ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

3 December 2008 *

In Case T-227/06,

RSA Security Ireland Ltd, established in Shannon (Ireland), represented by B. Conway, Barrister, and S. Daly, Solicitor,

applicant,

v

Commission of the European Communities, represented by X. Lewis and J. Hottiaux, acting as Agents,

defendant,

APPLICATION for the annulment of Commission Regulation (EC) No 888/2006 of 16 June 2006 concerning the classification of certain goods in the Combined Nomenclature (OJ 2006 L 165, p. 6),

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

Combined Nomenclature

1 For the purposes of applying the Common Customs Tariff and facilitating the establishment of statistics of the Community's external trade and other Community policies relating to imports and exports of goods, the Council, by adopting 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; 'the Combined Nomenclature

Regulation'), established a complete nomenclature of goods being imported and exported in the Community ('the Combined Nomenclature' or 'the CN'). That nomenclature is set out in Annex I to that regulation.

2 In order to ensure the uniform application of the Combined Nomenclature in the Community, the Commission, with the assistance of a committee of representatives of the Member States, may adopt a number of measures which are set out in Article 9 of the Combined Nomenclature Regulation. Among those measures is the possibility for the Commission to adopt tariff classification regulations for particular goods in the Combined Nomenclature (first indent of Article 9(1)(a) of the Combined Nomenclature Regulation).

3 At the time of the adoption of Commission Regulation (EC) No 888/2006 of 16 June 2006 concerning the classification of certain goods in the Combined Nomenclature (OJ 2006 L 165, p. 6; 'the contested regulation'), tariff headings 8470, 8471 and 8543 of the Combined Nomenclature were worded as follows:

— heading 8470: '[c]alculating machines and pocket-size data-recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers …';

— heading 8471: '[a]utomatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included';

— heading 8543: '[e]lectrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter'.

Binding tariff information

4 Under Article 11(1) and Article 12 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'), as amended, economic operators may obtain binding tariff information ('BTI') from customs authorities. That is information on the tariff classification of particular goods which binds those authorities vis-à-vis the applicant for, and/or holder of, the BTI.

5 Article 12 of the Customs Code states:

'1. The customs authorities shall issue [BTI] or binding origin information on written request, acting in accordance with the committee procedure.

...

4. Binding information shall be valid for a period of six years in the case of tariffs … from the date of issue …

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;

…

The date on which binding information ceases to be valid for the cases cited in (i) and (ii) shall be the date of publication of the said measures …;

…

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, provided that he concluded binding contracts for the purchase or sale of the goods in question, on the basis of the binding

information, before that measure was adopted. However, in the case of products for which an import, export or advance-fixing certificate is submitted when customs formalities are carried out, the period of six months is replaced by the period of validity of the certificate.

In the case of paragraph 5(a)(i) and b(i), the Regulation … may lay down a period within which the first subparagraph shall apply.

…'

6 Article 8(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code (OJ 1993 L 253, p. 1), as amended, states:

'In the case of [BTI], the customs authorities of the Member States shall, without delay, transmit to the Commission the following:

(a) a copy of the application for [BTI] …;

(b) a copy of the [BTI] notified …

…

Such transmission shall be effected by electronic means.'

7 Article 9(1) of Regulation No 2454/93 provides:

'Where different binding information exists:

— the Commission shall, on its own initiative or at the request of the representative of a Member State, place the item on the agenda of the Committee for discussion at the meeting to be held the following month or, failing that, the next meeting,

— in accordance with the Committee procedure, the Commission shall adopt a measure to ensure the uniform application of nomenclature … rules … as soon as possible and within six months following the meeting referred to in the first indent …'

Background to the dispute

8 The applicant, RSA Security Ireland Ltd, is a company incorporated under the laws of Ireland which manufactures, imports and markets within the European Community a security device called 'RSA SecurID authenticator' in two principal forms, a 'credit card' form and a 'key fob' form.

9 On 8 February 2001, the Irish Revenue Commissioners ('the IRC') issued, at the request of the applicant, BTI classifying its product under subheading 8473 30 10 00 of the Combined Nomenclature. That BTI describes the product as follows: '[It is] a security mechanism for Internet transactions [which] consists of an LCD, a PCB, an IC/microcontroller, capacitors and a button cell battery. All [those] components are encased in a plastic case.'

10 On 1 December 2003 the IRC informed the applicant that the Customs Code Committee, 'Tariff and Statistical Nomenclature' Committee ('the Nomenclature Committee'), had decided that the product had to be correctly classified according to the CN code 8543 89. Thus, in order to comply with the decisions of that committee, the IRC revoked the BTI of 8 February 2001 with immediate effect and replaced it on 8 April 2004 with another BTI classifying the type of device in question in the tariff subheading corresponding to CN code 8543 89 95 99. The new BTI describes the product as follows: 'This is a security device for a computer [which] consists of an LCD, a printed circuit board and a battery encased in either a plastic case or a credit card form factor. When programmed it provides security of access to a computer system at the point of log on by identifying and authenticating the user.'

