



TC05502

**Appeal numbers: LON/2007/7061, 7062, 7066, 7067 & 7106,
LON/2008/7002 & 7063, LON/2009/7007, MAN/2007/7031**

*Customs Duty – classification – mobility scooters – 8703: vehicles for
persons, or 8713: carriages for disabled persons*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**INVAMED GROUP LIMITED
INVACARE UK LIMITED
DAYS HEALTHCARE LIMITED
ELECTRIC MOBILITY EURO LIMITED
MEDICARE TECHNOLOGY LIMITED
SUNRISE MEDICAL LIMITED
- and -**

Appellants

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE CHARLES HELLIER
RUTH WATTS DAVIES**

**A Decision made without a further hearing following a reference to the CJEU
and further written submissions from Fieldfisher LLP for the Appellants, and
Kieron Beal QC, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This decision relates to the classification of certain mobility scooters for the purposes of the Combined Nomenclature ("the CN"). The question is whether those scooters fall under the heading 8713 (carriages for disabled persons) or 8703 (motor vehicles principally designed for the transport of persons).

2. The hearing of the appeal took place in July 2014; following that hearing we released a decision on 13 November 2014 (the "First Decision") in which we made findings of fact from the evidence we had heard and considered the submissions of the parties on the law. We concluded that a reference to the CJEU was necessary to decide the appeals because there were aspects of the prior decision of the CJEU in *Lecson Elektromobile GmbH v Hauptzollamt Dortmund C-12/10* ("*Lecson*") about which we were not clear. With the assistance of the parties the terms of a reference were settled, and a request was made for a preliminary ruling of the CJEU in April 2015. The CJEU's judgement was received on 31 May 2016 (the "*Invamed* Judgement") and the parties have since then provided written submissions on the issues.

3. The First Decision is included as an appendix to this decision and should be read with it. In it we set out: the relevant terms of the CN and other sources relating to its interpretation [5] - [32]; factual findings made from the evidence (acknowledging that not all those findings might be relevant to the eventual resolution of the appeals) [33 – 62]; other statutory and regulatory material relating to mobility scooters [63 - 84]; and material relating to the classification of the mobility scooters (including the HSEN, CNEN and the EU Customs Code Committee Opinion) [85]- [106]. We then discuss the *Lecson* Judgement. After that we set out our reasoning on the issues in paragraph [113 to 220.] In summary we said (the numbered paragraphs below refer to numbered headings in the First Decision):

(1) that the effect of GIR 3 was that if the scooters were prima facie classifiable under 8713 they would fall within that heading rather than 8703 [116 – 119];

(2) the words of 8713 "for disabled persons" did not require the use of the vehicles to be exclusively for such persons [120-122];

the context of 8713 indicated that vehicles within that classification did not have to be exclusively for disabled persons [123-125]. We concluded what 8713 required was features which made the vehicle particularly suitable for disabled persons;

although HSEN 8713 spoke of vehicles "specially" designed for disabled persons an enquiry was not directed to the subjective purpose of the designer but was to be limited to inferences from objective features of the vehicles. What was required was that the vehicle had features which (1)

which were not common to the generality of passenger vehicles [129]; (2) which alleviated or compensated for the effect of a disability [130], and (3) which made the vehicle attractive to disabled persons by reason of their disability, but which did not make the vehicle more attractive to persons without a relevant disability [132];

(3) "Disability" meant a physical or mental condition which limited a person's activities or senses in a way which was more than marginal [133 - 152];

(4) the actual use of the product or the use evident from marketing material might illustrate (or bring to the tribunal's attention) a use of the product which was intrinsic to its objective features; but neither actual use nor marketing materials were determinative of the intended use, which was to be assessed from the objective characteristics and properties of the product [153 to 162]. Our findings of fact in relation to actual use of scooters were to be viewed in that light [163]. We did not regard the marketing material as indicating that the intended use was by persons who could walk easily;

(5) the scooters in the appeals had features which could be divided into four classes:

(a) they were small, electrically powered vehicles with a non-marking tyres and a tight turning circle.

These features made the scooters capable of helping those who were limited in their ability to walk, or to walk in or to shops, on pavements or at home and compensated for that limitation. They were not features of the generality of passenger vehicles. Whilst the scooters could be used by people without those limitations using a scooter was more awkward than walking so these features would not advantage such persons [165 -172];

(b) they had low platforms, a high seat, were not enclosed and had no doors.

These features were not common to the generality of passenger vehicles and were capable of assisting those subject to limitations on their ability independently to get into a car or a wheelchair. They afforded no extra ease to a person without such limitations [173 - 176];

(c) they had features – a wig-wag, a swivel seat and a bent or hinged tiller which did not compensate for a limitation on the ability to walk but conferred advantages on those with other limitations on their abilities. These features conferred no advantages on those without limitation or those whose only limitation was on their ability to walk [176 - 178];

(d) they had features which made them safer or more comfortable, e.g. armrests, an adjustable height chair, a smooth ride, and anti-tipping wheels, which afforded no alleviation of the effects of any limitation on ability [178];

(6) powered wheelchairs shared similar categories of features. In particular we noted that the joystick controls and footrests of a powered wheelchair did not aid mobility although they might alleviate limitations other than those on walking;

(7) the ability to use a vehicle for leisure activities did not mean that the vehicle was not for disabled persons. Indeed the contrary was the case if a mobility limitation rendered the independent performance of such leisure activity unduly difficult and the vehicle was specifically designed to alleviate that difficulty;

(8) & (9) the scooters did not have the objective features of golf carts and snow vehicles nor were golf carts and snow vehicles designed for the disabled;

(10) many of the elderly and infirm use scooters. But if (and we emphasised "if") actual use was of any value in determining CN classification, what mattered was whether those people could be described as disabled. If age and infirmity brought a non-marginal limitation on the ability to move, those of the elderly and infirm so afflicted could be described as disabled, and where they had such a limitation the scooters' design alleviated that limitation. But the design of the scooters afforded no assistance to persons with only a marginal limitation on walking ability because they were cumbersome in confined spaces. We now also note that the speed limitation (to at most a fast walking speed) means that they afford no material time advantage to someone who has no, or only a marginal limitation on her ability to walk;

(11) on our understanding of the meaning of "disabled" and the nature of 8713, the Committee Opinion and the 2005 CNEN, wrongly restricted the application of 8713; the reason given in Commission Regulation 718/209 for classifying scooters under 8703 rather than 8713, namely that they had no special features to alleviate disability, was not, on the basis of the above analysis of the features of the scooters, persuasive. To the extent that "disability" was synonymous with a limitation on the ability to walk, we regarded the scooters as specially designed for a person with that limitation [204].

4. We then turned to the *Lecson* Judgement:

(1) we noted that the CJEU had said that "the decisive criterion for classification" under 8713 was "the special design of the vehicle to help disabled persons.", and explained that we understood this to mean that the vehicle had to have special features, not common to the generality of passenger vehicles, which compensated for, or alleviated the effects of, a disability;

(2) we were not clear whether the court had in mind a particular disability or a disability in addition to a limitation of the ability to walk;

(3) it seemed to us that when the court offered guidance to the referring court it did not have in mind all the features of the scooters which were before us;

(4) at [25] the court had said that the mere fact that the scooters "may be used" by disabled persons did not affect the tariff classification "since they are suitable" for being used by persons without a disability. In this context we said:

“[216] In this paragraph the CJEU puts the proposition that just because the vehicles can be used by disabled persons, that does not make them

vehicles for the disabled since they can be used by those who are not disabled. We do not understand this as meaning that any possibility of use by the nondisabled will take a vehicle out of 8713. That is because: (1) a powered wheelchair may be used by a non-disabled person, and the court appears to accept that it is a vehicle for the disabled, and (2) at no point in the Court's judgement does it say that vehicles for the disabled means vehicles only for the disabled.

[218] The first part of this statement, the fact that scooters may be used by the disabled does not mean that they are for the disabled, appears to reflect the case law of the Court that actual use or the possibility of a particular use is not determinative. Thus the first three lines do not appear to need further explanation. But then the Court adds a different explanation "since...". We find some difficulty in reconciling this later part of this part paragraph with the 'decisive criterion' earlier accepted by the CJEU. The part of the paragraph beginning "since" suggests that suitability for use by the nondisabled may mean that something more is needed for classification under 8713 than that decisive criterion, and suggests that that something is non-suitability for the able-bodied.

[218] If that is the case what is meant by "suitable" is important. The Court speaks of vehicles as "suitable" for use by nondisabled persons. It was not clear to us what criteria were relevant to determine suitability: was it the possibility of mere physical use - so that as we suggested at the hearing a catheter might be said to be suitable for use as a drinking straw? Did suitability encompass speed and flexibility of motion – the fact that in a shop is it easier to be on foot than on a scooter? And could subjective features factors be relevant such as the stigma a nondisabled person might feel using a mobility scooter?...

[220] Mr White drew from this paragraph its converse: that, just because the scooters can be used by nondisabled persons, it does not take them out of 8713. We do not think that this proposition can be deduced from the paragraph, but, subject to the concerns we have expressed in relation to the implications of that paragraph, we believe that it follows from the decisive criterion that a vehicle falls within 8713 if it has special features to help disabled: the mere fact that a fit person that can use it does not prevent it from being for the disabled.

5. We therefore sought a ruling from the CJEU on 5 questions:

1. Are we correct in construing the words "for disabled persons" as not meaning "only for" disabled persons?

2. What is the meaning of disabled person for the purposes of 8713? In particular: (1) Is its meaning confined to a person who has a disability in addition to a limitation on his or her ability to walk or to walk easily or does it include a person whose only limitation is on his or her ability to walk or to walk easily? (2) Does "disabled" connote more than a marginal limitation on some ability? (3) Is a temporary limitation such as results from broken leg capable of being a disability?

The first particularisation in this question arose because the referring court in *Lecson* suggested¹ that “reference has to be made to a handicap that extends beyond the problems of mobility”; and the features which the CJEU cited in paragraph [19] of its judgement were limited to those which assisted only a person with a disability in addition to a mobility limitation :

(1) The Court had cited a limitation on speed to 10 km/h. We were uncertain how a limitation on the speed of a vehicle by itself “helped” disabled persons unless they had additional disabilities which limited their reaction speed. Thus it appeared that the Court might have in mind such additional disabilities (in this context we considered that the fact that the provisions of one particular State’s road traffic laws provide advantages to disabled persons using vehicles with such speed limitations seemed irrelevant to their classification under the CN);

(2) The Court had referred to footrests as features of a vehicle for disabled persons. On a vehicle without a platform footrests would be needed by *any* user if their feet were not to drag along the ground. Specially designed footrests, however, might offer alleviation of the effects of an inability to prevent uncontrolled movements of the legs: thus it seemed that the Court might have had in mind persons with such a disability in addition to a lack of mobility.

(3) The Court had cited steering controls which are easy to reach and manipulate and therefore are usually attached to one of the arm rests. The court clearly had in mind the joystick attached to a powered wheelchair or something similar. But such a control would not help a person whose disability was limited to, for example the loss of a leg, (and would not assist a person such a stroke patient who would benefit from the use of a tiller). That suggested that the Court may have had in mind a person with a disability in addition to problems of mobility.

6. Set against these implications from the Court's judgement however there was no express statement by the court that it agreed with the suggestion made by the referring court.

7. The second and third particularisations in the question arose because it seemed to us that the degree to which the scooter is attractive to other persons who are not disabled affects whether its features are specially to help the disabled. If it is plain that they offer advantages to a large class of people with limitations which fall short of disability then the features may not be special.

3. Does the CNEN, in excluding scooters fitted with separate steering columns alter the meaning of heading 8713?

We asked this question because we found that there were features of scooters with a separate steering columns which were not common to passenger vehicles generally, and which were features which alleviated the effects of a limitation on

¹ The quote which follows appears in the translation of the 10th paragraph of Ground II of the Dusseldorf court’s request to the CJEU in the papers before us. In para 44 of the Commission’s observations to the CJEU on our reference there is what appears to be a different translation, but one consonant with our description of what that court suggested.

the ability to walk. They thus appeared to us to be special features to help disabled persons.

We did not understand why, if the existence of such features was the decisive criterion, a scooter with a fixed steering column was excluded by the CNEN?

4. Does the possibility of the use of a vehicle by a person without a disability affect the tariff classification if it can be said that the vehicles have special features which alleviate the effects of a disability?

We asked this question for the reasons in para 4 above.

We also considered that the Court might have had use by non-disabled persons in mind when it spoke of the 10 km/h maximum speed. If such a maximum speed is a fast walking (or jogging) pace then a scooter affords no advantage to non-disabled users, and accordingly is less likely to be 'suitable' for them: if the Court regarded suitability for use by non-disabled persons as a factor which precludes, or weighed heavily against, the vehicle being for disabled persons, the existence of such a maximum speed (as is the case in the vehicles in this appeal) would indicate that 8713 was not precluded on this ground.

We also noted that the referring court appeared to indicate that some of the scooters in relation to which the reference was made were "used in the sport of golf (pages 33 and 34 of the legal file)". In the case of the scooters before us, many could not be so used.

5. If suitability for use by non disabled persons is a relevant consideration, to what extent should the disadvantages of such use also be a relevant consideration in determining such suitability?

We found that persons without a walking limitation would generally shy away from such use because of the stigma of decrepitude, and because such use in shops and smaller buildings would be more awkward and slower than walking on two feet. We also found that the scooters were not suitable for use as golf carts.

The judgement of the CJEU in the *Invamed* decision.

8. The Court took questions 1,3 and 4 together:

"[15] By its first, third and fourth questions, which it is appropriate to examine together, the referring court asks essentially whether heading 8713 of the CN must be interpreted as meaning that the words "for disabled persons" mean that the product is intended only for disabled persons, whether the fact that a vehicle may be used by non-disabled persons is irrelevant to its classification under heading 8713 of the CN and whether, when carrying out that classification, the Explanatory Notes to the CN modified the scope of heading 8713 of the CN."

9. At [16] the Court noted that its task was not to classify but to give guidance. The national court was in a better position to affect classification since it had all the information. But, as it had in the *Lecson* Decision, it could, in the spirit of cooperation, provide the referring court with all the guidance it deemed necessary [17].

10. Thus the judgement did not resile from that in the *Lecson* Judgement but also indicated that the referring court, being possessed of all facts, was in a better position to make a classification. That remission to the referring court was repeated in paragraph [23], quoted later below.

11. At [18] the Court recalled that the decisive criteria for classification were to be found in the objective characteristics and properties defined in the heading of the CN, and, at [19] and [20], that the CNENs were important aids to construction but may not alter the meaning of the CN heading. The court continued:

“[21] That being said, it is important to note that as regards headings 8703 and 8713 of the CN the court has already held that it is apparent from the wording of those headings themselves that the difference between them results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons [see the judgement in *Lecson*].

"[22] The intended use of the product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties ...

[23] In the light of that case law, it is for the referring court, in the case in the main proceedings, to determine whether the vehicle at issue is intended, with regard to its characteristics and objective properties to be used specifically by disabled persons, in which case such use must be classified as "the main or logical use" of that type of vehicle."

12. At [24 - 26] the court addressed the issue of possible use. This addressed our concern that it might be inferred from paragraph [25] of the *Lecson* Judgement that the CJEU might regard possible use by nondisabled persons as relevant to classification: we had said at [220 of the First Decision] that we thought that the mere fact that a fit person could use a scooter would not prevent it from being 'for the disabled' but that [25] of the *Lecson* Judgement had caused us concern.

13. The CJEU's judgement dispels this concern. It makes clear that possible use by nondisabled person is irrelevant to classification and 8713 ([27] and the Disposition).

14. Our concern over the possibility of use by nondisabled persons was also reflected in our first question which arose from our discussion in [120-132] of the First Decision of the meaning of "for" disabled persons. In those paragraphs we concluded that "for" did not require the use of the vehicle to be exclusively by the disabled, but required that it had features particularly relevant to such persons [120-122], but we then [123-125] extended that conclusion in relation to use to the nature of the vehicle (rather than simply its use).

15. The CJEU makes clear that that latter extension is wrong :

[24] As the Commission noted, the tariff classification does not take account of possible use, but only of the intended use, determined on the basis of characteristics and objective properties of the product at the date of its import.

and [27] "...- the words 'for disabled persons' mean that the product is designed solely for disabled persons

-the fact that a vehicle may be used by nondisabled persons is irrelevant to the classification under heading 8713 of the CN ..."

16. Thus the possibility of use by nondisabled person is irrelevant, and the question we must answer is whether the vehicles are designed solely for disabled persons. As the CJEU said in the *Lecson* Judgement the decisive criterion is a special design to help disabled persons. And, as the CJEU put it in [23] of the *Invamed* Judgement, it is for us to:

"decide whether the vehicle at issue is intended with regard to its characteristics and objective properties to be used specifically by disabled persons, in which case such use must be classified as "the main or logical use" of that type of vehicle "

17. At [218] of the First Decision (see 4 above) we discussed what was meant in [25] *Lecson* by "suitable for" use by a non disabled person. We asked whether it meant simply that such use was possible. The Court's rejection of the relevance of possible use shows that "suitable for" use in [25] means more than that such use is possible. It seems to us that it must therefore indicate that such use confers an advantage on the user.

