



HARMONIZED SYSTEM
COMMITTEE

-
32nd Session
-

NC0786E1
(+Annexes I to VI)

O. Eng.

Brussels, 20 October 2003.

DECISION THAT “PHOTOCOPYING” IS NOT LIMITED TO THE PROJECTION OF AN
IMAGE ONTO A PHOTSENSITIVE SURFACE AND PRESENT HEADING 90.09 COVERS
DIGITAL COPYING (RESERVATIONS BY THE CANADIAN, JAPANESE, MEXICAN AND
US ADMINISTRATIONS) AND CLASSIFICATION OF THE RELEVANT MACHINES
(RESERVATIONS BY THE BRAZILIAN AND US ADMINISTRATIONS (HSC/27)
AND THE EC (HSC/27))
(Item VI.4 on Agenda)

Reference documents :

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| 42.406 (RSC/18) | NC0300E1 (HSC/26) |
| 42.498 (RSC/18) | NC0335E1 (HSC/26) |
| 42.500, Annex B/19 (RSC/18 – Report) | NC0398E1 (HSC/26) |
| 42.750, Annex E (HSC/22 – Report) | NC0430E2, Annex H/4 (HSC/27 – Report) |
| NR0023E1 (RSC/19) | NC0613E1 (HSC/30) |
| NR0037E1 (RSC/19) | NC0614E1 (HSC/30) |
| NC0090E2, Annex IJ/26 (HSC/23 – Report) | NC0616E1 (HSC/30) |
| NC0160E2, Annex H/14 (HSC/24 – Report) | NC0655E2, Annex G/3 and G/4 (HSC/30 – Report) |
| NC0211E1 (HSC/25) | NC0757E1 (HSC/32) |
| NC0250E2, Annex H/13 (HSC/25 – Report) | |

I. BACKGROUND

1. At its 30th Session, the Committee examined the issues of whether “photocopying” was limited to the projection of an image onto a photosensitive surface and whether present heading 90.09 covered digital copying. When the matter was put to a vote, 22 delegates voted to reaffirm the Committee’s previous decision that “photocopying” was limited to the projection of an image onto a photosensitive surface and that present heading 90.09 did not cover digital copying, while 24 delegates voted to reverse these decisions. On the basis of this vote, the Committee decided that “photocopying” was not limited to the projection of an

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File No. 2755

image onto a photosensitive surface and that present heading 90.09 did cover digital copying.

2. At its 30th Session, the Committee instructed the Secretariat to undertake a study, for examination by the Committee at its next session, (i) to determine whether GIR (b) can be applied to multifunction machines which perform functions covered by headings in Chapter 84, 85 or 90 and (ii) to determine the consequences of the Committee's previous decision (that heading 90.09 covered digital copying) on the application of GIRs 3 (b) and 3 (c) for the classification of the multifunction machines before it. The machines which were the subject of agenda items VII.4 to VII.9 would all be included in this study (see Annex V to Doc. NC0786E1 for this Report).
3. At the Committee's 31st Session, the Director explained that the Secretariat had refrained from preparing the study, given the fact that the decision of the Committee (HSC/30) that the term "photocopying" in Chapter 90 was not limited to the projection of an image onto a photosensitive surface and that present heading 90.09 covered digital copying, had been referred to the Council under the reservation procedure. He further clarified that the Secretariat was hesitant to carry out the study in the abstract. Nonetheless, if the Secretariat received new instructions from the Committee to conduct the study at issue, the Secretariat was prepared to do so, preferably on the basis of one or more concrete products.
4. The **US** Delegate stated that it would be difficult to conduct the study at issue without actual product descriptions and, therefore, supported the Secretariat.
5. After further discussion, the Committee decided, by 25 votes to 10, to instruct the Secretariat to conduct a study to determine whether GIR 3 (b) can be applied to multifunction machines which perform functions covered by different Sections of the Nomenclature. The results of this study should be presented to the Committee at its next session (November 2003).
6. The results of the Secretariat's study are presented in Doc. NC0759E1 under Agenda Item VI.6.
7. By letter of 23 January 2003, the **United States** requested the Secretary General of the WCO to submit this HS Committee decision to the Council in accordance with Article 8.2 of the HS Convention for referral back to the Harmonized System Committee for re-examination. The Council, at its 101st and 102nd Sessions, referred the matter back to the Harmonized System Committee for re-examination at its 32nd Session.
8. Pursuant to Rule 20 of the HS Committee's Rules of Procedure, on 17 September 2003, the Secretariat received the following Note from the **US** Administration on the issues of whether "photocopying" was limited to the projection of an image onto a photosensitive surface and whether present heading 90.09 covered digital copying. Reservations were also submitted on the same issues by **Canada**, **Japan** and **Mexico**.
9. On 17 September 2003, the Secretariat received the following note from the **US** Administration

II. US NOTE ON WHETHER PHOTOCOPYING IS LIMITED TO
THE PROJECTION OF AN IMAGE ONTO A PHOTSENSITIVE SURFACE AND
WHETHER HEADING 90.09 COVERS DIGITAL COPYING

INTRODUCTION

10. "At its 32nd Session (November 2003), the Harmonized System Committee will again examine the classification of certain multifunction digital machines, all of which use a digital copying process or technology. The initial question that must be addressed as part of this examination is whether heading 90.09 covering photocopying apparatus merits consideration with respect to the classification of these machines. This question, in turn, depends on whether the term "photocopying," as used in heading 90.09, is limited to the projection of an image onto a photosensitive surface and whether heading 90.09 covers digital copying.
11. For the reasons set forth below, the **United States** strongly believes that the term "photocopying" is limited to the projection of an image onto a photosensitive surface, and therefore the legal text of existing heading 90.09 does not cover digital copying.