11 Since the customs duty rate is considerably higher under heading 8543 than under heading 8473, the applicant lodged an appeal against the IRC's classification before the Revenue Appeal Commissioners (Ireland) ('the AC').

12 By decision of 10 October 2005, the AC upheld the appeal, deciding that the correct classification of the product in question pursuant to the rules of construction and classification of the Customs Code had to be determined by reference to its objective characteristics and qualities, specifically in that it calculates and displays pseudo

random numbers. The AC thus decided that the product had to be classified as a calculating device falling under heading 8470 10 00 00.

13 Since the AC's decision had the effect of invalidating the BTI issued on 8 April 2004, the IRC informed the Commission of that decision. Subsequently, the IRC decided not to challenge that decision before the Superior Courts of Ireland. The AC's decision concerning the classification of the product in question therefore become final in Irish law.

14 The applicant therefore requested from the IRC the repayment of customs duty previously paid in respect of the goods imported pursuant to the BTI of 8 April 2004. By letter of 27 October 2005, the IRC formally revoked that BTI, in line with the AC's decision of 10 October 2005 classifying the product in heading 8470 10 00 00.

15 On 15 November 2005 the Commission submitted to the Nomenclature Committee the note by the IRC concerning the 'classification of a computer security device known as a SecurID authenticator (digipass)'. That request was reviewed in the course of several meetings of that committee.

16 By letter of 9 March 2006, the IRC informed the applicant that the Nomenclature Committee had discussed the revocation of the BTI subsequent to the AC's decision of 10 October 2005 and that the Commission, following approval of a draft text by the Nomenclature Committee, had finally adopted a regulation classifying the product in question in subheading 8543 89 97 of the Combined Nomenclature. By email of

23 June 2006, the IRC advised the applicant of the publication of the contested regulation, indicating that this was the relevant regulation to which the IRC had referred in that letter of 9 March 2006.

17 The Annex to the contested regulation determines the classification of the product at issue in the following terms:

Description of the goods	Classification (CN code)	Reasons
(1)	(2)	(3)
A security device designed to gain access to records stored on an automatic data-processing (ADP) machine. It consists of a liquid crystal display (LCD), a printed circuit assembly and a battery encased in a plastic case which can be put on a keyring. The device generates a sequence of six digit numbers, being specific to a particular user, and allows the user access to the records stored on an ADP machine. The device cannot be connected to an ADP machine and functions independently of such a machine.	8543 89 97	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8543, 8543 89 and 8543 89 97. The device is not classifiable under heading 8470 because it has no manual arrangements for data input nor has it a calculating function in the context of this heading (see HS Explanatory Notes to this heading). It is not classifiable under heading 8471,because it is not freely programmable in accordance with the requirements of the user (see Note 5(A)(a)(2) to Chapter 84), nor is it a unit of an automatic data-processing machine because it is not connectable to the central processing unit (see Note 5(B)(b) to Chapter 84). The device is classifiable under heading 8543 because it is an electrical apparatus with an individual function not specified or included elsewhere.

18 In accordance with Article 3 thereof, the Regulation entered into force on the 20th day following its publication in the *Official Journal of the European Union*, that is on 7 July 2006.

19 By letter of 11 August 2006, in reply to an enquiry of 8 August 2006 from the applicant, the IRC confirmed that the contested regulation classified 'RSA's SecurID authenticator at heading 8543 89 97', stating also that from the date of its entry into force, it annulled the AC's decision of 10 October 2005 and that it applied to the product in question in both 'key fob' and 'credit card' form.

Procedure and forms of order sought

20 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 25 August 2006.

21 By a document lodged at the Registry on 22 November 2006, the Commission raised a preliminary objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant filed its observations on that objection on 8 January 2007.

22 In its preliminary objection of inadmissibility, the Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to bear the costs.

23 The applicant claims that the Court should:

— dismiss the objection of inadmissibility;

— in the alternative, reserve its decision on that objection until final judgment;

— annul the contested regulation as it fails to classify the applicant's product under the Combined Nomenclature by reference to its objective characteristics and qualities;

— in the alternative, annul the contested regulation, as it was enacted on foot of an abuse of powers and/or an infringement of essential procedural requirements by the Commission;

— declare that the product, which is in the nature of an automatic data processing machine, falls to be classified within the terms of heading 8471 of the Combined Nomenclature;

— in the alternative, declare that the essential characteristic of the product is its specific capacity to generate and perform mathematical calculations specified by the user at the time of purchase and that it so falls to be classified as a calculating device within the terms of heading 8470 of the Combined Nomenclature;

— declare that the essential characteristic of the product is not that of a security device or the granting of access to records whether stored on an automatic data-processing machine or otherwise;

— order the repayment of such customs duty that it has paid in respect of the importation of the product into the Community since the coming into force of the contested regulation, together with the payment of interest relating to that duty;

— order that the Commission bear the costs of the proceedings.

