OPINION OF ADVOCATE GENERAL JACOBS

delivered on 1 February 2001 [1]

1. This is a request for a preliminary ruling from the Appeal Commissioners, Ireland, in an area already touched upon in *Peacock*, [2] namely the classification for customs purposes of items of equipment used to enable computers to be connected in a local area network ('LAN'). Since such equipment may operate in computer networks extending beyond the purely local, it may be referred to more generally as 'network equipment'.

2. Whereas *Peacock* concerned a single type of equipment — 'network cards' — in respect of which no specific Community regulation had been adopted at the material time, a ruling is sought in the present case both on the classification of 58 named types of equipment which, for the period relevant to the national proceedings, appear to be covered either explicitly or by analogy by Commission regulations classifying them in the Combined Nomenclature ('CN'), [3] and in particular on the validity of those regulations themselves.

Factual, legal and procedural background

The nature of computer networks

3. Before considering the circumstances of the present case, it may be useful to have in mind an idea of the general nature of computer networks. A number of extremely helpful submissions have been made to the Court on this subject, and more information is publicly available on the biggest network of all, the Internet, on which I have also drawn. [4]

4. The earliest computers stood alone and information was transferred between them in recorded form. They could be connected to peripherals which provided input and output functions — printers, keyboards and screens being among the first. In due course, since they were capable of performing many operations at once, some were provided with a number of terminals which

1 — Original language: English.

2 — Judgment of 19 October 2000 in Case C-339/98 *Peacock* v *Hauptzollamt Paderborn* [2000] ECR I-8947, I-8949, Opinion delivered on 28 October 1999.

3 — Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ 1987 L 256, p. 1, as amended.

4 — I am particularly indebted to the informative web pages maintained by Kyungsan System, NetReference Inc. of the Burton Group and the 116th Bomber Wing of the Georgia Air National Guard.

had no processing capacity of their own but could be used by different operators to give instructions to the central processing unit and obtain the relevant results.

5. The first computers were large, and some remain so. Advances in data-processing technology have meant, however, that today's large machines have very much more processing and storage capacity than their predecessors of similar size. The same advances have meant that very much smaller machines now possess considerable capacity and have become, in the developed world, a standard feature in many homes and workplaces. In the latter, it is common for each individual to have his or her personal computer with its own processing and storage capacity.

6. In that context, individual computers are often linked together in such a way that they can call on each others' processing and storage capacities, share certain input and output devices and exchange information. In particular, workstations may share printers and have access to larger mainframe machines which can store and process large amounts of data.

7. It is thus common for computers to be linked together in networks. The smallest of these, typically covering a single building or complex of buildings, are called LANs. Larger areas may be covered by MANs (metropolitan area networks) and WANs (wide area networks). Different networks can be connected together to allow communication between them and ultimately the vast majority of them (together with many home computers) are linked on a global level to form the internet.

8. The physical links between machines may take different forms, including infrared beams. Most commonly, however, some form of cable is used — within LANs usually coaxial, twisted-pair or fibre-optic cable. In order to communicate over the cable, each computer must possess a network card of the type considered by the Court in *Peacock*.

9. Where WANs are concerned, or where geographically separate networks are interconnected, it is usually necessary for part of the communication to use a rented or public telecommunication link. Because of differences between the technologies used in computer networks and in telecommunications, it was at first always necessary for the communication to pass through a modem (*mo*dulator-*dem*odulator), which converts signals between the digital form

used by most computers and the analogue form used at each end of a telecommunication link. Now, however, telecommunication networks often use digital techniques and a modem is no longer always required.

10. A specific difference between telecommunication and LAN technologies is that in the former, a 'point-to-point' link is set up between the two communicating parties for each communication. At the end of the communication, the link is 'torn down', and the parties are no longer in contact. In a LAN, however, all the computers forming part of the network are constantly connected. A communication from one of those machines to another is 'broadcast' over the whole network but only accepted by the designated recipient or recipients.

11. If only two computers were connected together, it would presumably be a simple enough matter to string a cable between them. However, where large numbers of machines are linked, each of which must have access to each of the others, it is clear that some sort of multiple connection apparatus will at some stage be required to link cables to each other. In addition, since signals sent over cables weaken and deteriorate with distance, apparatus may be required to forward, regenerate or correct them. Where networks using different standards are connected, some device will be necessary to 'interpret' between them, or simply to connect two different types of cable. Beyond a certain size of network, it will no longer be practical to have literally every computer broadcasting and 'listening' to each of the others all of the time; it then becomes desirable to have devices which divide a LAN into smaller, more manageable, segments (often known as virtual LANs or 'VLANs', a term also used for groups of discrete networks which function as if they were one) and which will direct communications only towards the segments in which the addressees are situated. It may also be necessary to deal with situations in which several machines on the network are attempting to communicate at once and their messages are 'colliding' or (in particular where LANs are connected to other networks, including the internet) in which it is undesirable that certain types of message should enter or exit the network.

12. Thus, LANs and computer networks in general comprise physically, in addition to their constituent computers and the cables between them, a number of types of equipment which are described in the order for reference in the present case as carrying out 'a variety of functions including controlling, processing, formatting, routing, switching and bridging' information from one unit of a LAN to another. The designations listed in the annex to the order for reference include (by no means exhaustively): 'repeater', 'router', 'bridge', 'concentrator', 'media interface module', 'hub', 'channel interface', 'network card', 'trans-

ceiver', 'adapter', 'multimedia access centre' and 'media filter'.

13. Such devices all perform different functions at a detailed level, but they all operate in the general area I have outlined above. Their common function may be summarised as that of ensuring that all authorised communications, and no others, reach the intended addressee(s) undamaged and by the most efficient route possible. They do this, using a variety of techniques, by performing a number of tasks, including verifying, correcting, regenerating and forwarding data, converting data transmissions from one standard to another and filtering, switching, (re)directing, delaying or blocking communications. The types of equipment in issue in the present case all fall within this broad category.

