Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

22 November 2012*

(Common Customs Tariff — Tariff classification — Combined Nomenclature — Apparatus capable of receiving television signals and incorporating a modem for gaining access to the internet and having a function of interactive information exchange)

In Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Administrativen sad – Varna (Bulgaria), made by decisions of 10 June, 21 June, 27 June and 1 July 2011, received at the Court on 27 June, 29 June and 18 July 2011 respectively, in the proceedings

Digitalnet OOD (C-320/11 and C-383/11),

Tsifrova kompania OOD (C-330/11),

M SAT CABLE AD (C-382/11)

v

Nachalnik na Mitnicheski punkt – Varna Zapad pri Mitnitsa Varna,

THE COURT (Sixth Chamber),

composed of U. Lõhmus, acting as the President of the Sixth Chamber, A. Arabadjiev and C.G. Fernlund (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 September 2012,

after considering the observations submitted on behalf of:

— Digitalnet OOD, Tsifrova kompania OOD and M SAT CABLE AD, by M. Ralchev, advokat,

— the Nachalnik na Mitnicheski punkt – Varna Zapad pri Mitnitsa Varna, by D. Yordanov, S. Valkova, D. Yordanova, N. Yotsova and V. Konova, acting as Agents,

— the Bulgarian Government, by Y. Atanasov, acting as Agent,

— the European Commission, by L. Bouyon and D. Roussanov, acting as Agents,

* Language of the cases: Bulgarian.

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

gives the following

Judgment

1 The present references for a preliminary ruling concern the interpretation 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, respectively, by Commission Regulations (EC) No 1214/2007 of 20 September 2007 (OJ 2007 L 286, p. 1), (EC) No 1031/2008 of 19 September 2008 (OJ 2008 L 291, p. 1) and by (EC) No 948/2009 of 30 September 2009 (OJ 2009 L 287, p. 1) ('the CN'), and the interpretation of Article 78(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Customs Code').

2 The references have been made in separate sets of proceedings between, on the one hand, Digitalnet OOD ('Digitalnet'), Tsifrova kompania OOD ('Tsifrova') and M SAT CABLE AD ('M SAT CABLE') and, on the other hand, Nachalnik na Mitnicheski punkt – Varna Zapad pri Minitsa Varna (Director of the customs office Varna West, Varna customs; 'Director of customs, Varna') concerning the payment of customs duties relating to set-top boxes which have a communication function.

Legal context

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

3 The 1994 General Agreement on Tariffs and Trade (GATT) and, in particular, the Understanding on the Interpretation of Article II:1(b) of GATT form 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 paragraph 1, that each contracting 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.'

6 Council Regulation (EC) No 2559/2000 of 16 November 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 3 in the preamble to that regulation.

The Customs Code

7 Article 78(2) of the Customs Code is worded as follows:

'The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.'

The tariff classification

The CN

8 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.

9 The version of the CN applicable to Case C-382/11 is that which results from Regulation No 1214/2007, which entered into force on 1 January 2008. The version applicable to Cases C-320/11 and C-330/11 results from Regulation No 1031/2008, which entered into force on 1 January 2009. That applicable to Case C-383/11 results from Regulation No 948/2009, which entered into force on 1 January 2010.

10 The general rules for the interpretation of the CN are set out in Part One, Section I, Heading A, thereof. Those rules are identical in the versions of the CN which result from Regulations No 1214/2007, No 1031/2008 and No 948/2009. 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.

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

...

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.'

11 Part Two of the CN features a Section XVI. That section includes Chapter 85, which covers electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

12 The wording of headings 8521 and 8528 is identical for the versions of the CN which result from Regulations No 1214/2007, No 1031/2008 and No 948/2009. That wording is as follows:

'8521	Video recording or reproducing apparatus, whether or not incorporating a video tuner:
8521 10	- Magnetic tape-type:
...	
8521 90 00 ...	- Other
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:
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")
8528 71 19	– – – – Other'

13 At the time material to the facts in the main proceedings, the rate of customs duty on imports applicable to goods classified under subheading 8528 71 19 was 14%, whereas apparatus coming under subheading 8528 71 13 was exempted from duty.