24 By way of measures of organisation of procedure, the Court of First Instance, by letter of 4 March 2008, put a written question to the Commission requesting it also to produce certain documents. The Commission acceded to those requests within the periods prescribed.

Law

25 Under Article 114 of the Rules of Procedure, if a party so applies, the Court of First Instance may give a decision on admissibility without going to the substance of the case. Under Article 114(3), the remainder of the proceedings is to be oral, unless the Court

decides otherwise. In the present case, the Court considers that it has sufficient information from the documents before it and that there is no need to open the oral procedure.

Arguments of the parties

26 The Commission contends that the applicant is not individually concerned by the contested regulation.

27 It recalls, first of all, that according to case-law, an action brought by an individual is not admissible in so far as it is directed against a regulation having general application within the meaning of the second paragraph of Article 249 EC. It contends, in particular, that, according to settled case-law, operators are not individually concerned by tariff classification regulations for goods in the Combined Nomenclature and that their actions against such regulations have been dismissed as inadmissible.

28 Moreover, Case T-243/01 *Sony Computer Entertainment Europe* v *Commission* [2003] ECR II-4189 ('*Sony*') is the only case in which an individual operator has been held to be individually concerned by a classification regulation, and that was in the light of the presence of four factors. The 'exceptional circumstances' of that case are not sufficiently established in this case to warrant the same conclusion.

29 Regarding the first factor, namely the fact that at the origin of the regulation at issue in *Sony*, paragraph 28 above, there had been a BTI application submitted by Sony and that no other product, apart from its PlayStation, was demonstrated or discussed in the lead up to the adoption of that regulation (*Sony*, paragraph 28 above, paragraphs 64 to 66), the Commission submits that little or no weight can be given to that factor in the present case, since the procedure leading to the adoption of a classification regulation is always triggered by difficulties relating to the classification of a product. Moreover, as the applicant conceded in its application, the product in question was not specifically examined by the Nomenclature Committee and no photographs of that product were produced. In addition, the applicant also conceded that that committee had contemplated the situation of a similar product, 'the Digipass', which had been previously classified under the same heading.

30 As regards the second factor, namely the fact that Sony was the only operator to be affected in law by the classification regulation at issue and the outcome of national litigation was affected by it (*Sony*, paragraph 28 above, paragraphs 68 and 69), the Commission observes that the applicant has failed to establish the existence of any litigation in the national courts concerning the classification of the product in question, the outcome of which depends on the contested regulation. Moreover, the applicant is not the only undertaking to be affected by the contested regulation, as it has itself expressly conceded in its application, since at least four different undertakings are able to manufacture and market products with features that are either similar or very similar to those of the applicant's product, all of which may be affected by that regulation. In this respect, although the exchange of correspondence with the Irish authorities annexed to the application shows beyond doubt that the contested regulation is applicable to its product, it does not however show that its product is the only one to be affected by that regulation.

31 Regarding the third factor, namely the fact that, in *Sony*, paragraph 28 above, the regulation at issue focussed specifically on the applicant's product, given that a photograph of the product with the Sony logo was annexed to it and that no other product existed with identical features at the time when that regulation entered into force (*Sony*, paragraph 28 above, paragraphs 71 to 74), the Commission submits that it is not present in this case. The contested regulation contains no photograph of the product at issue nor any reference to a logo, trade mark, patent or other proprietary

right held by the applicant. Furthermore, the applicant has not alleged either that it was the holder of the patents describing the product at issue, extracts of which were submitted in the file, or that its rights under them have been changed in any way whatsoever by the contested regulation. The Commission submits, lastly, that the description of the product in column 1 of the Annex to the contested regulation is generic, based on the technical characteristics and properties of the goods at issue as well as on the reasons found in column 3 of the Annex, and that it cannot be inferred from that description that it applies solely to the product of the applicant, who has not indeed claimed or demonstrated the contrary.

32 As regards the fourth factor, the Commission contends that, unlike Sony, which was the sole authorised importer of the product classified in the regulation at issue in *Sony*, paragraph 28 above, the applicant has not alleged that it is the sole authorised importer of the product in question.

33 The Commission submits, in short, that none of the exceptional circumstances of the case which gave rise to *Sony* applies in the present one. Accordingly, the contested regulation is to be characterised as a measure of general application within the meaning of the second paragraph of Article 249 EC. The applicant is not therefore individually concerned by that regulation. The Commission also recalls that, according to the case-law, a classification regulation is applicable by analogy in so far as the examination of a particular product by the Nomenclature Committee concerns not only the product under consideration, but also identical or similar products.

34 Lastly, the Commission observes that a decision holding that the action is inadmissible does not deprive the applicant of judicial protection, since it can plead the illegality of the contested regulation in support of an action brought before the national court against a national implementing measure.

