



166TACD2022

Between

████████████████████

Appellant

and

The Revenue Commissioners

Respondent

Determination

Contents

Contents.....	2
I. Introduction	3
II. Urinary Incontinence	4
III. Background	9
IV. Legislation and Guidelines	13
A. The EU Regulations	13
B. General Rules and the Harmonised System	14
C. The Nomenclature	16
D. The Harmonised System Explanatory Notes (HSEs).....	17
E. BTIs and the Customs Code.....	19
V. Evidence Provided by the Parties and Legal Submissions	19
Appellant.....	19
Respondent.....	24
VI. Material Facts	27
VII. The Preliminary Ruling Mechanism	29
VIII. Analysis	33
Definitions.....	34
Heading 6108 of the CN.....	34
The Test for Classification in the CN	36
Objective Characteristics of the product	36
The Intended Use of the product.....	38
Heading 9619 of the CN.....	48
GIR 1 & 2(a) & 6	49
Requirement for products to be presented together at point of import	51
GIR 1 & 6	57
BTIs and Cross Rulings.....	62
IX. Determination.....	68
X. Appendices.....	69
Appendix 1 Appellant’s Legal Submissions	69
Appendix 2 Respondent’s Legal Submissions	70
Appendix 3 [Draft] Statement of Agreed Facts.....	71

I. Introduction

1. This is an appeal to the Tax Appeals Commission (“the Commission”) pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 (“the TCA 1997”). The appeal is brought on behalf of [REDACTED] (“the Appellant”) against a Binding Tariff Classification (BTI) issued by the Revenue Commissioners (“the Respondent”) in relation to “*Reusable Incontinence Fixation Pants*” (“the product”).
2. Tariff classification decisions are in the form of a BTI issued by the Respondent. A BTI is a document which provides a written account of the holder of the classification decision, the tariff code applicable to the product, a detailed description of the product and the legal justification for the decision to classify the product in the particular code.
3. This appeal concerns the interpretation of **Heading 9619** and **Heading 6108** of the Combined Nomenclature (“CN”) set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ([1987] OJ L 256/1) (“the 1987 Regulation”) and Commission Implementing Regulation (EU 2018/ 1602 of 31 October 2018 amending Annex I to Council Regulation (EEC) No 2568/87 ([2018] OJ L 273/1) (“the 2018 Regulation”) which represent European Union (“EU”) legislation. Article 288 of the Treaty on the Functioning of the European Union (“TFEU”) states that EU Regulations are directly applicable in all Member States. This means that they are legally binding on Member States, without any action on the part of the Member States. Article 288 of the TFEU states that with respect to a Regulation, it “*shall be binding in its entirety and directly applicable in all Member States*”. Hence, the 1987 Regulation and the 2018 Regulation are directly applicable to Ireland as a Member State in their entirety. There is no dispute between the parties about the status of these EU Regulations and their direct applicability.
4. By way of an application dated 8 October 2018, the Appellant requested classification for the product under subheading 9619 00 89 of the CN. On 18 February 2019, the Respondent issued BTI 18NT-14-7127 to the Appellant under subheading **6108 22 00** of the CN, on the basis that the product was classified according to its constituent material, as an **article of apparel, briefs, panties**. The classification issued carries a customs duty of 12%, as opposed to the classification sought by the Appellant, which carries a customs duty of 0%. The Respondent had 180 days to make a decision in respect of an application for a BTI.

5. On 1 March 2019, the Appellant issued a first stage formal appeal to the Customs Appeal Unit of the Respondent. On 3 April 2019, the Respondent's Designated Appeals Officer issued a determination upholding the BTI classification under subheading **6108 22 00** of the CN. On 2 May 2019, the Appellant duly appealed to the Commission. The hearing took place over two days, 6 and 7 July 2022. The Commissioner notes the extensive work undertaken by both parties in presenting the appeal and the most useful witness evidence provided by both parties. The issue at stake is the classification of the product. In order to understand the product (and hence classification), the Commissioner considers that she must both understand the product but also the debilitating condition of incontinence. Hence, the Commissioner summarises in the first instance the condition of incontinence.