BACKGROUND

12. At its 27th Session, the Harmonized System Committee decided that the term "photocopying" was limited to the projection of an image onto a photosensitive surface, and therefore existing heading 90.09 does not cover digital copying. The Committee thereafter classified all the multifunction digital machines under consideration outside of heading 90.09. The Committee also decided to amend the Explanatory Notes to heading 90.09 to reflect its decisions.
13. Subsequent to the 27th Session of the Committee, reservations were entered against these decisions. At its 30th Session, the Committee re-examined these items and reversed its previous decisions by concluding that the term "photocopying" is not limited to the projection of an image onto a photosensitive surface and that existing heading 90.09 did cover digital copying.
14. The **United States** believes that these decisions taken by the Committee at its 30th session are legally incorrect. Furthermore, the **United States** believes that they are contrary to the sound administration of the Harmonized System. Therefore, the **United States** entered reservations against the decisions, as did three other administrations.
15. It should also be noted that the **United States** submitted for consideration by the Committee at its 30th Session a note expressing its view on the scope of heading 90.09 and on the classification of the multifunction digital machines currently under consideration by the Committee. That note can be found in Doc. NC0616E1. We invite other administrations to consult the note.

THE MEANING OF THE TERM PHOTOCOPYING

16. The **United States** has carefully examined the machines of heading 90.09 and has concluded that all photocopying apparatus of that heading operate by means of exposing a photosensitive material or surface with an image of the object to be copied.
17. The Explanatory Note to heading 90.09 is especially instructive as to the type of machine or apparatus that falls within the terms of that heading. The first paragraph of item (A) (page 1784) of the Explanatory Note to heading 90.09, states very clearly that photocopying apparatus incorporating an optical system project an “optical image of an original document onto a light-sensitive surface.” The Explanatory Note to heading 90.09 also provides that the other photocopying apparatus of that heading also operate by the projection of an image onto a photosensitive surface (i.e., by bringing the original into contact with the sensitive surface to be printed).
18. In light of the above, it seems very clear that that the drafters of the Harmonized System Nomenclature and Explanatory Notes intended the term “photocopying” to mean what was understood at the time those instruments were drafted and what is still applicable today: The term “photocopying,” as used in the legal text of heading 90.09, requires that an image be projected onto a photosensitive surface.
19. The above interpretation of the term “photocopying” is entirely consistent with the common and technical meaning of that term. The McGraw-Hill Dictionary of Scientific and Technical Terms (Sixth edition, 2003) on page 1583 defines “photocopying process” as “[a]ny of the means by which a copy is created on a sensitized surface (generally paper, film or metal plate) by the action of radiant energy.”

DIGITAL COPYING

20. By contrast, digital copying (the technology used in all of the machines before the Committee) uses a very different process and technology than does photocopying. Digital copying uses an optical scanner (or reader) and a printer (both machines of heading 84.71) to produce a copy of what has been scanned. Digital copying does not include or use a photocopying process.
21. An optical reader consists of a light source, mirror, lens and an electronic photoreceptor that converts points of light into electrical signals. It reproduces images by converting individual points of light, reflected from the object, into electrical signals or digital data. This data may either be stored in that form or converted into a printed image and then deleted.
22. The process used by an optical reader is fundamentally different from that of a photocopying apparatus. Specifically, there is no projection of an optical image. Instead, as indicated above, optical readers convert individual points of light, reflected from an object, into electrical signals that are stored in the form of a digital file.
23. Through the use of digital technology, optical readers can function and be coupled with output devices to print onto paper that which has been scanned or recorded, i.e., an optical reader is used within an ADP system in order to print the scanned file or “copy” it onto paper. A document produced by this process would not be a “photocopy” as that term is used to describe a document produced by the photocopying apparatus of heading 90.09.

24. Optical readers and printers are combined in composite machines known as “multifunction digital machines.” Multifunction digital machines cannot perform the function of a photocopying apparatus because they cannot produce a photocopy (1) by projecting an optical image onto a photosensitive surface or (2) by bringing the original into contact with the sensitive surface to be printed. The ability of multifunction digital machines to duplicate documents is attributable to the optical reader found in the machine working in conjunction with the printer. This is not a function of a machine of heading 90.09 or one that uses a photocopying process.

CONCLUSION

25. In light of the above, the **United States** concludes and urges other delegations to conclude (1) that the term “photocopying” is limited to the projection of an image onto a photosensitive surface and (2) that the legal text of existing heading 90.09 does not cover digital copying.
26. The Committee should reconfirm the decisions taken at its 27th Session that the term “photocopying” is limited to the projection of an image onto a photosensitive surface, and therefore the legal text of existing heading 90.09 does not cover digital copying.”
27. For the convenience of the delegates, the Secretariat has reproduced the previous Committee Reports on this issue, which can be found in Annexes I to VI to this document.

III. CONCLUSION

28. The Committee is invited to take account of the Note from the **US** Administration when it examines this agenda item.

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Excerpt from Doc. NC0160E2 - Annex H/14
(HSC/24/Oct. 99)

| 1 | 2 |
|----------------------|--|
| NC0059E1 (HSC/23) | Classification of multifunctional digital copiers. |

DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE (O. Eng.)