18. In the First Decision we said that, having regard to the ENs and the words of the CN, we understood specially designed to mean that that the vehicle must have features not common under the generality of passenger vehicles which alleviated or compensated for the effects of a disability and which made the vehicle attractive to such persons because of their disability, but did not make the vehicle more attractive to (helpful or beneficial for) a person without a relevant disability [120-132]. The CJEU's response indicates that the last of these reflects non "suitability" for use by the non disabled.

Question 2: "disability"

19. We sought a preliminary ruling of the court in on the meaning of disability because: (1) there were indications in the *Lecson* Judgement that it might mean something other than a limitation on the ability to walk, and (2) there was some uncertainty as to whether disability encompassed a marginal or temporary limitation on some ability.

20. The court answered that question succinctly:

"[34] Having regard to the foregoing considerations, the answer to the second question is that the words "disabled persons" under heading 8713 of the CN must be interpreted as meaning that they designate persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant."

The parties' submissions on the *Invamed* Judgement.

HMRC's arguments

21. HMRC contrast [25] and [26] of the Judgement. These paragraphs must be read in the context of [24]:

"[24] As the Commission noted, the tariff classification does not take account of the possible use, but only of the intended use, determined on the basis of characteristics and objective properties of the product at the date of its import.

[25] Furthermore, it should be added that the Court has already held, in relation to the interpretation of heading 8703 of the CN, that the fact that electrical ability scooters may be used, where appropriate by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who, for one reason or another prefer to travel short distances other than on foot, like golfers or persons going shopping ...

[26] That reasoning confirms, *a contrario*, that the fact that the vehicles at issue in the main proceedings may, in some circumstances, be used by non-disabled persons is irrelevant to the tariff classification of such vehicles under heading 8713 of the CN, since by reason of their original purpose those vehicles are unsuitable for other persons do not suffer disabilities."

22. We read [25] and [26] in the context of [24]. In [24] the Court corrects any misapprehension on the part of this tribunal that possible use is relevant, and says that what is relevant is intended use only. [25] and [26] are extensions of this point - as is shown by the introductory word "Furthermore". In [25] it is made clear that actual use by disabled persons does not affect the classification of vehicles under 8703, and [26] makes clear the reverse, that actual use by nondisabled persons does not affect classification under 8713. The important point to note is that the Court is saying that such use is irrelevant to the process of classification, not that scooters are properly classified under either heading.

23. In HMRC's written submissions Mr Beal suggests that in [26] the CJEU's reasoning proceeds on the assumption that what is in issue is a vehicle intended "only for" used by disabled persons in contrast to the guidance on the classification of mobility scooters specifically provided in [25].

24. We do not read the contrast between those paragraphs in the same way because, as we explained, we regard [24] as providing the context for [25] and [26], and the court as using "classification" to mean the process of classification and not its result.

25. Mr Beal also suggested that in [26] the Court had in mind the wheelchairs alluded to in our reference to the Court and not the scooters which were the subject of our reference. We do not think that the court would have made the mistake of considering that what it called "the vehicles at issue in the main proceedings" were not scooters.

26. Mr Beal argues that the CJEU has confirmed *Lacson*. He says that there were "no material differences between the scooters *classified* in *Lacson* and those in this appeal".

27. We agree that the *Invamed* Judgement does not derogate from the principles set out in *Lacson*. We also agree that the scooters at issue in this appeal will be

materially similar to those in *Lecson*. But we do not accept that the CJEU "classified" the scooters in its judgement in *Lecson*. In our view it gave guidance that "vehicles designed for the transport of one person who is not necessarily a disabled person" with particular features were covered by 8703 (see the disposition in the *Lecson* judgement); and that is different from affecting classification.

28. Mr Beal says that in *Invamed* at [25] the court confirmed that the appropriate classification of the scooters was 8703 even if the scooters may be used by or adapted for disabled persons.

29. We do not read paragraph [25] in this way. For the reasons already set out we regard that paragraph as part of a sequence starting at [24] in which the Court is correcting any misunderstanding that possible use is relevant. It confirms similar reasoning in *Lecson* but indicates that the same reasoning applies to the process of classification under 8713. (In the same way we do not regard [26] as confirming or agreeing with a conclusion that scooters fall within 8713.)

30. Mr Beal says that Court cast no doubt on the four non-binding measures which provide substantial guidance in the classification exercise; namely the HSEN, the CNEN, the WCO Opinion and Commission Regulation 718/209, all of which were referred in our order for reference.

31. The Court did not engage with the suggestion in our reference (in [71] of the direction) that the CNEN appeared in some respects to restrict the meaning of the heading of 8713 or our questioning of this CNEN's exclusion of scooters with a fixed steering column. Instead it reiterated that the CNENs were an important aid to the interpretation of the headings but did not have legally binding force [19] and were not capable of amending the scope of the tariff headings [27]. It is thus left to the tribunal to consider whether the CNEN's description and conclusions were consistent with the meaning of headings.

32. As the First Decision describes we found assistance in our understanding of the CN headings from these sources, but we did not, and do not, consider ourselves bound by their conclusions.

33. Given the doubts we expressed about the CNEN in our reference we do not therefore regard the Court as having provided either a steer in the direction of its specific conclusion or away from it.

34. Mr Beal says that the scooters in this appeal are not solely designed for disabled persons, that this is confirmed by the inherent features of the scooters and the advertising material and that the scooters are "suitable" for use by persons who do not suffer from any disability..

35. To our minds whether this is the case is the central question which we must resolve.

The Appellant's submissions

36. The Appellants say that in [113] of the First Decision we said that were it not for significant uncertainties over the interpretation of the *Lecson* Judgement we would have classified the scooters under 8713. Those uncertainties they say are

dispelled by the *Invamed* Judgement and the tribunal can now effect classification under 8713.

37. It seems to us that the process may not be quite that simple. What we said in [113] was based on the reasons which follow that paragraph. Among those reasons was the discussion (between [120 and it 132]) of the meaning of "for" disabled persons, and the judgement in *Invamed* shows that we incorrectly extended our conclusion that possible use need not be exclusive, to a conclusion that there was no requirement that the vehicles should be only for disabled persons. We therefore need to return to our analysis, which we do below.

38. The Appellants say that we should give particular weight to the evidence of Miss Dowie which was not available to the referring court in *Lecson*.

39. It seems to us that the injunction in the *Invamed* Judgement is to have regard to the characteristics and the objective features of the goods, and not to have regard to how in practice the goods are used. Although intended use is relevant if inherent in the product and is capable of being assessed on the basis of the product's objective characteristics. As a result of the evidence of Miss Dowie is not directly relevant to the task in hand.

40. However as we noted in [161-162] of the First Decision we considered that evidence of actual use may illuminate a use which is inherent in the product by indicating that it is a possible use which needs to be considered (we gave an example relating to a screwdriver). Evidence of the nature of various disabilities would enable the tribunal to assess whether the design of the goods is such as to alleviate their effects.

41. The Appellants also suggests that the absence of comment in the *Invamed* Judgement on our analysis of the CNEN indicates that the CJEU agreed with us.

42. We are not inclined to treat silence as agreement or disagreement

Discussion

(1) Does the *Lecson* Judgement bind us to find that the scooters are to be classified under 8703?

43. In our opinion it does not. That is for three reasons.

44. *First*, the operative part of the judgement in *Lecson* does not so require. It states:

"heading 8703 of the Combined Nomenclature ... must be interpreted as covering three or four-wheeled vehicles *designed for the transport of one person who is not necessarily a disabled person*, powered by a battery-operated motor, reaching a maximum speed of 6 to 15 km/h and equipped with a separate, adjustable steering column, known as "electric mobility scooters" such as those at issue in the main proceedings" [our italics].

45. The words we have italicised make clear that the conclusion that 8703 applies is dependent on a prior conclusion that the scooters are "designed for the

transport of one person who is not a disabled person". If the scooters are not so designed it does not follow that 8703 is mandated by this paragraph.

46. *Second*, the *Invamed* Judgement is clear that it is for the referring court to determine whether the vehicle is intended with regard to its characteristics and objective properties, to be used specifically by disabled persons [23].

47. *Third*, the *Lecson* Judgement makes clear [15] that the CJEU's task is to provide guidance rather than to affect the classification since it does not necessarily have all the information available to it. Thus the Court's statement at [25] that in the light of the characteristics mentioned (a separate steering column, a platform and an anti-tipping system but "no specific feature which is aimed at aiding disabled persons' use of the scooters") the scooters must be classified under 8703 is guidance only and not binding. In particular it is dependent upon the conclusion that the scooters have no specific features aimed at aiding disabled persons use - a factual conclusion with which, on the evidence before us, we disagree.

(2) HSEN 8713, The HS Opinion, the CN Opinion and the CNEN

48. HSEN says that 8713 covers vehicles which are "specially" designed for the transport of the disabled and excluded those simply adapted for use by invalids. The necessity for "special design" was confirmed in the *Lecson* Judgement; the scooters in this appeal have not been adapted; the question is whether they have a special design.

49. The majority of the HSEN Committee considered that the scooters it considered were "normal" vehicles for the transport of persons to go shopping etc. It seems to us that the scooters in this appeal are not "normal vehicles": they are for the transport of one person only and have other significant features which are not common to the generality of passenger vehicles.

50. The EU Customs Code Committee concluded that special features were necessary for a vehicle to fall within 8713. That conclusion is confirmed by the *Lecson* Judgement. But it also said that "having a mobility problem is not the same as being disabled". The force of this latter remark is now to be seen in the light of the *Invamed* Judgement which makes clear that a non marginal limitation on a person's ability to walk is a disability, and calls into doubt the Committee's reasoning.

51. The CNEN identified four features which distinguished vehicles in 8713 from those in 8703: (1) a maximum speed of 10 km/hr, and maximum width of about 32 inches (80cm), (3) two sets of wheels which touch the ground, and (4) special features which alleviate the disability "for example footrests stabilising the legs".

52. It seems to us that the first two of these features mark a vehicle as not being "normal" (and therefore as being "special"). Those features are exhibited by the scooters in this appeal although the limitation on the speed of the larger scooters is 10 mph or 12.87 km/hr. That difference is not significant. We do not understand the significance of the third feature which is shared by most passenger vehicles. The fourth feature, 'special features which alleviate the disability' is confirmed as "decisive" in the *Lecson* Judgement, but the example given,

“footrests for stabilising the legs”, seems to us to refer to a disability other than the limitation on walking which the *Invamed* Judgement shows is the disability for which a vehicle falling in 8713 must be designed and is therefore irrelevant (and in any case no better than the platform for the feet in the scooters under appeal).

53. Likewise the CNEN regards controls that are easy to manipulate for example “a joystick” as indicative of 8713, but that criterion seems to relate to a limitation other than on walking and thus to be irrelevant to the classification process.

54. The CNEN also speaks of vehicles in 8713 being “specifically” (using that word rather than the HSEN’s “specially”) designed for disabled persons. That is consistent with the *Invamed* Judgement.

55. Thus from these aids to construction (taken with the *Invamed* Judgement) we take 8713 to require: (i) that the vehicle not to be normal, and that a 10 km/hr limitation is not normal; (ii) that the vehicle must have a special design to alleviate a non marginal walking limitation; and (iii) that the design must be specifically for persons with a walking limitation which is non marginal.

(3) Our Approach to Classification

56. We apply the following principles:

(1) if a scooter falls prima facie within 8703 and 8713, then it is to be classified under 8713 (for the reasons in the First Decision [116 - 119]);

(2) classification falls to be made by the national court applying the guidance given by the CJEU (*Invamed* [16]);

(3) the suggested classification under 8703 in the *Lecson* judgement is not binding on this tribunal for the reasons set out above;

(4) the HSEN, CNEN and the Committee Opinions are valuable aids but are not binding on us. In particular while we find that the HSEN statements that 8713 vehicles be “specially” designed for disabled persons, and the CNEN statement that they be “specifically” so designed coincide with the guidance of the CJEU that respectively the decisive criterion is “special design” for disabled persons (*Lecson* [19]), and that the design must be solely for the disabled (*Invamed* [27]), and that the features which are not normal described in the CNEN are helpful indicators of differentiation, we do not find the conclusion of the CNEN or the Committee Opinion in relation to scooters persuasive.

(5) 8703 covers means of transport in general whereas 8713 applies to means of transport for disabled persons (*Lecson* [18] and *Invamed* [21]);

(6) a vehicle can fall within 8713 only if it is designed solely for disabled persons (*Invamed* [27]);

(7) no enquiry is required into the subjective purpose of the designer (the First Decision [126]);

(8) the condition that a vehicle be designed solely for disabled persons may also be expressed as a requirement for a conclusion that:

(a) its design satisfies the criterion and that it is a special design to help disabled persons (the "decisive criterion" per *Lecson* [19] and see also the HSEN and CNEN (see the First Decision [126]));

(b) the vehicle is intended, having regard to its characteristics and objective properties to be used specifically by disabled persons (*Invamed* [23]); and

(c) that use for disabled persons is the main or logical use of the vehicle (*Invamed* [23]).

(9) if a vehicle is "suitable for" use by a non disabled person it is not specially designed for disabled persons, but "suitable for" use does not mean that such use is merely possible, it requires that the design means that such use is advantageous to such a person (see [17] above);

(10) a design feature helps disabled persons if it makes the vehicle attractive to, and available for use by, a person with a disability because of the nature of that disability when without that feature it would not be so attractive or available. (We said this in [131] of the First Decision after a discussion in which we erroneously concluded that "for" did not mean "only for". However this description of what is meant by helping disabled persons is not dependent on that conclusion. The *Invamed* Judgement shows that need for the additional condition that the vehicle be not "suitable" for use by non disabled persons);

(11) the possible use of a vehicle by disabled or non-disabled person is irrelevant to the process of classifying it (*Invamed* [24 – 26]);

(12) whether or not a vehicle is designed solely for disabled persons is to be assessed from the characteristics and properties of the vehicle. The intended use may be a criterion if it is inherent in the vehicle and can be assessed from its objective characteristics and properties (*Invamed* [22]);

(13) in assessing whether a vehicle is designed solely for disabled persons, "disabled persons" means persons affected by a non-marginal limitation on their ability to walk, the duration of that limitation and the existence of other limitations on their capacities being irrelevant (*Invamed: Disposition*). The design must therefore be assessed by reference to such a limitation only.

(4) The application of those principles

57. The scooters in this appeal are not in our view "normal" vehicles for the transport of persons. They are small, they are slow, they are for one person only; their design makes them usable in shops and indoors. Those are not normal features.

58. The design of the scooters is such that they all have features which alleviate the effects of a non marginal limitation on the ability to walk. These features are their small size, their tight turning circle, and their non marking tyres. A non marginal limitation on the ability to walk would make it impossible or unduly difficult to get around the house, get out of the house, or to go shopping etc. These particular features help a person so afflicted to overcome the effects of that limitation.

59. The design of the vehicle and these features do not aid, or confer an advantage on, a person who does not have such a limitation. Such a person, even one with only a marginal limitation on his walking ability, would find being on their own two feet faster and more flexible and, when in a shop or a house or on a pavement, less cumbersome. Whilst the scooters could be used by such persons, these features do not make the vehicle more attractive to such persons and the vehicle cannot be said to have been designed for such persons or to be “suitable” for them to use.

60. The design of the vehicles is thus a special design to help disabled persons, and the vehicles may properly be described as designed solely or specifically for disabled persons.

61. These features are such that the main or logical use of the vehicle is for a person with a non marginal limitation on the ability to walk. That is because they will clearly assist such persons and logically they will not assist persons without that limitation.

62. We conclude that the scooters may be classified under 8713. They are also clearly prima facie classifiable under 8703. As a result of GIR3 8713 must prevail.

63. The scooters are thus to be classified under 8713.

(5) Electric Wheelchairs

64. As we noted in the First Decision, the CNEN and the Committee Opinion (and their reflection in the *Lecson* judgement) differentiate between powered wheelchairs and mobility scooters. We are unable to follow this distinction. Neither of these types of vehicle is a normal vehicle –being small and for one person only. Both offer design features which alleviate the effect of a non marginal limitation on the ability to walk by permitting independent travel which would otherwise be impossible or unduly difficult for such a person. The design of each type of vehicle does not afford any advantage to those without such a limitation on the ability to walk: in particular the limitation on to maximum the speed and the possibility of occupancy by one person only make the use of the vehicle less advantageous than walking for a person without such a disability. Both types of vehicles may thus be said to be specifically designed for such disabled persons and as having use by them as their main or logical use. The additional features of a scooter – such as a tiller which may help those who have had a stroke or a wig wag which is easy to use with the thumbs – or of a powered chair – such as a joystick which is easy to use if one’s arms or fingers are weak, may help those with difficulties other than limitations on walking, but are irrelevant to the question of whether the vehicle is designed solely for those with a non marginal walking disability, and thus to classification. Seeing no difference in the relevant objective characteristics of each type of vehicle, each should be classified under 8713.