35 The applicant disputes the Commission's arguments and submits that the contested regulation is of individual concern to it by reason of circumstances in which it is differentiated from all other operators.

36 It claims that, in accordance with Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 ('*Plaumann*'), several particular factors are liable to give rise to a situation peculiar to the applicant.

37 First, the applicant's appeal against the classification of the product in question by means of the BTI of 8 April 2004 was upheld by the AC, which meant that that BTI was revoked.

38 Second, the decision of the AC settled the law in Ireland, once the IRC chose in consultation with the Commission not to pursue their right of appeal against that decision.

39 Third, the administrative procedure followed by the IRC and the Commission following the AC's decision was conducted specifically by reference to the product in question.

40 Fourth, the IRC's letters to the applicant (see paragraphs 16 and 19 above) show beyond doubt that the contested regulation was formulated with the express intention of overturning the AC's tariff classification decision.

41 Fifth and lastly, the applicant is the only undertaking which had overturned by due legal process a BTI addressed to its product and which had achieved a more favourable tariff classification on foot of that legal process, a classification which was invalidated by the contested regulation.

42 The applicant also claims that although the contested regulation may appear to be worded in a general and abstract manner, it cannot be analysed solely as a measure having general application to objectively determined situations and entailing legal effects for categories of persons regarded generally and in the abstract. The nature of the involvement of the Commission with the IRC in the decision to drop the IRC's appeal against the AC's decision and the manner of formulation and adoption of the contested regulation show that the Regulation is a measure which sought intentionally to overturn the AC's finding and, accordingly, the BTI issued by the IRC following that determination. In the final analysis, the contested regulation is merely a disguised decision.

43 The applicant also refers to Case C-309/89 *Codorníu* v *Council* [1994] ECR I-1853 ('*Codorníu*'), in which the applicant had been held to be individually concerned because, first, it possessed a legal entitlement to use a graphic trade mark registered before the adoption of the regulation at issue and, second, that regulation prevented it from availing of all its rights in its trade mark. In the present case, the applicant finds itself in a similar situation to Codorníu, having established a legal entitlement, by means of the AC's decision, to a particular tariff classification, a legal entitlement which the contested regulation purports to overturn.

44 Moreover, the Commission's analysis of the concept of a person 'individually concerned' is so flawed that it surreptitiously equates that concept to that of a person 'uniquely concerned'. As the case which gave rise to *Codorníu*, paragraph 43 above, shows, the fact that other Community producers potentially holding relevant registered trade marks might have had like restrictions imposed upon them by virtue of the regulation at issue did not prevent the Court from concluding that Codorníu had established that it was directly and individually concerned by that regulation. The Court

did not therefore hold that the regulation at issue had to be directed specifically and solely at Codorníu in order for a right to lie for Codorníu to bring an action for annulment.

45 The applicant states that the case-law to which the Commission refers is not relevant. The facts of the cases which gave rise to the judgments in Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463, and Case 40/84 *Casteels* v *Commission* [1985] ECR 667, and the orders in Case T-120/98 *Alce* v *Commission* [1999] ECR II-1395 and Case T-49/00 *Iposea* v *Commission* [2001] ECR II-163 are in stark contrast to those of the present case.

46 The applicant further submits that the Commission's interpretation of *Sony*, paragraph 28 above, is incorrect, in so far as it seeks to make the admissibility of an application for annulment of a tariff classification regulation subject to the existence of four factors in combination. On the contrary, the correct construction of that case is that it was the presence of these four factors which led the Court of First Instance to conclude, by application of the criteria laid down in *Plaumann*, paragraph 36 above, that Sony was individually affected.

47 The applicant also disputes the merits of the Commission's arguments relating to the four factors identified by it. Regarding the first factor, it claims that the factual background of this case cannot be overlooked when reviewing the actions of the Commission in framing and issuing the contested regulation, since it intended to deny to the applicant the classification status determined by the AC. This aspect of the factual background, together with all the interaction between the Commission and the IRC, shows in particular that the contested regulation is in reality a disguised decision identifying the applicant as individually concerned.

48 In this respect, the applicant disputes the Commission's claim that the absence of individual concern is established by the fact that the product in question, the photographs of it and patent papers were not specifically reviewed by the Nomenclature Committee. Such lack of attention to its product amounts, on the contrary, to a lack of due process in the procedure for the adoption of the contested regulation. As the correspondence between the applicant and the IRC shows, the members of the Nomenclature Committee, like the Commission itself, were aware that the core purpose of their activities was to consider the AC's classification of the product, given that this issue had been brought to the Committee by the IRC following the AC's classification decision. In the final analysis, the simple fact that the applicant's right to a specific tariff classification following the AC's determination was deliberately removed by the contested regulation distinguishes it from other traders.

49 As regards the second factor, the applicant submits that the Commission's argument that in this case there is no current litigation in the national courts concerning the classification of the product at issue, the outcome of which depends on the contested regulation, is of no relevance to the question of the admissibility of its action.