1. The Delegate of **Brazil** informed the Committee that this question first arose in the context of a proposal by the **Brazilian** Administration to change the Nomenclature because of current problems in the classification of these products. He stated that the demonstrations on 12 October 1999 provided delegates with the opportunity to see a number of different machines and that each of these machines should be examined individually.
2. He informed the Committee that the **Xerox Document Centre 230 DC**, which it had referenced in its proposal to amend the Nomenclature, performed the functions of printing, faxing, photocopying and scanning. It was not possible to classify the individual elements separately and, as a result, GIR 3 (b) had to be applied. It was his Administration's view that this machine was a reproducing or copying machine. Consequently, the two functions most appropriate to the classification of this machine were the scanning and copying functions. His rationale was that these were typical functions used in reproducing (copying) a document that already existed.
3. Between the scanning and photocopying functions, the **Brazilian** Administration felt that the photocopying function represented the essential character of the unit since the reproduction process in this apparatus was optical and electrostatic, similar to that of the photocopying process. Therefore classification in heading 90.09 by application of GIR 3 (b) would be appropriate. If the Committee did not consider it possible to determine essential character, then classification in heading 90.09 would still be appropriate by application of GIR 3 (c).
4. Other delegates indicated that it was premature for the Committee to take a decision, as there was no document before the Committee containing the necessary technical information.
5. The Director suggested that the Secretariat study the classification of multifunctional digital copiers on the basis of a number of machines that could be selected from those that were demonstrated to delegates last week. Several delegates agreed that this would be an appropriate course of action. The **US** Delegate indicated that perhaps the Secretariat could choose the models in consultation with the industry, thereby ensuring that the basic types of machines (e.g., a desk top model which incorporates a fixed scanning device over which an image is passed, a flatbed scanning device connected to a printer unit and a network connectable machine) would be represented in the study.
6. The **EC** Delegate informed the Committee that the **EC** had classified a multifunctional machine performing the functions of printing, faxing, photocopying and scanning in heading 90.09 by application of GIR 3 (c). The Chairman asked the **EC** Delegate to submit the appropriate technical literature to the Secretariat.

DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE (contd.)

7. The **US** Delegate also expressed the view that, as stated earlier in this Committee, terms used in the industry to describe products may not be sufficient for classification. For example, a photocopier of heading 90.09 takes an image and either puts it directly on a paper or puts the image directly on a drum. There is no conversion to a data file, as is the case with these multifunctional units. It was his view that one of the functional components of these devices (i.e., the scanner) was an optical reading device of heading 84.71. Consequently, he suggested that a device which operates on the principle of an optical reader would not, perhaps, be classifiable as a photocopier which traditionally is designed and operates on a different principle.
8. The Committee decided that the Secretariat in consultation with the industry and Contracting Parties would choose a representative samples of machines for study by the Committee. Technical information with regard to these machines would then be made available to administrations as quickly as possible, in order for administrations to study the matter and to submit their comments to the Secretariat. The Secretariat, for its part, would also prepare its comments to be included in a document for the Committee's next session.
9. In response to the **EC** Delegate's comments concerning the possibility of also studying the amendment of the legal texts, the Chairman indicated that once these machines had been classified, the Committee could then look into the advisability of amending the legal texts.

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Excerpt from Doc. NO0250E1 - Annex H/13
(HSC/25/March 2000)

| 1 | 2 |
|----------------------|--|
| NC0211E1 NC0243E1 | Classification of multifunctional digital copiers. |

DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE (O. Eng.)

1. The Director referred to Annex I to Doc. NC0211E1 and informed the Committee that the **HP 320 Mopier** did not have a fax capability. All the other machines in Annex I had fax capability. He further explained that the **Brother MFC 1970 MC** was a thermal machine and not an ink jet machine.
2. The Delegate of **Brazil** began the discussion with a history of this item dating back to 1998 when the **Brazilian** Administration requested the RSC to look into amending the structured Nomenclature for 2002 to encompass multifunctional machines in heading 90.09. The RSC left it to the HSC to take a decision on the present-day classification and opted not to amend the nomenclature for multifunctional machines for 2002. While recognizing that this was a preliminary discussion, the Delegate of **Brazil** reiterated his contention that the machine presented by the **Brazilian** Administration by way of example, i.e., the **Xerox Document Centre 230 DC**, was classified in heading 90.09 by application of GIR 3 (b). Furthermore, he reminded the Committee that the machine in question contained a laser and a set of lenses which were used to create an image on the photoreceptor in order to produce a new image which would be revealed after being placed in contact with a chemical toner. In the view of the Delegate of **Brazil**, this was, in fact, an optical-electrostatic process of the type described in the Explanatory Notes to heading 90.09.
3. The Delegate of **Brazil** expressed his disappointment that Doc. NC0211E1 did not mention other classification possibilities (85.17 or 90.09), noting that, in his opinion, the Secretariat's document implied classification in heading 84.71 for these multifunctional units and **Brazil** disagreed with that classification. Referring to paragraphs 7, 8 and 9, he noted several problems. He was unsure as to the meaning of "output technologies" and, specifically, whether this was a reference to printing or photocopying. In any case, he pointed out that these "output technologies" could have an important role in the classification of these machines. That is why he disagreed with the Secretariat's remarks in paragraph 7 (third sentence).
4. Drawing the Committee's attention to the information found in Annex III to Doc. NC0211E1, the Delegate of **Brazil** informed the Committee that this information was supplied by the manufacturers of these products. While not opposed to the Secretariat receiving such information, he reminded delegates that the HSC classified products according to the rules of the HSC and not according to manufacturers' interests. Finally, in response to the Secretariat's three questions, he informed the Committee that his administration wanted to replace the **Xerox 230ST** by the **Xerox Document Centre 230DC**, while maintaining the **Xerox Document Centre 340ST** on the list of products to be examined.

DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE (contd.)

He requested further technical information specific to each product and, finally, did not consider it necessary to receive further product demonstrations but would not be opposed to such demonstrations should other administrations consider them necessary.