II. Urinary Incontinence

6. This appeal relates to the product used in the treatment of incontinence. The Commissioner had access to the product in its physical manifestation and form, both at the hearing and afterwards. The Commissioner took away the product and the packaging for consideration after the hearing. In addition, the Commission was provided with sample pads which work with the product. The Commissioner was also provided during witness evidence with a fixation pant from 1990, which was a very much "cruder" version and had a wider mesh material. On sight and examination, it was evident it did not have the same ability to fixate an incontinence pad as the product. The Commissioner noted at the hearing that the 1990 version had the appearance of more like a knitted dishcloth but had also two separate entry points, like an extremely "crude" pair of pants, for the legs to be placed. It was evident that through extensive research, innovation, and technical advancement, there was little resemblance between the subject of this appeal, namely the product, and the version from 1990, other than they resembled in the loosest sense a pair of rudimentary shorts or pants. Both the 1990 version and the product had a seam stretching across the crotch area and down the "legs" of the pant, such that any reasonable person would have concern about chafing to the skin, if worn on its own (without the pad). It does not need a technical expert to know that chafing is a distinct possibility if the product is worn on its own due to the pronounced seam at the crotch area (which would be covered by the pad if worn for its intended use).
7. The Commissioner has also familiarised herself with the technical specification of the product. The Commissioner considers it appropriate in order to provide the most accurate determination that she has read widely about the product and other incontinence products on the market. In determining this appeal, it is also important for the Commissioner to have an understanding of the medical condition of incontinence. The understanding of the

medical condition and its treatment has been acquired by the Commissioner in extensive research from open source material and the relaying of expert evidence provided by the Appellant's witness at the hearing. It is a complex matter, with different types and different levels of incontinence. The BTIs and the Cross Rulings set out in this determination can be sourced from open material on the internet and are shared to assist traders. The Commissioner notes that in the decisions of the Court of Justice of the European Union ("CJEU"), the Court goes to extraordinary lengths to understand the technical products that are subject to preliminary references. Hence, the Commissioner determines that it is consistent with the CJEU's rulings to ensure that extensive research is undertaken to understand the technical specifications and use of the product and other products brought to market and subject to other classification decisions.

8. Incontinence may be classified as a disability in accordance with the Disability Act 2005. Disability is defined in section 2 of the Disability Act 2005 as follows:-

"in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment."

A person suffering from incontinence may be eligible to receive incontinence products from the Health Service Executive ("HSE")¹.

9. Urinary incontinence, also known as involuntary urination, is any uncontrolled leakage of urine. It is a common and distressing problem that affects millions of people worldwide, and can have a large impact on an individual's quality of life. Urinary incontinence is an example of a stigmatised medical condition, which can create barriers to successful management and make the problem worse. It has been identified as an important issue in geriatric health care.² The World Health Organization has identified urinary incontinence as a health priority.
10. People suffering from incontinence are users of incontinence products and many of those users are extremely vulnerable. Several chronic conditions and environmental factors increase the risk of urinary incontinence in older people. Chronic diseases that are associated with urinary incontinence include diabetes mellitus, Parkinson's disease, dementia, stroke, prostatic cancer, chronic obstructive pulmonary disease (COPD) and

¹ <https://www2.hse.ie/conditions/urinary-incontinence/incontinence-products/>

² <https://aboutincontinence.org/treatment/barriers-on-diagnosis-and-treatment/>.

arthritis. Environmental factors such as inaccessible or unsafe toilet facilities, and the absence of caregivers for toileting assistance are also associated with urinary incontinence. Non pharmacological interventions are mostly preferred and remain the mainstay of urinary incontinence management for patients with mild urinary incontinence.³

11. Many factors can go wrong with the complex system that allows individuals of all ages to control urination. Incontinence is categorised by the medical profession as follows:

Stress incontinence. Urine leaks when you exert pressure on your bladder by coughing, sneezing, laughing, exercising or lifting something heavy.

Overactive Bladder (Urge) incontinence. You feel a strong urge to urinate even when your bladder isn't full, your incontinence might be related to overactive bladder, sometimes called urge incontinence. This condition occurs in both men and women and involves an overwhelming urge to urinate immediately, frequently followed by loss of urine before you can reach a bathroom. Urgency is caused when the bladder muscle, the detrusor, begins to contract and signals a need to urinate, even when the bladder is not full.

