not classified in one of the headings to which the Additional Note refers; otherwise, in its view, the regime applicable to briefs would not be respected. Not only does such an argument ignore the wording of the relevant provisions, but it also begs the question, by assuming that the regime for a matching set of ladies' underwear must respect the regime which would apply for briefs considered alone. I can find no merit either in the Commission's bald assertion that the application of Note 13 would only be precluded if

12 — The General Rules for the Interpretation of the Harmonised System, along with their Explanatory Notes, are published in a loose-leaf form by the CCC in English and French. In June 1994, the CCC adopted the informal working name 'World Customs Organisation'.

13 — As regards the Community, these were set out in Annex I to Regulation No 2551/93, cited in paragraph 13 and footnote 11 above.

14 — The Additional Note has subsequently been incorporated into the text of Note 13; *Explanatory Notes* of the CCC, second edition (1996), D/1996/0448/1, p. 775.

neither of the elements of a set could be classified under the CN codes cited in the Additional Note. The Commission's interpretation of the Additional Note would, in effect, extend the scope of application of Note 13 to Section XI to include sets comprising both a 'textile garment' as defined and a garment which is not a 'textile garment' within the meaning of Note 13. Such a modification would, in my view, go beyond the mere application of this Note, such as was intended by Article 9 of Regulation No 2658/87.

*(d) Application of the General Rules of Interpretation*

18. As the contested Regulation cannot be justified by reference to Note 13 to Section XI, it now becomes necessary to verify whether the classification of the goods in question is none the less in conformity with that which arises from the application of the Chapter Notes or the General Rules for Interpretation of the Harmonised System.

19. The notes to the respective chapters do not deal specifically with the question of sets comprising an item from each chapter. Note 2(a) to Chapter 61 (Articles of apparel and clothing accessories, knitted or crocheted), which includes CN code 6108 21 00 (ladies' briefs), provides that the chapter does not cover 'goods of heading No 6212'. Similarly, Note 1 to Chapter 62 (Articles of apparel and clothing accessories, not knitted or crocheted), which includes CN code 6212 10 00 (brassières), provides that the chapter 'applies only to made-up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading No 6212)'. It has not been argued that these notes apply for the classification of sets, as distinct from articles of apparel considered as separate items.

20. As neither the terms of the headings or subheadings nor the Section or Chapter Notes determine the classification of the goods at issue, the remaining General Rules apply. Rule 2 concerns primarily incomplete or unfinished goods, and goods comprising mixtures or combinations of materials or substances, and is of no assistance in the present case.

21. Rule 3, which is central to the present dispute, in the version in force at the material time reads as follows:

'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:

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

description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items *in a set put up for retail sale*, [15] those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods *put up in sets for retail sale* [16], 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.

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

22. It is not disputed that the goods at issue in these proceedings are '*prima facie* classifiable under two or more headings' within the meaning of Rule 3. In accordance with its terms, Rule 3(b) only applies if the goods cannot be classified by reference to Rule 3(a). This appears to be the case, as no heading, general or specific, refers to a set of ladies' underwear. It also follows from Rule 3(a) that the relevant headings, which correspond to CN codes 6212 10 00 and 6108 21 00, 'each refer ... to part only of the items of a set put up for retail sale', and that as a result these headings are to be regarded as 'equally specific in relation to those goods'.

23. In such circumstances, the next provision which falls to be considered is Rule 3(b). Under this provision, the goods should be classified 'as if they consisted of the ... component which gives them their essential character in so far as this criterion is applicable'. As it is not immediately obvious which of the components gives the set its 'essential character', it may be useful in the present case to resort to the Explanatory Notes to the Harmonised Commodity Description and Coding System, [17] which the Court has recognised 'may be considered a valid aid to the interpretation of the [common customs] tariff', in so far as their content is in accordance with the provisions of the tariff. [18]

15 — Emphasis added.

16 — Emphasis added.

17 — These are the Explanatory Notes (formerly 'Commentary') to the General Rules published by the CCC, and should not be confused with the Explanatory Notes to the Combined Nomenclature of the European Communities, published by the Commission.

18 — Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, paragraph 21 of the judgment; see also Case C-105/96 *Codiesel* [1997] ECR I-3465, paragraph 17.