5. Another delegate indicated that his administration considered that naming these units "multifunctional digital copiers" was a misnomer. Specifically, the HP Office Jet 1175 and the Brother MFC 1970 MC were not digital copiers and referring to them as such could unduly influence their classification. In his view, the remaining five machines would represent an appropriate cross-section of products for the Committee to consider. A further product demonstration was not strictly necessary.
6. Yet another delegate agreed with the Brazilian requests for further information, as well as for the change in Xerox model numbers. He asked if it was known or could be determined whether the machines listed in paragraph 6 of Doc. NC0211E1 could work on their own, without being connected to an automatic data processing (ADP) machine. He felt it important to include in the study not only machines that could work on their own (standalone), even though they could be connected to an ADP machine but also multifunctional machines that could work only when connected to an ADP machine.
7. The Director confirmed a statement made by one delegate that the "output technologies" referred to by the Secretariat in paragraph 7 were in reference to the marking technology, i.e., thermal, ink jet or laser, and not to printing or photocopying.
8. A fourth delegate felt that it was important to consider classification of these machines in the context of the heading texts. For example, heading 90.09 covered photocopying devices incorporating an optical system. The scanning device incorporated in these systems, if imported separately, would be classified as an optical reader of heading 84.71. Consequently, in examining the classification of these machines, he believed it important to determine the scope of the phrase "incorporating an optical system" in order to determine whether these machines were, in fact, photocopying machines of heading 90.09.
9. It was finally agreed that the machines identified by the Secretariat in the working document were appropriate candidates for the study (subject to the substitution of the Xerox Document Centre 230 DC) and that the Secretariat's next document would include all classification possibilities, including headings 84.71, 84.72, 85.17, 90.09 and printing machines. The Committee left open the possibility for Contracting Parties to submit other products for the study should they deem it necessary. Finally, the Committee determined that further demonstrations of these machines at the 26th Session were not necessary. Contracting Parties were invited to submit written comments to the Secretariat on the classification of these machines.

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Excerpt from Doc. NC0430E2 - Annex H/4
(HSC/27/May 2001)

| 1 | 2 |
|----------------------------------|--|
| NC0300E1 (HSC/26) NC0398E1 | Classification of multifunctional digital copiers. |

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1. The Chairman began the discussion of this agenda item by suggesting that the Committee have a general discussion on the classification of the multifunctional digital copiers at issue and then move on to discuss each machine individually. He provided a brief synopsis of Doc. NC0300E1 and then asked the Delegates of **Japan** and the **United States** to summarize their submissions. Afterwards, he opened the floor for discussion.
2. The Delegate of **Brazil** drew the Committee's attention to paragraph 9 of Doc. NC0211E1, wherein the common features of all multifunctional digital machines were described, and page 1592 of the Explanatory Notes. He pointed out that the descriptions in both were similar. Each description referred to an optical system which projected the optical image of an original document onto a light-sensitive surface, and components for the developing and printing of the image. In his administration's view, the marking of paper by a laser was, in fact, an operation carried out by an optical system. This view was supported by dictionary definitions of the term. As a consequence, in his administration's view, heading 90.09 provided for these multifunctional digital copiers. He felt that the Secretariat and certain Contracting Parties, in ruling out this conclusion, were invoking an interpretation of the Explanatory Note to heading 90.09 that was too restrictive.
3. The Delegate of **Brazil** also cited the first sentence of Part B of the Explanatory Note to heading 90.09 which gave an indication of the difference between photocopiers incorporating an optical system and contact type photocopiers, noting that the latter had no optical system and only made copies of the actual size of the documents to be reproduced. In his opinion, this Note indicated that, in general, any machine incorporating an optical system that enabled it to produce copies of variable dimensions to suit the needs of the users could, in principle, fall in heading 90.09.
4. The **EC** Delegate supported the possibility of classifying these multifunctional digital copiers in heading 90.09. In his view, an analysis of the text to that heading supplied the appropriate legal basis for that position. He noted that the Secretariat had used the fact that the Explanatory Notes did not mention digital types of photocopiers to exclude classification in heading 90.09. When those Notes were drafted, these types of apparatus did not exist, but it went without saying that the Explanatory Notes could not expand or restrict the legal scope of a heading. There was no legal basis for excluding the digital photocopying function from heading 90.09. This view appeared to be confirmed by decisions of the **European Court of Justice** which had found that the present heading 90.09 included, in addition to optical and direct-reproduction photocopiers, those that used an intermediate for indirect reproduction.

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The indirect reproduction process could take the form of the conversion of images into digital data.

5. Furthermore, the machines at issue were composite machines. Consequently, it was necessary to determine their principal function. These machines could scan, copy, fax and print. They could be used in conjunction with an automatic data processing (ADP) machine but also in a stand alone mode. It would be difficult to determine the main function at time of importation. One should not confuse the main function with principal use. The use was determined in accordance with the needs of the user and these were not known at the time of clearance. In addition, at time of importation, they were not presented with an ADP machine. Given these facts, he wondered how the machines in question could satisfy the terms of Note 5 (B) to Chapter 84, as being of a kind solely or principally used in an ADP system, as their principal use could only be determined after importation. If it was not possible to determine the principal function, then classification according to Note 3 to Section XVI was ruled out and one must turn to GIRs 3 (b) or 3 (c). In addition, the possible application of Note 5 (E) to Chapter 84 should also be considered.
6. The **EC** Delegate saw a general trend in the Committee to classify any product connectable to an ADP machine in heading 84.71, as an output unit of an ADP machine. However, he questioned this practice. All products which could fulfil the conditions of Note 5 (B) to Chapter 84 did not necessarily have to be classified in heading 84.71. Just because a machine was connectable to an ADP machine did not automatically mean that it was an output unit of an ADP machine. In this regard, he referred to the recent classification of an ink-jet printing machine in heading 84.43, even though it was connectable to an ADP machine and could only function when connected to an ADP machine (see Classification Opinion 8443.51/1).
7. Several other delegations expressed their support for the conclusions reached by the **EC** Delegate. Comments were expressed that it would be difficult to classify these machines as output units of ADP machines when they could operate autonomously and were not presented with an ADP machine. Furthermore, the Explanatory Note to heading 90.09 referred only to the technology available at the time of its drafting. Technology evolved and, in the view of certain delegates, the copying of a document by whatever means was still a process covered by the scope of heading 90.09.
8. The **US** Delegate stated that for purposes of classification in heading 90.09, the phrase "digital photocopiers" was a contradiction in terms. In his view, "photocopying" was limited to the projection of an optical image directly onto a photosensitive surface. He expressed support for the Secretariat's position in Doc. NC0300E1 that "photocopying" did not include the conversion of an image into digital data by a scanner and the printing of that data by the printer as was done by the machines under consideration. There was substantial support from other delegates for this point of view.
9. At the conclusion of its general discussion, the Committee, by a vote of 22 to 14, decided that "photocopying" was limited to the projection of an image onto a photosensitive surface and that, therefore, present heading 90.09 did not cover digital copying. The Committee then looked at the classification of each individual machine.