Mixed incontinence. If you have symptoms of both overactive bladder and stress incontinence, you likely have mixed incontinence, a combination of both types. Most women with incontinence have both stress and urge symptoms — a challenging situation. Mixed incontinence also occurs in men who have had prostate removal or surgery for an enlarged prostate, and in frail older people of either gender.

Overflow incontinence. If your bladder never completely empties, you might experience urine leakage, with or without feeling a need to go. Overflow incontinence occurs when something blocks urine from flowing normally out of the bladder, as in the case of prostate enlargement that partially closes off the urethra.

Functional incontinence. If your urinary tract is functioning properly but other illnesses or disabilities are preventing you from staying dry, you might have what is known as functional incontinence. For example, if an illness rendered you unaware or unconcerned about the need to find a toilet, you would become incontinent. Medications, dementia, or mental illness can decrease awareness of the need to find a toilet.

Reflex Incontinence. Reflex incontinence occurs when the bladder muscle contracts and urine leaks (often in large amounts) without any warning or urge. This can happen as a result of damage to the nerves that normally warn the brain that the bladder is

³ <https://www.who.int/publications/i/item/WHO-MCA-17.06.08>

filling. Reflex incontinence usually appears in people with serious neurological impairment from multiple sclerosis, spinal cord injury, other injuries, or damage from surgery or radiation treatment.⁴

12. The principal aim of the product at issue in this appeal is to maintain, and where applicable improve, the quality of care to patients and individuals suffering incontinence problems. It is devised for those suffering from the most severe types and levels of incontinence. As stated above, the Commissioner has researched incontinence and its associated products from open source material and a synopsis of that research is set out in the paragraph below together with the applicable reference materials. The Commissioner has taken considerable care in acquiring the requisite knowledge about this condition to assist in the understanding for this appeal.
13. Twenty years ago, the availability of discrete and efficient pants/pads was limited. Increased awareness regarding incontinence care products is successfully breaking the social stigma. With the rise in awareness, there is an increasing demand for products that build individual confidence, provide comfort, are more discreet, and help normalise an individual's lifestyle. As noted by health professionals, this has, in turn, encouraged incontinence device market manufacturers to invest in research and development in projects with excellent fluid management⁵. Innovation and investment by the market has transformed the products available to people who have difficulties with incontinence. As such, individuals are becoming more open about their requirements on discretion, aesthetics and comfort, triggering manufacturers to launch new products suitable for various consumers⁶.
14. The Commissioner notes that many agree that it is important that innovation and the development of products is not stifled. The Commissioner agrees with commentators that ensuring the advancement and availability of dynamic incontinence care products makes sound economic as well as moral sense⁷. Research in this area and newer technologies have made major advances in patient safety and quality of life. The Commissioner further notes that in addition with the environmental movement, sanitary products of all varieties, especially those produced in relation to menstruation, have changed dramatically in the

⁴ <https://www.health.harvard.edu/bladder-and-bowel/types-of-urinary-incontinence>

⁵ <https://www.fortunebusinessinsights.com/industry-reports/incontinence-care-products-market-101178>

⁶ <https://www.fortunebusinessinsights.com/industry-reports/incontinence-care-products-market-101178>

⁷ [Health: Drug Tariff Part IX - Hansard - UK Parliament](#)

last few years. There has been increased emphasis on the sustainability and reusability of such products.

15. The Appellant's witness, who has spent his career advancing technology surrounding incontinence products, gave evidence that in the Western world, Europe and the United States (USA), there is a rise in incontinence and that has been the case for a number of years. He conveyed to the Commissioner that incontinence is also becoming more prevalent in the younger generation. He said that when he commenced his career, incontinence in women after childbirth was uncommon. However, now it is a big focus area and he said that a study from the Maastricht University in Holland and from a University in Canada, shows that in Europe, 30% of women, 12 months after childbirth, are still incontinent. The witness stated that that if you are over 65, you have about a 40% chance of being incontinent and if you are a resident in a care home in either Ireland, Europe or the US, your chances of having incontinence rise to about 80% - 85%. In addition, the rise in obesity is also exacerbating an increase in incontinence.
16. He mentioned that the current duty is 12.2% and the European market for fixation pants is worth many millions of euro. He said that the vast majority of these products are paid for by healthcare authorities. The Commissioner is satisfied through extensive reading and careful consideration of the witness evidence, that the Commissioner has acquired an in-depth understanding of the medical condition of incontinence and the associated incontinence products to assist and alleviate the effects of this condition. The Respondent did not challenge the Appellant's expertise or evidence in relation to incontinence and the associated products.
17. The Commissioner sets out the background below of the application for the BTI to the Respondent and hence the description of the product. As stated above, the Commissioner was provided with samples of the product and the accompanying pads and they featured consistently throughout the questioning during the hearing.
18. There are references throughout the determination to the words "*pant*" and "*pants*" but this is drafted with the generic meaning of various products that take the appearance of the human form going through the legs and covering the torso, hence form a "pant". It is not an indication that they are an item of apparel (i.e. clothing) as classified under various customs legislative provisions.