Conclusion

65. We allow the appeals.

Rights of Appeal

66. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 22 NOVEMBER 2016

APPENDIX

The First Decision

Made after a hearing in public at 45 Bedford Square WC1 on 14 -18 and 21 - 25 July 2014, with Jeremy White and Charles Bradley instructed by Behan & Co Ltd, appearing for the Appellant, and Kieron Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, appearing for the Respondents.

Introduction

1. Mobility scooters are a distinctive type of vehicle. Unlike cars or motorbikes they are for the use of one person only; they are narrow with the result that they may be used on pavements or inside buildings; they are generally low slung so that you do not have to mount a step to get onto them; they usually have an accelerator, reverse and brake combined in one control; they have a platform which is stable when the vehicle is stationary (unlike a motorbike); they are battery-powered which makes them acceptable indoors or within shops; they are limited in the speed at which they may travel (such a limitation enables them to be driven, in the UK at least, without insurance and on pavements and footpaths); they generally have small wheels as compared to car or motorbike; they have a tighter turning circle than a car or motorbike; and they have something akin to handlebars with which they are steered rather than a steering wheel.

2. We have all seen mobility scooters in the High Street, the supermarket or shopping precinct. They are generally driven by those of more advanced years. We may or may not have seen their users dismount and walk or move away. If they do walk away we may have wondered why they were using a scooter. We can understand the reluctance of the young and fit to use them regularly: because you sit below the eye level of your peers. It is much more flexible to walk, and generally quicker, and using a scooter suggests to those who see you that there is something wrong with you.

3. This appeal concerns the proper customs classification in the period 2004 - 2007 of 75 different types of mobility scooter. The appellants argue that they are all properly to be classified under heading 8713 as:

"carriages for disabled persons";
and HMRC argue that they must all be classified under heading 8703 as:

"... motor vehicles principally designed for the transport of persons."

4. In the Appendix at the end of this decision we set out the citations for the authorities to which we have referred (in abbreviated italicised form) in this decision.

Customs classification: sources of law and interpretation.

(A) The Combined Nomenclature.

5. The EU is a party to the International Convention on the Harmonised Commodity Description and Coding System 1983. This Convention lays out the World Customs Organisation's (the "WCO"'s) system of commodity description (the "HS"). This consists of a harmonised system of commodity nomenclature (description) under sections, chapters, headings, subheadings, associated notes and general rules for interpretation. By article 3 of the Convention the EU agrees to apply the nomenclature and the general rules.

5 6. The EU fulfils its obligations under this convention in Regulation 2658/1987 which contains, in annex 1, a combined nomenclature (the "CN") which comprises (i) the WTO's harmonised nomenclature, (ii) further community subdivisions of the subheadings in the WTO's nomenclature, and (iii) additional notes. The Taric sets out the rates of customs duty applicable to each description of goods.

7. The CN uses an eight digit identification system. The first two digits represent the chapter heading. In this appeal the only relevant chapter is chapter 87 which is headed:

10 Vehicles other than railway or tramway rolling stock, and parts and accessories thereof.

8. The next two digits represent headings in the chapter. In this case the competing headings are 03 and 13 (so 8703 and 8713):

15 "8703: motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars.

8713: carriages for disabled persons, whether or not motorised or otherwise mechanically propelled.

20 9. And the fifth and sixth digits represent further World Customs Organisation subheadings. Thus 8703 10 is:

vehicles specially designed for travelling on snow; golf carts and similar vehicles.

25 And subheadings 21 to 33 differentiate vehicles with internal combustion engines leaving subheading 90 for vehicles propelled by other means (the numbers of the subheadings do not run continuously and there is a gap between 33 and 90 with no subheadings);

10. Heading 8713 is broken down into:

8713 10: those not mechanically propelled, and

8713 90 others.

30 11. The EU's further subdivisions of the nomenclature may add two more digits to the classification (and occasionally a further two). Thus the subheading 8703 90 is broken down into:

8703 9010 those with electric motors, and

8703 9090 those with other power,

35 but 8713 10 and 8713 90 have no further subdivision.

12. The WTO nomenclature is produced in English and French, both of which carry equal authority. The French version of 8713 is:

“Fauteuils roulants et autres vehicules pour invalides, meme avec moteur ou autre mechanism de propulsion.”.

13. We note at this point the rendition of the single English phrase "carriages for disabled persons" as comprising two categories in the French version:

- 5 (a) fauteuils roulants, and
 (b) autres vehicules pour invalides

14. The WTO has a rolling programme of review and revision of its nomenclature. This is undertaken by a committee established under the Convention, the Harmonised Systems Committee (the “HS Committee”), which makes proposals for amendments which are considered for adoption by the Council. After 2001 heading 8713 was revised. Previously it had read:

“invalid carriages, whether or not motorised or otherwise mechanically propelled.”

15. Thus "invalid carriages" was replaced by "carriages for disabled persons". There was no corresponding change in the French version which retained its bifurcation between wheelchairs and other vehicles for invalids.

16. The CN in Annex 1 is amended by the EU annually by regulation. The version of the CN applicable from 1 January 2004 was the result of Regulation 1789/2003, and already incorporated the 2001 change to the heading 8713 in the HS.

(B) The GIRs.

17. The WTO's general rules for interpretation of the nomenclature (the GIRs) are set out in section 1 of annex 1. There are six GIRs. GIR 1 provides that classification shall be determined according to the terms of the headings and any related section or chapter notes and, provided those headings and notes do not otherwise provide, according to the following GIRs.

18. GIR 2 deals with incomplete articles or mixtures. It requires that an unfinished article be classified as the finished article provided that it has "the essential character" of the complete article.

19. GIR 3 applies where "goods are prima facie classifiable under two or more headings". So far as relevant it provides:

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

(b)...

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

20. GIR 4 provides a sweep up rule: 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.

5 21. GIR 6 provides for a hierarchy of comparative classification under the subheadings so that only subheadings at the same level are to be compared.

(C) HSEN's and CNENs

10 22. The HS Committee produces Explanatory Notes (HSENs) in relation to the headings in the HS. There are HSEN's for 8703 and 8713. Under regulation 2658/87 the EU adopts a further series of explanatory notes (CNEN's) on the CN. There are CNENs for 8703 and 8713. The most recent CNEN for 8713 (but not the HSEN) refers to certain mobility scooters.

15 23. The CJEU has consistently held that the explanatory notes "may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force" (see e.g. [48] *Metherma GmbH*). They must be consistent with the provisions of the CN and cannot alter their scope ([48] *Intermodal*; [20] *Possehl Erzkontor*)

(D) HS Committee Opinions.

20 24. The Convention also gives the Harmonised Systems Committee the function of preparing Classification Opinions on the interpretation of the HS. The CJEU has held that these opinions do not have legally binding force in the EU but are "a valid aid to the interpretation of the code" (see for example [41] *Unomedical*). In November 2000 the Committee settled an opinion on the classification of certain mobility scooters which was published a year later in the Official Journal.

(E) EU classification regulations.

25 25. From time to time the EU Commission promulgate, on the advice of the EU Customs Code committee, regulations on the classification of particular goods for the purposes of the CN. They do so where the classification of a particular product under the CN is difficult or disputed. These regulations provide reasons for specifically described goods to be classified under a particular heading and
30 prescribe that classification.

26. In August 2009 Regulation 718/209 prescribed the classification of certain mobility scooters, as being under 8703 and set out the reasons therefore. In *Hewlett-Packard*, the CJEU accepted the possibility of declaring a classification regulation invalid (although it held that the particular regulation at issue in that
35 case was not in doubt). In so finding it stated that:

"20. In the interpretation of a classification regulation, in order to determine its scope, account must be taken inter alia of the reasons given ...".

27. Taking account of the reasons given in that Regulation the Court found that the regulation did not apply to the goods in issue which accordingly did not fall to be classified under it.

5 28. In *Anagram* (at[32]) the CJEU said that the application of a Regulation classification to similar products by analogy would be desirable.

(D) BTIs

10 29. A person may apply to the customs authority of a State for a Binding Tariff Information (BTI) classifying particular goods. Once issued the BTI binds the customs authorities of the other member states to use the specified classification in relation to goods imported by the holder of the BTI, but it does not confer rights upon any other person.

15 30. Under article 12 of the Community Customs Code, a BTI becomes invalid where: a contrary regulation is adopted, the CN is amended, a conflicting HSEN, CNEN or HS Committee Opinion is adopted, there is a contrary judgement of the CJEU or where, there being an error in its reasoning, it is revoked.

31. Tariff classifications similar to BTI's are issued by states outside the EU but these have no formal effect in the EU.

32. Tariff classifications had been issued in relation to certain mobility scooters by the US authorities and a BTI has been issued by the Dutch authorities.

20 **The evidence and our findings of fact.**

33. We were shown three types of scooter and one type of powered wheelchair. The three types of scooter corresponded to the three classes into which the scooters which were the subject of appeal had been divided by the appellants: essentially small, medium and large.

25 34. We had a number of bundles of documents before us which included copies of the brochures and specifications of the scooters, and documents which had been before the High Court in the case of *Days Medical Aids Ltd v Pihsiang Machinery and Manufacturing Co Ltd* (the “Days litigation”). Save as noted below, we had regard to these latter documents only to the extent that the
30 witnesses before us commented on them in their evidence. We were also shown a brochure for a golf buggy.

35 35. We record below factual findings we make from the evidence before us. In doing so we do not assume that all those factual findings are relevant to our decision. We shall discuss this issue later, but an issue arises as to the relevance of actual use and of the use suggested by promotional material.

(a) The Scooters

Terminology and Function

36. Generally a distinction was drawn between a powered wheelchair and a mobility scooter.

5 37. The driver of a powered wheelchair drives feet foremost into the world and sits broadly squarely over the wheels (of which there are generally four but occasionally six). The driver of a mobility scooter has a "tiller" and wheels between him or her and the world, and generally sits over the back wheels.

10 38. The powered wheelchair is steered by driving its wheels differentially; the mobility scooter is steered by using the physical movement of the tiller to turn the front wheels. The different speeds of powered wheelchairs' steering wheels are normally achieved by separate motors on the driving wheels. Because these speeds are regulated by the control of the power applied to each motor, the control of the steering cannot be mechanical and direct: instead an electrical or electronic system is required. In many powered wheelchairs the driving control takes the form of a joystick (which combines left and right with forward and backward control) on the arm of the chair and is operated by using the thumbs, fingers and/or hands; in some a control operated by the chin or some more unusual mechanism is used. Powered wheelchairs may also have controls for a helper to operate.

20 39. Because a powered wheelchair has no platform on which to rest the feet some form of footrest is required to prevent the feet dragging or otherwise hitting objects in front of the chair. Generally therefore they have folding footrests at each side onto which the user must hoist his or her feet if they can, or obtain help in so doing if they cannot do that independently.

25 40. The tiller on a scooter has the same function as the handlebars (together with the shaft attaching them to the front wheel) of a bicycle. Turning it moves the front wheels as a result of a mechanical action. The tiller is a broadly vertical bar about 2'6" high with a horizontal bar attached to the top which, when the scooter is moving forward in a straight line, is perpendicular to the direction of motion. There are handles on either side of this upper bar.

30 41. Whereas the handlebars on a bicycle rotate about the axis of the spindle to which they are attached, the centre of the bar at the top of the tiller moves roughly in a circle perpendicular to its notional axis. The movement of the top of the tiller around this circle is translated, by an offset or bend in the shaft of the tiller, into movement at its foot around the axis of a spindle which moves the front wheel(s) by a mechanical connection. As a result the vehicle may be steered by pushing the tiller top one way or the other; this may be contrasted with the solely rotational movement of handlebars.

35 42. A "wig wag" is a thin strip, generally about three quarters of an inch wide mounted width vertically and pivoted about its centre. It is mounted at the top of the tiller of a mobility scooter in line with the cross bar or head of the tiller with its pivot at the centre of the cross bar, and is sprung to return to a position in line with the tiller head. On pressing the right hand side of the wig wag forward the

scooter is powered forward, on release the wig wag returns to its central position and the scooter stops. By pressing the left hand side of the wig wag forwards the scooter is powered backwards, stopping again when it is released. Since pressing the right hand side forward has the effect of moving the left-hand side backwards, motion forward and backward respectively may also be achieved by pushing the left-hand side of the wig wag back or the right-hand side of the wig wag back. The vehicle's speed may thus be controlled with either hand, and with thumbs, fingers or the front or back of the whole hand.

43. Many scooters have an automatic braking system which ensures that when the 'throttle' is released the scooter comes to a halt within a short distance.

44. In an expert report for the Days litigation Dr Harrop said: "in the industry of the vehicles for the disabled, the main distinction is between the impeded and the more seriously disabled". He then subdivides what we have called powered wheelchairs into (i) power chairs - well padded chairs made mobile by wheels and motors, and (ii) powered wheelchairs which have extensive customisation and facilities for motorised reclining and so on which he says are for the severely disabled. We include both of his categories in our use of "powered wheelchair".

Observations on the physical examples and the scooters the subject of the appeal.

45. The Appellants produced tables describing certain features of the scooters relevant to the appeals. We accept that the contents of those tables (which appeared at Tab 9 of the Authorities Bundle 4) were accurate.

46. The tables group the scooters into three broad classes: small, medium and large. The physical examples of the scooters we examined represented those classes.

47. The scooters were driven by battery powered electric motors. Each type of scooter had: a seat for one person (which was larger and more luxuriously padded in the larger scooters), a tiller with a wig wag, a platform connecting the front and back wheels on which to mount to the scooter and on which the feet could be kept during a journey, and either four wheels (two driven wheels at the back and two at the front) or three wheels (two at the back and one at the front). Most seats had moveable adjustable armrests and many seats could be raised and lowered and swivel through 360 degrees. Most of the smaller scooters could be disassembled into moderately light units for easier transport.

48. At the back of almost all the scooters were two small freewheeling "anti-tipping" wheels, which, if the scooter tipped backwards engaged with the ground and would cause the scooter to roll backwards rather than to tip over backwards

49. Some of the typical ranges of measurement for the scooters in each class were:

| | | | |
|--|-------|--------|-------|
| | Small | Medium | Large |
|--|-------|--------|-------|

| | | | |
|------------------|------------------|--------------------|----------------------|
| Length | 90-105cm (~3'4") | 110-130cm (~4 ft) | 125-160cm (~4'8") |
| Width | 50-55cm (~1'8") | 53-60cm (1' 9") | 60-68cm (2'1") |
| Wheel diameter | 20cm (~8") | 25cm (~10") | 30-40cm (~14") |
| Ground clearance | < 10cm (4") | <12cm (~5") | < 15 -20 cm (~6'-7') |
| Range | 8-12 miles | 20-30 miles | 20-40 miles |
| Turning Circle | 90-110 cm(~3'3") | 110-115 cm (~3'6") | 120-180 cm (~5ft) |

50. The scooters had devices which served to limit their maximum speeds. Such limitation was to 4 mph (6.43 km/h) for the small and medium scooters and 8 mph (12.87 km/h) for the larger scooters (with a control to change that limitation to 4 mph). These limitations appear to be incorporated to benefit from certain exemptions from the provisions of the UK Road Traffic Acts which applied when such a scooter was driven by a disabled person (as defined in the relevant provision) – see below. There was no evidence that they provided any other benefit or advantage to any possible user.

51. Independent use of a Scooter would be possible only if the user had some ability independently to get on and off the vehicle; the same is true of powered wheelchairs. A person without the ability to mount either independently could be helped to do so. Scooters may be used generally outside. Powered wheelchairs will, because of their even tighter turning circle, be easier to use inside and in more confined spaces. Powered wheelchairs on the other hand may, having smaller wheels, have difficulties with kerbs.

52. The physical characteristics of the scooters were such that we would have been able to use them to drive around the Courtroom, but there would have been some awkward corners; and no doubt we would have disturbed some papers - particularly had we been driving the larger scooters. It would have been faster and easier on foot. All were suitable for use outside or on pavements.

53. The comments in the preceding paragraph also apply to the powered wheelchair, but we would have felt more embarrassed using it.

Observations on Advertising material

54. The appellants' brochures and sales material for the scooters generally made no explicit reference to disability. There was instead an emphasis on speed, safety and comfort. The ability of the scooter to help overcome difficulties was emphasised: one brochure spoke of the "independence" that was available with a scooter, and another of trips to the shops, excursions and holidays with a scooter.

The implication was that without a scooter these things would be, at best, difficult. The nearest express references to disability were lines which read:

- (1) "if you ... need a scooter ..."
- (2) "a solution for people with mobility difficulties" and
- 5 (3) [with a scooter] "you don't have to worry about falling or losing balance or getting tired and wanting to sit down".

We regard the emphasis on independence, the activities which could be undertaken with the scooter, and the later phrases as targeting those who had some degree of impaired mobility. We noted Mr Prosser's evidence that the brochures for powered
10 wheelchairs made no mention of disability either.

The Witness Evidence

55. We heard oral evidence from Sarah Dowie, an occupational therapist, and from officers or employees (or former officers or employees) of each of the appellants:

- 15 (1) Malcolm Edwards: Sunrise
- (2) Harmer Roberts: Invamed and Roma
- (3) Mark Prosser: Invacare
- (4) Mark Riggs: Days Healthcare
- (5) Richard McGleenan: Drive Medical
- 20 (6) Paul Kendall: Drive Medical
- (7) Terry Score: Electric Mobility.