The customs classification of goods

14. Within the Community, goods are classified for customs purposes in accordance with the CN, based on the worldwide Harmonised System ('HS'), [5] to which it is identical as regards the headings and six-digit subheadings, only the seventh and eighth digits forming subdivisions specific to the CN. The HS is established under the auspices of the World Customs Organisation ('WCO'), formerly known as the Customs Cooperation Council.

15. The WCO includes a Harmonised System Committee ('HS Committee'), on which the European Community, as a party to the HS Convention, is represented by the Commission. The HS Committee has the role, *inter alia*, of proposing amendments to the HS and preparing explanatory notes thereto ('HSENs'), classification opinions, other advice on interpretation and recommendations to secure uniformity in interpretation and application of the HS. [6] Such explanatory notes, classification opinions, advice and recommendations are deemed to be approved by the WCO Council automatically unless a contracting party requests re-examination. [7] Although not recognised as having binding authority, they are usually regarded as persuasive. [8]

5 — The Harmonised Commodity Description and Coding System, introduced by the International Convention of 14 June 1983, approved for the Community by Council Decision 87/369/EEC of 7 April 1987, OJ 1987 L 198, p. 1.

6 — See the HS Convention cited in note 4, Article 7.

7 — Ibid., Article 8.

8 — The Court has consistently held the HSENs to be a valuable aid to the interpretation of the CN. See, for example, the judgments in Case C-67/95 *Rank Xerox* v *Inspecteur der Invoerrechten en Accijnzen* [1997] ECR I-5401, paragraph 17, and Case C-382/95 *Techex* v *Hauptzollamt München* [1997] ECR I-7363, paragraph 12, and *Peacock*, cited in note 1. However, at paragraphs 22 to 24 of its judgment in Case C-280/97 *ROSE Elektrotechnik* v *Oberfinanzdirektion Köln* [1999] ECR I-689, it declined to follow the HSENs on the ground that 'they are contrary to the actual wording of heading 8536 and alter its meaning'.

The relevant CN headings

16. The CN and the HS refer to computers as 'automatic data-processing machines', also abbreviated to 'ADP machines'.

17. CN heading 8471 is worded as follows: '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'.

18. Since the issue in this case is essentially that of the correct tariff heading for customs classification, I do not consider it necessary to set out the various subheadings in detail. Moreover, a substantial revision of the HS and the CN took place as from 1 January 1996, [9] during the course of the period material to the present case, and the subheadings before and after that date are not identical. Suffice it to say that for both periods there are categories for, *inter alia*, digital ADP machines, digital processing units, input or output units, storage units and 'other' units, including peripheral units.

19. Until the end of 1995, heading 8517 was for: 'Electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier-current line systems'. Subheading 8517 82 90 was for telegraphic apparatus other than facsimile machines and other than for carrier-current line systems.

20. Since 1 January 1996, the wording of heading 8517 has been: 'Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones'. The subheading most closely equivalent to the former subheading 8517 82 90 is now 8517 50 90, which covers apparatus (other than telephone sets, videophones, fax machines, teleprinters or telephonic or telegraphic switching apparatus) for digital line systems.

21. A final heading, not originally envisaged by the parties, the national court or the Commission, has been suggested during the course of the procedure before the Court, following a decision taken by the

9 — See Commission Regulation (EC) No 3009/95 of 22 December 1995 amending Annex I to Council Regulation No 2658/87, OJ 1995 L 319, p. 1. That regulation reflected a similarly substantial revision of the HS.

HS Committee shortly before the hearing in this case. It is the residual heading 8543: 'Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter'.

Guidance for the interpretation of the HS and the CN

— General rules

22. The HS and the CN are each prefaced by the same six general rules for their interpretation which, having in the latter case been enacted by the Community legislature, are binding in Community law. They are, indeed, sometimes referred to as the 'legal rules'.

23. Rule 1 provides that '... 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'. Of those 'following provisions', Rules 3 and 4 may be borne in mind although, as will become apparent, I do not consider that they need apply in the present case.

24. Rule 3 applies where goods are prima facie classifiable under two or more headings. It is structured in three steps: (a) the heading which provides the most specific description is to be preferred; (b) goods of a mixed or composite nature, if not classifiable by reference to (a), are to be classified as if consisting of the material or component giving them their essential character; (c) if classification is not possible by reference to (a) or (b), the heading last in numerical order is to be used.

25. Rule 4 provides: 'Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin'.

26. Rules 2 and 5 cover situations which are not in issue here. Rule 6 may also be mentioned, but it applies only to classification under subheadings, whereas the issue here concerns the determination of the correct heading for classification. Essentially, it applies at subheading level the same principle as that embodied in Rule 1.

— Section and chapter notes

27. Each section and, within each section, each chapter of the nomenclature is pre-

faced by a number of more specific notes. [10] The headings in issue in this case fall within Chapters 84 and 85, which in turn form part of Section XVI. The notes to Section XVI and to Chapter 85 do not appear to be decisive for present purposes, but Note 5 to Chapter 84 has been extensively debated.

28. That note read, prior to 1996:

'(A) For the purposes of heading No 8471, the expression "automatic data-processing machines" means:

(a) digital machines, capable of

(1) storing the processing program or programs and at least the data immediately necessary for the execution of the program;

(2) being freely programmed in accordance with the requirements of the user;

(3) performing arithmetical computations specified by the user; and

(4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;

[(b) and (c) cover analogue and hybrid ADP machines respectively, and are not relevant here.]