III. Background

19. On 8 October 2018, the Appellant, through its Agent, [REDACTED], applied to the Respondent for a BTI for the product. On 11 October 2018, the Application was received by the Respondent. The Appellant engaged the services of [REDACTED], a Company specialising in Customs and Trade Compliance. In addition to the form, the application to the Respondent for BTI contained an explanatory attachment providing clarification and documentation for the envisaged classification. The explanatory attachment detailed matters such as the product description, functionalities, the applicable legislation, classification, system configuration and instructions for use. The Commissioner has spent a considerable time studying the materials provided by the Appellant.
20. In its application, the Appellant requested a classification for the product under subheading **9619 00 89 of the CN**, as *“the product is solely used for managing serious chronic incontinence problems”*. The product was described as follows:

“reusable incontinence fixation pants - the article is designed as part of the two-piece incontinence management system to effectively manage serious chronic incontinence problems and therefore specifically designed to benefit health care institutions and the chronically incontinent patients they serve. The incontinence pants are sold in two parts, the pants and the pad, and both are delivered and sold separately. However, both are needed to be an effective product. This classification is for one part of the system the reusable incontinence fixation pants”.
21. Heading 9619 of the CN relates to “Sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles, of any material:”
22. Subheading 9619 00 89 of the CN relates to “Other (for example, incontinence care articles)”.
23. The Appellant, in support of its application referenced BTI SK1439406/15/308, stating that this SK BTI is for a similar article with the exception that, in this case, it is a two piece system where the absorption pad can be disposed of after every use while the support part of the incontinence fixation pants can be used multiple times before disposal. The Appellant stated that the incontinence pants are not packaged with the pads, due to the available variety of the pads according to their level of absorbency.
24. On 10 December 2018, the Respondent wrote to the Appellant’s representative stating that there are a number of precedents that classify similar articles according to their

constituent material. The Respondent referenced a German BTI, namely BTI DE 12084/18-1 which refers to a product called **NOBAPANTS** and the Respondent states they “*are described as fixation pants designed for use with fixation absorbent pads*” capable of classification in subheading 6210 10 98 of the CN. The Respondent’s email also states that the “*HSEN text of heading 9619 states “this heading does not cover...or other non-absorbent articles (in general, classified according to their constituent material)”*”. It is also stated that “*in general, articles of this heading are disposable*”. In addition, the Respondent states “*regarding invoking GIR 2(a) as grounds for classification under heading 9619, the fixation pants on their own, as presented, would not have the essential character of the complete item as they do not contain absorbent material, and they are reusable..... it is also possible, however unlikely, it may be, that the fixation pants could be worn without the pads and therefore considered as an article of apparel.*”

25. The Commissioner notes that the Respondent used the IT package “Google translation” to translate the German BTI relating to NOBAPANTS, from German to English. This was confirmed at the appeal hearing. However, Counsel for the Respondent did not have an English version of the BTI nor was it provided to the Appellant’s representative who also used Google translate. The Appellant was able to provide the Google translation to the Commissioner. The photograph of the NOBAPANTS provided by the Respondent consisted of a product which was translucent in nature and went on the body, like a pair of pants.
26. It was established in evidence that significant reliance was placed on the photograph of the NOBAPANTS attached to the BTI by the Respondent and that despite the BTI being relied on by the Respondent as a comparator, the Respondent was not aware in evidence of the product’s purpose. The classification of NOBAPANTS was for a single use gown of the kind used by patients or surgeons during surgical procedures and it was **not classified in Heading 6108 as an article of apparel namely *briefs, panties***. Hence, despite the Respondent’s reliance on the NOBAPANTS in their letter dated 10 December 2018 referencing the NOBAPANTS and their evidence at the hearing that they looked like a pair of underwear pants, (and indeed had “pants” in that product’s name), they were not classified as apparel (namely underwear – briefs/panties) in the CN but as garments, namely single use gowns of a kind used by patients during surgery. The classification was 6210 10 98 (garments made up of fabrics 5602 or 5603 and single use gowns of a kind used by patients during surgical procedures.) The intended use of NOBAPANTS was related to patients undergoing surgery. Hence, the constituent material and the intended

