OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 24 April 1997 *

1. In this preliminary reference the Court is asked to interpret certain provisions of the 1986 version of the Common Customs Tariff (hereinafter 'the CCT'). The issue raised is whether certain separate units of electrical apparatus, designed to provide an uninterruptible power supply for computers, should, since they are designed to be used together, be classified under one single CCT heading and, if so, which.

I — The legislative context

2. The relevant version of the CCT in 1986 was contained in Council Regulation (EEC) No 3331/85 of 5 December 1985 amending Regulation (EEC) No 950/68 on the Common Customs Tariff. [1] The relevant tariff headings, omitting subheadings, except where necessary, are as follows: [2]

'84.53 Automatic 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:

... .'

Since this is the specific heading effectively invoked by the plaintiff, reference must also be made to part of the subheading of the nomenclature adopted for statistical purposes by Commission Regulation (EEC) No 3631/85 of 23 December 1985 [3] amending the nomenclature of goods for the external trade statistics of the Community and statistics of trade between Member States

* Original language: English.

1 — OJ 1985 L 331, p. 1.

2 — They are contained in Chapters 84 and 85 of Section XVI and Chapter 90 of Section XVIII of the Annex to Regulation No 3331/85.

3 — OJ 1985 L 353, p. 1 (hereinafter the 'Nimexe').

(Nimexe). The relevant subheading of the Nimexe heading 84.53 is as follows:

'B Other:

I. Automatic data processing machines and units thereof:

...

b Digital machines:

...

2 Other:

...

cc Peripheral units, including control and adapting units (connectable directly or indirectly to the central unit):

...

33 Other

... .'

3. The other relevant CCT headings are as follows:

'85.01 Electrical goods of the following descriptions: generators, motors, converters (rotary or static), transformers, rectifiers and rectifying apparatus, inductors:

...

B. Other machines and apparatus:

...

II. Transformers, static converters, rectifiers and rectifying apparatus; inductors

...

85.04 Electric accumulators:

...

90.28 Electrical measuring, checking, analysing or automatically controlling instruments and apparatus:'

4. Section I of the 1986 version of the CCT is entitled 'General Rules', and, at part A, contains 'Rules for the interpretation of the nomenclature of the Common Customs Tariff'. Rule 3 of the General Rules provides:

'When for any 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, 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 ...'.

II — Facts and procedure

5. On 20 May 1986, Codiesel — Sociedade de Apoio Técnico à Indústria, Lda, a Portuguese company (hereinafter 'the plaintiff'), imported certain electrical equipment from France, to wit an uninterruptible power supply ('UPS') system comprising two separate cabinets. [4]

6. In its customs declaration, the plaintiff had requested that the goods be classified as 'other electronic apparatus for measuring electrical quantities' under heading 90 28 180 000 T of the Portuguese tariff. However, the customs examiner issued an opinion to the effect that the goods should

4 — The invoice of the exporter, Merlin Gerlin, indicated that the two cabinets contained an 'Alpes 100 12Kva' worth FF 95 200 and an 'Armoire Batterie Autonomie 30 MN' valued at FF 19 040.

be classified under tariff heading 90 28 380 000 D of the Portuguese tariff (concerning electrical measuring or controlling apparatus). In the event, both of these tariff headings have become irrelevant.

7. Disagreeing with that opinion, the plaintiff's clearing agent, none the less, amended the tariff heading which he had previously indicated to 84.53.890.900 C, for the following reasons: [5]

'The apparatus presented for clearance is incomparably more complex and expensive than a regulator, comprising, essentially, a rectifier/charger, a set of batteries and a static bypass inverter. Its main functions are as follows: the network provides energy to the computer through the rectifier/charger and the AC converter; the rectifier/charger simultaneously ensures that the set of batteries is kept charged; the continuous tension is adjusted at the output side of the rectifier to the correct charging rate for the set of batteries. When operating independently, the set of batteries provides the necessary energy to the AC converter to supply the critical charge, without there being any variation in the output tension; the tension of the set of batteries will diminish progressively until reaching its end-of-discharge value. As soon as the tension in the network resumes its normal values (or those within the tolerances), the rectifier/charger again feeds the AC converter and ensures that the set of batteries is recharged at constant tension.'