The Explanatory Notes to the CN

14 Pursuant to the second indent of Article 9(1)(a) of Regulation No 2658/87, the Commission draws up Explanatory Notes to 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; 'the Explanatory Notes of 7 May 2008'), applicable at the time of the imports at issue in the main proceedings, stipulate, in regard to heading 8528:

'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 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. 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. An indication of the presence of such a modem is an RJ 11 connector. 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. An indication of the presence of such a device is an RJ 45 connector. The modem must be built into the set-top box. Set-top boxes which do not have a built-in modem but use an external modem are excluded from this subheading (e.g. a set consisting of a set-top box and an external modem). The Transmission Control Protocol/Internet Protocol (TCP/IP) must be present as firmware in the set-top box. Set-top boxes of this subheading must enable the user of the apparatus to access the internet. The apparatus must also be able to run internet applications in an "interactive information exchange" mode such as an e-mail client or a messaging application using UDP or TCP/IP sockets. 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).
8528 71 19	Other See the last paragraph of the Explanatory Notes to subheading 8528 71 13.'

15 The Explanatory Notes of 7 May 2008 and those published on 6 May 2011 (OJ 2011 C 137, p. 1) were deleted with effect from 1 July 2011, as regards subheadings 8521 90 00, 8528 71 13, 8528 71 19 and 8528 71 90, by the Commission communication published on 25 June 2011 (OJ 2011 C 185, p. 1).

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

16 Digitalnet (Cases C-320/11 and C-383/11), Tsifrova (Case C-330/11) and M SAT CABLE (Case C-382/11) are companies whose principal activity is the provision of access to digital television and to the internet. The goods at issue in the main proceedings are identical in the four cases. They are set-top boxes with a communication function ('set-top boxes'). Those set-top boxes were manufactured in Korea and imported into Bulgaria between 21 November 2008 and 22 March 2010 under a variety of trade names by those companies. The set-top boxes were declared as coming under CN tariff subheading 8528 71 13, that is to say, with exemption from customs duties.

17 Following the communication of information by the European Anti-Fraud Office (OLAF), the customs authorities carried out an inspection and took the view that the set-top boxes were not equipped with an integrated modem and that they ought to have been classified under CN subheading 8528 71 19. Consequently, customs duty of 14% ought to have been collected. The customs authorities adopted administrative acts making the three companies liable for payment of customs duties.

18 The applicants in the main proceedings have challenged the validity of those administrative acts before the Administrativen sad – Varna (Varna Administrative Court), bringing four separate sets of proceedings, two of which concern Digitalnet.

19 According to the referring court, the customs authorities take the view that the set-top boxes consist of digital cable receivers with a microprocessor and a video tuner. They have the following interfaces: [SKART], Ethernet and RS-232 audio and video output. The items of equipment do not contain integrated modems allowing access to the internet. In accordance with the Explanatory Notes of 7 May 2008, due to the lack of incorporated modems, the set-top boxes could be classified, not under subheading 8528 71 13, but rather under CN subheading 8528 71 19.

20 Two expert reports were ordered for the court proceedings. According to the first report, the set-top boxes are not equipped with a modem. Internet access is gained via the TCP/IP protocol. It is possible to run internet applications in an interactive information exchange mode and to receive television signals.

21 By contrast, it is apparent from the second report that set-top boxes are items of equipment with a microprocessor-based device with integrated modem software, which enable an interactive information exchange to be effected and are capable of receiving television signals.

22 In Cases C-382/11 and C-383/11, according to the referring court, the applicants in the main proceedings claimed that the customs authorities had classified the set-top boxes without physically checking the goods at issue.

23 In those circumstances the Administrativen sad – Varna decided to stay the proceedings in the four cases and referred questions to the Court of Justice for a preliminary ruling, some of which are common to several cases and others unique to some of them:

'(1) What is to be understood by the term "internet" within the meaning of the Explanatory Notes to the [CN] if it is used in relation to the classification of goods under … code 8528 71 13 (first question in Cases C-320/11, C-330/11 and C-382/11)?