use of the NOBAPANTS determined the classification, rather than the appearance and name.

27. The Commissioner has undertaken an independent translation of the NOBAPANTS and the classification and description are confirmed as “fixation pants... made of single-coloured nonwovens of heading 5603... serves to fix absorbent pads – is not included in the range of goods as panties covered by 6210 10 92”. The Commissioner has checked the technical information provided by the makers of NOBAPANTS and it is evident from the technical information at www.nobamed.com, information sheet in English, 311011gb that the NOBAPANTS are described by the makers as a “*white fixation panty, reinforced at the crotch. NOBAPANTS is used to secure absorbent pads and underpads. It is also used frequently during medical examinations and treatments to reduce the feeling of shame*”. It is evident that the NOBAPANTS have multiple purposes including the fixation of all sorts of absorbent pads. They are also used without pads during medical treatment. In addition, it is evident from the technical information on the above website that there are no seams at the crotch but it is reinforced (namely a gusset). The Commissioner discusses the NOBAPANTS further in relation to the witness evidence provided and the analysis.
28. By letter dated 18 February 2019, the Respondent issued BTI 18NT 14 7127 to the Appellant via its Customs Agent, [REDACTED] confirming that the product was classified according to its constituent material, at subheading **6108 22 00** of the CN. The Respondent’s letter does **not** state that the Appellant has a right to a first stage appeal in relation to the decision of the Respondent in respect of the BTI issued. The Commissioner notes that it is important for the Respondent to set out clearly any taxpayer’s right of appeal.
29. Heading 6108 of the CN relates to “Women’s or girl’s slips, petticoats, briefs, panties, nightdresses, pyjamas, negligées, bathrobes, dressing gowns and similar articles, knitted or crocheted”.
30. Subheading 6108 22 00 of the CN relates to “**women’s or girls slips, petticoats, briefs, panties.... of man-made fibres**”. Hence, the Respondent had classified the product as women’s briefs/panties of man-made fibres.
31. Hence, the Respondent classified the product as women’s briefs/panties made of man-made fibres.

32. The Respondent had 180 days to make a decision in respect of the Appellant's application for BTI. The Respondent's letter dated 10 December 2018, appears to communicate the views of the Respondent as to its decision relating to classification. The formal decision issued on 18 February 2019. The Commissioner notes that the formal decision letter dated 18 February 2019, is brief in terms of the reasons for its decision as to classification, particularly when contrasted with the detailed BTI application of the Appellant. The reasons for the decision were brief and were contained in paragraph 9 of said BTI.
33. By letter dated the 1 March 2019, the Appellant lodged a first stage appeal. On 3 April 2019, the Designated Appeals Officer, issued a determination to the Appellant informing it that based on the examination of all the facts of the case, **subheading 6108 22 00 of the CN as quoted on BTI 18NT-14-7127, as issued to the Appellant, was correct and that the Appellant's appeal was, therefore, not being upheld.** As stated above, on 2 May 2019, the Appellant duly appealed to the Commission and the Appellant's grounds of appeal are set out below.
34. The Appellant appeals on the basis of its view that classification subheading 9619 00 89 of the CN, as an **incontinence care article**, should apply. The Appellant maintains that the product is **designed as part of the two piece incontinence management system**, to effectively manage serious chronic incontinence problems and therefore, specifically designed to benefit health care institutions and the chronically incontinent patients they serve. The incontinence pants are sold in two parts, the pants and the pad, and both are delivered and sold separately. They are sold separately due to the different sizes of the product and the accompanying different sizes of the pad, which depends on the type and level of incontinence. However, both are needed to be an effective product for the management of incontinence.
35. The Appellant argues that the product **cannot** be characterised as merely *briefs, panties* as mentioned in Chapter 61 of the CN "*Articles of apparel and clothing accessories, knitted or crocheted*", as the wording of the headings and the subheadings does not fully or accurately describe the product. They are not designed to be worn as a garment, they are almost transparent when stretched on and are not as durable, with no strengthened seams or double stitching as would be needed in underwear or similar garments. The buyers and users of the product specifically acquire them for the sole purpose that they are designed for, namely, as part of the two piece incontinence management system to effectively manage serious, chronic incontinence problems. The Appellant states that "*When classifying this product, one must take into consideration the following factors: the actual*