10. The Committee first looked at the "HP Mopier 320". The Chairman drew the Committee's attention to the fact that this was a composite machine encompassing a printer and scanner. As a result of the Committee's decision, classification in heading 90.09 was ruled out and, as a consequence, Note 3 to Section XVI could apply. He pointed out that if it was not possible to determine the principal function, then GIR 3 (c) would come into play.
11. Taking into account the issues raised during the general discussion, the Committee further discussed the classification of the "HP Mopier 320". The following additional points were raised. One delegate pointed out that the printing output of 32 pages per minute had to be taken into account, as it related to the essential character of the machine. Another delegate viewed the principal function of this machine as being provided by the printing function. In his view, at the time of importation, Note 5 (B) to Chapter 84 applied, given that the text of the Note stated that it was "of a kind solely or principally used in an ADP system". This was the case with this machine, as it was connectable to an ADP machine at time of importation. What the user did after importation was not relevant to the classification of this product. Other delegates pointed out that this was a machine that could operate either independently or in conjunction with a computer. They considered that the Committee's principle had always been to classify machines that could function independently outside heading 84.71 and, moreover, it had already been noted that the Committee had recently classified a printer designed to operate exclusively with an ADP machine in heading 84.43.
12. Before the Committee voted on the classification of the machine, the Committee first voted on whether it was the printing or copying function which provided the principal function. By a vote of 22 to 10, the Committee decided that it was the printing function which was the principal function.
13. The Committee then voted on the classification of the machine. By a vote of 21 to 8, the Committee voted in favour of the view that the conditions of Note 5 (B) to Chapter 84 were fulfilled and, as a consequence, the product was classifiable in subheading 8471.60 as a printer, by application of GIR 1 (Note 3 to Section XVI and Note 5 (B) to Chapter 84). The Committee then instructed the Secretariat to prepare a draft amendment to the Compendium of Classification Opinions for review by the next pre-session Working Party, reflecting the decision to classify the "HP Mopier 320" in subheading 8471.60.
14. The EC Delegate was of the view that based on the earlier discussions in the Committee, 14 delegations would classify this machine in heading 90.09 by application of GIR 3 (c). The Chairman agreed with this assessment.
15. After some discussion, the Committee decided to postpone the classification of the "Océ 3133" to its next session, on the basis of a new document to be presented by the Secretariat that would provide additional information on the nature of the machine, i.e., the precise nature of the options included with the machine.
16. Taking into account the issues raised during the general discussion, the Committee then took up classification of the "Xerox Document Centre 340 ST" without fax function. After further discussion, the EC Delegate requested a roll call vote. Twenty-two delegates opted for classification in subheading 8471.60, 12 opted for classification other than in heading 84.71 and there was one abstention. The Committee then instructed the Secretariat to prepare a draft amendment to the Compendium of Classification Opinions for review by the next pre-session Working Party, reflecting the decision to classify the "Xerox Document Centre 340 ST" without fax function in subheading 8471.60, by application of Note 3 to

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Section XVI and Note 5 (B) to Chapter 84. The **EC** Delegate requested that the Report note that the **EC** was of the view that the machine should be classified in heading 90.09.

17. Taking into account the issues raised during the general discussion, the Committee next examined the "Xerox Document Centre 340 ST" with fax function. The **EC** Delegate pointed out that a similar machine had been the subject of a recent decision by the **European Court of Justice** which had decided to classify the machine in heading 90.09. He reiterated the arguments that the machine could operate autonomously. Furthermore, given the faxing speed and quality, it was not possible to state that the fax component was only an accessory function subordinate to the printing function. In his view, the faxing and digital copying functions were more important than the printing function, or at least as important. Given this, headings 85.17, 84.72 or 90.09 should be considered for classification and GIR 3 should be used.
18. The **US** Delegate stressed to the Committee that it must be consistent in its decisions. The Committee had already decided that heading 90.09 did not cover digital copying. Furthermore, it had decided that the "HP Mopier 320" was classified in subheading 8471.60. The only difference between this machine and the previous machine was the addition of the faxing function. In his view, looking at the technical characteristics, this machine was not purchased as a fax machine. It was the printing function which was the principal function. As there was no factual basis upon which to make a different decision, he concluded that the conclusion was the same, i.e., classification in subheading 8471.60 by application of Note 3 to Section XVI and Note 5 (B) to Chapter 84.
19. By a vote of 20 to 13, the delegates gave the Chairman an indication that they viewed the printing function as the function which represented this machine's principal function. Before the Chairman called for a vote, the **EC** Delegate requested that the Report indicate that all of the machines that were being classified could work on a stand alone basis or in conjunction with an ADP machine. The Chairman confirmed that all of the machines being considered could work either on a stand alone basis or in conjunction with an ADP machine.
20. The Chairman then called for a vote. By a vote of 20 to 14, the Committee classified the "Xerox Document Centre 340 ST" with a fax function in subheading 8471.60 by application of Note 3 to Section XVI and Note 5 (B) to Chapter 84. To reflect this decision, the Committee instructed the Secretariat to prepare a draft amendment to the Compendium of Classification Opinions for review by the next preessional Working Party.
21. Taking into account the issues raised during the general discussion, the Committee next examined the "Xerox Document Centre 230 DC". The Delegate of **Brazil** called the Committee's attention to the fact that this machine, as presented, was not connectable to an ADP machine and that when adapted to be connectable to an ADP machine it became a different machine, the "Xerox 230 ST". After some discussion, the Committee decided to postpone the classification of this machine to its next session, on the basis of a new document to be presented by the Secretariat that would provide additional information on the nature of the machine, i.e., whether it was connectable to an ADP machine as imported and the difference between the **DC** and **ST** models. Administrations were also invited to provide any additional information.