(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all the following conditions:

(a) it is connectable to the central processing unit either directly or through one or more other units;

10 — Like the HSENs, these notes have been held by the Court to be a valuable aid for interpretation; see, for example, *Rank Xerox* and *Techex*, cited in note 8.

(b) it is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system).

Such units presented separately are also to be classified within heading No 8471.

Heading No 8471 does not cover machines incorporating or working in conjunction with an automatic data-processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.'

29. From 1 January 1996, the wording of Note 5 to Chapter 84 was amended. Whilst paragraph (A) remains unchanged, the remainder of the note now reads:

'(B) Automatic data-processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all of the following conditions:

(a) it is of a kind solely or principally used in an automatic data processing system;

(b) it is connectable to the central processing unit either directly or through one or more other units; and

(c) it is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(C) Separately presented units of an automatic data processing machine are to be classified in heading No 8471.

(D) Printers, keyboards, X-Y coordinate input devices and disk storage units

which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading No 8471.

(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

...'

— Explanatory notes to the HS

30. The HSENs, to which I have referred in paragraph 15, provide several definitions which may prove useful for present purposes, including those of automatic data processing, ADP machines, ADP systems and electrical apparatus for line telephony and line telegraphy. I shall refer to these definitions in the course of my analysis, as the case requires.

31. In particular, however, it is worth mentioning that under heading 8471, part (D) of the note concerns 'separately presented constituent units of data processing systems'. For the whole of the period relevant to the present case, the note stated, *inter alia*:

'Apart from central processing units and input and output units, examples of such units include:

...

(4) Control and adaptor units such as those to effect interconnection of the central processing unit to other digital data processing machines, or to groups of input or output units which may comprise visual display units, remote terminals, etc.

This category includes channel to channel adaptors used to connect two digital systems to each other.

(5) Signal converting units. At input, these enable an external signal to be understood by the machine, while at output,

they convert the output signals that result from the processing carried out by the machine into signals which can be used externally.

...'

32. Subsequently, at the 26th session of the HS Committee, which was concluded shortly before the hearing in this case, the decision was taken — apparently unanimously — to amend that note by corrigendum, deleting the second paragraph of item (4) and replacing it with:

'This category includes routers, bridges and hubs used to control and direct communications between the machines in local area networks (LANs) and channel to channel adaptors used to connect two digital systems (e.g. LANs) to each other.'

33. At the same time, a new second paragraph was added to item (5):

'This category includes optical fibre converters which are used in LANs.'

Binding tariff information

34. In order to provide a uniform measure of legal certainty as to the customs classification of goods for traders throughout the Community, there is a system of binding tariff information, at present governed by Article 12 of the Community Customs Code. [11]

35. Under those provisions, essentially, traders may apply to the customs authorities of their countries for information as to the classification of specific goods. The tariff information issued by those authorities is binding on them, as against the addressee and in respect of goods which correspond to those described, for a period of six years unless it ceases to be valid for one of a number of specified reasons.

36. Where information ceases to be valid because it is revoked or amended, the holder may continue to rely on it for a period of six months; where it ceases to be valid by reason of the adoption of a regulation with which it is not in conform-

11 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302, p. 1, as amended with effect from 1 January 1997 by Article 1(3) of Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 amending Regulation (EEC) No 2913/92 establishing a Community Customs Code, OJ 1997 L 17, p. 1.

ity, the regulation may lay down the period within which it may still be relied upon.

The relevant classification regulations

37. A power to adopt regulations concerning the classification of goods in the CN is conferred on the Commission by Articles 9 and 10 of Regulation No 2658/87. [12]

38. Regulation No 1638/94 [13] was adopted on 5 July 1994 and entered into force on 28 July 1994. It classified the following goods under CN subheading 8517 82 90 (telegraphic apparatus other than facsimile machines and other than for carrier-current line systems):

'1. An adapter in its own housing ...

The adapter provides for the digital transmission of data between automatic data-processing machines within a digital network that works at 10 Mbps (megabits per second).

2. A link adapter in its own housing ...

The apparatus digitally links two networks having different characteristics and so provides for the transmission of data.

3. A transceiver in its own housing ...

The apparatus makes it possible to attach up to four adapters to a 50-Mbps (Megabits per second) network for the digital transmission of data.'

39. Those classifications were stated to be '... determined by the provisions of general rules 1 and 6 for the interpretation of the combined nomenclature, Note 5 to Chapter

12 — Cited above in note 3.

13 — Commission Regulation (EC) No 1638/94 of 5 July 1994 concerning the classification of certain goods in the combined nomenclature, OJ 1994 L 172, p. 5.

84 and by the texts of CN codes 8517, 8517 82 and 8517 82 90'.

40. Regulation No 1165/95 [14] was adopted on 23 May 1995 and entered into force on 14 June 1995. It classified under heading 8517 82 90, for the same reasons as those cited above in Regulation No 1638/94:

'4. An adapter card for incorporation in cable linked automatic data-processing (ADP) machines enabling the exchange of data over a local area network (LAN) without using a modem.

With such a card, an ADP-machine can be used as an input-output device for another machine or a central processing unit.

...'

14 — Commission Regulation (EC) No 1165/95 of 23 May 1995 concerning the classification of certain goods in the combined nomenclature, OJ 1995 L 117, p. 15.

41. That description corresponds to the network cards in issue in *Peacock*. [15]

42. Under Article 2 of both Regulation No 1638/94 and Regulation No 1165/95, binding tariff information previously issued by customs authorities but not in conformity with the classifications which they enact could continue to be relied upon for a period of three months.

Background to the main proceedings

43. Cabletron Systems Ltd ('Cabletron'), the appellant in the main proceedings, imports into Ireland, from outside the Community, equipment of the types to which I have referred in paragraph 12 above.