design, built in pad supports, the rigid testing criteria, product expiry dating, the Class I Medical Device listing, the public procurement process, the CPV code listing, the EU purchasing tenders, the actual sales and distribution channels, the actual proven use in care homes and residential facilities”.

36. The BTI issued with subheading 6108 22 00 of the CN as an article of apparel, namely *women’s or girls...briefs, panties*. The Respondent in considering its decision, determined that this product does not have the features which would distinguish it significantly from the products of **Heading 6108 of the CN** and that as the product does not have absorbent material, it does not comply with the Harmonised System Explanatory Notes to Heading 9619. The Respondent maintains that the product, as presented, does not have the essential characteristics of incontinence wear. The Respondent maintains that it placed significant reliance on the wording of the Harmonised System Explanatory Notes (“HSEN”) and other BTIs and Cross Rulings.
37. In determining this appeal, the Commissioner has taken the approach of considering the legislation and guidelines, the General Rules and the Harmonised System, and the application of the evidence and submissions of the parties to those various rules. The Commissioner appreciates that there is some repetition in this determination but that arises due to the hierarchical nature of the various rules.

IV. Legislation and Guidelines

38. The relevant legislation is set out in the below and includes the following:- EU Regulations, the General Rules and the Harmonised System, the Nomenclature, the HSEN, Binding Tariff Information (BTI) and the Customs Code.

A. The EU Regulations

39. The Customs Cooperation Council, now the World Customs Organisation (“WCO”), was established by the convention creating that Council, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System (“the HS”) was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System (“the HS Convention”) concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987.

40. Under Article 3(1) of the HS Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures are in conformity with the HS, to use all of the headings and subheadings of the HS without addition or modification, together with their related numerical codes, and to follow the numerical sequence of that system. Each Contracting Party also undertakes to apply the General Rules for the interpretation of the HS and all the section, chapter and subheading notes of the HS, and not to modify their scope.
41. Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ([1987] OJ L 256/1) (“the 1987 Regulation”) and Commission Implementing Regulation (EU 2018/ 1602 of 31 October 2018 amending Annex I to Council Regulation (EEC) No 2568/87 ([2018] OJ L 273/1) (“the 2018 Regulation”) represent EU legislation which is directly applicable in all Member States (together, “the Regulations”).
42. The purpose of those Regulations is to facilitate international trade by the establishment, *inter alia*, of tariff and statistical nomenclatures in conformity with an international harmonised system and is designed to show the various rules applying to specific products when imported into the EU. In this connection, the Combined Nomenclature of the Common Customs Tariff (“CN”) is set out and established in Annex I to the 1987 Regulation as amended.

B. General Rules and the Harmonised System

43. The General Rules for Interpretation of the CN are extracted from the *International Convention on the Harmonised Commodity Description and Coding System* (also known as the “Harmonised System” or “HS”). The objective of the HS is to facilitate international trade by the establishment, *inter alia*, of tariff and statistical nomenclatures in conformity with an international harmonised system.
44. The General Rules for the interpretation of the CN (General Interpretive Rules (“GIR”)), which are set out in Part One, Section 1, of the CN, state that Classification of Goods in the Combined Nomenclature shall be governed by six principles.
45. The six principles are set below and provide:-
 1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined

according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

(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 order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rule shall be classified under the heading appropriate to the goods to which they are most akin.
5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:
 - (a) camera cases, musical instrument cases, gun cases, drawing-instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;
 - (b) subject to the provisions of rule 5(a), packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.
6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise.