22. Based on the Committee's previous decision not to classify a machine that was no longer being manufactured, the Chairman suggested, and the Committee agreed, that the classification of the "HP OfficeJet Pro 1175C" be dropped from the Agenda.
23. The Committee then examined the classification of the "Brother MFC-8600" and the "Brother 1970mc". Several delegates felt that there were differences between these two machines and those previously classified by the Committee during the present session. This was particularly evident with regard to the print output speeds of 12 and 2 pages per minute (ppm), respectively. This compared to the 30+ ppm of previous machines. As a consequence, these delegates viewed the faxing function as representing the principal function.
24. The US Delegate stated that the situation was indistinguishable from the analysis applied to the previous machines classified by the Committee. In his view, a decision on the importance of the print function could not be made solely on the output speed of the printer. Printers of heading 84.71 existed wherein the typical output speed was less than 12 ppm. He noted that the function of the printer components in these composite machines, when assessed with respect to the fax or scanner components, provided the principal function, i.e., by providing direct output from an ADP machine, as well as by providing the output for the scanner or fax components. Consequently, classification in heading 84.71 by application of Note 3 to Section XVI and Note 5 (B) to Chapter 84 was warranted. Other delegates agreed.
25. The EC Delegate referred to the technical information contained in Annexes VII and VIII to Doc. NC0300E1, which clearly showed the importance of the fax function when compared to the other functions. In this context, these machines should be classified in heading 85.17 by application of GIR 1, Note 3 to Section XVI and Note 5 (E) to Chapter 84.
26. When asked by the Chairman, a majority of the delegates indicated that they were in a position to decide on the principal function of the two Brother machines. The Chairman then called for a separate vote on each machine.
27. By a vote of 17 to 12, the Committee classified the "Brother MFC-8600" in heading 85.17 (subheading 8517.21), as a fax machine rather than a print device of heading 84.71, by application of Note 3 to Section XVI. The Committee then voted on the classification of the "Brother 1970mc". By a vote of 19 to 12, the Committee classified the "Brother 1970mc" in heading 85.17 (subheading 8517.21), as a fax machine rather than a print device of heading 84.71, by application of Note 3 to Section XVI. To reflect these decisions, the Committee instructed the Secretariat to prepare draft amendments to the Compendium of Classification Opinions for review by the next presessional Working Party.
28. The US Delegate requested that the Committee look at amending the Explanatory Note to heading 90.09 to reflect the Committee's decision that heading 90.09 did not cover "digital copying". This request was not supported by the EC Delegate.
29. As there were differing viewpoints within the Committee, the Chairman put the matter to a vote. By a vote of 15 to 7, the Committee decided to amend the Explanatory Notes to reflect its decision that heading 90.09 did not cover "digital copying". The question was to be submitted to the Committee for consideration at its next session. The EC Delegate drew the Committee's attention to the fact that, in his view, this amendment would be contrary to the legal text of heading 90.09.

DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE (contd.)

30. Following this, a discussion ensued as to whether the Nomenclature should be amended for the year 2007, with regard to the classification of multifunction digital copiers. A proposal was made that the Secretariat undertake a study with a view to amending the legal text. The Director indicated his willingness to look into the matter.
31. The Committee concluded the discussion by instructing the Secretariat to undertake a study with a view to determining whether an amendment could be made to the legal text and administrations were invited to send in submissions.
32. During the course of the Committee's deliberations, the Chairman asked the Committee to take Note of the fact that Annex X to Doc. NC0300E1 had been submitted by the Norwegian Administration and not by the Danish Administration as indicated in the document.
33. Finally, during the course of the discussion on this item, a number of statements were made regarding the impact of the Committee's decisions on the ITA agreement. In response, the Chairman re-affirmed the basic tenet that this Committee was responsible for the classification of products according to the rules of the Harmonized System. The effect of such decisions on other international agreements was not, therefore, a concern of this Committee.

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Excerpt from Doc. NC0655E2 - Annex G/3
(HSC/30/Nov. 2002)

| 1 | 2 |
|----------------------|---|
| NC0613E1 NC0616E1 | Decision that "photocopying" is limited to the projection of an image onto a photosensitive surface and that present heading 90.09 does not cover digital copying, and the decision to amend the Explanatory Notes accordingly (Reservations by the EC and the Brazilian Administration). |

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1. The EC Delegate began the discussion of this agenda item by explaining the EC's reservation. He pointed out that the Committee's decision at its 27th Session had been based on Note 3 to Section XVI, i.e., the principal function characterising (as a whole) a machine designed to perform several different functions, provided for under different headings of Section XVI. Moreover, the Committee had decided that the machines were not photocopiers of heading 90.09 after having decided that this heading did not cover digital copying but was restricted to copying by projecting an image onto a photosensitive surface.
2. He reiterated that the EC could not find a legal basis in the Committee's decision that would permit such a restrictive interpretation of the legal text of heading 90.09, so as to exclude digital technology from the scope of that heading. He asked the Committee to confine itself to analysing the legal texts of the HS Nomenclature on this point, in order to determine whether those texts allowed such a restriction. The fact that the (non-binding) Explanatory Notes did not refer to digital technology did not mean that it was excluded from heading 90.09, but merely that the Explanatory Notes were drafted at a time when the technology did not yet exist. In any event, these devices were also designed to make copies as an essential, not a subsidiary, function. This photocopying function was distinct from the printing function which these machines also possessed.
3. The EC Delegate admitted that the Explanatory Notes were a useful tool for interpreting the legal texts but were not determinative for classification purposes. As had been mentioned before in the Committee, the Explanatory Notes could not broaden or restrict the scope of a heading. He agreed with several delegates who mentioned that the Explanatory Notes, the way that goods were bought and sold, as well as technical literature, should be consulted and considered. However, in arriving at a decision, he believed that it was the legal text, on the one hand, and the case law on the other, which was determinative for classification.
4. He informed the Committee that the EC had conducted a detailed study of the current scope of heading 90.09. This study went as far as the European Court of Justice, which had declared that, in addition to photocopiers incorporating an optical system and of the direct reproduction type, heading 90.09 included those which incorporated an intermediate for

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reproduction by the indirect process. The indirect reproduction process consisted of converting the image into digital data. It went without saying that this judgement was binding on the EC and its Member States.