However, the customs examiner maintained his opinion, which was ultimately confirmed by the Conference of Supervisory Examiners (Conferência dos Revificadores). The Customs Office of Lisbon (Delegação Aduaneira de Alverca) accordingly classified the goods under Portuguese heading 90 28 380 000 D.

8. The plaintiff appealed and the Tribunal Técnico-Aduaneiro de 1ª Instância (Specialized Customs Court of First Instance) decided to assign two tariff classifications to the goods in question: the 'Cabinet described as Alpes 100' was placed under '[Nimexe] tariff heading 85.01 B. II. f, static converters'; the 'Cabinet containing the set of accumulators' was classified under 'tariff heading 85.04 B. I., other lead-acid accumulators'. This dual classification was upheld on appeal in a judgment of 26 June 1988 by the Tribunal Técnico-Aduaneiro de 2ª Instância (Specialized Customs Court of Second Instance) on the basis of the following considerations:

'The goods in question comprise two cabinets: one of them contains a rectifier, an AC converter and a static inverter switch; and the other contains a set of accumulators. The

5 — It emerged from the response provided by Portugal to a written question posed by the Court that this classification is the same as subheading 84.53 B. I. b.2. cc.33 of the Nimexe, which is set out at paragraph 2 above.

first of the two cabinets has an input for alternating current through two networks, network 1 and network 2: the rectifier converts the alternating current from network 1 into direct current which then feeds the AC converter and maintains the set of accumulators charged, whereas the alternating current in network 2 feeds the consumer units, directly or through a transformer by inversion of the circuits operated by the switching unit, in cases of a temporary surge of current; the AC converter converts the direct current into alternating current, ensuring that it is of the regular frequency and tension needed for the proper functioning of microcomputers and other sensitive electronic devices. Both the rectifier and the AC converter carry out functions which fall within the scope of those performed by the static converters referred to in Title V and the explanatory note for heading 85.01, which heading gives merely an illustrative list. In the second cabinet, the set of accumulators constitutes an alternative source of accumulated energy designed to feed the AC converter when there are cuts or faults on network 1: since the batteries are independent from the units they feed (which are complete in themselves), they must be classified separately, except where they are presented as part of those units; they are not stabilizer units of the kind referred to in paragraph D-6 of the explanatory notes to heading 84.53, since they are not units forming part of the data-processing system for the purpose of supplying an appropriate current to each of the component parts at all times as a result of monitoring by the system.'

9. On 31 May 1994, the judgment of the Tribunal Técnico-Aduaneiro de 2ª Instância (described in the order for reference as 'the contested administrative measure') was upheld by the Tribunal Tributário de 2ª Instância (Tax Court of Second Instance), which ruled that the plaintiff had failed to discharge the legal burden of proving that the contested administrative act was illegal. The plaintiff then appealed finally to the Supremo Tribunal Administrativo (Supreme Administrative Court, hereinafter 'the national court').

10. Before the national court, the plaintiff contended, *inter alia*, that the cabinets 'form a unit whose sole and inseparable function is to regulate and guarantee the supply of electricity to computers', and that pursuant to Rule 3(b) of the General Rules, coupled with explanatory note 3 to Section XVI of the CCT, [6] 'the classification must take account of the main function' of the goods. [7]

11. In its reference, the national court states that 'the fundamental question is whether the contested administrative measure was unlawful in that it maintained the classifica-

6 — The said note 3 is worded as follows: 'Unless the headings otherwise require, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function'.