C. The Nomenclature

46. The Nomenclature is governed by the HS Convention, which was elaborated under the auspices of the World Customs Organisation ('WCO'). In the EU, the HS Nomenclature was given the force of law in the 1987 Regulation.
47. The HS Nomenclature comprises about 5,000 commodity groups, which are identified by a six-digit code and arranged according to a legal and logical structure based on fixed

rules. EU Member States are contracting parties to the aforementioned Convention. Ireland became a contracting party to the HS on 22 December 1987 and the Convention entered into force, in respect of Ireland, on 1 January 1988.

48. In the EU, the HS Nomenclature was given the force of law in the 1987 Regulation. In particular, the 1987 Regulation integrated the HS Nomenclature and comprised additional eight-digit subdivisions and legal notes specifically created to address the need of the Community which is the CN. Thus, the CN is based on the HS Nomenclature drawn up by WCO.

D. The Harmonised System Explanatory Notes (HSENs)

49. Under Article 3(1) of the HS Convention, each contracting party undertakes to ensure that its customs tariff and statistical nomenclatures will be in conformity with the HS. As an aid to the correct classification of goods, the WCO has produced explanatory notes ('HSENs').

50. The HSENs and CNs under consideration in this appeal are as follows:

51. The General HSEN to Chapter 61 provides:-

"... Garments which cannot be identified as either men's or boys' garments or women's or girls' garments are to be classified in the headings covering women's or girls' garments".

52. The HSEN relating to CN 6108 provides:

"This heading covers two separate categories of knitted or crocheted clothing for women or girls, namely slips, petticoats, briefs, panties and similar articles (underclothing) and nightdresses, pyjamas, negligées, bathrobes (including beachrobes), dressing gowns and similar articles".

53. Heading 6108 of the CN relates to "Women's or girl's slips, petticoats, briefs, panties, nightdresses, pyjamas, negligées, bathrobes, dressing gowns and similar articles, knitted or crocheted".

54. Subheading 6108 22 00 of the CN relates to "women's or girls slips, petticoats, briefs, panties.... of man-made fibres".

55. The HSEN to Chapter 90 General Part I “*General Content and Arrangement of the Chapter*” provides:

“This Chapter covers a wide variety of instruments and apparatus which are, as a rule, characterised by their high finish and high precision. Most of them are used mainly for scientific purposes (laboratory research work, analysis, astronomy, etc.), for specialised technical or industrial purposes (measuring or checking, observation, etc.) or for medical purposes”.

56. The HSEN to Chapter 90 General Part II ‘*Incomplete or unfinished machines, apparatus, etc*’ states:

“Provided they have the essential character of the complete or finished article, incomplete or unfinished machines, appliances, instruments or apparatus are classified with the corresponding complete or finished articles (for example, a photographic camera or a microscope presented without its optical elements or an electricity supply meter without its totalling device)”.

57. The General HSEN to Chapter 96 states:

“this Chapter covers....., certain sanitary absorbent products (sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles of any material) and various other articles not more specifically covered by other headings in the Nomenclature”.

58. Heading 9619 of the CN states

“This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners for babies and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.

In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer’s skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the

human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.

*This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material)".*

59. Subheading 9619 00 89 of the CN relates to "Other (for example, incontinence care articles)".
60. As a Contracting Party to the HS Convention, Ireland and the EU are obliged, under Article 3, paragraph 1(a)(II): "*not to modify the scope of the Sections, chapters, headings or subheadings of the Harmonised System*". This means that classification decisions cannot be taken which involve the expansion of a heading or code beyond that provided. The Explanatory Notes are an important aid to interpretation, but do not have legally binding force.

E. BTIs and the Customs Code

61. Tariff classification decisions are in the form of BTI. A BTI is a document which provides a written account of the holder of the classification decision, the tariff code applicable to the product, a detailed description of the product and the legal justification for the decision to classify the product in the particular code.
62. The case law, BTIs and Cross Rulings referred to by the parties and considered by the Commissioner are set out in this determination.

V. Evidence Provided by the Parties and Legal Submissions

Appellant

63. The Commissioner heard evidence from [REDACTED]. The following oral evidence was given by [REDACTED], Director of the Appellant:-
 - (i) He trained as an Engineer in [REDACTED] and for many years, he worked for an Engineering Company in [REDACTED], as a mechanical engineer. He mentioned that he returned to Ireland to set up a company in [REDACTED] making incontinence products and spent 20 years working with the Company, eventually being appointed the

Chief Executive Officer. He was responsible for running factories in [REDACTED], [REDACTED], [REDACTED], [REDACTED] and the [REDACTED] and the production of goods was outsourced to [REDACTED] and [REDACTED]. He stated that in 2005, he left that Company to set up his own company.