50 The applicant further submits that the Commission's claim that it is not, unlike Sony, the only operator to be affected in law by the contested regulation amounts to an incorrect understanding of *Sony*, paragraph 28 above. First, like Sony, the applicant had successfully challenged a BTI issued by the national customs authorities and, second, the favourable tariff classification granted by the national court was annulled and superseded by the contested regulation. The applicant is therefore the only undertaking whose legal position has been affected by the adoption of that regulation.

51 Furthermore, the legal position of the other undertakings which are able to manufacture and market products which may be concerned by the contested

regulation is not affected by that regulation. Unlike the applicant, those undertakings had not obtained any legal entitlement to import their product into the Community under tariff heading 8470. Their legal position is therefore analogous to that of the third party described at paragraph 70 of *Sony*, paragraph 28 above, which held a BTI relating to a product similar to the PlayStation®2 under the tariff classification disputed by Sony rather than under that granted to Sony by the VAT and Duties Tribunal (United Kingdom).

52 As regards the third factor, the applicant submits that the importance attached by the Commission to the fact that there are no photographs of the product in the contested regulation or other direct or indirect reference therein to its logo, patent or trade mark amounts again to a distortion of the Court's findings in *Sony*, paragraph 28 above. In the case which gave rise to that judgment, the photograph of the product annexed to the regulation at issue was merely additional evidence, as distinct from conclusive evidence, of the fact that the regulation at issue was to be interpreted as a decision concerning the classification of the PlayStation®2. It is not possible to conclude from this fact that the Court of First Instance held that the lack of such written or photographic evidence in the body of a regulation and its annexes precludes the relevant importer from being individually concerned by that regulation. Such a conclusion is contrary to the case-law of the Court of Justice, according to which lack of identification in a regulation of the operators who may be affected by it is not determinative of lack of individual concern. The latter may be proved, under *Plaumann*, paragraph 36 above, by the existence of individuating facts or circumstances.

53 As regards the Commission's argument alleging that the extracts from patents placed on the file by the applicant lack evidential value, the applicant states that it has not suggested that its rights pursuant to the patents have been infringed by the contested regulation. In this respect, it states that it is not the existence of the patents but the fact of the AC's decision that determines a nexus between the circumstances in the present case and those in the case which gave rise to *Codorníu*, paragraph 43 above.

54 The applicant also disputes the Commission's argument that the fourth factor of *Sony*, paragraph 28 above, is not applicable in the present case, as, unlike Sony, it is not the sole authorised importer of the product at issue. In that judgment, the Court of First Instance did not hold that an operator must be the sole authorised importer to be individually concerned by any tariff classification regulation; that would, moreover, be contrary to *Plaumann*, paragraph 36 above. Furthermore, the applicant disputes the Commission's approach that the practice of tariff classification by analogy renders inadmissible any action against that type of act. Classification by analogy does not affect in any way the entitlement of natural or legal persons to establish that they are individually concerned so that their actions before the Community judicature are declared admissible.

55 As regards, lastly, the Commission's argument concerning effective judicial protection, the applicant states that the present action is its sole means of challenging the regulation at issue, since it can have no further recourse to the appeal processes in the Irish Superior Courts following the IRC's decision not to pursue that option. Moreover, the unfettered and unqualified right of individuals to bring an action for annulment before the Court of First Instance conferred by the fourth paragraph of Article 230 EC is in addition to the right to plead before a national court that a Community measure is invalid; the existence of an alternative remedy is not, per se, a bar to admissibility of an action brought under that article.

Findings of the Court

56 According to settled case-law, natural and legal persons may not, as a rule, bring actions under the fourth paragraph of Article 230 EC for annulment of tariff classification regulations. In spite of the apparent specificity of the descriptions which they contain, such measures are none the less of entirely general application, since they concern all products of the type described, regardless of their individual characteristics and origin, and since they take effect, in the interests of the uniform application of the Common

Customs Tariff, in relation to all customs authorities in the Community and all importers (see *Sony*, paragraph 28 above, paragraph 58 and the case-law cited; orders of 19 March 2007 in Case T-183/04 *Tokai Europe* v *Commission*, not published in the ECR, paragraph 48, and in Case T-82/06 *Apple Computer International* v *Commission* [2008] ECR II-279, paragraph 45).

57 In the present case, Article 1 of the contested regulation provides that the goods with the characteristics described in column 1 of the table set out in the Annex are to be classified within the Combined Nomenclature under the CN code indicated in column 2 of that table, namely the CN code 8543 89 97. The provision applies to all products analogous to, or of, the type described, regardless of their individual characteristics and origin (see, to that effect, the judgment in *Casteels* v *Commission*, paragraph 45 above, paragraph 11, and the order in *Apple Computer International* v *Commission*, paragraph 56 above, paragraph 46).