56. We had a witness statement from Philippe de Baere, a Belgian lawyer who represented Pride Mobility Products in an appeal before the Amsterdam Court of Appeal in relation to the customs classification Pride mobility scooters, and from
25 Stephen Palmer, an officer of HMRC, to neither of which any objection was taken. Mr de Baere provided copies of the decision of the Haarlem district Court and the Amsterdam Court of Appeal in the Pride case, and said that the Dutch customs authorities had withdrawn their appeal to the Dutch Supreme Court against the decision of the Amsterdam Court of Appeal. Mr Palmer related the
30 history of HMRC's decisions on the appeal: Mr Palmer explained that the reviewing officer had concluded that mobility scooters were

"to assist persons who have difficulty walking",
rather than carriages for disabled persons.

57. Miss Dowie is currently the Head Occupational Therapist at Stoke
35 Mandeville Hospital Spinal Injuries Centre a recognised centre of excellence. Miss Dowie had extensive experience of the treatment of patients who had conditions such as multiple sclerosis, Guillain Barre syndrome, ataxia, Parkinson's disease, early motor neurone disease, cerebral palsy, spinal-cord

injury, incomplete spinal-cord lesion, and polio, which resulted in restrictions on their mobility; she was an expert in the suitability of products for such patients. We found her a clear and frank witness. From her evidence we find as follows:

- 5 (1) Both mobility scooters and powered wheelchairs enabled some patients to overcome limitations on their ability to move around. These patients included: lower limb amputees, those with conditions such as rheumatoid or osteoarthritis, and those with neurological conditions such as those mentioned above, in which patients had difficulty with walking, with lower limb sensation, with knowing where their limbs were, with balance, and with pain and fatigue.
- 10 (2) If a patient needs a mobility product the first choice is between a manual and a powered vehicle. The choice of the type of powered vehicle depended on the patient's disability and preference.
- 15 (3) For some patients a powered wheelchair would be the only option: that would be the case for an example with patients who had little control of the muscles of the trunk of their body, and those who did not have the ability to clasp the tiller of a scooter.
- 20 (4) But for some patients mobility scooters were to be preferred to powered wheelchairs: some Parkinson's disease patients benefited from having a tiller to lean on, stroke patients affected principally on one side obtained therapeutic advantages from using the affected hand together with the better one on the tiller and from improved postural symmetry.
- 25 (5) When a patient was able to use a scooter, it could be a better choice where some leg or foot protection was needed (if a leg is stuck out a powered wheelchair has some advantages by contrast) and had the recognised benefit, not always available in a powered wheelchair, of keeping the patient's knee and hip joints at 90°.
- 30 (6) The degree of retained function in the upper and lower body would affect a recommendation for the type of mobility aid. Necessarily the patient's perception of the aid was important to its efficacy. The more acceptable the aid the greater chance that full use would be made of it.
- 35 (7) Scooters were regarded, particularly by the young or younger, as more acceptable than powered wheelchairs. The patient's presentation to the world in a powered wheelchair made him or her seem more disabled than did that in a scooter. When patients had some retained ability to walk they were reluctant to use a conspicuous powered wheelchair.
- 40 (8) Scooters (and powered wheelchairs) were used and recommended for those who had some walking ability, but whose walking was painful, slow or uncertain. A person would be unlikely to use a scooter or a powered wheelchair if they had no limitation on their ability to move around.
- (9) Scooters were also used for patients with transitory conditions (eg amputees before the fitting of prostheses, and orthopaedic surgery patients).

(10) A wig wag rather than a twist grip was a real advantage to patients with limited hand function (arising for example from arthritis, peripheral nerve or spinal cord injury)

5 (11) The following particular features of scooters enabled some persons with limitations on their mobility to use the scooter more easily:

- (a) the ability to swivel at the seat
- (b) lifting armrests
- (c) the two-handed tiller
- (d) the ability to adjust and tilt the tiller
- 10 (e) the smoothness of the ride,
- (f) the tight turning circle,
- (g) the footrest platform for protection against a user's feet falling off and dragging along the ground (unlike a powered wheelchair)
- (h) dead stop breaks, and
- 15 (i) thumb/finger/hand operated wig wag (accelerator and brake control).

58. In summary: for some disabilities (such as deafness) a mobility vehicle will afford no benefit. A person with mobility problems will benefit from a mobility vehicle unless his or her limitations made the use of one impossible or were such that independent movement was no advantage. The type of vehicle affording that benefit will depend upon the nature both of the mobility problems and of other problems and limitations, and also on the preferences of the particular user. For some only a powered wheelchair would provide any benefit, for some a mobility scooter would afford benefits which a powered wheelchair would not provide. Mobility problems may arise (as other witnesses also told us) from amputations, joint pain, cardiac or respiratory problems, injury - particularly spinal injury, and neurological conditions.

59. Miss Dowie offered us a definition of disability as "any form of impairment that affected the ability to perform everyday tasks: the loss of a specific function. It was characterised by a degree of permanence distinguishing it from injury". Some people were more disabled than others. She said she would describe a fat person as disabled if their excess body weight limited his or her abilities, but would not regard a pregnant woman as such.

60. From the evidence of the officers and employees we find as follows:

- 35 (1) Each appellant regarded the scooters it sold as being required to comply, and as complying with:
- (a) the Medical Services Directive EC 92/42;
 - (b) EU Standard EN 12184 "Electrically Powered Wheelchairs";
 - (c) the International Standards Organisation Standard ISO 7176;

- (d) the requirements of the UK Road Traffic legislation; and
- (e) the Code of Practice of the British Healthcare Traders Association.

(2) Two of the appellants had been monitored by the Medicines and Healthcare Products regulatory agency in relation to their scooters, and one by the UK Department of Health.

(3) The appellants sold their scooters mainly through dealers who were instructed to, and were believed to assess the purchaser's needs; it was likely that most of the dealers' sales were to customers who made VAT declarations indicating they were disabled (we understood this to mean for the purposes of Item 2(g) and Note (3) of Group 12 Sch 8 VAT Act 1994.).

(4) Not all the scooters were so sold. Some were sold through the Internet.

(5) It was possible that able-bodied people could buy scooters through dealers, although the witnesses thought, and we accept, that if they did, the scooter would normally (but perhaps not always) be for someone else with a mobility impediment.

(6) We have noted above that the appellants' brochures and sales material generally made no explicit reference to disability. We accept the witnesses' evidence that this was because customers were not regarded as being attracted by a reminder that they were disabled or limited in their physical capacity. The potential customers, at whom the leaflets were aimed, were regarded as not being attracted by being told they were disabled, but by being told what they would be able to do if they had a scooter.

(7) A scooter user with for example a stroke affecting one side only might be able to mount the scooter using his or her good leg, and by swinging it, or manually lifting it or with the aid of a helper get the other leg onto the platform. The same was true of a powered wheelchair but to lift the leg manually into the footrest of such a chair was a more difficult operation.

(8) The largest group purchasers were the elderly. Mr Score said that most purchasers were over 80.

(9) In the users' minds there was a (greater) stigma attached to having to use a powered wheelchair than a scooter: a powered wheelchair was regarded as making the user look seriously disabled. Mr Rigg said pithily that every powered wheelchair user would like not to have a powered wheelchair but would like a scooter: it looked faster moving and was more stylish; and the tiller provided cover for those worried about modesty (the user of a powered wheelchair was very much on show from the ankle up).

(10) We noted that in Dr Harrop's witness statement in the Days litigation, he says that his analysis of testimonials showed that almost half the powerchair users would have been able to use a scooter and only 20% could not use a scooter. We observe that Dr Harrop does not distinguish between indoor use (where a powered wheelchair might be more manoeuvrable and its use less public, and outdoor use with the user with more on show). We preferred the evidence of witnesses.

(11) Scooters could be used by the lazy and the fat. Mr Score had sold scooters to people who were substantially overweight.

5 (12) The scooters were capable of use by those who were not disabled in any way, but used only rarely by those who did not have some sort of mobility impairment. This was because, inter alia, such persons generally felt embarrassed or fraudulent using a scooter when they had no such impediment. There was a stigma attached to appearing to have a disability.

10 (13) A small or mid-range scooter would not make a good golf cart. The small diameter wheels did not work well on soft ground and they were too low-slung. Larger scooters would manage the ground but had narrower tyres than the traditional 'grass tyres' on golf carts.

(14) Golf buggies tended to have steering columns rather than sweeping (bent) tillers, and a twist grip accelerator rather than a wig wag.

15 61. There was some debate, and slightly conflicting evidence, about the history of the development of the mobility scooter. In a witness statement for the Days litigation Mr Wu, a director of Pihsiang, said that that company initially made golf carts. He says that he then developed problems with his knees and had a spinal tumour, and he designed and manufactured a scooter to get him around the factory. He said that he then realised that there was a market for such scooters.
20 On the other hand, Mr Edwards told us that scooters had evolved from manual wheelchairs. Mr Roberts said that Mr Wu's company had not been the only promoter of mobility scooters when they had started to be sold.

25 62. It seems to us quite possible that Mr Wu was Wallace to someone else's Darwin, and that scooters could be akin to those flying animals which evolved separately from mammals, reptiles and arthropods. We do not however believe this question is relevant to the issue before us so we do not need to express any conclusion on it. What is relevant is the observable characteristics of the scooters, not how they evolved.

Other material applicable to scooters and wheelchairs and their use.

30 (1) UK statutory provisions relating to the use of invalid carriages.

63. The Road Traffic 1988 defines an "invalid carriage" as

35 "a mechanically propelled vehicle the weight of which unladen does not exceed 254 kg and which is specially designed and constructed, and not merely adapted, for the use of a person suffering from some physical defect or disability and is used solely by such person" (section 185 (1)).

64. The Act provides exemption from the requirements for insurance where such a vehicle is used on the road and from the requirement to produce certain documents to a constable.

40 65. The Chronically Sick and Disabled Persons Acts 1970 contains a slightly different definition of invalid carriage:

"a vehicle, whether mechanically propelled or not, constructed or adapted for use for the carriage of one person, being a person suffering from some physical defect or disability."

5 66. Where such a vehicle is used in accordance with the conditions and requirements of SI 1988/2268 it is exempt from statutory provisions restricting its use on footways, footpaths and bridleways, and from many other Road Traffic enactments. Those conditions and requirements include the following:

- (1) that it is used by a person for whose use it was constructed, being a person suffering from some physical defect or disability; and
- 10 (2) that it satisfies certain other requirements in relation to stopping, lighting, audible warning and vision.

67. These regulations also distinguish three classes of invalid carriage,: Class 1 carriages are those which are not mechanically propelled, Class 2 are mechanically propelled but not capable of exceeding 4 mph (6.437 km/h) , and 15 Class 3 mechanically propelled but not capable of exceeding 8 mph (12.875 km/h) Class 3 invalid carriages are subject to more conditions and, when used on a footway must be limited by a device to 4 mph if they are to be legally so used. The small and medium scooters before us fell into Class 2, and the larger scooters into Class 3.

20 68. We find that the relevant UK authorities have treated mobility scooters of the types relevant to this appeal as "invalid carriages" for the purposes of these provisions, and accordingly that there has been a general acceptance in the UK that they are constructed for the use of a person suffering from some physical defect or disability. We also take note of the number of scooters which may be 25 seen on most high streets and shopping precincts on most days, and conclude that it is likely that generally they are being used on the footway legally, that is to say by a person suffering from such a physical defect or disability for whose use they were constructed.

30 69. We do not however find these provisions assist in ascertaining the meaning of heading 8713.

(2) The Medical Devices Directive 93/42/EEC.

70. This Directive was adopted in 1993. Article 2 (a) defines "medical device" as:

"any ... appliance ... intended by the manufacturer to be used for human beings for the purposes of:

- 35 - ... treatment or alleviation of disease,
- ... alleviation of, or compensation for an injury or handicap ...".

71. The intended purpose is defined as:

"the use for which the device is intended according to the data supplied by the manufacturer [or responsible seller] on the labelling in the instructions and/or in the promotional material".

5 72. Article 2 of the Directive requires Member States to ensure that medical devices are marketed or put into service only if they comply with the requirements of the Directive. Annex 1 sets out the essential requirements (which include requirements to minimise risks of injury and for regard to safety), and Article 17 requires such devices to bear the CE mark of conformity. accompanied by the identification number of the monitoring body.

10 (3) Standards.

73. The preamble to the Medical Services Directive recognises the European Committee for Standardisation (CEN) as competent for the adoption of harmonised standards, and Article 5 requires Member States to presume compliance with the Directive's requirements if the devices are in conformity with the relevant national standards adopted in accordance with published harmonised standards.

74. The British Standards Institution is a body incorporated by Royal Charter responsible for preparing British Standards. The British Standard "Electrically powered wheelchairs, scooters and their chargers - requirements and test methods" adopts a European Standard EN12184 of March 1999. The foreword to that standard states:

"this standard provides one means to demonstrate that electrically powered wheelchairs and scooters, which are also medical devices, conform to the essential requirements of the [Medical Services Directive]."

25 75. The Standard sets out a long list of requirements, from the characteristics of braking systems and battery containers to switches and driving characteristics. In annexes it contains recommended design features such as maximum dimensions, seating design and lighting.

30 76. Annex A recommends, at A 1.1 that some wheelchairs may benefit from anti-tip devices.

77. The scope of the standard is stated to cover both electric motor driven wheelchairs with manual steering and power steering. "Wheelchairs" are defined for the purpose of the standard to include electrically powered wheelchairs and scooters.

35 78. We conclude that other EU recognised bodies have considered that scooters and powered wheelchairs are, by reason of their promotional material and instruction manuals, intended by the manufacturer or responsible seller to be used for the purposes of the alleviation of or compensation for a handicap.

(4) ISO standards

79. The International Standards Organisation ("ISO") is a federation of national standards bodies. The national bodies may adopt standards created by ISO as their national standards. The British Standards Institution adopts ISO standards (and uses them, as noted earlier, in its own standards).

5 80. The European Standard EN 12184 incorporates provisions from a number of ISO standards including the standard ISO 6440 "Wheelchairs - nomenclature terms and definitions". This appears to have been replaced by ISO 7176 Ch 26 (of 2007) (which in itself was adopted as a British Standard). It defines a wheelchair to be:

10 "a device to provide wheeled mobility with a seating support system for a person with impaired mobility";

and a scooter to be:

15 "an electrically powered wheelchair with a tiller [a bar fitted to pivot wheel(s)] to control direct steering [i.e. control by changing the orientation of the pivot wheel(s)]".

In other words it regards scooters as a subset of wheelchairs.

81. The other chapters of ISO 7176 contain standards, inter-alia on brakes, energy consumption, dimensions, climatic tests, test dummies, speed controls and obstacle climbing.

20 82. It was clear that the contents of the chapters of this standard 7176 did not differentiate between scooters and power wheelchairs by reference to the nature of the disability of the user, but regarded both as, at least potentially, for use by those with limited mobility.

25 83. Finally we note a comment in Annex A of ISO 7176 that ISO 9999 establishes a classification of technical aids for persons with disabilities and attempts to include a class for wheelchairs, but says that with the variety of wheelchairs and the advancement of technology that it is not possible to classify wheelchairs into a reasonable number of different classes.

30 84. The definition adopted by ISO cannot determine the meaning of a heading in the CN, but we note the similarity between the French version of 8713 – wheelchairs and other vehicles for “invalides” – and the wide definition of wheelchairs provide by ISO.

Authority on the classification of scooters.

(1) *HSEs*

35 (a) HSEN 87.03

85. The 2007 version of this HSEN was, in matters material to this appeal, the same as the 1996 version. It included the following:

"This heading covers motor vehicles of various types ... designed for the transport of persons ...

This heading also covers lightweight three wheeled vehicles of simpler construction such as

- 5 - those ... with ... the characteristics of conventional cars
- those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery powered electric motors. These vehicles are normally operated by means of a central control stick ... or by turning the front wheel...

10 The heading also includes
 ... (5) golf cars and similar vehicles.

(b) HSEN 87.13

15 86. The 1996 and 2007 editions of this HSEN differed only in so far as the English version of the 2007 edition used the terminology of the new HS heading, "carriages for disabled persons" and whereas the 1996 edition used the older words "invalid carriages ...". It stated:

20 "This heading covers carriages, or similar vehicles, specially designed for the transport of disabled persons [1996: invalids (sick, paralytic, disabled, etc)] whether or not fitted with a means of mechanical propulsion.

Vehicles fitted with means of mechanical propulsion are usually driven by a light motor, or propelled by hand by means of a lever or hand operated mechanism. The other carriages for disabled persons [1996: invalid carriages] are pushed by hand or propelled by direct manual operation of the wheels.

25 This heading excludes

- (a) normal vehicles simply adapted for use by invalids (for example, a motor car with a hand operated clutch, accelerator etc)
- (b) trolley stretchers ..."