7 — The plaintiff also submitted that account should be taken of expert evidence, such as that contained in two opinions submitted by experts on its behalf, in appeals concerning contentious but technical customs matters. Since the representative of the Ministério Público (State Lawyer's Office) agreed with this submission, their use would not appear to be an issue in this reference.

tion attributed by the Tribunal Técnico-Aduaneiro de 1ª Instância to the goods concerned'. [8] Viewing the proceedings before it as reflecting a difference regarding the proper tariff classification of the imported goods — four different tariff headings having been successively assigned to them in Portugal — the national court took the view that it was necessary to refer the following questions to the Court:

'1. Having regard to the facts held to be proved in part 3 of this judgment (above all those set out in paragraphs A to D and L, commencing on the 7th folio and ending on the 12th folio) [9] and the applicable Community provisions, is the dual tariff classification assigned to the goods in question by the Tribunal Técnico de 1ª Instância and later confirmed by the Tribunal Técnico de 2ª Instância and the Tribunal Tributário de 2ª Instância correct?

2. If not, what is the proper tariff classification?'

8 — The national court states that Portugal was obliged to apply the CCT nomenclature with effect from 1 March 1986 (pursuant to the Act of Accession of the Kingdom of Spain and the Republic of Portugal to the European Communities; OJ 1985 L 302, p. 23).

9 — These facts are essentially set out in paragraphs 5 to 9 above.

III — Observations

12. Written observations were submitted by the plaintiff, the Portuguese Republic and the Commission. The Court decided, pursuant to Article 104(4) of the Rules of Procedure, to dispense with an oral hearing, which had not been requested.

13. The plaintiff relies upon the conclusions of the expert technical opinion that it requested for use in the national proceedings, which state, firstly, that the rectifier part of the apparatus cannot function without the batteries, secondly, that the apparatus is not a regulator since its output is not the result of anything which it actually regulates and, finally, that it is not a converter since it neither converts alternating current into direct current nor the latter into the former. These conclusions conform, in the plaintiff's view, to both Rule 3(b) of the General Rules and explanatory note 3 to Section XVI of the 1986 version of the CCT, whereby products assembled from different components should be classified by reference to the component which gives them their essential character, namely, in this case, that which enables the apparatus to control and guarantee the continuous supply of energy.

14. In Portugal's view, the impugned classification should be upheld. It submits that the

goods at issue may not be classified under one single heading pursuant to their essential character, because the batteries are independent of the electrical supply apparatus, the latter being complete in itself and, hence, capable of separate customs classification.

15. The Commission, by way of a preliminary observation, states that the Court has no competence under Article 177 of the Treaty to apply Community law to specific factual circumstances. It follows, in its view, that the questions referred should be reformulated. The Commission suggests that essentially three questions arise: (i) should Chapter XVI of the 1986 version of the CCT be interpreted as containing provisions that permit the classification of goods such as those at issue in the main proceedings under a single tariff heading or subheading as constituting one functional unit; (ii) if the answer to the first reformulated question is negative, should subheadings 85.01 B. II. f and 85.04 B. I be interpreted as covering such goods; (iii) if the answer to the second reformulated question is negative, under what other heading or subheading should the goods be classified?

16. The Commission contends that, in order for a number of different goods to be classified under one heading (at least under the 1986 version) of the CCT, the combination of the goods must perform a singular and specific function which is itself reflected in the relevant nomenclature, to wit, Chapters 84 or 85 of the CCT. However, it maintains that the combined function at issue here, viz. that of guaranteeing the uninterrupted supply of electricity, is not one that is contained in that nomenclature. Moreover, that function is not fundamentally different from that performed by the cabinet containing the rectifier, the AC converter and the static inverter switch (hereinafter 'Cabinet A') which, in the Commission's opinion, may consequently be viewed as constituting a complete apparatus in itself. On its second reformulated question, the Commission, referring in particular to the applicable explanatory notes of the Customs Cooperation Council (hereinafter 'the CCC'), submits that subheading 85.01 B. II. f of the Nimexe (namely, 'static converters, rectifiers and rectifying equipment') should be interpreted as encompassing Cabinet A. As for the cabinet containing the set of accumulators (hereinafter 'Cabinet B'), it contends that both the text of and accompanying explanatory note to subheading 85.04 B. I of the CCT (namely, 'lead-acid accumulators') support its classification under that subheading.