58 That provision, being in the form of a measure of general application within the meaning of the second paragraph of Article 249 EC, applies to an objectively determined situation and produces legal effects with respect to categories of persons envisaged generally and in the abstract, and in particular importers of the product it describes (see, to that effect, the order in *Iposea* v *Commission*, paragraph 45 above, paragraph 24 and the case-law cited).

59 However, even a measure of general application may, in certain circumstances, be of direct and individual concern to some economic operators and therefore may be challenged by them under the fourth paragraph of Article 230 EC. That is the case when the measure in question affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and which distinguish them individually in the same way as the addressee of a decision (judgments in *Plaumann*, paragraph 36 above, at 107, and *Codorníu*, paragraph 43 above, paragraphs 19 and 20; orders in *Tokai Europe* v *Commission*, paragraph 56 above, paragraph 49, and *Apple Computer International* v *Commission*, paragraph 56 above, paragraph 48). In this respect, the mere fact that a measure of general application may have specific effects which differ according to the various persons to whom it applies is not such as to differentiate them in relation to all the other

operators concerned where that measure is applied on the basis of an objectively determined situation (order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 37; orders of 25 September 2002 in Case T-178/01 *Di Lenardo* v *Commission*, not published in the ECR, paragraph 52, and of 12 January 2007 in Case T-104/06 *SPM* v *Commission*, not published in the ECR, paragraph 70).

60 According to settled case-law, the possibility of determining more or less precisely the number or even the identity of the persons to whom a measure applies does not mean that that measure must be regarded as being of individual concern to them, provided that it applies to them by virtue of an objective legal or factual situation defined by the measure in question (see, to that effect, *Codorníu*, paragraph 43 above, paragraph 18; orders in *Iposea* v *Commission*, paragraph 45 above, paragraph 31, and in *Apple Computer International* v *Commission*, paragraph 56 above, paragraph 52).

61 Moreover, the fact that certain operators are economically more affected by a measure than the other operators in the same sector is not sufficient for them to be regarded as individually concerned by that measure (orders in Case T-287/04 *Lorte and Others* v *Council* [2005] ECR II-3125, paragraph 54, and in Case T-417/04 *Regione Autonoma Friuli-Venezia Giulia* v *Commission* [2007] ECR II-641, paragraph 58).

62 In the present case, the applicant in essence claims that the classification in question was triggered by its BTI application to the IRC, that, following its appeal to the AC, the latter adopted a final decision in relation to the product in question and classified it in CN code 8470 and that consequently it is the only undertaking with a particular tariff classification, which was subsequently overturned by the contested regulation. Lastly, it claims that the administrative procedure followed by the IRC and the procedure which led to the adoption of the contested regulation followed by the Commission, subsequent to the AC's decision, were conducted specifically in relation to its product.

63 The Court is of the view that the arguments put forward by the applicant do not reveal an attribute which, in derogation from the principles set out in paragraphs 56 to 58 above, is peculiar to the applicant, or circumstances which differentiate it and consequently distinguish it individually from the other economic operators potentially concerned by the contested regulation.

64 In this respect, first of all, it must be recalled that the aim of BTI is to enable the operator to proceed with certainty where there are doubts as to the classification of goods in the existing customs nomenclature, thereby protecting him against any subsequent change in the position adopted by the customs authorities with regard to the classification of the goods. However, such information is not aimed at, nor can it have the effect of, guaranteeing that the tariff heading to which the operator refers will not subsequently be amended by a measure adopted by the Community legislature, since the limited validity of BTI is set by Article 12 of the Customs Code itself (see, to that effect, Case C-315/96 *Lopex Export* [1998] ECR I-317, paragraph 28).

65 The fact that a Member State court decides to annul a BTI and to reclassify a given product under a certain heading of the Combined Nomenclature is not capable, of itself, of distinguishing individually the position in law of the trader who may rely on that decision. Although such a decision binds the customs authorities of that State, this does not mean, as the applicant claims, that that decision amounts to a right to import the goods under a given CN code which is, of itself, sufficient to distinguish it individually. It follows that in the present case the applicant cannot base its claim that it is distinguished individually on the fact that it is the only undertaking which has had a BTI overturned by a court and which has acquired, on the same basis, the right to import the product in question under heading 8470 of the Combined Nomenclature.

66 The preceding considerations are not undermined by the applicant's arguments based on the procedure by which the contested regulation was adopted.

67 Whilst it is true that the procedure by which the contested regulation was adopted was triggered by the request submitted by the Irish authorities following the AC's decision, such circumstances cannot, of themselves, distinguish the applicant individually for the purposes of the fourth paragraph of Article 230 EC. The application of a tariff classification regulation extends in principle to all products analogous to, or of, the type described, regardless of their individual characteristics and origins.