(2) What is to be understood by the term "modem" within the meaning of the Explanatory Notes to the [CN] if it is used in relation to the classification of goods under … code 8528 71 13 (second question in Cases C-320/11, C-330/11 and C-382/11)?

(3) What is to be understood by the terms "modulation" and "demodulation" within the meaning of the Explanatory Notes to the [CN] if they are used in relation to the classification of goods under … code 8528 71 13 (third question in Cases C-320/11, C-330/11 and C-382/11)?

(4) How are the terms "modem" and "access to the internet" to be interpreted for the purposes of subheading 8528 71 13 of the [CN] and the Explanatory Notes (first question in Case C-383/11)?

(5) What is the main function of the set-top box …, pursuant to which the tariff classification must be carried out: receipt of television signals or the use of a modem which facilitates interactive information exchange for the purposes of gaining access to the internet (fourth question in Cases C-320/11, C-330/11 and C-382/11 and second question in Case C-383/11)?

(6) If the main function of the set-top box … is the use of a modem which facilitates interactive information exchange for the purposes of gaining access to the internet, is the type of modulation and demodulation which the modem brings about or the type of modem used relevant to the tariff classification, or does it suffice that access to the internet is provided by means of the modem (fifth question in Cases C-320/11, C-330/11 and C-382/11 and third question in Case C-383/11)?

(7) Under which heading and which code should equipment corresponding to the description of the [set-top box] be classified (sixth question in Cases C-320/11 and C-330/11, seventh question in Case C-382/11 and fifth question in Case C-383/11)?

(8) If a set-top box [such as that at issue in the main proceedings] is classified under subheading … 8521 90 00 of the [CN], is the application of a positive rate of customs duty lawful as a matter of Community law, if such classification would constitute a violation of the [European] Community's obligations under the [ITA], or does classification under heading 8521 entail a conclusion that a set-top box [such as that at issue in the main proceedings] falls outside the scope of the relevant part of the [ITA] (seventh question in Cases C-320/11 and C-330/11 and eighth question in Case C-382/11)?

(9) Is it permissible for the customs authorities to amend the customs duty classification of a specific product without physically checking the imported product, and for the experts' report to be issued exclusively on the basis of written evidence, namely the user manual, technical characteristics and inspection of a device made by the same manufacturer which has the same number from another imported consignment (sixth question in Case C-382/11 and fourth question in Case C-383/11)?'

24 By order of the President of the Court of 29 September 2011, Cases C-320/11, C-330/11, C-382/11 and C-383/11 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The first question in Cases C-320/11, C-330/11, C-382/11 and C-383/11, the second question in Cases C-320/11, C-330/11 and C-382/11, the fifth question in Cases C-320/11, C-330/11 and C-382/11 and the third question in Case C-383/11

25 By these questions, which it is appropriate to examine together, the referring court seeks to ascertain how the CN must be interpreted, and, more specifically, which goods may be classified under CN subheading 8528 71 13. That court seeks to establish, inter alia, what the terms 'modem' and 'access to the internet' cover within the meaning of that subheading and within the meaning of the

Explanatory Notes of 7 May 2008. The referring court is also uncertain whether the type of modem used is relevant for the purpose of tariff classification or whether it suffices that the modem makes internet access possible.

26 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.

27 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, inter alia, 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-376/07 *Kamino International Logistics* [2009] ECR I-1167, paragraph 31; and Joined Cases C-288/09 and C-289/09 *British Sky Broadcasting Group and Pace* [2011] ECR I-2851, paragraph 60).

28 It is apparent from an examination of the CN that subheading 8528 71 13 covers apparatus for television, 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 (*British Sky Broadcasting Group and Pace*, paragraph 67).

29 It should be noted that the expressions 'video reception' and 'television reception' refer to two identical concepts (*British Sky Broadcasting Group and Pace*, paragraph 68).

30 In order to be classified under CN subheading 8528 71 13, apparatus must be able, first, to receive television signals, and, second, to incorporate a modem for gaining access to the internet and having a function of interactive information exchange. Any apparatus which does not have one or other of those characteristics must be classified under CN subheading 8528 71 19, in accordance with general rule 3(c) for the interpretation of the CN.