(2) *The HS Committee Opinion.*

30 87. In October 2000 the HS Committee secretariat invited the Committee to consider the classification of Fisher & Paykel scooters:

35 "Three- or four- wheeled vehicles, driven by battery powered electric motors (150 W continuous and 1,700W maximum power), having a horizontal platform which joins the front and rear portions, small tyres (290 mm in diameter), a rotating adjustable seat with foldable armrests at the rear, and levers (handlebars) on a steering column (which can be moved forward and equipped with a small control panel) at the front for starting, accelerating, braking and reversing the vehicle, as well as steering it to the right or left. The motor is started with a key and, after selecting one of the four speed buttons, the vehicle

is accelerated by squeezing the speed lever, automatically braked by releasing the same lever and reversed by squeezing the opposite lever. A range of hand controls for one handed users, those with arthritis, or simply right/left handed options and a range of accessories (e.g. walking sticks and frames, oxygen cylinders, golf clubs) are available to customise the vehicles. Without a driver's license, they may be used on foot paths and in public places to go shopping, fishing and on golf courses etc."

88. The Secretariat noted that the vehicles were not mounted on a T-shaped chassis (see HSEN8703 para 2) but electrically powered and steered by handlebars, and that they were designed for carrying the driver only and might be fitted with "provisions for carrying golf equipment, fishing rods etc". They noted that racing cars, go-kart and golf cars also transported one person only.

89. At this time the version of 8703 specified, in its English form, "invalid carriages", and not "vehicles for disabled persons".

90. When the Committee met it was divided. 19 voted for classification under 8703, and four for classification under 8713. The majority appear to have felt that the scooters were normal vehicles principally designed for the transport of persons to go shopping, to local golf courses etc, but might be adapted for use by invalids. But other delegates thought that the electric power, a rotating adjustable chair, hand controls, small wheels and low platform distinguished them. "Invalid" they thought should cover elderly persons disabled by age.

91. The Committee's opinion was published in 2001 in the Official Journal of the EU. The opinion classified the scooters under 8703, providing the description in the Secretariat's classification invitation.

25 (3) *The Customs Code committee and the 2005 CNEN.*

92. In September 2003 the German delegation to the EU Customers Code Committee asked the Committee to examine the classification of scooters because several BTI's had been given classifying them under 8713 in apparent contradiction to the HS Committee opinion.

93. A briefing paper was presented to the Committee by Pride Mobility Products with submissions for classification under 8713 and brochures and specifications.

94. The Committee met in February 2004 and concluded:

"-heading 8713 is restrictive (see also HS Opinion for HS heading 8703). Special features needed for a product to fall under this heading (having a mobility problem is not the same as being disabled) [Member States] to reflect on potential criteria (such as single rotatory seat, maximum speed, steering easy to manipulate ...)

- submissions from legal representatives not persuasive ... products mentioned do not have special features for disabled people ..."

95. We observe that the possibility that the question of whether “having a mobility problem is not the same thing as being disabled” was considered by the Dusseldorf Court in its decision to make a reference to the CJEU in *Lacson*.

96. After that, in 2005, an amendment was made to CNEN 8713 by adding:

5 "Motorised vehicles specifically designed for disabled persons do not have a fixed body and are distinguishable from comparable vehicles of heading 8703 mainly because they have:

- a maximum speed of 10 km/h i.e. ie a fast walking pace,
- a maximum width of 80 cm
- 10 - 2 sets of wheels touching the ground
- special features to alleviate the disability (for example footrests for stabilising the legs)

Such vehicles may have --

- an additional set of wheels (anti-tips)
- 15 - steering and other controls (for example a joystick) that are easy to manipulate; such controls are usually attached to one of the armrests; they are never in the form of a separate adjustable steering column.

This subheading includes electrically driven vehicles similar to wheelchairs which are only for the transport of disabled people. They can have the following appearance:

20 [there followed a picture of a powered wheelchair]

However, motor driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this subheading. They can have the following appearance and are classified in heading 8703:

25 [there followed a picture of a mobility scooter]."

(4) The judgements of the Haarlem district Court (2006) in the Amsterdam Court of Appeal (2008) in proceedings brought by Pride Mobility Products.

30 97. In January 2006 Haarlem District Court gave judgement on an appeal brought by Pride against the Dutch Inland Revenue's assessment that a mobility scooter fell within 8703.

98. The District Court considered the HSEN and the CNEN. It said that it was apparent from CNEN 8713 that that heading comprised electrically powered vehicles which were "exclusively used for the transport of the disabled". It held that 8703 applied, but noted that the scooters were "preeminently suitable for assisting individuals with mobility problems".

35 99. The Amsterdam Court of Appeal disagreed. In April 2008 it held that the scooters had the objective characteristic to be used specifically by disabled persons - that inherent use, taken with GIR 1, put them in 8713:

"7.1. It appears to be very unlikely to [the Court] that the vehicles concerned ... would be used by people in general, without there being any problem regarding their physical mobility. Someone who, temporarily or chronically experiences such a problem is, in normal language referred to as a "disabled person".

5 100. The Dutch Inland Revenue initially appealed to the Dutch Supreme Court but later withdrew its appeal. The judgement of the Amsterdam Court of Appeal was considered by the CJEU in *Lecson* [11].

(5) *BTIs and their USA equivalents.*

10 101. In March 2005 in the US office of Customs and Border Protection issued rulings to ShopRider and Landlex classifying certain mobility scooters under 8713. The rulings record that ShopRider had said that the scooters were designed to assist the elderly for transport within the home and in shopping centres, parks etc; and that Landlex had said that they were for use by the handicapped: the elderly and others unable to stand and walk for extended periods. A similar third
15 ruling was issued to Landlex in June 2006.

102. In August 2007 the same office classified a number of SunStar scooters under 8703. This latter ruling contained no reference to use by the elderly or handicapped.

20 103. In September 2009 the Dutch authorities issued a BTI classifying a three wheeled scooter under 8703.

104. We understand that Segways, two wheeled devices controlled by sophisticated electronic programming, have been classified by a BTI under 8713.

(6) Commission Regulation 718/2009.

25 105. In August 2009 the Commission promulgated this regulation which classified mobility scooters with the following characteristics under 8703. This regulation does not have retrospective effect and so does not directly affect the classification of scooters which are the subject of this appeal. The characteristics were these:

- 30 4 wheeled electric scooter
- 48 cm (19 inches) wide; 99 cm (40 inches) long
- maximum load 115 kg (18 stone)
- horizontal platform
- small wheels (less than 8 inches in diameter)
- adjustable seat
- 35 folding tiller with control unit
- wig wag
- capable of disassembly into 4 parts.

106. The reasons given in the regulation for classifying the scooter under 8703 were that (i) GIR 1 and 6 and the words of 8703 determined classification, (ii) the vehicle was not “a special type of vehicle for the transport of persons” and (iii) that classification under 8713 was excluded because the vehicle was not:

5 "specially designed for the transport of disabled persons and ... has no special features to alleviate a disability."

Lecson Elektromobile GmbH v Hauptzollamt Dortmund C-12/10 (the “Lecson case”)

10 107. In December 2009 the First Instance Court of Düsseldorf referred a question to the CJEU in relation to the classification of a number of different mobility scooters. The scooters, depending on the precise type:

- (1) were 3- or 4 wheeled,
- (2) had maximum speeds which ranged from 6 km an hour (4 mph) to 15 km/h (9 mph)
- 15 (3) were between 100 cm (40 inches) and 152 cm (16 inches) long
- (4) were between 47 cm (19 inches) and 67 cm (27 inches) wide
- (5) all had a platform on which the driver could place his or her feet
- (6) had in some cases anti-tipping wheels
- (7) were all operated by an adjustable steering column (a tiller) with controls
- 20 (8) were in some cases demountable for transport.

108. The Düsseldorf court said it had doubts about the decision of the Amsterdam Court of Appeal in the Pride case:

- (1) it regarded 8713 as not obvious "because the vehicles are not provided with fittings that actually intend them to be used for handicapped people";
- 25 (2) it said that the scooters, which went at no more than 6 km per hour (just under 4 mph), "may well be assumed to be used mainly by people who are handicapped" (because, since that was only a little faster than walking speed, it offered the fit no advantage) but that generally they offered no advantage to persons who did not have impairment of use of their legs.
- 30 (3) it regarded CNEN 8713 as requiring that classification under that heading required there to be "fitted a special provision specifically designed for handicapped people which was lacking in the scooters";
- (4) echoing the comment by the EU Customs Code Committee referred to above, it said that "when special fittings had to be provided in terms of the
35 concept of handicapped people on which 8713 is based, reference has to be made to a handicap which extends somewhat beyond the problem of mobility". In other words that "disability" in 8713 must mean more than a mobility impairment;

5 (5) it was concerned that the differentiation adopted by the Amsterdam Court of Appeal in *Pride* was based on a finding that scooters were used in general by persons with mobility problems. But it considered that the Combined Nomenclature was a worldwide classification so that such a differentiation, if it was going to be made, had to be made on a worldwide basis, but such worldwide differentiation on the basis of almost exclusive use by the disabled was not possible; and

(6) it considered that comparable vehicles were used in golf – which had nothing to do with a mobility handicap.

10 109. The CJEU gave judgement without an opinion from the Advocate General. It recounted the settled law that the decisive criteria for the classification was to be found in the objective characteristics properties as defined in the wording of the CN heading, and that CNENs were important aids to interpretation but non-legally binding. It set out the CNEN and some of the features of scooters and then held the vehicles should be classified under 8703. We set out later the relevant parts of the CJEU's judgement.

The Parties' Arguments.

110. Mr Beale argues:

20 (1) The appellants' scooters are, as the witnesses conceded, broadly similar to those described in the Committee Opinion, the CNEN, the Regulation and the judgement in *Lecson*;

(2) The Committee Opinion and the CNEN provide valid and important aids for interpreting the CN. Applying those aids the scooters fall within 8703; the Regulation contains reasoning which should be applied by analogy.

25 (3) The US tariff classifications are limited, conflicting and not authoritative. The Swedish and Dutch BTIs classify similar products under 8703

(4) Those aids indicate classification under 8703.

30 (5) *Lecson* provides binding authority that the scooters should be classified under 8703. There is no factual error in that decision which would justify departing from the conclusion in the dispositive section that these scooters must be classified under 8703;

(6) The scooters are not specially designed for disabled people, at best they are for the less able rather than the disabled:

35 (a) The features to which the witnesses pointed and which the promotional material highlighted: the tiller, the anti tip wheels, the armrests, the swivelling adjustable seat, the automatic brakes, were concerned with comfort, ease of access, stability, control and performance. They were not features which specifically helped the disabled;

(b) The scooters aid those who are simply elderly or infirm: they helped those who could walk but not great distances, or who were temporarily incapacitated

5 (c) The witnesses had explained that scooters had an advantage over powered wheelchairs in the minds of potential users because they made the user look less disabled – that of itself indicated that the scooters were not for the disabled;

(d) Features which addressed the consequences of a disability did not alleviate the disability

10 (7) It is not relevant if the scooters are in fact used by persons who have disabilities.

(8) “disability” should not be construed to mean any limitation: people with myopia, the pregnant, and those with transitory conditions should not be regarded as disabled.

15 111. Mr White makes the following arguments:

(1) As the contrast with the use of "principally" in 8703, and the use of similar words in other headings, illustrates, the words of 8713 do not require that a vehicle be "solely" or "principally" for disabled persons.

20 (2) The approach adopted by the Advocate General in *Eru Portuguese* shows that where terms are not defined by the Nomenclature itself recourse may be had to normal English usage as recorded in the Oxford English Dictionary, and to other community and international sources.

25 (3) The OED gave "to be used by" and "with the purposes or results of benefiting" as relevant definitions of "for", and defined “disability” as a "physical or mental condition (usually permanent) that limits the person's activities or senses". The scooters were to be used for the benefit of people with limitations on their mobility.

30 (4) The meaning of "disability" as including impaired mobility was supported by community legislation and international instruments (recourse to such an approach was sanctioned by *Navas* and *Eru Portuguese*):

(5) In the context of Directive 200/78, whose object was to combat discrimination at work, the CJEU held in *Navas* that “disability” was a limitation resulting from physical or mental impairment which hinders participation in professional life.

35 The Court in *Navas* had also referred to the International Classification of Functioning Disability and Health (the ICF) drawn up by the World Health Organisation. The ICF provides a standard language for defining and classifying disability, and does so, not by reference to a particular diagnosed illness, but by reference to impairments in bodily functions and structures, and the effect of those impairments on the activities (including mobility) of a person and on his
40 or her participation in their particular environment. It uses "disability" as an

umbrella term for impairments, activity limitations and participation restrictions.

These sources show that disability should be given a meaning which encompassed impairment of mobility.

5 In particular there was nothing to suggest that transitory disability was not a disability for the purposes of 8713.

(6) HSEN 8713 spoke of vehicles "specially designed" for disabled persons. This was in contradistinction to its later note about "normal vehicles" which had been "simply adapted" for the disabled (in the French version "normal" is omitted). Thus it included in 8713 vehicles designed from the ground up for the disabled. The use of "specially" rather than "solely" emphasised the absence of a sole or principal test in the words of the CN itself.

(7) The minutes of the HS Committee showed a mistaken understanding of scooters by the majority. Scooters were not normal vehicles simply adapted for use by invalids but were designed from the ground up for the disabled. They were not designed for use as golf buggies. The majority erred by taking into account potential use: that was not an objective characteristic they also erred by inferring a requirement for exclusive disabled use. The minority view was therefore to be preferred.

20 The statement in the opinion that the vehicles could be used on footpaths, to go shopping or to golf courses did not reflect distinguishing characteristics of scooters - powered wheelchairs could also be so used.

(8) The amended 2005 CNEN for 8713 repeats these errors and provides no reason for distinguishing scooters from powered wheelchairs. The CNEN was based on the erroneous presumption of exclusivity adopted by the Committee: rigidly applying it, or applying by analogy, would alter the meaning of the CN heading. It therefore should not be followed.

(9) The Regulation's express reasoning for its classification of scooters under 8703 was that the vehicle described had no special features to alleviate the disability. The appellants' scooters did have such features; the Regulation should not be applied by analogy simply because it related to scooters.

(10) A tiller steering mechanism was as much a special fitting for the disabled as a joystick.

(11) The subjection of scooters to the provisions of the Medical Services Directive, and their inclusion in the CEN standards, BSIs and ISOs, all shared the same broad policy displayed in 8713: namely to enable disabled persons to carry on their lives safely. That policy must influence the meaning accorded to "carriages for disabled persons".

40 (12) 8713 should also be viewed in the light of the fact that the UK was a signatory to the UN Convention on the Rights of Persons with Disabilities. Article 9 of that Convention obliges States to take measures to ensure people with disabilities have equal access, inter alia, to transport, and Article 20 obliges

them to take effective measures to facilitate mobility and access to mobility aids including by making them available at reasonable cost.

5 (13) The only other CN heading in which "disability" or "disabled" occurred was 9021 which, together with crutches, trusses, hearing aids and bodily implants, included "appliances ... to compensate for a defect or disability". In *Premis*, the CJEU considered the classification of a walker rollator. It classified it under 9021. In examining the comparative functions of crutches and the walker rollator the Court noted that:

10 "51. ... the main function of crutches is to compensate for a defect or disability of the lower limbs so that a person suffering from such a handicap is able, with the help of crutches, to walk alone. It is in that sense that the crutches are essential to a person with a mobility handicap."

Clearly the Court considered lack of mobility to be a disability. If it was a disability for 9021 it should be for 8713.

15 The Court also held in that case, that the CNEN, which distinguished between devices which took over functions of defective parts and devices which "simply alleviated" the effect of a disability, did not preclude classifying the Walker Rollator under 9021. That he says, indicates that the Court saw some overlap between "alleviate" and take over. In turn that suggests that the "special features to alleviate the disability" referred to in CNEN 8713 may extend to features which take over the functions of walking.

20 (14) "The intended use of a product may constitute an objective criterion for the classification if it is inherent in the product, and that inherent character must be assessed on the basis of the product's objective characteristics and principles" ([47] *Metherma* and *Premis* [43]). If a use can be demonstrated by evidence of actual use of the product that use must be inherent in the product. Use by the disabled had been demonstrated: it was inherent in the scooters.

30 112. *Lecson* is the greatest obstacle in Mr White's path. He says that the Court's decision was based on an inadequate factual report from the Dusseldorf Court. A precise decision was only as good as its factual basis. To the extent that the facts before this tribunal were different that case is binding only in relation to the principles set out. Those principles are only that (i) the decisive criterion is the special design of the vehicle to help disabled persons (see the judgement at [18]), (ii) the mere fact of scooters "may" be used by a class of fit persons is irrelevant if they are "suitable" for use by another class of persons (applying the converse of the reasoning in the judgement at [25]).

Discussion

40 113. For the reasons which follow, were it not for the judgement of the CJEU in *Lecson*, we would have found that the scooters were vehicles for disabled persons and thus classified under 8713. That judgement, however, raises significant uncertainties over the proper interpretation of CN 8713.

114. We start therefore by considering the issues without reference to the guidance given in *Lecson*, and then turn to that decision.