68 Furthermore, as regards, in the first place, the applicant's claim that the facts after the AC's decision show, in essence, that that procedure was pursued specifically in relation to the product in question, the Court observes that it is apparent from the documents before the Court that, already in August 2003, the Commission had informed the customs authorities of the Member States that it had received a request from the Polish customs authorities in relation to the tariff classification of a product, the 'digipass', displaying similar features to those of the product in question. That question was reviewed, initially, at the 322nd meeting of the Combined Nomenclature which took place in October 2003 and which was preceded by an exchange of correspondence between the Commission and the IRC regarding the first BTI issued by the latter, namely that of 8 February 2001, which attributed a tariff heading different from that indicated by a BTI issued by the German customs authorities, which classified a similar product in subheading 8543 89 95. It was only following the opinion of the Nomenclature Committee concluding that the 'digipass' was a security device which fell under residual subheading 8543 89 that the IRC announced, by letter of 1 December 2003, that they had revoked the BTI of 8 February 2001 and intended to issue a new BTI, which they did on 8 April 2004, reclassifying the applicant's product under heading 854389 95 99, a classification which was then called in question by the AC's decision of 10 October 2005.

69 Meanwhile, the question of the classification of those products had again been re-examined by the Nomenclature Committee at its 350th meeting, which took place on 20 September 2004, during which it was concluded that 'devices, secured by a password, serving to personal identification, which calculate and produce a specific password, are goods with an individual function to be classified in HS heading 8543 89'. All those circumstances were, for that matter, clearly referred to in the note by the IRC which triggered the procedure which led, after several rounds of discussions in the

Nomenclature Committee at the 386th, 389th and 391st meetings respectively, to the adoption of the contested regulation (see paragraph 15 above).

70 It is not therefore possible, contrary to what the applicant claims, to confine oneself to the finding that the procedure which followed the AC's decision was triggered by the IRC's request, since it is part of a larger and more general context which goes beyond the facts of this case, since, as was stated above, another Member State had previously requested information on a similar product and the Commission had referred to the existence of a divergence between the BTIs issued by the German and Irish customs authorities, and to a divergence of opinion on the classification of such products between several Member State authorities.

71 As regards, in the second place, the applicant's claim that the letters it received from the IRC show that the contested regulation was formulated with the express intention of invalidating the AC's decision, it must be observed that not only is that argument insufficiently substantiated but is also irrelevant, given that those letters emanate from Irish customs authorities and not from the Commission and that, accordingly, the statements contained therein cannot have the effect of binding the Commission. Moreover, those letters merely confirm that the contested regulation applies to the applicant's product and do not show at all that the intention of that regulation was to invalidate the AC's decision. It follows in particular from the IRC's letter of 11 August 2006 that the invalidity of the AC's decision is the consequence of the entry into force of the contested regulation and not the aim pursued by its adoption.

72 As regards, in the third place, the applicant's claim that the IRC had chosen in consultation with the Commission not to appeal against the AC's decision, there is nothing in the documents before the Court to show that such a decision had been taken following any suggestion or pressure on the part of the Commission. On the contrary, in

the note sent to the Combined Nomenclature Committee (see paragraph 15 above) which triggered the procedure which led to the adoption of the contested regulation, the IRC stated:

'It was decided by the Revenue Commissioners not to take a case stated for an opinion of the High Court on a point of law as the [AC's] determination was one of fact. The matter is now being referred to the [Nomenclature] Committee for information.'

73 As regards, in the fourth place, the applicant's argument alleging that the AC's decision constitutes circumstances which have the effect of distinguishing it individually in the same way as Codorníu in the case which gave rise to *Codorníu*, paragraph 43 above, it is sufficient to note that, contrary to the trade mark right enjoyed exclusively by the applicant in that case — the Court of Justice having noted in that respect that the applicant had registered its graphic trade mark in Spain in 1924 and traditionally used that mark both before and after that registration — the applicant's right to import its product under a given Combined Nomenclature code stems solely from the AC's decision. Since the two situations are in no way comparable, the AC's decision cannot be regarded as a circumstance which is capable of distinguishing the applicant individually in the same way as Codorníu, which, pursuant to the exclusive right resulting from the registration of its mark, found itself, following the adoption of the regulation at issue in that case, in a situation which was entirely distinct from that of all other economic operators.

74 As regards, in the fifth place, the fact that the customs duty corresponding to the subheading determined by the contested regulation is higher than that which the applicant could rely on pursuant to the AC's decision, it must be recalled that the fact that certain operators are economically more affected by a measure than the other operators in the same sector is not sufficient for them to be regarded as individually concerned by that measure (orders in *Lorte and Others* v *Council*, paragraph 61 above, paragraph 54, and in *Regione Autonoma Friuli-Venezia Giulia* v *Commission,* paragraph 61 above, paragraph 58).

75 In the sixth place, the Court must also reject the applicant's argument — which moreover has not been established in the present case — alleging lack of effective legal protection resulting from the fact that it has no right of action under national law with which to review the validity of the contested regulation because it can have no further recourse to the appeal processes in the Irish Superior Courts, the AC's decision having settled the law in Ireland.