24. The first method of classification, under Rule 3(a), is described in Explanatory Notes III to V. Notes VI, VII, VIII and X, [19] which relate to Rule 3(b), provide in relevant part as follows (emphasis in original):

'(VI) This second method relates only to:

(i) Mixtures.

(ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales.

It applies only if Rule 3(a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

...

(X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings ...

19 — Explanatory Note IX concerns composite goods made up of different components, rather than goods put up in sets for retail sale.

(b) consist of products or articles put up together to meet a particular need or to carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking ... .'

25. The notion of 'goods put up in sets' was interpreted by the Court in *Telefunken* as implying 'that the goods are closely linked from the marketing point of view, with the result that they are not only presented together for customs clearance but are also normally supplied together, at the various marketing stages and in particular at the retail stage, in a single packet in order to satisfy a demand or to perform a specific function'. [20] The applicant's assertion that the two items of the goods in question were imported in a single package has not been challenged, and the national court has found as a matter of fact that the items are offered together for retail sale as a set.

26. While not contesting that the conditions specified in paragraphs (a) and (c) of Explanatory Note X are satisfied, the Commission has suggested an interpretation of paragraph (b) which would preclude the application of Rule 3(b) in the present case. It admits that the goods should be considered an ensemble having regard to certain objective factors such as the quality of the goods, the material used and their external appearance, and might be so considered having regard to the fact that the components are matching. The Commission is, however, of the view that the determinant factor in the purchase of such garments is size. The customer must be able to try on and choose each component separately before purchase; external identity of presentation is of no assistance in this regard. In its view, the presentation of the goods in question as a set does not therefore meet a clearly defined 'particular need'. The Commission adds that, in any case, the two elements of the goods are of equal importance, that their essential character cannot be determined according to their nature, quality or function, and that, in these circumstances, it was not obliged to take account of Rule 3(b) in classifying the goods at issue.

27. The Court's case-law clearly establishes that 'in the interests of legal certainty and ease of verification, the decisive criterion for the customs classification of goods is in general to be sought in their *objective* characteristics and properties, as defined by the wording of the headings of the Common Customs Tariff and the notes to the sections

20 — Case 163/84 *Hauptzollamt Hannover* v *Telefunken* [1985] ECR 3299, paragraph 35 of the judgment.

or chapters'. [21] The analysis proposed in the present case by the Commission for determining the existence of a particular demand seems to me to be subjective in character; the Commission is attempting to put itself in the mind of the consumer, and suggesting, without either objective proof or any convincing reason, that the consumer's choice of the goods at issue depends upon one factor, that is, size, to the exclusion of any others.

28. The Commission's view regarding consumer choice may or may not be correct; I do not consider it necessary or proper to make any recommendation to the Court on this matter, even if that were possible on the basis of the documents in the case-file. The applicants have explained at length that the goods are offered to the consumer in a single package, that the sets allow the customer to choose one of three brassière sizes for each size of briefs, but that the customer may not mix items from different sets. Furthermore, it has provided some evidence of the existence of a market demand in a number of Member States for sets of undergarments such as those at issue in the present proceedings. This is not the general demand for brassières and briefs, but a particular demand for a range of exactly matching brassières and briefs offered for sale under particular retail conditions as to price, quality and external appearance. These are objective matters of which the Court may, and in my view should, take account; the fact that the applicant does not cater for customers who require a combination of sizes of brassière and briefs which it does not offer for sale does not suffice to preclude the existence of a particular demand within the meaning of Explanatory Note X(b).

29. The Commission further relies on the CCC Explanatory Note to heading 6212, which provides in part that '[This] heading covers articles of a kind designed for wear as body-supporting garments', to show that it is only the optimal fit of the garments, and not their external appearance, which constitutes a particular demand. In the first place, this Explanatory Note does not apply either to CN heading 6108 or to goods which, in accordance with Rule 3(b), must be considered as being '*prima facie* classifiable under two or more headings' and 'put up in sets for retail sale'. Furthermore, even if it were relevant, an Explanatory Note is at best only an aid to interpretation, and may not defeat the application of a binding rule of law, such as Rule 3 of the General Rules for the Interpretation of the Harmonised System.