31 It is not disputed that the apparatus at issue in the main proceedings is appropriate for the purpose of receiving television signals. By contrast, the applicants in the main proceedings, on the one hand, and the Director of customs, Varna, on the other, are in disagreement as to whether that apparatus incorporates a modem for internet access which allows an interactive information exchange.

32 The CN does not define the concept of 'modem' or that of 'access to the internet.' However, the Explanatory Notes of 7 May 2008, in force at the time of the imports at issue in the main proceedings, provide details as to the type of apparatus which may be considered to be modems, within the meaning of subheading 8528 71 13, and as to the characteristics which that apparatus must have in order to be regarded as allowing internet access and interactive information exchange.

33 According to the Court's case-law, 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, 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 *British Sky Broadcasting Group and Pace*, paragraph 63).

34 The content of the Explanatory Notes to the CN must accordingly be consistent with the provisions of the CN and may not alter their scope (see, inter alia, *Kamino International Logistics*, paragraph 48, and *British Sky Broadcasting Group and Pace*, paragraph 64).

35 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, to that effect, Case C-229/06 *Sunshine Deutschland Handelsgesellschaft* [2007] ECR I-3251, paragraph 31; *Kamino International Logistics*, paragraphs 49 and 50; and *British Sky Broadcasting Group and Pace*, paragraph 65).

36 In that regard, it must be noted that, in its written observations and during the hearing, the Commission submitted that the Explanatory Notes of 7 May 2008 adopted an unduly narrow interpretation of the term 'modem' within the meaning of CN subheading 8528 71 13. It states, inter alia, that in the context of disputes WT/DS375/R, WT/DS376/R and WT/DS377/R between the European Union and a number of States, the WTO panel gave a broader definition to the term 'modem' than that set out in the Explanatory Notes of 7 May 2008. That institution takes the view, consequently, that those notes are contrary to the wording of the CN headings and must therefore be disregarded for the purposes of the interpretation requested by the referring court.

37 In order to provide an answer to the referring court, it is necessary to examine what is covered by the term 'modem for gaining access to the internet', within the meaning of CN subheading 8528 71 13, and to determine whether, as the Commission maintains, the definition which is given to that term in the Explanatory Notes of 7 May 2008 is overly restrictive.

38 It is settled case-law that the meaning and scope of terms for which European Union 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 purposes of the rules of which they form part (see to that effect, inter alia, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21 and the case-law cited; and judgment of 5 March 2009 in Case C-556/07 *Commission* v *France*, paragraph 50).

39 According to equally settled case-law, even though the provisions of an agreement 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 (*British Sky Broadcasting Group and Pace*, paragraph 83 and the case-law cited).

40 A modem, in the usual meaning of that word, is used to transfer, between computers, digital data via a support operating on an analogue basis, that is to say, in particular, a telephone line. The modem modulates the digital data into analogue data and, conversely, it demodulates the analogue data to convert them into digital data.

41 Moreover, it is apparent from point 7.880 of the report of the WTO panel, referred to in paragraph 36 of the present judgment, that 'the plain meaning of the term "modem" can include devices other than those that convert a digital signal to analogue for purposes of information transfer over a telephone line.' At point 7.878 of the same report, the panel notes that 'the term "modem" has been used in referring to other devices that provided modulation and demodulation over different mediums and also potentially without digital-to-analogue signal conversion' and that 'the term "modem" is used to refer to "cable modems" as well, which are in several ways technologically distinct from telephone line-based modems, in terms of the medium used, frequency range and other parameters.'

42 As regards the term 'for gaining access to the internet, and having a function of interactive information exchange' the WTO panel stated, at point 7.884 of its report, that it informs the nature of the 'communication function' referred to in the wording of CN subheading 8528 71 13. Therefore it is the functionality of the apparatus that is central to the definition. The incorporation of a modem in the apparatus fulfils the purpose of gaining internet access.

43 In that regard, 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, inter alia, Case C-309/98 *Holz Geenen* [2000] ECR I-1975, paragraph 15; Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and *British Sky Broadcasting Group and Pace*, paragraph 76).