115. We should say at the start that we reject Mr White's argument that the heading should be considered in the light of an overall policy to help disabled persons. The nomenclature simply divides up products into classes. The rate of duty is set by the EU. Any policy of that sort would take effect at the stage of setting the rate of duty, not as part of the classification of the products to which that duty applied. Were 8703 the correct classification the EU could give effect to any such policy by introducing a sub subheading to which it would attach a lower rate of duty.

(1)GIR 3

116. The very existence of GIR 3 indicates that the headings should not be construed as mutually exclusive. However in *VTech* Lawrence Collins J referred to the number of cases in which the ECJ had decided between competing headings without recourse to Rule 3 and cautioned against assembling a long list of theoretically possible but increasingly implausible categories to which Rule 3 should be applied. He regarded the purpose of Rule 3 as being to arbitrate between two finely balanced headings. In *Ge Ion Track*, however, Briggs J did not regard Rule 3 as being virtually otiose: he distinguished between the "common sense" more-specific rule in GIR 3(a) and the last-in-numerical-order rule of GIR 3(c) which he said really was "truly a last resort".

117. In *BVBA Van Landeghem C-486/06* the ECJ found that Rule 3 had no application if one of the competing headings "cannot reasonably be envisaged". That suggests to us that the threshold for the existence of prima facie classification is being reasonably classifiable under a particular heading.

118. The scooters are plainly motor vehicles. The existence and prominence of a seat and hand controls are objective features which indicate that they are principally designed for the transport of persons of some sort. Potentially therefore they may reasonably be regarded as falling within 8703.

119. If these scooters may also reasonably regarded as falling under 8713, then GIR 3(a) (the most specific) or GIR 3(c) (the last numerically) would require the scooters to be classified under 8713. Our task is therefore to decide whether the scooters are prima facie classifiable under 8713.

(2) 8713: "for" disabled persons

120. If 8713 had said "golf clubs for children" one might initially think of reduced size golf clubs of lesser weight and adorned with bright colours. One might also think of a small person who realised that children's golf clubs were more suitable than full size ones, but that would not immediately dissuade you from concluding that such golf clubs were also "for" children: the words do not require the use to be exclusive, just that the vehicles have features which are somehow particularly relevant to persons of the described class. We say

“particularly”: if all of those features made them attractive to almost everyone, one would hesitate to say that they were for a particular class of persons.

121. That example illustrates three aspects of the words of 8713. First that the words of the example cause to the reader to seek to identify particular features of the product which make it particularly suitable for, or attractive to, children. Second, that children, like the disabled, vary: they will not all want or need the same thing. And third, that some, but not widespread, use of, or desire for, the vehicles by some other persons may not be relevant to whether they are "for" a particular class of persons: in other words that “for” does not suggest exclusively for.

122. It does not seem to us that “for” requires that the vehicle can be used by disabled persons only. Were that the case it would be difficult to imagine any vehicle which would qualify. Even a wheelchair (specifically included in the French version’s ‘fauteuils roulants’) is capable of being used by a person with no disability, and is suitable for being used by, for example, an actor playing the part of a disabled person.

123. The use of "for" in 8707 also suggests that “for” does not mean exclusively for:

"bodies (including cabs), for the motor vehicles of headings 8701 to 8705".

That plainly has the meaning of bodies whose features are such that they will be capable of comprising part of such motor vehicles. The fact that such bodies might be used for other purposes seems to us to be irrelevant in considering whether a product falls within this heading.

124. We bear in mind the use of “principally” in 8703. The lack of this word in 8713 is an indication that that heading is not describing vehicles principally for disabled persons.

125. As a result we conclude that there is no requirement in the words of 8713 that the vehicles should be only or principally for disabled persons. Instead it seems to us that a vehicle is for disabled persons if it has features which make it in some way particularly suitable for or attractive to persons with a disability where those features do not carry the same benefit to persons without that disability.

126. HSEN 8713 speaks of vehicles "specially designed" (and the 2002 CNEN for 8713 of “specifically designed”). This could be taken as making an enquiry into the purpose of the designer, but that cannot be the proper construction unless it is limited to inferences which may be drawn from the characteristics and properties of the vehicles (since the ECJ has made it clear on many occasions that only these are relevant: see e.g. *Metherma* [46]). It must therefore be taken as indicating that there must be special design features - or simply special features - which enable the vehicle to qualify. We shy away from the word "design"

because it is not in the heading, and other headings (e.g. 8703 and 8704.10) speak expressly of "design": we conclude that an investigation into the purposes for which the product was actually designed is not required by the heading, and that what is required is an investigation of the features of the product.

5 127. We found "specially" troublesome. It is used in some of the EU sub
subheadings of chapter 87 e.g. 8716.39.10: "Tankers specially designed for the
transport of highly radioactive materials". The word appears to invite comparison
with the normal or the ordinary. That comparison may be possible with tankers,
but what is an ordinary vehicle? (We observe that the exclusionary note in the
10 English version of the HSEN indicates that the heading does not include "normal
vehicles simply adapted", but the French version eschews "normal": "véhicules
simplement adaptés", and we conclude that "normal" in that part of the HSEN
serves little purpose).

15 128. "Special" in these explanatory notes might be read as indicating that the
features had to be those which made the vehicles suitable for use by disabled
people only. But we reject that as it would be to restrict the words of the heading
which we have concluded do not require that the vehicles be only for disabled
persons.

20 129. A vehicle within 8713 must be for the transport of persons and thus any
comparison – special with normal - must be with the generality of such passenger
vehicles and identify features of the 8713 vehicles which are not normally present
in that generality which mark the 8713 vehicles out as being for disabled persons.
That is to say one aspect of such features must be that they are not common to the
generality of passenger vehicles.

25 130. What must be the link between the relevant features of the vehicle and the
disability for the vehicle to qualify? The 2005 CNEN regards vehicles as being
for the disabled where inter alia they have

"features designed to alleviate the disability"

30 and gives the example of footrests. It does not seem to us that these words mean
"to reduce the physical defect" for no feature or vehicle would alleviate,
for example, the amputation of legs. What it means is "alleviate the effects of the
disability" or to compensate for the effects of the disability. The example of
footrests illustrates the point: they do not alleviate in an inability to control one's
feet, but alleviate the effect of not having control – when they could drag along,
35 or jump about. (To this extent we accept the thrust of the argument made by Mr
White in relation to *Premis*, although it seems to us that it is not necessary to rely
upon that judgement to reach this conclusion).

40 131. What is important, however, is that the features alleviate or compensate in
such a way as to make the vehicle attractive to (and available) for use by a person
with the relevant disability because of the nature of their disability when without
those features the vehicle would not be so attractive or available, This seems to us
to express the nature of the necessary link between an identifiable feature and a

disability for it to be described as something which is designed for, or has the effect of, alleviating the disability.

132. Thus we conclude that to qualify under 8713 the vehicle must have features which (i) are not common to the generality of passenger vehicles, (ii) which alleviate or compensate for the effect of a disability and (iii) which, with or without other such special features, make the vehicle attractive to such persons because of their disability, but which do not make the vehicle more attractive to people without a relevant disability.

(3) Disability

133. Two problems arise with the term "disabled". The first relates to the variety of disabilities, and the second to what degree of variation in severity of a condition will make it a disability. We discuss the second in section (3)(b) below.

(a) The variety of disabilities

134. Whatever precise meaning of disability is intended by the heading, it cannot be doubted that there will be some conditions which will be disabilities for the purposes of the heading. A person who is totally blind, someone without arms, and someone who does not have, or does not have the use of, a leg will all be disabled on any definition. It cannot be the case that "for disabled persons" requires that the vehicles would have features which aid, assist or attract all of those people because of their disabilities for then no vehicle would qualify: a person whose only disability was total blindness would not find any vehicle (save perhaps a self driving robot google car) attractive in view of their blindness. Thus it must be accepted that a vehicle can fall within the heading even if there are disabled persons for whom it would have no benefit, attraction or use. And correspondingly the heading must therefore mean that a vehicle may qualify if there is a disabled person whose disability is such that the special features of the vehicle make it beneficial for or attractive to that person because of their particular disability.

135. The 2005 CNEN speaks of "special features to alleviate the disability". But the CNEN contains no previous references to a particular disability, so the use of the definite article cannot refer to one particular disability. Neither, for the reasons in the preceding paragraph, can it refer to every or any disability (for then no vehicle would qualify). It seems to us therefore that it must mean "a particular disability". In other words what is required is that the vehicle has special features to alleviate an identifiable disability.

136. We conclude from the words of the heading and with the aid of the HSEN that a vehicle is "for disabled persons" if it has special (uncommon) features which make it attractive to a person with a particular disability where that attraction arises because of that particular disability. We use "attractive" in this formulation to encompass "helpful to" and "beneficial for".

(b) Disability: meaning and severity

(i) meaning.

137. There is no definition of disability in the Combined Nomenclature, the HEN or the CNEN. We start by considering Mr White's argument that *Eru Portuguese* and *Sachsenmilch* indicate that we may look to other sources to determine or illuminate its meaning.

138. Mr White says that: (1) in *Belgium v Vandertaelen* [1975] ECR 1647 the ECJ took into account the definition of ice cream in other community legislation, (2) the Advocate General in *Eru Portuguese* took into account the shorter Oxford English Dictionary definition of cheese, Council regulations, a Directive and the Codex Alimentarius drawn up by the WHO; and from "all" these sources he concluded that the Explanatory Notes in that case were not wrong. The Court made approving reference to the use of community legislation for the purposes of construction; and (3) in the *Sachsenmilch* the court had regard to the Codex Alimentarius to assist in determining what was the ripening of cheese in the context of a CN heading referring to unripened cheese.

139. On the other hand Mr Beale says that: (1) in *Deserbais* the Court rejected the argument that compliance of a particular cheese with the requirements of the Codex Alimentarius for Edam cheese should be a condition for marketing cheese as Edam cheese; and said that the Codex was to be treated as guidance for the defining characteristics of particular types of food, and (2) in *LTM* the court declined to find that classification under Directive 65/65 as a medicinal product compelled the conclusion that the product was a pharmaceutical product for the purposes of the CN: it said that the object of the Directive, which permitted difference in classification for the purposes of the Directive across different member states, must be taken into account, and contrasted that purpose with the uniformity of nomenclature intended by the CN. Whilst factors such as presentation and distribution were strong indicators for the purposes of the Directive, they would not be decisive for the purposes of the CN.

140. We conclude that external sources may illuminate but will not generally determine the meaning of headings in the CN, and that, in assessing their relevance, the purpose and circumstances of an external source is important.

141. As an ordinary English word used in an international convention the OED definition:

"a physical or mental condition (usually permanent) that limits a person's activities or senses"

seems a good starting point.

142. The French version of the heading however uses "fauteuils roulants pour invalides" which, in the word "invalides", may retain some of the former English version's ("invalid carriages") emphasis on the medical nature of a defect and less emphasis on the limiting effect of the condition. However it seems to us that both the meaning of the French word "invalide" (explained in the HSEN to include

“malades, paralytiques, mutilés, etc”) and the fact that the change was made the English version of 8713 without changing French version, suggest that French version is capable of bearing a meaning in which limitation on activities or senses is significant.

5 143. In *Navas* CJEU said that for the purposes of Directive 2000/78 (employment discrimination) "the concept of "disability" must be understood as referring to a limitation which results from physical, mental or psychological impairment and which hinders the person concerned in professional life." That was a definition which emphasised the limitation rather than its cause

10 144. *Premis* concerned classification under 9021. That heading included "appliances to compensate for a defect or disability". The Court found that a walker rollator compensated for the lack of the balance necessary to enable a person to walk alone and classified it under 9021. It is thus accepted that such a mobility handicap was a "defect or disability" for the purpose of the CN.

15 145. The Advocate General in his opinion in *Karsten Kaltoff* considered whether obesity could be a disability for the purposes of Directive 2000/78 (which counters employment discrimination on grounds of disability). He explained that the UN Convention on the Rights of Persons with Disabilities formed part of the EU legal order and "disability" for the purposes of 2000/78
20 had to be interpreted against that background, and as far as possible consistently with that Convention. Then, consistently with the emphasis on limitation rather than medical cause, he explained that obesity itself would not be a disability; the obese person would have a disability for the purposes of the Directive only if the obesity gave rise to limitation which hindered his participation in professional
25 life. (But he opined that only severe, extreme or morbid obesity was likely to create such limitations and therefore qualify the sufferer as having a disability)

146. The restriction to professional life in the Advocate General’s opinion in that case reflected the purposes of that particular Directive and is not relevant in the context of the CN.

30 147. We conclude that, if this was a matter of the construction of "for disabled persons" solely in an EU context, a meaning in which limitation on activities was significant would be appropriate.

35 148. The WHO’s ICF disability classification dates from 2001. The most recent relevant Combined Nomenclature dates from 2007. The aims of the ICF are to provide a scientific basis for studying health, to establish a common language in describing health-related states, to permit data comparison and to provide a systematic coding system for health information systems. It does not seem inappropriate to view "disability" in 8713 in the light of the ICF. Such would confirm that disability is "a generic term which includes defects, limitation
40 of activities and restriction of participation in social life" (*Navas* [22]).

149. In *Karsten Kaltoff* the Advocate General limited the concept of relevant disability to that which hindered professional life - that aspect of limitation being inherent in the Directive he was considering. CN 8713 is about vehicles - things which move. That suggests that a limitation on mobility may on its own be a disability and that the question asked by the HS Committee in reaching its opinion (does 'disability' require more than a limitation on mobility, and reflected in the judgment of the Dusseldorf court ("reference has to be made to a handicap that extends somewhat beyond the problems of mobility"), should be answered in the negative. There is no warrant in the words of the heading or its context for requiring 'disability' to involve limitations in addition to those relating to the movement of a person's legs.

150. Taking all that together it seems to us that the OED definition of disability adequately describes the meaning of that word in 8713.

(b) severity

151. Does it matter for the purposes of 8713 how severe the limitation is? If a vehicle has a feature which makes it attractive to a person with a slightly painful knee, or who is a little fat, or gets a little bit out of breath when walking, is that enough to make the vehicle "for disabled persons"?

152. The French text's expressly mentions wheelchairs, to which one would not normally resort without a limitation of some significance. That indicates that the words "autres véhicules" must have features alleviating a limitation which is more than marginal: a mere inconvenience is not a limitation.

(4) Intended use, actual use and marketing material

153. It is well established that the characteristics and objective properties of product are the decisive criteria for its classification, and that the function or intended use of the product can be an objective characteristic (but only if that use is inherent in the product) and may be assessed from its objective characteristics and properties. (*General Instrument* paragraph 13 and the cases cited).

154. In *Neckerman*, where neither the Combined Nomenclature, the HSEN, or the CNEN gave a definition of the goods in question, the CJEU found that it was appropriate to look at the objective characteristics of the goods which distinguished them from others in the use for which they were intended if that objective characteristic could be established at the time of customs clearance.

155. In *Sony* [111-113] the CJEU applied the reasoning in *Neckerman* to hold that in the absence of a definition of 'video games' it was appropriate to consider video games to be products intended to be used exclusively or mainly for playing video games even though they might be used for other purposes. In determining that intended use the Court had regard to the manner in which the goods were sold and presented to the public and to the brochures and promotional material. (It also had regard to the way "consumers perceive" the goods [13]).

156. In *Anagram* at [26] the CJEU, citing *Neckerman*, said that for the classification of a product for customs purposes that product does not have to be solely or exclusively intended for the use corresponding to the objective characteristics established at the time of customs clearance . It suffices if that is the main use for which it is intended.

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157. In *Ikegami*, the CJEU, citing *Sony*, had regard [21, 24 and 26] to the promotional material in assessing the function of the machine at issue.

158. On the other hand in *LTM* [27,28], while the court accepted that presentation could be a strong indicator, it said it was not decisive.

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159. In *Kubuto* the Upper Tribunal overturned a classification decision of the FTT on the grounds that the FTT's classification had been made "also by reference to the actual use to which the vehicles were put ... and the possible use to which they could be put". In doing so the Upper Tribunal relied upon the opinion of the Advocate General in *Kamino* in which he said ([73-75]) that intended commercial use or target use should not be taken into account, and taking into consideration packaging or advertising material led to a risk of abuse. The Upper Tribunal said that "marketing material and a product's targeted use are not to be taken into account". The Upper Tribunal quoted with approval a passage in *Honda* in which the FTT had said that taking into account marketing or actual use was to put the cart before the horse since intended use was what was inherent in the product and not determined by the use actually made.

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160. It seems to us that the Upper Tribunal's approach to marketing material may be a little too restrictive in the light of the express use made of such material by the CJEU in the cases quoted above, but it seems to us that the warning of the Advocate General in *Kamino* should be heeded and the tribunal should be wary of any attempted abuse when considering promotional material. We did not however detect any abuse in the promotional material before us. It was the material of several different manufacturers and we believed the explanations given to us for the absence in it of significant references to disability. The acceptance by other EU bodies (see [78] above) that scooters' marketing showed that they were intended to be used to alleviate a handicap supports the view we have reached in relation to it.

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161. So far as actual use is concerned, it seems to us that there is a difference between treating actual use as determinative and treating it as illustrating a use which is inherent in the product. It is plain that if a product can be used for a particular purpose, then that use is intrinsic to the product. But the fact that such is a use does not mean that it is the intended use or the defining characteristic of the product.