5. The EC Delegate believed that the restrictive interpretation of the text of heading 90.09 adopted by the Committee at its 27th Session, prevented this heading from being considered from the outset, and therefore strongly influenced the classification adopted. The EC was convinced that one of the functions of these machines, their photocopying function, fell within heading 90.09 and, consequently, since these were multifunction machines which must be classified according their principal function, heading 90.09 must also be considered alongside the other functions of these machines. This meant that Note 3 to Section XVI could not be the legal basis for classifying these machines, given that it only applied to articles of Chapters 84 and 85. Classification should therefore be based on General Interpretative Rule 3. He noted that in practice, these machines were sold, traded and called photocopying machines.
6. In this connection, if the Committee could agree on the principal function of the machines, that would determine their classification (under General Rule 3 (b)). However, if the Committee could not determine their principal function, the machines should be classified on the basis of General Rule 3 (c), in which case they would fall in heading 90.09, this being the last possible heading in numerical order.
7. The EC Delegate concluded by emphasising that there was already a specific heading for copying apparatus in heading 90.09. There was no legal reason for excluding digital copying apparatus from heading 90.09 and, consequently, the Committee should not do so. He, therefore, urged the Committee to reverse its previous decision so as to allow heading 90.09 to cover digital copying and to not limit "photocopying" to the projection of an image onto a photosensitive surface.
8. The Delegate of Brazil then explained his administration's reservation. He drew the attention of the Committee to the fact that, as several delegates had pointed out, the Explanatory Note to heading 90.09, written many years ago, could not describe products which incorporated modern technologies. The Explanatory Notes were very important as a guide for classification, but only the legal texts could limit the scope of HS headings. Nobody denied that the machines in question could perform several functions, including copying. And, more importantly, the copying function of all these machines could work independently of an automatic data processing machine. Therefore, in order to classify these products, he believed that the Committee must decide which heading in the Harmonized System covered the digital copying function.
9. He believed that the Committee, at its 27th Session, had only decided that heading 90.09 did not cover digital copying but it had not decided which heading covered the digital copying function. Simply stated, having disregarded heading 90.09 for classification, the Committee had considered heading 84.71 and heading 85.17. Following that, some machines had been classified in heading 84.71 and others in heading 85.17.

10. In the **Brazilian** Administration's view, heading 90.09 or even heading 84.72 could cover the digital copying function of these machines. The text of heading 90.09 read "Photocopying apparatus incorporating an optical system or of the contact type and thermocopying apparatus". The question was the scope of the term "optical system" in this context. If the Committee has a new product in front of it, then it cannot limit the meaning of the heading text by the strict terms of the Explanatory Notes, which only describe products existing at the time they were written. In this connection, the **Brazilian** Administration believed the Committee's decisions taken at its 27th Session used the Explanatory Notes to restrict the scope of the heading. He referred the Committee to paragraph 36 of Doc. NC0613E1, wherein the **Brazilian** Administration had explained its reasons for supporting the possibility of classifying these machines in heading 90.09 as follows :
- (1) The laser is, in fact, an optical phenomenon (it is a narrow beam of concentrated light, according the dictionaries);
 - (2) In these machines, there is an optical system which projects, by means of a laser, the optical image of an original document onto a light-sensitive surface for the developing and printing of an image;
 - (3) Therefore, the legal text of heading 90.09 does not exclude the laser printing system, and only the legal texts, not the Explanatory Notes, can limit the scope of a heading;
 - (4) The first sentence of Part B of the Explanatory Note to heading 90.09 gives an indication of the basic difference between photocopiers incorporating an optical system and contact type photocopiers, which do not have an optical system and only make copies of the actual size of the documents to be reproduced;
 - (5) In multifunctional copiers, the optical system (lenses, etc.) enables them to produce copies of variable dimensions; therefore, in this sense, even the Explanatory Notes do not exclude these machines from classification in heading 90.09.
11. The **Brazilian** Delegate reiterated that the Explanatory Notes could not be used to expand or, as in this case, restrict the scope of a heading. Heading 90.09 was not limited to analogue systems. The Explanatory Notes reflected the state-of-the-art at the time they were drafted. The Committee must use legal reasons to support an exclusion from heading 90.09. In the future, if the Committee decided to change the legal text, the Committee could then revise the Explanatory Notes as part of its normal work. He urged the Committee, therefore, to base its decisions strictly on the legal text. On this basis, the Committee should decide that heading 90.09 covered digital copying and that "photocopying" was not limited to the projection of an image onto a photosensitive surface.
12. The **US** Delegate began the explanation of his administration's position by agreeing that the question of the scope of heading 90.09 was one of interpreting the legal text. Clearly the question before the Committee was to determine the scope of the term "photocopying" within the meaning of the heading text. In order to do that, one should look not only at the Explanatory Notes, but also at the meaning of the term "photocopying" based on technical literature and commercial usage.