44. In 1993, the Revenue Commissioners, the Irish authority responsible for customs matters and the respondents in the main

15 — Cited in note 2. Following the 1996 amendments to the HS and the CN, and to deal with discrepancies between the new structure and existing classification regulations, Commission Regulation (EC) No 936/1999 of 27 April 1999 amending or repealing certain regulations on the classification of goods in the Combined Nomenclature (OJ 1999 L 117, p. 9) was adopted. It entered into force on 6 May 1999. With regard to the classifications relevant to this case, that regulation replaced the references to subheading 8517 82 90 by references to subheading 8517 50 90 (other apparatus, for digital line systems).

proceedings, issued binding tariff information at Cabletron's request classifying 43 types of equipment under CN heading 8471 99 10 (peripheral units of ADP machines). In all cases, the 'justification of the classification of the goods' was given as general rules 1 and 6 and Note 5B to Chapter 84.

45. Following the adoption of Regulations No 1638/94 and No 1165/95, the Revenue Commissioners withdrew that binding tariff information and replaced it with other information classifying the goods in question under CN heading 8517 82 90 (electrical apparatus for line telegraphy, other than facsimile machines). The justification given for the change was the last paragraph of Note 5(B) to Chapter 84 [16] and the wording of the regulations. In some cases, the goods were explicitly covered by the regulations whilst in others they were considered sufficiently similar by the Revenue Commissioners to warrant the same classification by analogy.

46. In 1996, following the revision of the CN, the Revenue Commissioners reclassified the goods under the new heading 8517 50 90 (other apparatus for digital line systems). Later that year, they responded to Cabletron's request for classification of 22 further types of equipment by issuing binding tariff information classifying 16 types of goods under heading 8517 50 90 and stating that the remaining six items were already covered by existing tariff information, the basis of classification still being the same.

47. The rate of customs duty being at that time appreciably higher under heading 8517 than under heading 8471, [17] Cabletron appealed against the Revenue Commissioners' classifications to the Appeal Commissioners.

The request for a preliminary ruling

48. Before the Appeal Commissioners Cabletron argued, in summary: (i) that many of the products in issue did not fall within the definitions given in Regulations No 1638/94 and No 1165/95 but fell to be classified under heading 8471; and (ii) that by classifying adapters, link adapters, transceivers and network cards under heading 8517, those regulations embodied a manifest error in the interpretation of the HS, such goods being classifiable under heading 8471 by reference to their physical description and functionality. The Revenue Commissioners contended that their classifications were not the result of any manifest error and should be upheld as consistent

16 — See paragraph 28 above.

17 — According to Cabletron, the tariff on its products rose from 3.9% to 7.5% in 1995.

with Regulations No 1638/94 and No 1165/95, the Common Customs Tariff and European Community customs practice. At a hearing which apparently lasted eight days, both parties adduced expert evidence in favour of the classification they favoured.

49. The Appeal Commissioners have made findings of fact and expressed an opinion on the legal issues, evincing in both cases a position favourable to Cabletron. Essentially, after hearing all the expert evidence, they accept that all the goods in issue are designed and manufactured solely for use in LANs, and that LANs, which operate as distributive computer systems, are ADP machines in the form of a system for the purposes of Note 5(B) to Chapter 84 of the CN. Each of the types of equipment in issue meets the definition of a unit within the meaning of that note but is incapable of being used in a telecommunications environment, where different techniques are used.

50. However, the Appeal Commissioners take the view that issues of Community law are central to the proceedings, and have sought a preliminary ruling on the following questions:

'1. Is Regulation No 1638/94 valid in so far as it classifies under CN code 8517 82 90 the goods respectively described at items 1, 2 and 3 of the annex to the said regulation?

2. Is Regulation No 1165/95 valid in so far as it classifies under CN code 8517 82 90 the goods described at item 4 of the annex to the said regulation?

3. Is the Combined Nomenclature to be interpreted as requiring that the goods set out in the schedule attached hereto be classified as "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" under tariff heading 8471 either (i) post 1 January 1996 or (ii) between 28 April 1993 and 31 December 1995 or (iii) for both periods of time?

4. If the answer to any part of question 3 is in the negative in respect of one or more of the goods set out in the schedule attached hereto, is the Combined Nomenclature to be interpreted as requiring such goods to be classified, ante 1 January 1996, as "Electrical apparatus for line telephony or line telegraphy, including such apparatus for carrier-current line systems" under

tariff heading 8517 or, post 1 January 1996, as "Electrical apparatus for line telephony or line telegraphy, including line telephone sets with cordless handsets and telecommunication apparatus for carrier-current line systems or for digital line systems; videophones" under tariff heading 8517?'

51. The schedule referred to in the order for reference lists 58 items [18] which are named, but not described. Cabletron, with its observations to the Court, has submitted copies of the binding tariff information issued in respect of those items, which contain a brief description, together with copies of more complete descriptions of 20 of them.

The Information Technology Agreement

52. The Agreement on Trade in Information Technology Products ('ITA'), [19] the parties to which include the European Community and together account for some 90% of world trade in information technology products, was concluded in Singapore on 13 December 1996 and came into effect in 1997.

53. Under it, all customs duties on information technology products are to be eliminated as between the parties by 1 January 2000, with progressive reductions in 1997, 1998 and 1999. The Community has therefore reduced to zero the conventional duty on all subheadings of headings 8471 and 8517 since 1 January 2000.

54. The ITA covers, on the one hand, HS headings 8471 and 8517 and their subheadings [20] and, on the other hand, *inter alia*, all 'Network equipment: local area network (LAN) and wide area network (WAN) apparatus, including those products dedicated for use solely or principally to permit the interconnection of automatic data-processing machines and units thereof for a network that is used primarily for the sharing of resources such as central processor units, data storage devices and input or output — including adapters, hubs, inline repeaters, converters, concentrators, bridges and routers and printed circuit assemblies for physical incorporation into automatic data-processing machines and units thereof', wherever classified in the HS. [21]

18 — Numbered 1 to 66, with the omission of numbers 8, 9, 13 to 15, 17, 19 and 47.