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162. Particularly in relation to complex technical or pharmaceutical products, a tribunal (or a customs officer on entry) may have no idea how they may be used. Evidence of actual use will be evidence of inherent use. The tribunal will then need to assess which inherent use is determinative. Thus suppose, for example, a

tribunal had to determine whether a flat headed screwdriver was a ‘tool for tightening fixings’ (an imaginary heading), but had never seen a screw or paint tin. It might start by recognising that the screwdriver could be used for stirring coffee; but once it had evidence that it was actually used for tightening and loosening screws and for opening paint tins, it would have to determine, from the characteristics of the screwdriver, which use was relevant to its classification. At that stage evidence, say, of predominant use or actual for opening paint tins would be irrelevant. The tribunal would notice the round handle as an aid to turning and would conclude it was intended for tightening screws. It does not seem to us that the Upper Tribunal were excluding such an approach: it seems that its concern was that the FTT were unduly influenced by the evidence of actual use. Otherwise the tribunal in the example, deprived of evidence, would classify the screwdriver as a spoon. In effect evidence of actual use is shorthand for evidence of matters in the world to which the characteristics and properties of the product could be applied and from which inherent use may be deduced.

163. We have made some findings in the part of this decision dealing with the evidence and in our findings of fact which relate to the actual use of the scooters. They are more naturally phrased in that way but we use them as evidence of matters in the world with which the scooters interact, and in that sense as relevant to, but not determinative of, their intended use.

(5) The Physical (Objective) Features of the mobility scooters.

164. There appeared to us to be four classes of such features:

(i) They were all small, electrically powered, vehicles with non-marking tyres and a tight turning circle.

165. These features were not common to, and distinguished the scooters from, the generality of passenger vehicles.

166. These characteristics meant that they could be used by a person independently to transport him or her to shops, in shops, in shopping centres, on pavements, to leisure activities and to some extent at home.

167. These features make the scooters attractive to, or capable of helping, those who are limited in their ability to walk in shops, to walk to shops, and to walk distances on pavements or at home because they compensated for or alleviated the effect of that limitation.

168. They could be used for these purposes by persons without any mobility limitations (or with marginal limitations) but the objective characteristic of their size meant that they were less manoeuvrable and more awkward than being on two feet and accordingly would not be attractive or advantageous to such persons.

169. Whilst the conclusion in the last paragraph could be supported by our factual finding that such use was in fact rare, that evidence related to use in the UK and was not in relation to Member States, or more generally to WTO States.

We do not therefore rely on that finding. A contrary finding would however have called into question our deduction from the physical characteristics of the vehicles that they were more awkward than being on two feet.

5 170. Other vehicles for one person did not have these characteristics: one seater cars, go carts and golf carts could not reasonably be used on pavements nor in shops nor in the house because of their size or noise.

10 171. It will be seen that we accept the thrust of Mr Beale's observations that some of the features of the scooters are not special and do not alleviate a disability or its effect, but the features we have identified under this heading are different. They permit a person with a mobility limitation to avoid the effects of that limitation and are not features of normal passenger vehicles, and they do not make the vehicle attractive to people without mobility restrictions .

15 172. In *Premis* the CJEU drew a parallel between the function of crutches which was to compensate for a defect or disability of the lower limbs so that a person suffering from such a disability was able with the help of crutches to walk alone - in which sense crutches were essential to a person with a mobility handicap [51], and the function of a walker rollator which compensated for the inability of a person to coordinate the movement of the lower limbs whilst maintaining balance [52]. The court said it followed that the walker rollator fulfilled a function similar to crutches. In the same way the features mentioned
20 above, compensate for the lack of mobility and permit a person with a lack of mobility to be mobile.

25 *(ii) They all had a low platform without a vertically projecting sill, and, as compared to a saloon car, they had a high seat. They were not enclosed and had no doors.*

173. These features were not common to the generality of passenger vehicles.

30 174. The features meant that the scooters could be mounted and dismounted by those whose leg functions were so limited as to prevent them easily getting into a car or a wheelchair independently. These features were thus attractive to, and capable of assisting those who, in addition to being limited in their ability to walk, were also limited in their ability independently to get into a car or a wheelchair because they compensated for or alleviated the effect of those combined limitations.

35 175. It was likely, however, that a limitation on the ability to walk also made it difficult to get into a car seat. Thus it seemed likely that these features would help most people whose walking ability was limited, and would be attractive to such a person because of that limitation.

40 176. A person without such limitations would also be able to mount and dismount by virtue of these features, but they would afford no advantage and provide no attractions or extra ease for such a person.

(iii) *The following features meant that the vehicles could be used by persons with limitations in addition to a limitation on their ability to walk because without these features they would not have been able to use a scooter or been limited in their ability to use one.*

5 The difference between this class and (ii) is that the limitations which caused the listed features in (ii) to help would generally be associated with a walking disability. The limitations which the features discussed under this heading alleviate are not necessarily associated with a walking limitation.

10 These features were not common to the generality of passenger vehicles. They did not on their own provide the mobility which was otherwise lacking but compensated for additional disabilities:

(a) a wig wag. This feature permitted the scooter's speed and acceleration to be controlled by a person who had limited control of his or her fingers;

15 (b) a swivel seat and armrests which lifted (when provided). These could enable a person with limited flexibility in foot and/or leg or hip to dismount and mount the scooter independently when they might not otherwise be able to do;

20 (c) a bent or hinged tiller. We have explained the difference in function between a tiller and ordinary handlebars. A tiller may alleviate the effects of certain limitations on the movement of a person's arms and hands. It may thus, by permitting such persons the ease of steering which they would not otherwise have, permit them to use the scooter so that they would be able to access the benefits of the features of the scooter to alleviate the effects of a limitation on mobility.

25 Mr Beale says that a tiller is simply the mechanism by which a scooter is steered. Adjustment just permits comfort. We agree about adjustment, but any vehicle needs some sort of steering – by a joystick, a steering wheel, handlebars or a tiller. The feature of the scooters is that a tiller has been used. Some people with walking limitations could use one of the other means of steering and the tiller would afford them no advantage, but some will have disabilities which make the other methods of steering impossible or difficult and some may have their condition assisted by a two handed tiller: for these people the tiller is an attraction.

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177. These features did not on their own compensate for a limitation on walking ability, they merely conferred upon people with limitations in addition to a limitation on their walking, the ability to use the scooter in shops, in shopping centres on pavements, and in the home. Taken with the features that the scooters were small and electrically powered with non-marking tyres, a vehicle with one or more of these features would help a person with such compound limitations because they compensated for, or alleviated the effect of those multiple

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limitations. Thus they made the scooter attractive to such persons because of their limitations.

5 178. These features afforded no extra ability or facility to those who did not have any of those additional limitations, that is to say those whose only limitation was in walking. These features could be used by such persons without such extra limitations, but such use would be part of the use of the scooter. And the features of the scooter would afford, for the reasons explained at (i) above, no benefit or attraction for those without walking limitations. Nor did they provide any attraction to those who had the additional limitations (eg arthritis in the hand) but
10 did not have a walking limitation for the same reasons.

(iv) The following features made the use of a scooter more comfortable or safer but appeared to us either not to be different from the features common to the generality of vehicles or to offer no alleviation of the effects of any limitation or to provide no benefit which arises because of the disability:

- 15 (1) a headrest (rather than a head restraint)
(2) armrests (adjustable or otherwise)
(3) adjustable height chair
(4) a smooth ride
(5) automatic braking.

20 These features make the vehicle safer, easier to use or more comfortable but did not alleviate any limitations. They were not uncommon in passenger vehicles. They provided the same advantage to people without limitations.

- (6) The ability to adjust the tiller

25 Whereas the existence of a tiller may alleviate certain limitations or conditions - see [178(iv)(4)] above- the ability to adjust the tiller did not seem to us to be a feature which made a scooter attractive by reason of any disability which the adjustability alleviated.

- (7) The limitation of their maximum speeds to 4 or 8 mph² (depending on the scooter)

30 Whilst a limitation on maximum speed was a feature not common to passenger vehicles generally, it afforded no compensation for, or alleviation of the effects of any bodily limitation. The fact that UK domestic legislation permitted a disabled person (as defined in that legislation) to use a scooter with a speed limitation on a footpath or pavement, and provided certain other benefits to such
35 a user seemed to us irrelevant to the classification of the scooter for EU or more generally WCO nomenclature purposes.

- (8) Anti-tipping wheels

² See para [50] above for km/h

This feature made the scooter safer but did not alleviate the effects of any particular limitation. We accept that a person with a walking limitation might not find it as easy as a fully able bodied person to set upright a tipped scooter, but we did not consider that this feature alleviated the effects of that limitation. The compensation was provided by the features of the scooter described in class (i) and in most cases class (ii), not by the anti tipping wheels.

(6) Features of powered wheelchairs

179. It seemed to us that the comments made under the preceding headings in relation to certain features of scooters apply to similar features of powered wheelchairs. In that context:

(1) the joystick control falls under heading (iii): it does not provide in itself features which provide the advantage afforded by a vehicle which may be taken into shops, the home and on pavements (which ability alleviates the effect of a walking limitation): it does nothing to help the person who just needs a mobility aid. The joystick enables those with a further disability, namely the limitation on the ability to steer using larger physical movements with a means of alleviating the further effect of that additional limitation. The joystick could be used by someone with no limitation on his or her ability to use handlebars or a tiller, and such a person, if limited in walking ability, would have that limitation compensated by the features of small size and electric power and non-marking tyres and not by the joystick;

(2) the footrests offered alleviation of a particular additional limitation, namely a limitation on a person's ability to control the movement of his or her legs, and thus enabled a person with that limitation in addition to a mobility limitation to use the chair, but such footrests do not offer any alleviation of the effects of a limitation on the user's ability independently to lift his or her feet onto the rests: such a person might be able independently to use a scooter because of the low platform but not a chair with footrests. The footrests would also help an able bodied person to use the chair as they provide somewhere for them to stow their feet while using the chair. Their essential function is somewhere to put the user's feet, not something special to stabilise the legs (as Mrs Dowie explained) In that respect they have the same function as the platform on a scooter.

(7) Leisure Uses, and use at work

180. It does not seem to us that the ability to use a vehicle for leisure activities such as going for a 'walk' with friends or family, going to a park, a football match, an exhibition, a concert, to fish or to a golf course, can mean that the vehicle is not for disabled persons. On the contrary, if a person had a mobility limitation which rendered the independent performance of such activities impossible or unduly difficult without the use of a vehicle, then such a vehicle would alleviate the effects of such a limitation, and the features which rendered such participation possible could satisfy one of the conditions necessary to conclude that the vehicle was "for" people with such limitations.

181. In the same way the ability to use a scooter to go to work, or at work, does not in our view mean that it is not for disabled persons.

(8) Golf Carts

5 182. Heading 8703.10 includes golf carts and similar vehicles. The CN Committee Opinion speaks of the use of scooters to go to golf courses. There was some discussion before us of the history of the development of scooters and golf buggies.

10 183. The brochure for a one person golf buggy showed a vehicle with a wide base (36 inches or 914mm) which made it suitable for uneven terrain, wide tyres which distributed the weight and avoided indentation of the ground, and a place to keep a bag of golf clubs. These features made the buggy suitable for use on a golf course but were not possessed by the scooters which were narrower (almost all were less than 2ft (or about 60cm) wide), had narrow tyres, and had no accommodation for golf clubs. The scooters did not therefore have features which
15 enabled them to be described as golf carts or “for” persons playing golf. Further the lower ground clearance of the smaller and middle sized scooters would mean that they would have difficulty in negotiating terrain rougher than a path. These differences were such that we did not regard scooters as similar to golf carts.

20 184. Nor did we consider that a golf buggy was a vehicle for the disabled. Its objective features indicated that it was for use on a golf course. In that use it did not have features which made it attractive to a disabled person because of their disability. It provided no benefits other than the ability to play golf. These were not special benefits because they did not make the vehicle more attractive by reason of the disability but by reason of the activity. They did not alleviate a
25 disability by permitting something to be done which could not otherwise be done. The features of a scooter by contrast alleviate a disability by permitting a person who could not otherwise go shopping or participate in leisure activities to do so, and whilst they may be used for such activities by others, their function, like that of a powered wheelchair, indicates that their application and intended use is for
30 the disabled.

185. Other golf carts we believe may carry more than one person, and have space for heavy bulky clubs. They are designed for the fairways and cannot go to greens because of their weight.

(9) Snow vehicles.

35 186. The inclusion of vehicles “specially designed for travelling on snow” in 8703.10 (together with golf carts and similar vehicles) is an indication that such vehicles fall within 8703. Scooters however have quite different objective characteristics from such vehicles - they have no specially adapted wheels or
40 tyres (having tyres with fairly smooth tread); they have no obvious ability to take chains; they have a low profile so that they would stick in the snow and they have no four-wheel-drive option.

187. The history of the development of scooters and golf buggies is to our minds irrelevant to their classification. It is the objective features which are relevant, not the history of their design.

(10) Use by the elderly and infirm

5 188. We accept that many of the elderly and infirm may use scooters. However, the elderly and infirm often have limitations on their ability to walk. The fact that they are used by the elderly suggests to us that their use is by persons who seek to alleviate the effects of their limitations. If (and we emphasise 'if') actual use is of any value in determining classification, then what matters is
10 whether elderly and infirm users are properly described as disabled, not whether they belong to any other class of persons.

189. If a vehicle fell within 8713 only if it was only for the disabled, then actual use by persons shown not to be disabled would suggest that the features of the vehicle did not assist only the disabled and that would mean 8713 was not
15 applicable. There was however no evidence before us of any substantial use by persons without some mobility limitation.

190. The issue which use by the elderly highlights however is the extent what severity of limitation is relevant to being disabled. It is reflected in HMRC's officer's decision that the mobility scooters were "to assist people who have difficulty walking", and were thus not for the disabled.
20

191. In our view a non marginal limitation on the ability to move around is a disability for the purposes of the heading.

192. However, it does not seem to us that the scooters have features which would assist a person with only a marginal limitation because they are more cumbersome in confined spaces than even walking slowly. We accept that they
25 might benefit the lazy on a journey to a destination on open pavements or roads (where legal to do so) but they would provide even the lazy with an advantage in confined spaces.

(11) The Committee Opinion and the 2005 CNEN.

30 *(a) The Committee Opinion.*

193. We must start by observing that the Committee Opinion and the 2005 CNEN were formulated at a time when the English version of the heading was "invalid carriages", while the French version was, in rough translation, "wheelchairs and other vehicles for invalids". The change in the English version
35 brought it closer to the French version.

194. Despite the fact that the 1997 HSEN appears, in the use of the words "invalids (sick, paralytic, disabled etc)" to regard "invalid" as a wider term than "disabled", our impression of the words "invalid carriages" - as a composite phrase - is different from that of "vehicles for disabled persons", even though

when were dissected word by word the result might be the same. "Invalid carriages" call to mind black ungainly contraptions in which those who are sick are generally wheeled around, and unattractive roadgoing vehicles with unusual controls. "Vehicles for disabled persons" calls to mind something more modern, perhaps a little more stylish, for those whose disabilities might not make them "invalids" in ordinary parlance.

195. That the Committee's deliberations took place in the shadow of the term "invalid carriage" is clear from the summary of the majority opinion. That shadow casts some doubt on the reasoning majority in relation to the new term "vehicles for the disabled".

196. Further we have also noted that majority thought that scooters were normal vehicles principally designed for the transport of persons to go shopping, fishing, and to local golf courses etc but might be adapted for use by invalids. We do not understand the significance of shopping, fishing and golf to the classification and (save perhaps in relation to the possible addition of Delta handlebars) saw no evidence that the scooters were, or needed to be, adapted for use by invalids.

197. If our understanding of the 8713 heading is correct then it seems to us that the 2005 addition to the CNEN and the Committee Opinion restrict the meaning of that heading.

(b) The CNEN

198. The 2005 addition starts by identifying four features which distinguish items of 8713 from those of 8703:

- (1) A maximum speed of 10 kph.

We do not see how such a maximum speed is a feature which helps a disabled person unless it can be shown that in every relevant State such a restriction affords some regulatory or legal relaxation on the use of the scooters. Such a feature would not on our understanding be a special feature which helped the disabled. Thus treating it as a distinguishing feature restricts the proper meaning of the heading.

We also observe that in the UK the ability of a disabled person to drive legally on pavement is contingent on the vehicle having a maximum speed of 4 mph (6.43 km/h) so that limitation to 10 km/h would provide no benefit to a disabled person; and the ability for a disabled person to drive on a road in the UK is contingent on a maximum speed 8 mph (12.87 km/h) so that a maximum speed of 10 km/h would permit driving on the road, but limit the speed to less 2.7 km/h than that allowed. That is a very odd form of benefit.

- (2) A maximum width of 80cm (32 inches).

A small width does seem to us to be a special feature: it is not normal, and it permits the use of the vehicle in confined spaces such as shops, and helps a disabled person by enabling him or her to use shops when such use would otherwise have been difficult or impossible.

5 (3) Two sets of wheels touching the ground.