IV — Analysis

17. The function of Article 177 of the Treaty is to ensure 'unity of interpretation of Community law' within the Member States. [10] It follows from the division of competence

10 — Joined Cases 28/62 to 30/62 *Da Costa* v *Nederlandse Belastingadministratie* [1963] ECR 31, at p. 38.

between the Court and national courts in Article 177 references, that it is for the referring court to apply the relevant provisions or rules of Community law which have been interpreted by the Court in the specific case pending before it. [11] In the circumstances of the present case, where the first question referred, on its face, asks the Court to determine whether the contested administrative measure is correct, I agree with the reformulation of the questions proposed by the Commission.

18. The Commission, relying particularly upon the relevant explanatory notes of the CCC, contends that, notwithstanding that the essential character of a UPS system is to ensure the uninterrupted supply of electricity, goods such as those imported by the plaintiff may not be classified by reference to that character since it is not mirrored in the nomenclature contained in Chapters 84 or 85 of the 1986 version of the CCT. I do not think that such an absolute position is appropriate in the present case. I think that Rule 3(b) of the General Rules is relevant and its potential application must, thus, be considered.

19. According to Rule 3(b) of the General Rules, whenever Rule 3(a) thereof is of no assistance, Rule 3(b) applies. Under Rule 3(a), 'the heading which provides the most specific heading shall be preferred to headings providing a more general description', whereas under Rule 3(b) '... composite goods consisting of different materials or made of different components ... 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' (emphasis added). Guidance as to the interpretation of this rule may be obtained from the relevant explanatory notes of the CCC. [12] Composite goods are therein defined as 'those in which the components are attached to each other to form a practically inseparable whole' as well as 'those with separable components, provided those components are adapted one to the other and are mutually complementary and that together they form a whole which it would be difficult to sell in different parts'. [13] According to the CCC commentary, the factor determining the essential character of goods varies between different kinds of goods and may be determined 'by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods'. [14]

20. This approach is largely mirrored in the Court's case-law, though without any par-

11 — See, for example, Case 35/75 *Matisa* v *Hauptzollamt, Berlin* [1975] ECR 1205, paragraph 3 of the judgment.

12 — The Court has consistently held that CCC explanatory notes and classification opinions 'are a means of interpretation for the original and present meaning and scope of the individual tariff headings ...' and, consequently, that they 'should be regarded as an authoritative source for the purposes of the interpretation of the headings' to the CCT; see, for example, Case 14/70 *Bakels* v *Oberfinanzdirektion München* [1970] ECR 1001, paragraphs 9 and 11 of the judgment, and, more recently, Case C-35/93 *Develop Dr Eisbein* [1994] ECR I-2655, paragraph 21 of the judgment.

13 — CCC, Explanatory Notes, Rules for the Interpretation of the Nomenclature, Rule 3(b), Commentary VIII, 2nd edition 1966, Vol. 1 (1978 impression).

14 — CCC, Explanatory Notes, Rules for the Interpretation of the Nomenclature, Rule 3(b), Commentary VII, 2nd edition 1966, Vol. 1 (1978 impression).

ticular emphasis on the relevance of material used. Thus, in *ELBA* v *Hauptzollamt Berlin-Packhof*, [15] where it was concerned with the classification of certain plastic frames containing 'flashing light circles' which were intended for use, among other things, on Christmas trees, the Court held that '... it cannot be argued that the "essential character" of the article within the meaning of the General Rules ... is determined by the materials used', but that, on the contrary, its essential character must be 'determined by its intended purpose as a decorative lighting appliance regardless of the material used for its frame'. [16] In *Sportex* v *Oberfinanzdirektion Hamburg*, [17] where the Court was asked to rule on the classification of goods known as 'pre-impregnated carbon-fibres', it considered Rule 3(b) of the General Rules to be 'the sole provision to which recourse [might] be had' for classification purposes when the separate subheadings under which the goods might otherwise be classified were 'general in scope'. [18] It held that under Rule 3(b) 'it is necessary, in carrying out the tariff classification of a product, to identify, from among the materials of which it is composed, the one which gives it its essential character [and that] this may be done by determining whether the product would retain its characteristic properties if one or other of its constituents were removed from it'. [19]