19 — 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.

20 — See Attachment A to the Annex to the ITA.

21 — See Attachment B to the Annex to the ITA.

The judgment in Peacock

55. On 19 October 2000, after the close of the written procedure in the present case, the Court ruled that Note 5(B) to Chapter 84 of the CN (as it stood before 1 January 1996) [22] did not preclude the classification of network cards designed to be installed in ADP machines under heading No 8471, and that between July 1990 and May 1995 those cards were therefore to be classified under heading No 8471 as units of machines of that type.

56. The Court found, in particular, that 'network cards are designed solely for automatic information processing machines, they are directly connected to those machines and their function is to supply and accept data in a form which those machines can use. Network cards are thus comparable with any other medium whereby an automatic information processing machine accepts or delivers data in the sense that they have no function which they would be capable of performing without the assistance of such a machine'. They could thus not be excluded from heading 8471 by the last paragraph of Note 5(B) to Chapter 84 of the CN, since they did not perform a specific function. [23] They did, however, satisfy all the conditions relating to 'units' set out in that note, 'since they can be connected to the central unit and are specifically designed as parts of an automatic data-processing system'. [24]

The 26th session of the HS Committee

57. I have already referred to two amendments to the HSENs effected by the WCO's HS Committee at its 26th session in November 2000, shortly before the hearing in this case. A number of other decisions relevant to the classifications in issue here were also taken during that session, and were discussed at the hearing.

58. First, a decision was taken to classify LAN repeaters under heading 8543 — which is for electrical machines and apparatus having individual functions not specified or included elsewhere in Chapter 85 — following a discussion during which the delegates of the United States and of the European Community maintained opposing views as to whether the repeaters used in computer networks could be distinguished from those used in telecommunications. The committee decided, by 16 votes to 13, to classify LAN repeaters outside

22 — See paragraph 28 above.

23 — See paragraphs 16 and 17 of the judgment.

24 — Paragraph 20 of the judgment.

heading 8471. The view was then expressed, and apparently accepted without a vote, that since they could not be used in line telephony or line telegraphy such repeaters must be classified under the residual heading 8543, and the residual subheading 8543 89 ('other') within that heading.

59. Secondly, it was unanimously agreed that 'Communications controllers or routers (including "LAN bridges")', 'Synchronous-Network-Architecture (SNA) cluster controllers (including remote control units)', 'Multistation access units, which are passive local area network (LAN) hubs' and 'Optical fibre converters' used in LANs were all to be classified under subheading 8471 80 pursuant to Note 5(B) to Chapter 84, Note 5(E) not being applicable. Similar decisions had previously been taken, by a majority, in 1997 and 1998, but the Commission had on those occasions entered a reservation on behalf of the Community, preventing them from taking effect. In November 2000, however, the decision appears to have been unanimous.

60. Finally, a decision was taken by 25 votes to 5 to classify the 'ENW-9500-Fast Ethernet Adapter' under subheading 8471 80. Such items are of a kind similar to those classified by the Court under heading 8471 in *Peacock*.

Procedure before the Court

61. Written observations have been submitted by the parties to the main proceedings, the Netherlands Government and the Commission. Cabletron, the Revenue Commissioners and the Commission presented oral argument at the hearing.

Analysis

62. It must be said at the outset that this Court cannot rule on the precise nature of each of the 58 items in issue. The Appeal Commissioners have heard extensive evidence in that regard and have made certain findings of fact. Various representations have been made during the present proceedings, but it is not the proper role of the Court to determine such matters. The nature of the items to be classified must remain a question for the national court alone.

63. However, it was made clear at the hearing that Cabletron, the Revenue Commissioners and the Commission all accepted the Appeal Commissioners' finding that all the products in issue were

designed for use in a LAN[25] and no objection was voiced to Cabletron's assertion that there was also agreement on the finding that a LAN was an ADP machine in the form of a system.

64. I shall base my analysis on that assumption.

65. Furthermore, it was common ground that — with a few possible exceptions which might fall under heading 8543 following the recent decision of the HS Committee on the classification of repeaters — the disputed items must be classified either all under heading 8471 or all under heading 8517. I shall address the issue on that basis, leaving the question of heading 8543 in abeyance for the moment.

66. The view originally put forward by the Revenue Commissioners, the Netherlands Government and the Commission was essentially that the items in issue, although they met all the criteria for units of ADP machines in the form of a system as laid down in Note 5(B) to Chapter 84, were none the less excluded from heading 8471 by the last paragraph of that note (or by Note 5(E) after 1 January 1996) because they performed a specific function (other than data processing), namely telecommunication in the form of data transmission.

67. That was before the judgment in *Peacock*.

68. Since that judgment, it is clear that network equipment which meets the definition of 'units' in Note 5(B) is not to be regarded as performing a 'specific function' excluding it from heading 8471 when it has no function that it would be capable of performing without the assistance of an ADP machine.

69. At the hearing, both the Revenue Commissioners and the Commission accepted that to be the case at least prior to the entry into force of Regulation No 1638/94 but argued that those regulations were not vitiated by a manifest error and should not be declared invalid. The Commission put forward in addition the view that the amendment to the wording of heading 8517 as from 1 January 1996, by including a reference to apparatus for digital line systems, changed the content of that heading to include digital data transmission equipment; as a result, it was no longer the case that network equipment was excluded from heading 8471 by Note 5(E) to Chapter 84 but rather that such

25 — With the possible proviso that, as pointed out by the Commission, one product appears to be designed also for WANs.

equipment was specifically included under heading 8517 so that heading 8471, Note 5(E) and the ruling in *Peacock* were no longer relevant.