30. It therefore seems to me that the marketing criterion identified in *Telefunken* may be applied to the present case, and that the goods in question must be considered as

21 — Case C-105/96 *Codiesel*, cited in footnote 18 above, paragraph 17 of the judgment, emphasis added; see also Case C-164/95 *Fábrica de Queijo Eru Portuguesa Ld*ª [1997] ECR I-3441, paragraph 13; Case C-405/95 *Bioforce* [1997] ECR I-2581, paragraph 12; Joined Cases C-274/95 to C-276/95 *Wünsche* [1997] ECR I-2091, paragraph 15; Case C-265/89 *Vismans Nederland*, cited in footnote 8 above, paragraph 14.

being 'put up in sets' for the purposes of Rule 3(b).

31. Unfortunately, that conclusion does not resolve the issue, since I find it difficult to see, without indulging in an inappropriate degree of subjective speculation, how either of the components could be said to give the set its essential character. While expressly recognising the difficulty of this matter in its observations, the applicant has argued that the brassière should be considered as giving the set its essential character because it is more complex to manufacture and requires more work and more material, and because it weighs and costs more than the briefs. The national court has taken the view that 'the brassière ... gives the set its essential character as regards both the value of the set and the cost of the manufacturing process'.

32. Of the elements identified in Explanatory Note VIII for the determination of the essential character of the goods, it seems to me that only the nature of the components or their respective values could be relevant in the present case. No evidence has been put before the Court as to how any difference between the components in regard to their respective bulk or weight could be determinant of the essential character of the set. In the case of the goods at issue, the brassière is valued at DM 5.93, the briefs at DM 4.31, giving the set a value of DM 10.24. This difference in the respective values of the items compared to the total value of the set (58% to 42%) is not, in my view, sufficiently large clearly to establish that the brassière constitutes the element which gives the set its essential character.

33. The Court's judgment in *Sportex* provides a useful criterion for the application of this aspect of Rule 3(b). There the Court found that the identification of the essential character of the goods may be effected 'by determining whether the product would retain its characteristic properties if one or other of its constituents were removed from it'. [22] It seems tolerably clear to me, particularly in the light of the arguments relied upon by the applicants in the present case to show that the goods must be treated as a set rather than as individual items of clothing, that the characteristic property of the set would be taken away if one of the components were removed, and that this is as true of the briefs as of the brassière.

34. In these circumstances, I am forced to the conclusion that the 'essential characteristic' test cannot be applied, a possibility which is expressly foreseen in Rule 3(b) itself, which only applies 'insofar as this criterion is applicable'. As Rules 3(a) and 3(b)

22 — Case 253/87 *Sportex* v *Oberfinanzdirektion Hamburg* [1988] ECR 3351, paragraph 8 of the judgment.

have not provided a determination of the tariff classification, Rule 3(c) comes into play. In accordance with this Rule, the goods in question should be classified under the heading which occurs last in numerical order among those which equally merit consideration, to wit CN code 6212 10 00.

35. It follows from the foregoing that, in classifying the goods at issue in the main proceedings under separate CN code numbers, the Commission failed to respect the classification of these goods which arises from the application of the General Rules of Interpretation of the Harmonised Commodity Description and Coding System. Having been adopted in breach of Article 3(1)(a)(ii) of the International Convention on the Harmonised Commodity Description and Coding System, the Regulation is *ultra vires* and should be declared invalid. The same conclusion would follow if the Court were to hold that the brassière gives the set its essential character.

## III — Conclusion

36. The questions submitted by the Hessisches Finanzgericht by order of 7 March 1996 should be answered as follows:

Commission Regulation (EC) No 1966/94 of 28 July 1994 concerning the classification of certain goods in the combined nomenclature is invalid in so far as, in Item 6 of the Annex thereto, it classified goods put up in sets for retail sale, comprising a brassière and briefs, separately under tariff subheadings 6108 21 00 and 6212 10 00. The Common Customs Tariff, in the version established in Annex I to Commission Regulation (EEC) No 2551/93 of 10 August 1993 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 goods such as those at issue in the main proceedings should be classified under subheading 6212 10 00.