44 The Explanatory Notes of 7 May 2008 give a definition of a modem within the meaning of subheading 8528 71 13 and state that 'modems modulate and demodulate outgoing as well as incoming data signals' and that '[d]evices 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. An indication of the presence of such a device is an RJ 45 connector.'

45 It appears, therefore, that, by excluding from the concept of a 'modem' devices which fulfil similar functions to a modem because of technical considerations, whereas only the objective of the capacity for gaining access to the internet is relevant for the purpose of classification, the Explanatory Notes of 7 May 2008 regarding subheading 8528 71 13 have restricted the meaning of that term. Those notes therefore contradict the CN on that point and must be disregarded.

46 It follows from all of the foregoing considerations that, for the purposes of the meaning of CN subheading 8528 71 13, a 'modem for gaining access to the internet' is a device which is capable of accessing the internet and of ensuring interactivity or an exchange of information in both directions. It is solely the capacity to gain access to the internet, and not the technique used to achieve this, that is relevant for the purposes of classification.

47 Moreover, in order to be classified under CN subheading 8528 71 13, the apparatus must be capable of accessing the internet solely by means of the modem which is incorporated in it. Access to the internet, therefore, must not require the intervention of any another apparatus or mechanism.

48 It follows from all of the foregoing that the answer to the questions is that the CN must be interpreted as meaning that, for the purposes of classification of goods under subheading 8528 71 13, a modem for gaining access to the internet is a device which, alone and without the intervention of any other apparatus or mechanism, is able to access the internet and to ensure interactivity and an exchange of information in both directions. It is solely the capacity to gain access to the internet, and not the technique used to achieve this, that is relevant for the purposes of classification under that subheading.

The third question in Cases C-320/11, C-330/11 and C-382/11

49 By these questions, the referring court seeks to ascertain what is to be understood by the terms 'modulation' and 'demodulation' within the meaning of the Explanatory Notes of 7 May 2008 so that apparatus can be classified under CN subheading 8528 71 13.

50 The words 'modulation' and 'demodulation' appear, as the referring court noted, in the Explanatory Notes of 7 May 2008, but are not used in the wording of CN subheading 8528 71 13.

51 At paragraph 45 of the present judgment, it was stated that the Explanatory Notes of 7 May 2008 had to be disregarded so far as the interpretation of CN subheading 8528 71 13 is concerned.

52 Moreover, it follows from paragraph 48 of the present judgment that it is solely the capacity to gain access to the internet, and not the technique used to achieve this, that is relevant for the purposes of classification under that subheading. It is consequently not necessary to define the words 'modulation' and 'demodulation' for the purposes of classification of the apparatus at issue in the main proceedings under CN subheading 8528 71 13.

53 There is therefore no need to answer that question.

The fourth question in Cases C-320/11, C-330/11 and C-382/11 and the second question in Case C-383/11

54 By these questions, the referring court asks, in essence, whether the CN must be interpreted as meaning that the reception of television signals and the presence of a modem allowing access to the internet are two equivalent functions that the apparatus at issue in the main proceedings must perform in order to be classified under CN subheading 8528 71 13, or whether, in the absence of one or other of those functions, that apparatus must be classified under CN subheading 8528 71 19.

55 Accordingly, that court seeks to ascertain which of those two functions performed by that apparatus may be regarded as being the principal function.

56 As was stated at paragraph 30 of the present judgment, in order to be classified under CN subheading 8528 71 13, apparatus must be able, first, to receive television signals, and, second, to incorporate a modem for gaining access to the internet and having a function of interactive information exchange. Any apparatus which does not have one or other of those characteristics must be classified under CN subheading 8528 71 19, in accordance with general rule 3(c) for the interpretation of the CN.

57 It follows that, for the purposes of determining whether apparatus may be classified under CN subheading 8528 71 13, it is not necessary to examine whether the function of television reception is the principal function and whether the function of gaining access to the internet is subsidiary, or vice versa, since those two functions must be present at the same time in the apparatus and, in the absence of one or other of those functions, the apparatus will come, not under subheading 8528 71 13, but under CN subheading 8528 71 19.