The correct classification prior to the adoption of the regulations

70. There can in fact be no challenge to the classification applied to Cabletron's goods during this period since Cabletron was issued with binding tariff information classifying 43 products under CN heading 8471, on which it was entitled to rely until withdrawn or, in so far as it conflicted with either of the regulations in issue, until three months after the entry into force of that regulation. [26] However, it is useful to begin by verifying whether that classification was in principle correct.

71. It is common ground that all the items in issue are, in accordance with the criteria set out in Note 5(B), connectable to the central processing unit either directly or through one or more other units, that they are specifically designed as part of a system and that they are able to accept or deliver data in a form which can be used by the system. Nor is it contested that, in accordance with the judgment in *Peacock*, they have no function that they would be capable of performing without the assistance of an ADP machine.

72. It is true that *Peacock* concerned only one type of network equipment. However, not only is it agreed that the goods in issue here all meet the criteria on which the Court based its ruling in that case but those goods all appear to be covered by the broad definitions in items (4) and (5) of Note I(D) to heading 8471 in the HSENs, [27] as 'control and adaptor units such as those to effect interconnection of the central processing unit to other digital data processing machines, or to groups of input or output units', 'channel to channel adaptors used to connect two digital systems to each other' or 'signal converting units' used on input and output.

73. Indeed, the matter is made even clearer by the recently-agreed amendments to the HSENs, which included 'routers, bridges and hubs used to control and direct communications between the machines in local area networks (LANs) and channel to channel adaptors used to connect two digital systems (e.g. LANs) to each other'.

26 — Namely 28 October 1994 or 14 September 1995, as the case may be. See Article 12 of the Community Customs Code, cited in note 11.

27 — See paragraph 31 above.

74. Admittedly those amendments were made only very recently and some considerable time after the period material to the present case. However, they were made by way of 'corrigendum', which suggests that they were not modifying the tenor of the previous less explicit version, and they were approved unanimously, which indicates that the Community authorities were in full agreement with them.

75. It may therefore be accepted in my opinion that the items in issue were properly to be classified under heading 8471 prior to the adoption of Regulation No 1638/94 or Regulation No 1165/95, as the case may be.

The validity of the regulations

— General considerations

76. Clearly it is desirable that in cases of doubt there should be some mechanism for specifying the classification of goods in the CN, and the Commission has a power to adopt regulations for that purpose. [28]

28 — See paragraph 37 above.

77. The principles governing its exercise have been set out by the Court as follows:

'... the Council has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods ...

However, the Commission's power ... does not authorise it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonised system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.

It must therefore be considered whether the Commission ... has in fact amended [the relevant heading] of the combined nomenclature, thus exceeding the limit of the powers conferred upon it ...' [29]

78. In *GoldStar Europe*, [30] the Court approached that question by examining

29 — Case C-267/94 *France* v *Commission* [1995] ECR I-4845, at paragraphs 19 to 21 of the judgment; see also, more recently, Case C-309/98 *Holz Geenen* v *Oberfinanzdirektion* [2000] ECR I-197, paragraph 13.

30 — Case C-401/93 *Goldstar Europe* [1994] ECR I-5587, paragraph 20 of the judgment.

whether the Commission had committed a 'manifest error of assessment' in the classification made.

79. At the hearing in the present case, there was discussion as to what is necessary, where it is agreed that a classification was made in error, to render that error 'manifest' and thus to vitiate the regulation.

80. The consensus appeared to be that it was not enough for the error to have been made manifest as a result of a subsequent decision of the Court or the HS Committee but that it must have been manifest — to an 'informed observer', in the Commission's words — at the time of adoption of the regulation in issue.

81. However, that does not address the question of the requisite degree of 'manifestness'.

82. I would suggest that the Court should not be reluctant to review the Commission's assessment in a case such as the present.

83. Where there is real doubt, it is important that the Commission should be able to resolve that doubt within the Community in the interests of legal certainty but it is also important that Community law should not find itself at odds with the intended tenor of the HS. The concern not to limit unduly the Commission's power to settle genuinely doubtful cases by way of regulation must be qualified by the need to control the exercise of that power where it brings the Community into conflict with the uniform international practice which the HS seeks to achieve.

84. What is at issue here is the correct classification of the goods in accordance with the Community's obligation to comply with the HS Convention. Closer scrutiny is I consider justified in such cases, where the dispute is between headings or subheadings whose content is established at that higher level and which fall only to be interpreted for Community purposes, than where the Commission enjoys a fuller discretionary power, for example as regards the determination of the correct eight-digit sub-subheading, which is a matter of Community law alone. In the former case (as here), a regulation may be invalid by reason of its failure to comply with the Community's international obligations; in the latter, it will not be invalid unless the classification was manifestly at odds with the CN.

— The present case

85. The Revenue Commissioners and the Commission submit essentially that, because of the degree of uncertainty prevailing internationally in the mid-1990s over the proper classification of network equipment, any error made by the Commission in classifying such equipment under heading 8517 cannot be said to have been 'manifest'. Cabletron considers that it was just as clear in 1994 and 1995 as it is now that items of network equipment do not have, simply because they transmit data for processing within a network, a specific function separate from data processing, so that it was manifestly erroneous to apply to them what was then the last paragraph of Note 5(B) to Chapter 84.

86. Cabletron's view appears highly persuasive to me. A computer network meets the definition of a 'system consisting of a variable number of separately housed units' in Note 5(B). Its primary purpose is to share data processing capacity and storage capacity for the data which is to be processed. Given such an arrangement, it is clear that data must be transferred from one part of the system to another efficiently and without distortion, and that the equipment used to transfer it not only forms part of the system but in the transfer process performs no function which does not serve the purpose of data processing.