21. Although, as the Commission submits, the 1986 version of the CCT nomenclature contains no heading or subheading covering the function of ensuring the uninterrupted supply of power, I am satisfied that, read in the light of the General Rules, the nomenclature permits the classification of goods by reference to such a function. Consequently, it is necessary, in my view, to determine, firstly, the essential purpose of a UPS system and, secondly, which CCT classification most accurately defines that essential purpose.

22. The essential purpose of a UPS system is to assure the continuous and balanced supply of electricity. In the present age of information technology such systems are often, but not invariably, used to maintain computer networks and to protect data from accidental damage or deletion. I agree with the view of the Commission that such systems cannot, in themselves, be regarded as units of 'automatic data-processing machines ...' under CCT heading 84.53. The Commission rightly emphasizes the finding of the Tribunal Técnico Aduaneiro de 2ª Instância that the goods at issue in the main proceedings 'are not stabilizer units of the kind referred to in paragraph D-6 of the explanatory notes to heading 84.53, since they *are not units forming part of the data-processing system* for the purpose of supplying an appropriate current to each of the component parts at all times as a result of monitoring by the system' (emphasis added). However, it must ultimately be for the national court to make the final factual decision in this respect.

15 — Case 205/80 [1981] ECR 2097.
16 — Paragraph 17 of the judgment.
17 — Case 253/87 [1988] ECR 3351.
18 — Paragraph 7 of the judgment.
19 — Paragraph 8 of the judgment.

23. On the basis that the units at issue in this case are not units of a data-processing system, it remains to be determined how they ought to be classified. Notwithstanding the important role played by the set of accumulators in a UPS system, it is clear that they do not determine its essential character. They permit energy to be stored but cannot perform the role required of the apparatus in Cabinet A (namely, the rectifier, the AC converter and the static inverter switch). Their role is, instead, to ensure that the parts of a UPS system in Cabinet A continue to function whenever a power cut occurs; thus the accumulators play a subsidiary role to that of Cabinet A.

24. Consequently, I am satisfied that the essential character of an uninterrupted power supply system is defined, in combination, by the rectifier, the AC converter and the static inverter switch. I agree with the Commission's observation that CCT heading 90.28 (namely, 'electrical measuring, checking, analysing or automatically controlling instruments and apparatus') should not be applied to apparatus such as that at issue in this reference. In those circumstances, I think that the component parts of an uninterrupted power supply system should be regarded as 'transformers, static converters, rectifiers and rectifying apparatus; inductors' within the meaning of subheading 85.01 B. II of the 1986 version of the CCT (to wit, 85.01 B. II. f of the Nimexe).

V — Conclusion

25. In the light of the foregoing, I recommend that the Court answer the questions referred by the Supremo Tribunal Administrativo as follows:

(1) The part of the apparatus of an uninterruptible power supply system that comprises a set of accumulators should not be assigned, under Council Regulation (EEC) No 3331/85 of 5 December 1985 amending Regulation (EEC) No 950/68 on the Common Customs Tariff, a tariff classification separate from that assigned to the part comprising a rectifier, an AC converter and a static inverter switch, which, in accordance with Rule 3(b) of the General Rules for the interpretation of the nomenclature of the Common Customs Tariff, should be regarded as defining the essential character of such a system.

(2) Where the essential character of goods comprising an uninterruptible power supply system is defined by reference to the function performed by its rectifier, AC converter and static inverter switch, imports containing those parts should be regarded for the purposes of the version of the Common Customs Tariff applied by Council Regulation (EEC) No 3331/85 as falling within subheading 85.01 B. II.