76 The Court cannot accept an interpretation of the system of remedies to the effect that a direct action for annulment before the Community judicature will be available where it can be shown, following an examination by it of the particular national procedural rules, that those rules do not allow natural and legal persons to bring proceedings to contest the validity of the allegedly unlawful Community measure. Such a system would require the Court in each particular case to examine and interpret national procedural law, thus exceeding the bounds of its jurisdiction when reviewing the legality of Community measures (see the order in *Tokai Europe* v *Commission*, paragraph 56 above, paragraph 63 and the case-law cited).

77 As regards, in the seventh place, *Sony*, paragraph 28 above, also relied on by the applicant, it must be pointed out that, as was made clear at paragraph 77 of that judgment, it is only in the 'exceptional circumstances of this case' that the applicant was considered to be individually concerned. It is therefore necessary to recall what those exceptional circumstances were in order to establish whether, as the applicant maintains, they exist in the present case.

78 First, in the case which gave rise to *Sony*, paragraph 28 above, once Sony had been informed that discussions were taking place within the Nomenclature Committee regarding the tariff classification of its product, the PlayStation®2 video game console, it contacted the President of that committee and, at his request, demonstrated the product at a committee meeting, answering various questions put by its members.

There was subsequent contact between Sony and the services of the Commission in order to draw up the decision on the classification of its product.

79 Second, following a court decision, the United Kingdom customs authorities issued to Sony a BTI classifying its product in a subheading which was subsequently invalidated and replaced by the regulation at issue.

80 Third, the regulation challenged by Sony described in detail all of the features of its product and a photograph of it was annexed to that regulation. Moreover, at the time the contested regulation entered into force, there were no other products with identical features.

81 Fourth, Sony was the sole authorised importer of that console in the Community.

82 Thus, the only similarity between that case and the present case lies in the fact that, in both cases, there were decisions of national courts annulling BTIs issued previously by the customs authorities and classifying the products in question under different CN codes, decisions which were subsequently overturned by the adoption of the regulations at issue before the Court of First Instance. It must be noted that the differences between the two cases are considerable.

83 That is true, first of all, of the procedure before the Nomenclature Committee, in which, as stated above, Sony participated actively, unlike the applicant (see, to that effect, the

order in *Apple Computer International* v *Commission*, paragraph 56 above, paragraphs 50 and 51).

84 The same is true of the description of the product contained in column 1 of the table in the Annex to the contested regulation, since the applicant, unlike Sony, has failed to prove that that description contains any element which relates specifically and solely to its product. In this respect, it must be observed that, in the case which gave rise to *Sony*, paragraph 28 above, the Commission had not only described the manner in which the video game console was presented for retail sale, but also the different elements of which it was composed and to which it could be connected, as well as its principal functions. Sony had therefore succeeded in establishing that such a description corresponded exactly to the technical specifications of its product sent to the Commission and that it was so specific that it could not have applied to any products other than its game console, at least not at the time the regulation at issue entered into force (*Sony*, paragraph 28 above, paragraph 72).

85 Moreover, contrary to the situation of Sony, which was the sole authorised importer of the product at issue in the Community, in the present case the applicant has not only made no attempt to demonstrate the contrary, but has not even disputed the Commission's assertion that there were at least four different undertakings which could manufacture and market products with features that were likely to match the description contained in column 1 of the table in the Annex to the contested regulation. That description must therefore be considered instead to be generic, given that it may include within its scope products other than that of the applicant.

86 Lastly, in the case which gave rise to *Sony*, paragraph 28 above, the fact that there was a photograph of the product on which the PS2 logo was clearly visible, even though the Sony logo had been obliterated, carried significant importance in the assessment of the admissibility of the action. Although the photograph of the product in the table annexed to the regulation at issue in that case is, in principle, merely additional evidence, as distinct from conclusive evidence, the fact remains that it is a factor which must be taken into account for the purpose of analysing the nature of the provisions of

the contested regulation. The Court notes that in the present case the contested regulation does not contain a photograph either of the applicant's product or of another product.

87 The applicant has therefore failed to establish the existence of 'exceptional circumstances', such as those identified in *Sony*, paragraph 28 above, such as to warrant the conclusion that it was individually concerned by the contested regulation in the same way as the addressee of a decision.

88 It follows that the applicant is concerned by the contested regulation only in its objective capacity as an importer of security devices designed to gain access to records stored on an automatic data-processing machine such as those referred to in the table annexed to that regulation, in the same way as any operator, actually or potentially, in an identical situation.

89 It follows from all the foregoing considerations that the contested regulation is not of individual concern to the applicant and that the action must therefore be dismissed as inadmissible.

Costs

90 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the

applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. RSA Security Ireland Ltd shall pay the costs.

Luxembourg, 3 December 2008.

Registrar — President

E. Coulon — J. Azizi