87. That view is supported by the wording of headings 8471 and 8517. The former is clearly intended for data-processing equipment, the latter for telephony and telegraphy equipment. The transfer of data for the exclusive purposes of an automatic data-processing machine seems a function much more closely related to data processing than to telephony or telegraphy. The terms used in the HS and the CN cannot necessarily always be interpreted on a commonsense basis as having their everyday meaning, but there must be some convincing reason for departing from that meaning.

88. The HSENs define data processing as 'handling information of all kinds, in pre-established logical sequences and for a specific purpose or purposes' and ADP machines as those 'which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such or, in some cases, serve in turn as data for other data processing operations'. There does not appear to be anything in those definitions which would exclude equipment of the kinds classified in Regulations No 1638/94 or No 1165/95; on the contrary, the items classified seem to fit well within them.

89. It is true that the HSENs also define telephony or telegraphy as 'the transmission between two points of speech or other

sounds (or of symbols representing written messages, images or other data)'. The reference to the transmission of data is, however, very subsidiary in that definition and seems intended to prevent an item which is clearly 'apparatus for line telephony or line telegraphy' from being excluded from heading 8517 simply because the content of the message transmitted does not fall within one of the listed categories.

90. The mention in those notes [31] of 'control and adaptor units such as those to effect interconnection of the central processing unit to other digital data processing machines, or to groups of input or output units', of 'channel to channel adaptors used to connect two digital systems to each other' and of 'signal converting units' used on input and output as falling under heading 8471, on the other hand, indicates a clear intention that items similar to those classified by Regulations No 1638/94 and 1165/95 should be categorised as units of an ADP machine in the form of a system.

91. But the Commission points to the lack of international agreement — indeed, to the existence of a certain degree of vehement disagreement — which prevailed at the time as to the correct classification of computer network equipment, and argues that it could not have been expected to anticipate the later move towards agreement on heading 8471.

31 — See paragraph 31 above.

92. The answer to that objection lies, I think, in the Commission's own observations to the effect that much of the disagreement was prompted by economic considerations.

93. Clearly, it is in the interest of traders and of exporting countries to seek classification under a heading which attracts a lower rate of duty, and in the interest of importing countries — or customs unions, such as the Community — to seek a classification entailing a higher rate. When rates were lower under heading 8471 and higher under 8517, it is interesting to note that exporting countries argued for the former and the European Community for the latter. Following the entry into force of the ITA and the elimination of all duty under both headings, it appears that the Community has for whatever reason eased its opposition to heading 8471.

94. But those considerations are, as the Commission has rightly stressed, extraneous to the question of the correct classification.

95. I am satisfied that it should have been clear to the Commission from the wording of the headings, in particular when read in conjunction with the explanatory notes as they stood at the time, that it was in error

in classifying the items of network equipment covered by Regulations No 1638/94 and No 1165/95 under heading 8517. The existence of disagreement rooted in different considerations should not have clouded its view. In the light of the opinion I have expressed above in paragraphs 82 to 84, that error is in my opinion such as to vitiate the regulations.

The amendment to the wording of heading 8517

96. The Commission has suggested that, regardless of Note 5(E), of the judgment in *Peacock* and of the regulations, network equipment should be classified, in accordance with General Rules 1 and 3(a), under heading 8517, as the heading whose wording provides the most specific description, as from 1 January 1996 when that heading was amended. [32]

97. However, the amendments made to the HS and the CN with effect from that date do not appear to me to affect the content of headings 8471 or 8517, although they do affect the way those headings are structured in terms of subheadings, a matter which is not relevant to the issue here.

98. It is true that the wording of heading 8517 was amended. However, that amendment was not in my view relevant to the type of goods with which we are concerned. It added a reference to line telephone sets with cordless handsets and to videophones, neither of which are in issue. It also, however, expanded the phrase 'including such apparatus for carrier-current line systems' to 'including ... telecommunication apparatus for carrier-current line systems or for digital line systems', a modification which perhaps requires brief consideration.

99. The introduction of the term 'telecommunication apparatus' — which concerned only the English version of the HS and not the French, where it was already used — was clearly necessary simply for grammatical coherence.

100. More importantly and contrary to the argument advanced by the Commission at the hearing, the new inclusion of a reference to apparatus for digital line systems does not in my opinion mean that such apparatus was previously excluded.

101. The basic category covered by the heading remains as before that of 'electrical apparatus for line telephony or line telegraphy'. The fact that until 31 December 1995 only apparatus for carrier-current line systems was included by name does not mean that other types of system were

32 — See paragraphs 19 and 20 above.

excluded. Indeed, subheadings 8517 81 and 8517 82 came under the category 'other apparatus', following immediately upon subheading 8517 40 for 'other apparatus, for carrier-current line systems', demonstrating that they referred to apparatus *not* for such systems. The new reference does indeed reflect changes in the predominant technology but the fact remains that in either formulation the items listed after the word 'including' can only be construed as non-exhaustive examples.

102. Electrical apparatus for line telephony or line telegraphy thus remains classifiable under heading 8517 after 1 January 1996 as it was before, whether it is for digital line systems or not. Furthermore, equipment which meets the criteria for units of an ADP machine in the form of a system for the purposes of heading 8471 is not transferred to heading 8517, either before or after that date, simply by virtue of using cables and digital techniques.

Possibility of classification under heading 8543

103. As I have stated, [33] in November 2000 the WCO's HS Committee decided to classify LAN repeaters under heading 8453, following a failure to agree whether the repeaters used in computer networks could be distinguished from those used in telecommunications. It was decided by a small majority that LAN repeaters must be classified outside heading 8471 and then without a vote that, since they could not be used in line telephony or line telegraphy, they should fall under the residual subheading 8543 89.