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13. The **US** Delegate stated that while not determinative, the Explanatory Notes were a useful indication of the meaning of the term. The Explanatory Notes provided that the heading covered machines that projected an image onto a photosensitive surface. The digital machines before the Committee did not fit this description. Instead, they operated in a completely different fashion. The document was optically scanned and the image was converted into digital electrical impulses which were then printed. These were scanning and printing functions of heading 84.71.
14. He observed that this process was fundamentally different from that which occurred in photocopiers. Heading 90.09 was a heading that was based on the process or technology of photocopying. It was clear that digital copying was not embraced within that term.
15. The **US** Delegate further noted that in addition to the Explanatory Notes description of the goods of heading 90.09, there were other sources that should be taken into consideration. He pointed to the McGraw-Hill Dictionary of Science and Technology which defined the photocopying process as : “any of the means by which a copy is created on a sensitized surface (generally paper, film, or metal) by the action of radiant energy.”
16. This substantiated the view of the **United States** that based on technical literature, the term “photocopying” was limited to the process described in the Explanatory Note to heading 90.09; namely the use of an optical system to transfer an image to a photosensitive surface.
17. In addition, the **US** Delegate observed that the machines at issue were not known as photocopiers in the trade. Commercially, a clear distinction was made between analogue or traditional copiers of the light lens type and digital copiers. This commercial usage was further evidence that digital copying was not photocopying of heading 90.09.
18. He also drew the Committee’s attention to the fact that there was a precedent in the Harmonized System for drawing a distinction between goods which used digital technology and those that used analogue technology. That precedent (by analogy) was with regard to cameras. Photographic cameras were classifiable in heading 90.06, while digital cameras were classifiable in heading 85.25. In his view the analogy was quite apt : in cameras as in copiers the use of digital technology did not satisfy the requirement that a photographic process be used.
19. Summing up, the **US** Delegate concluded that based on the Explanatory Notes, technical literature and commercial usage, the legal text to heading 90.09 could not be said to cover digital copiers. He urged that the Committee’s previous decision to this effect be affirmed.
20. Several delegates agreed with this position, giving the following reasons :
 - Digital copiers were not photocopiers, according to dictionary definitions;

- The industry did not refer to digital copiers as photocopiers and, in fact, distinguished between the two processes;
- There was nothing in the heading text to suggest that digital copiers were photocopiers;
- Digital copiers functioned by scanning and then printing. The data was stored and could be manipulated and/or printed later. Photocopiers, on the other hand made an image of the document for each copy;
- In photocopying, the original image was projected onto a light-sensitive surface. In digital copying, the original image was scanned, converted to a series of "1s" and "0s" and then either put on paper or stored. The original document was not projected onto a light-sensitive surface;
- In classification, it was common practice to interpret words using the common meaning of the terms. To not do so would mean that anything could be classified in heading 90.09. There had been no external evidence provided to support the argument that photocopying in heading 90.09 could cover digital copying.

21. When the matter was put to a vote, 22 delegates voted to reaffirm the Committee's previous decision that "photocopying" was limited to the projection of an image onto a photosensitive surface and that present heading 90.09 did not cover digital copying, while 24 delegates voted to reverse these decisions. On the basis of this vote, the Committee decided that "photocopying" was not limited to the projection of an image onto a photosensitive surface and that present heading 90.09 did cover digital copying.

22. In order to reflect this decision, the Secretariat was instructed to prepare draft amendments to the Explanatory Notes for examination by the Committee at its next session.

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Excerpt from Doc. NC0655E2 - Annex G/4
(HSC/30/Nov. 2002)

| 1 | 2 |
|----------|---|
| NC0613E1 | Classification of the "HP Mopier 320" digital copier (Reservations by the EC and the Brazilian Administration). |

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1. The Chairperson opened the discussion on this issue by indicating that the Committee should begin by deciding whether it was necessary to determine the principal function of the product within the meaning of GIR 3 (b). If not, its classification should be dealt with by application of GIR 3 (c) because, following the Committee's previous decision regarding the scope of heading 90.09, Note 3 to Section XVI could not be invoked, as this note only applied to goods of Section XVI and did not apply to goods of Chapter 90.
2. However, the Delegate of Brazil stated that in his administration's view, there was a fundamental question which the Committee had never studied, and which should be examined first. Citing paragraphs 39 and 40 of Doc. NC0613E1, which were part of the Note submitted by his administration, he argued that the first step should be to determine whether a machine which performed different functions could be classified by application of GIR 3 (b), given that this Rule referred to composite goods consisting of different materials or made up of different components. Thus, given the significance of this question in terms of the classification of other multifunction machines, his administration would suggest that the Committee study it in more detail before taking a final decision. He added that the fundamental question of whether or not GIR 3 (b) was applicable to the classification of multifunction machines had been included on the agenda for Brazil's First Goods Classification Forum, to be held in December 2002. If appropriate, his administration would be prepared to send the Secretariat the relevant extract from the Forum Report in order to facilitate the examination of this question.
3. The Committee agreed that understanding this threshold question was extremely important in resolving the classification of the multifunction machines before it. In particular it was crucial to determine whether GIR 3 (b) could be applied in these cases and whether the determination of essential character would be based on the determination of principal function.
4. The Committee therefore agreed to instruct the Secretariat to undertake a study, for examination by the Committee at its next session, (i) to determine whether GIR (b) can be applied to multifunction machines which perform functions covered by headings in Chapter 84, 85 or 90 and (ii) to determine the consequences of the Committee's previous decision (that heading 90.09 covered digital copying) on the application of GIRs 3 (b) and

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3 (c) for the classification of the multifunction machines before it. The machines which were the subject of agenda items VII.4 to VII.9 would all be included in this study.

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Excerpt from Doc. NC0655E2 - Annexes G/5 - G/9
(HSC/30/Nov. 2002)

| 1 | 2 |
|----------------------|---|
| NC0613E1 | Classification of the "Xerox Document Centre 340 ST" digital copier with fax function (Reservations by the EC and the Brazilian Administration). |
| NC0613E1 | Classification of the "Xerox Document Centre 340 ST" digital copier without fax function (Reservations by the EC and the Brazilian Administration). |
| NC0614E1 | Classification of the "Brother MFC-8600" digital copier (Reservation by the US Administration). |
| NC0614E1 | Classification of the "Brother 1970mc" digital copier (Reservation by the US Administration). |
| NC0615E1 NC0649E1 | Classification of the "Xerox Document Centre 230 DC" digital copier. |

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For discussions related to these annexes, refer to Annex G/4 to this Report.