This seems to us to be a feature common to most passenger cars, and not at all special or distinctive.

(4) Special features which alleviate the disability.(for example footrests for stabilising the legs).

10 On the basis that this means special features which alleviate the effects of the disability, this reflects our understanding of the decisive criterion for this heading, although the example is confusing because we do not see how footrests do much more than to provide a place to put the feet –and stop them dangling at the front of the chair – unless the user has some additional limitation which
15 would otherwise cause his or her feet to move uncontrollably. If the object is to indicate that the vehicle must provide features which alleviate an additional disability other than that of walking, it is contrary to our understanding of the heading which does not require the disability to extend beyond one which compromises the ability to move around.

20 199. After dealing with anti-tip wheels, the addition to the CNEN turns to controls. It says that vehicles of 8713 have controls which “are never in the form of a separate adjustable steering column” and then that scooters with a separate steering column are excluded from this heading.

25 200. If this exclusion is intended as a logical consequence of the fourth feature we do not understand the logic; if it is a deduction from the words of the heading, we see no basis for it. We do not understand how, on its own, possession of a central steering column prevents a vehicle from having special features for disabled persons.

30 201. If we are right that “disabled person” may include a person whose disability is a limitation on walking, then a scooter with a separate steering column on which the controls are located will, by reason of its small size, tight turning circle, electric power and non marking tyres have special features which alleviate that disability. Thus the CNEN in this respect restricts our understanding of the heading. That understanding however is subject to consideration of the
35 judgement if the CJEU in *Lecson*.

(12) Regulation 718/2009.

40 202. In *Anagram* the CJEU said that the application by analogy of a classification regulation to products similar to those covered by that regulation facilitated a coherent interpretation of the CN. It held that the classification decided by a regulation should be applied by analogy to products which were considered to have principal characteristics similar to those described in the classification regulation. However we observe, as did Collins J in *Vtech*, the Advocate

General's comment in *Hewlett-Packard* that "where reasoning by analogy is employed, great care is called for".

203. The CJEU has made clear (see e.g. [29] *Anagram*) that in the interpretation of a classification regulation account must be taken of its statement of reasons.

5 204. We accept that the scooters at issue in this appeal share the substantial majority
of the principal characteristics of those in the Regulation although there are
differences in relation to certain elements of some scooters. If the regulation
were directly relevant to the period of this appeal we would feel bound to apply
by analogy. However, before 2009 its effect can be persuasive only in so far as
10 its reasoning is relevant to the scooters in this appeal, and, on the basis of what
we have found so far (that is to say absent consideration *Lecson*), we do not
concur with the reasons given in the Regulation for excluding classification
under 8713 to the extent that "disability" is to be regarded as synonymous with
a limitation on the ability to walk, as the scooters appear to us to be specially
15 designed for a person with that limitation - having features which alleviate it.

(13) Lecson

205. So far we have set out our views on the meaning of "vehicles for disabled persons", and on the characteristics and properties of the scooters before us without considering this case.

20 206. There were a number of aspects of this judgement which gave rise to uncertainties over the proper classification of the scooters before us.

207. At paragraph [19] the court says:

25 "19. Furthermore, it is clear from the explanatory note to the CN relating to heading 8713 that the decisive criterion for classification under that heading is the special design of the vehicle to help disabled persons. Accordingly, that heading covers electrically driven vehicles similar to "electric wheelchairs" ("Elektrorollstühle"), specifically designed for the transport of disabled persons with characteristics such as, in particular, a maximum speed of 10 km/h (which may correspond to a fast walking pace), special features to alleviate the disability (for example, footrests for stabilising the legs) and steering and other controls (such as the joystick) which are easy to reach and manipulate and therefore are usually attached to one of the armrests."

35 208. In this paragraph the CJEU draws from the CNEN that "the decisive criterion for classification" under 8713 is "the special design of the vehicle to help disabled persons".

40 209. We have explained that we understand this to mean that the vehicle has special features, that is to say features which are not common to the generality of passenger vehicles and which compensate for or alleviate the effects of a particular disability.

210. Although the CJEU uses "design" it appears, for the reasons we have already described in relation to the CNEN, that it uses that word to mean "features " rather than subjective intent of the designer.

5 211. In the remainder of [19] the CJEU explains ("accordingly") the effect of the conclusion in the first sentence. In doing so it does not address the question of which disability is being alleviated - it speaks of "the disability". We have set out our understanding of that phrase above: we understand it to mean a particular disability whose effects are so alleviated. We were not clear whether the Court intends that meaning or whether it had in mind a defined disability.

10 212. Mr Beale says that this recitation of the text of the CNEN merely endorses the CNEN. However, the word "accordingly" is not in the CNEN and is in the judgement. It does more than simply endorse the CNEN: it indicates that the second sentence of [19] is the logical consequence of the first.

213. In the following paragraphs the CJEU continues:

15 20. That explanatory note states in the last paragraph that conversely, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this heading and come under 8703 of the CN.

20 We pause at that point to note is that the CJEU is here reciting the explanatory note and not expressly approving it. The Court was not asked whether the CNEN improperly limited the meaning of the heading, and it does not explain how this paragraph follows from the "decisive criterion". Continuing:

25 21. The electric mobility scooters on the classification of which the referring court must rule all have separate, adjustable steering column, to which the steering and other controls for driving and braking and, as the case may be, a metal basket is attached.

30 22 Furthermore, those electric mobility scooters are equipped with a platform on which the driver can place his feet, but this does not constitute a support to stabilise the legs. The anti-tipping system of the electric mobility scooters also contributes to user comfort, but it does not include any specific feature which is aimed at aiding disabled persons' use of the scooters.

35 23 Lastly, as the information supplied by a referring court shows, electric mobility scooters at issue in the main proceedings can reach a speed exceeding 10 km/h ,being able to go at up to 15 km/hr

24 Consequently in view of those characteristics as a whole, the electric mobility scooters at issue must be considered to be means of transport of persons falling within heading 8703 of the CN, and not vehicles for disabled persons for the purposes of heading 8713 of the CN.

40 214. We note at this point that the Court appears to have regard to a limited number of features of the scooters and to conclude from those particular features

and from the CNEN that the scooters are not for disabled persons. The Court does not include in the features it addresses that the scooters are small, electrically powered and have non marking tyres. It is not clear whether, had this collection of features been included in the Court's list whether it would, in view of the decisive criterion, have reached the same conclusion.

215. The judgment continues:

25. Finally it should be added that the mere fact that those electric mobility scooters may be used, where appropriate, by disabled persons or may even be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability but who for one reason or another prefer to travel short distances other than on foot, like, as the referring court indicates, golfers or persons going shopping."

216. In this paragraph the CJEU puts the proposition that just because the vehicles can be used by disabled persons, that does not make them vehicles for the disabled since they can be used by those who are not disabled. We do not understand this as meaning that any possibility of use by the nondisabled will take a vehicle out of 8713. That is because: (1) a powered wheelchair may be used by a non-disabled person, and the court appears to accept that it is a vehicle for the disabled, and (2) at no point in the Court's judgement does it say that vehicles for the disabled means vehicles only for the disabled.

217. The first part of this statement, the fact that scooters may be used by the disabled does not mean that they are for the disabled, appears to reflect the case law of the Court that actual use or the possibility of a particular use is not determinative. Thus the first three lines do not appear to need further explanation. But then the Court adds a different explanation "since...". We find some difficulty in reconciling this later part of this part paragraph with the 'decisive criterion' earlier accepted by the CJEU. The part of the paragraph beginning "since" suggests that suitability for use by the nondisabled may mean that something more is needed for classification under 8713 than that decisive criterion, and suggests that that something is non-suitability for the able-bodied.

218. If that is the case what is meant by "suitable" is important. The Court speaks of vehicles as "suitable" for use by nondisabled persons. It was not clear to us what criteria were relevant to determine suitability: was it the possibility of mere physical use - so that as we suggested at the hearing a catheter might be said to be suitable for use as a drinking straw? Did suitability encompass speed and flexibility of motion – the fact that in a shop is it easier to be on foot than on a scooter? And could subjective features factors be relevant such as the stigma a nondisabled person might feel using a mobility scooter?

219. We did not understand the relevance of the Court's reference to golf and going shopping. Were these examples included because such use was not regarded as being the kind of activity disabled persons were expected to be able

to do? Or were they included because they illustrated that the nondisabled could use scooters for the same activities as the disabled would use them?

220. Mr White drew from this paragraph its converse: that, just because the scooters can be used by nondisabled persons, it does not take them out of 8713. We do not think that this proposition can be deduced from the paragraph, but, subject to the concerns we have expressed in relation to the implications of that paragraph, we believe that it follows from the decisive criterion that a vehicle falls within 8713 if it has special features to help disabled: the mere fact that a fit person that can use it does not prevent it from being for the disabled.

10 **Referral to the CJEU**

221. The CJEU says at [15] that it will not necessarily have all the information necessary to effect a classification, but, in the interests of cooperation it will provide such guidance it deems necessary. In its disposition the court pursues that spirit by concluding that three or four wheeled scooters:

15 “designed for the transport of one person who is not necessarily a disabled person

powered by an electric motor

reaching a maximum speed of 6 to 15 km/h and

equipped with a separate, adjustable steering column

20 known as electric mobility scooters

must be classified under 8703."

222. In relation to the scooters in this appeal we would conclude that they were designed for the transport of one person who has limited mobility (because they had special features for the alleviation of that limitation). If that limitation were a disability the consequence would be that our finding would be that the scooters were designed for the transport of one person who was disabled. Whilst we accept that they could be used by a person who is not disabled we would not find that they were "designed" for the transport of such a person. As a result they would not fall within the first part of the disposition quoted immediately above.

223. Not being able to resolve the appeal by reference to the disposition, we would look to the remainder of the judgement to try to resolve the question. We are uncertain about the proper interpretation of the number of parts of judgement. We explain the uncertainties below. As a result, we are not able to reach a decision on this appeal without further guidance from the CJEU. We propose therefore referring to the Court questions of the following nature on the proper interpretation of 8713:

35 **1. Are we correct in construing the words "for disabled persons" as not meaning "only for" disabled persons?**

If "for" means "only for", then it is difficult to think of any vehicle which would qualify under this heading. A wheelchair is capable of being used by a person with no disability: in training for carers to experience the needs of their patients, by actors playing the disabled, and by the able bodied taking part in wheelchairs in disabled games alongside the truly disabled.

On the other hand, if the fact that a vehicle is "a suitable for being used ... by a person who does not suffer from a disability" means that it is not "for disabled persons", that suggests "for" means "only for".

2. What is the meaning of disabled person for the purposes of 8713? In particular:

(1) Is its meaning confined to a person who has a disability in addition to a limitation on his or her ability to walk or to walk easily or does it include a person whose only limitation is on his or her ability to walk or to walk easily? (2) Does "disabled" connote more than a marginal limitation on some ability? (3) Is a temporary limitation such as results from broken leg capable of being a disability?

The first particularisation in this question arises because the referring court in *Lecson* suggested that "reference has to be made to a handicap that extends beyond the problems of mobility"; and the features which the CJEU cites in paragraph [19] of its judgement are limited to those which only assist a person with a disability in addition to a mobility limitation :

(1) The Court cites a limitation on speed to 10 km/h. We are uncertain how a limitation on the speed of a vehicle by itself "helps" a disabled person unless they have additional disabilities which limit their reaction speed. Thus it appears that the Court may have in mind such additional disabilities (in this context we consider that the fact that the provisions of one particular State's road traffic laws provide advantages to disabled persons using vehicles with such limitations seems irrelevant to their classification under the CN);

(2) The Court cites footrests as features of a vehicle for disabled persons. On a vehicle without a platform footrests would be needed by *any* user if their feet were not to drag along the ground. Specially designed footrests, however, might offer alleviation of the effects of an inability to prevent uncontrolled movements of the legs: thus it seems that the court has in mind persons with such a disability in addition to a lack of mobility.

(3) The court cites steering controls which are easy to reach and manipulate and therefore are usually attached to one of the arm rests. The court clearly has in mind the joystick attached to a powered wheelchair or something similar. But such a control would not help a person whose disability was limited to, for example the loss of a leg, (and would not assist a person such a stroke patient who would benefit from the use of a tiller). That suggests that the court has in mind a person with a disability in addition to problems of mobility.

224. Set against these implications from the court's judgement however there is no express statement by the court that it agrees with the suggestion put to it by the referring court.

225. The second and third particularisations in the question arise because it seems to us that the degree to which the scooter is attractive to other persons who are not disabled affects whether its features are specially to help the disabled. If it is plain that they offer advantages to a large class of people with limitations which fall short of disability then the features may not be special.

10 **3. Does the CNEN, in excluding scooters fitted with separate steering columns alter the meaning of heading 8713?**

15 We ask this question because we have found that there were features of scooters with a separate steering columns which are not common to passenger vehicles generally, and which were features which alleviate the effects of a limitation on the ability to walk. They thus appeared to us to be special features to help disabled persons.

If the existence of such features is the decisive criterion, why is a scooter with a fixed steering column excluded?

20 **4. Does the possibility of the use of a vehicle by a person without a disability affect the tariff classification if it can be said that the vehicles have special features which alleviate the effects of a disability?**

25 We ask this question because in paragraph [25] of its judgement the Court indicates that the fact that scooters “may” be used by disabled persons does not affect their tariff classification since they are “suitable” for use by others without disabilities. The use of “may” addresses whether the scooters are capable of use by the disabled, not whether they have special features which alleviate the effects of a disability. If a vehicle has such features is the fact that it appears suitable for use by other non disabled persons relevant?

30 We considered that the Court might have use by non-disabled persons in mind when it speaks of the 10 km/h maximum speed. If such a maximum speed is a fast walking (or jogging) pace then a scooter affords no advantage to non-disabled users, and accordingly is less likely to be ‘suitable’ for them: if the court regards suitability for use by non-disabled persons as a factor which precludes, or weighs heavily against, the vehicle being for disabled persons, the existence of such a maximum speed (as is the case in the vehicles in this appeal) would indicate that 8713 was not precluded on this ground.

40 In *Lecson* the referring court appeared to indicate that some of the scooters in relation to which reference was made were "used in the sport of golf (pages 33 and 34 of the legal file)". In the case of the scooters before us, many could not be so used.

5. If suitability for use by non disabled persons is a relevant consideration, to what extent should the disadvantages of such use also be a relevant consideration in determining such suitability?

5 We have found that persons without a walking limitation would generally shy away from such use because of the stigma of decrepitude, and because such use in shops and smaller buildings would be more awkward and slower than walking on two feet. We have also found that the scooters are not suitable for use as golf carts.

10 **Further steps.**

226. We seek the parties' comments on which questions we should refer, and upon the drafting of the reference. We direct that any submission on this matter be made within 28 days after the release of this document..

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**CHARLES HELLIER
TRIBUNAL JUDGE**

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RELEASE DATE:

This decision has been amended and reissued under Rule 37 correcting accidental typographical slips

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Appendix : Authorities cited (in order of appearance)

| | | |
|----|--------------------------|---|
| | <i>Metherma</i> | Case C-403/07 Metherma GmbH & Co KG v Hauptzollant Dusseldorf |
| 30 | <i>Intermodal</i> | Intermodal Transport Case C-495/03 [2005] ECR I-8151 |
| | <i>Possehl Erzkontor</i> | Case C-445/04 [2005] ECR I-10721 |
| | <i>Unomedical</i> | Case C-152/10 Unomedical A/S v Skattministeriet |
| 35 | <i>Hewlett Packard</i> | Case C-199/99 Hewlett Packard BV v Directeur General des Douanes |
| | <i>Anagram</i> | Case C-14/5 Anagram International Ltd v Inspecteur van de Belastingdienst (Rotterdam) [2006] ECR I-6763 |

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| | <i>Lecson</i> | Case C-12/10 Lecson Elektromobile v Hauptzollamt Dortmund [2010] ECLI:EU:C:2010:823 |
| | <i>Eru Portuguese</i> | Case C-42/99 Fabrica de Querigo Eru Portuguese Ld v tribunal Tecnico Aduaneiro de Segunda Instancia |
| 5 | <i>Navas</i> | Case C-13/05 Sonia Chacon Navas v Eurest Collectividaides SA |
| | <i>Premis</i> | Case C-273/09 Premis Medical [2010] ECR I-13783 |
| | <i>VTech</i> | VTech Electronics (UK) plc v Commissioners of Customs and Excise [2003] EWHC 59 Ch D |
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| 20 | | |
| | <i>Karsten Kaltoff</i> | AG opinion in Case C-354/13: FOA (acting on behalf of Karsten Kaltoff) v Kommunernst Landforening |
| | <i>General Instrument</i> | C&E Comms v General Instrument (UK) Ltd [2000] 1 C.M.L.R. 34 Ch D |
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| | <i>Sony</i> | Case T-243/01 Sony Computer Entertainment Europe Ltd v Commission [2003] ECR II-418 |
| | <i>Ikegami</i> | Case C-467/03 [2005] ECR I-2389 |
| | <i>Kuboto</i> | EP Barrus and Kuboto Ltd v HMRC [2013] UKUT 449 (TCC) |
| 30 | | |