104. That decision appears to be a compromise and — perhaps — not an entirely satisfactory one. It is, moreover, as yet one of principle and has not become definitive. The Commission stated at the hearing that the United States were likely to enter a reservation. If and when it is finalised, it will be of only persuasive authority as far as classification under the CN is concerned, and cannot in any event have any retroactive authority as regards the items to be classified in this case. Consequently, I consider, the HS Committee's decision to classify LAN repeaters under heading 8543 may be disregarded for present purposes. There is however one aspect to which I should like to draw attention.

105. As I have noted, [34] the Community's combined nomenclature contains further subdivisions within the six-digit subheadings of the HS. There are currently 11 such subdivisions within subheading 8543 89 and of those only the final residual subsubheading 8543 89 95 ('other') appears

33 — At paragraph 58 above.

34 — At paragraph 14 above.

capable of accommodating LAN repeaters or any other kind of network equipment, the first 10 all being for specified types of other equipment. The duty on goods falling under 8543 89 95 is, for the versions of the CN valid for the years 2000 and 2001,[35] 3.7%.

106. However, under the ITA, to which I have referred in paragraphs 52 to 54 above, the Community undertook to eliminate all customs duties completely not only on all goods classifiable under, *inter alia*, headings 8471 and 8517 but also, more generally, on all network equipment wherever it is classified in the HS.

107. Consequently, the Community appears to be in effect precluded by its international obligations from classifying any computer network equipment under subheading 8543 89 from 1 January 2000 and until such time as it modifies the structure of the subdivisions of that subheading and/or the rates of duty charged thereunder. It may not, in any event, charge the 3.7% duty which would at present ensue from classification under sub-subheading 8543 89 95.

35 — See Commission Regulation (EC) No 2204/1999 of 12 October 1999, OJ 1999 L 278, p. 1, and Commission Regulation (EC) No 2263/2000 of 13 October 2000, OJ 2000 L 264, p. 1, both amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

The effects of a ruling that network equipment is to be classified under heading 8471

108. At the hearing, the Commission suggested that a ruling on the classification of the products in issue in the present case could have economically significant repercussions for other types of products such as, *inter alia*, digital cameras, fax machines and photocopiers.

109. It seems to me that such fears are unfounded.

110. The approach I am advocating involves the classification under heading 8471 of all network equipment which meets the criteria set out in the *Peacock* judgment for units of an automatic data-processing system which are not taken out of that heading by virtue of having a specific function that they would be capable of performing without the assistance of an ADP machine. That category, according to my understanding, includes all the 58 items listed in the annex to the order for reference and all four disputed items classified by Regulations No 1638/94 and No 1165/95. Digital cameras, fax machines and photocopiers, however, clearly do have a function which is capable of being performed without the assistance of an ADP machine and such items would thus, in accordance with the judgment in

Peacock, be excluded from heading 8471 by virtue of Note 5(E) to Chapter 84 of the CN.

The temporal effects of a ruling that Regulations No 1638/94 and No 1165/95 are invalid

111. At the hearing, the Revenue Commissioners raised for the first time a request that, in the event of a ruling that the regulations in issue were invalid, the Court should limit its retroactive effect by specifying that it could be relied upon only by persons who had initiated legal proceedings or raised an equivalent claim under national law prior to the date of judgment.

112. Where in reply to a request for a preliminary ruling the Court finds that a Community measure is invalid, that ruling in principle takes effect *erga omnes* and *ex tunc*, so that any person may in any proceedings rely upon the invalidity of the measure.

113. The Court has, however, exceptionally made use of the possibility derived indirectly from the second paragraph of Article 174 of the EC Treaty (now Article 231 EC) to limit the retroactive effect of the finding of invalidity, where that is justified by overriding considerations of legal certainty. [36]

114. That step cannot, however, be taken without some substantiated representation as to the overriding considerations of legal certainty alleged, and no such representation has been made to the Court here. Some information has been given as to the existence of other disputes pending before national courts in several Member States (which would not be affected by the proposed limitation), but none as to the possible number or importance of proceedings which might be, but have not yet been, brought. The Court has heard no argument on the question why the legal certainty of duties previously levied should prevail over the correct interpretation of the CN, and at the hearing the Commission made no comment on the Revenue Commissioners' request.

115. I therefore cannot see any reason for limiting the *ex tunc* effect of the finding of invalidity which I propose should be made. It may in any event be noted that the practical effects of the ruling would concern only the period prior to 1 January 2000 and that Article 236(2) of the Community Customs Code [37] imposes a three-year time-limit on the repayment or remission of customs duties not legally owed.

36 — See, for example, Case 112/83 *Produits de Maïs* v *Administration des Douanes et Droits Indirects* [1985] ECR 719, paragraphs 16 to 18 of the judgment; Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraphs 23 to 30; Case C-212/94 *FMC and Others* v *Intervention Board for Agricultural Produce and Another* [1996] ECR I-389, paragraphs 54 to 66.

37 — Cited in note 11.

Conclusion

116. I therefore consider that the Court should give the following answers to the questions raised by the Appeal Commissioners in the present case:

(1) Commission Regulation (EC) No 1638/94 is invalid in so far as it classifies the adapters, link adapters and transceivers described in items 1 to 3 of its annex under heading 8517 of the Combined Nomenclature.

(2) Commission Regulation (EC) No 1165/95 is invalid in so far as it classifies the adapter cards described in item 4 of its annex under heading 8517 of the Combined Nomenclature.

(3) Items of computer network equipment which are connectable to the central processing unit either directly or through one or more other units, which are specifically designed as part of a data-processing system, which are able to accept or deliver data in a form which can be used by the system and which have no function that they would be capable of performing without the assistance of an automatic data-processing machine are to be classified under heading 8471 of the Combined Nomenclature both before and after 1 January 1996.