58 The apparatus here differs from that at issue in the case which gave rise to the judgment in *British Sky Broadcasting Group and Pace*. In that case, the apparatus at issue could both receive television signals and record programmes. That double functionality allowed classification of that apparatus under two distinct CN subheadings. Identification of the principal or essential function was necessary in accordance with general rule 3(b) for the interpretation of the CN.

59 Consequently, the answer to those questions is that the CN must be interpreted as meaning that the reception of television signals and the presence of a modem allowing access to the internet are two equivalent functions that apparatus must perform in order to be classified under CN subheading 8528 71 13. In the absence of one or other of those functions, that apparatus must be classified under CN subheading 8528 71 19.

The sixth question in Cases C-320/11 and C-330/11, the seventh question in Case C-382/11 and the fifth question in Case C-383/11

60 By these questions, the referring court asks the Court of Justice under which CN heading and which code the apparatus at issue in the main proceedings ought to be classified.

61 It should be borne in mind 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, in particular 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 do so (Joined Cases C-260/00 to C-263/00 *Lohmann and Medi Bayreuth* [2002] ECR I-10045, paragraph 26; Case C-500/04 *Proxxon* [2006] ECR I-1545, paragraph 23; and Case C-12/10 *Lecson Elektromobile* [2010] ECR I-14173, paragraph 15).

62 It is therefore a matter for the referring court, in the light of the answers given by the Court of Justice to the preceding questions, to classify the apparatus at issue in the main proceedings on the basis of its objective characteristics and properties. As was pointed out at paragraph 39 of the present judgment, the referring court must interpret the CN, so far as is possible, in accordance with the ITA.

63 There is therefore no need to answer those questions.

The sixth question in Cases C-320/11 and C-330/11 and the eighth question in Case C-382/11

64 In view of the answers given to the foregoing questions, CN subheading 8521 90 00 is not relevant for the purposes of resolving the disputes in the main proceedings, with the result that it is not necessary to answer those questions.

The sixth question in Case C-382/11 and the fourth question in Case C-383/11

65 By these questions, the referring court asks, in essence, whether Article 78(2) of the Customs Code must be interpreted as meaning that *ex post* inspection of goods and the subsequent change of their tariff classification may be made on the basis of written evidence without the customs authorities being required to physically check those goods.

66 According to Article 78(2) of the Customs Code, after releasing the goods, the customs authorities may 'inspect the commercial documents and data relating to the import or export operations in respect of the goods … or to subsequent commercial operations involving those goods' and they may also inspect the goods. It follows that *ex post* inspections of the declarations may be carried out without the customs authorities being required to physically inspect the goods.

67 The answer to those questions is that Article 78(2) of the Customs Code must be interpreted as meaning that *ex post* inspection of goods and the subsequent change in their tariff classification may be made on the basis of written documents without the customs authorities being required to physically check those goods.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decisions on costs are 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 (Sixth 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, respectively, by Commission Regulation (EC) No 1214/2007 of 20 September 2007, by Commission Regulation (EC) No 1031/2008 of 19 September 2008, and by**

Commission Regulation (EC) No 948/2009 of 30 September 2009, must be interpreted as meaning that, for the purposes of classification of goods under subheading 8528 71 13, a modem for gaining access to the internet is a device which, alone and without the intervention of any other apparatus or mechanism, is capable of accessing the internet and of ensuring interactivity and an exchange of information in both directions. It is solely the capacity to gain access to the internet, and not the technique used to achieve this, that is relevant for the purposes of classification under that subheading.

2. **That Combined Nomenclature must be interpreted as meaning that the reception of television signals and the presence of a modem allowing access to the internet are two equivalent functions that apparatus must perform in order to be classified under subheading 8528 71 13. In the absence of one or other of those functions, that apparatus must be classified under subheading 8528 71 19.**

3. **Article 78(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code must be interpreted as meaning that *ex post* inspection of goods and the subsequent change in their tariff classification may be made on the basis of written documents without the customs authorities being required to physically check those goods.**

[Signatures]