- (ii) In 2008, the Appellant's company was taken over by a venture capital company. In 2009, he said he travelled to [REDACTED] to set up a business making incontinence products. Since then, the business has grown primarily in the United States. However, in 2018, he set up a business in Ireland with a view to breaking into the European market, which is very attractive to the Appellant's business. He stated that one of the issues with trading in the European market, is that there is duty on the product, whereas in the United States these products are generally classified as disabled products and no duty attaches to them. He believes that it should be the same in Europe.
- (iii) Primarily the business is medical textile manufacturing which sells many products which are produced in China and sold across Europe. The product at issue is an incontinence fixation pant and is a major product for the business, with sales out of the [REDACTED] company being in the region of 16 million for incontinence care products, primarily to the United States and some to Europe. He stated that other products that the Appellant makes are elder care products and that all of the products produced are medical products, required to go through a certification process.
- (iv) He mentioned that at present, there are two main products in the incontinence market. One is a type of pull-up pant which has approximately 50% of the market share and the other 50% is what is called a two-piece system, with a "pant" and a separate pad. The two-piece system is gaining traction in the USA and the European market, as it is the most cost-effective way of managing incontinence in care homes, as the pant is reusable, the pad is smaller and there is 40% less waste, so it addresses environmental concerns. He said that there is growing awareness as to the treatment of incontinence and elderly people do not feel comfortable wearing a pull-up pant.
- (v) He mentioned that he has worked with the market leader in incontinence products, who has 40% of the European incontinence market and 25% of the global market and their research indicates that the most important thing for users

of incontinence pants is fixation. If you do not have a pad that fixates the pants then leakage occurs.

- (vi) A sample was provided and he demonstrated how the pant arrives as a pack of 25, sizes range from small to 6 extra-large (“XL”) with a label area on the pant to add a name. He said that while the pants appear very small in size despite the sample being XL, this is due to the fixation element of the product and this is where engineering expertise is relevant. He said that “recovery” on a garment is where fixation occurs and that anyone can make a pair of stretchy pants but these pants are not the same as that. These are not items that you can purchase in any store, for example the size 6 XL is 2 m wide when stretched and is one of the largest pants available on the market. He said that 90% of these products are sold in Europe on national health contracts and the largest consumer of these products in Ireland is the HSE. He explained that the HSE has a new contract coming out for the supply of fixation pants for the next four years and they are seeking a 25 piece pack and a five piece pack.
- (vii) He mentioned that the reason they might look for a five piece pack is that if you are an elderly person living at home in Ireland you might have a community nurse visit and if you suffer from incontinence, they might prescribe to the HSE what products you will get. The five piece pack can be delivered in a brown box to your door discreetly. He said that institutional care is always 25 piece packs. When questioned about availability otherwise, he stated that on the Internet you could find a five piece pack because of resellers but they are not pants in the normal sense that you would buy in a retail store. He said that the reason the pant is sold on its own is that it gives freedom of choice to the user as to the level of absorbency of pads to be used with the pant but the pant is useless without the pad.
- (viii) He said that the product is made of polyester and spandex for elasticity and the waistband is ribbed to prevent slippage down the body, which is not found on normal retail underwear. The pants are knitted in a certain way so that the tension is always equal and the bands exert pressure on the outside of the pad and keep it tight against the body. He mentioned that computerised machines are used to ensure the tension control. He said that the sizing of the product is determined through colour coding and that this is normal in a healthcare environment.

- (ix) The leg of the product carries down a bit longer so as to prevent slippage of the pad and through clinical trials, the company knows that if there is a shorter leg slippage can occur. The product is specifically seamless so as not irritate the skin on patients who are in bed for long periods of time. He said that the only seam is in the crotch of the product, as it had to close somewhere. He stated this is very different to normal underwear, which have a cotton or material inlay (commonly known as a gusset) and seams, typically on both sides. However, there is no need for a gusset as this the pad is designed to be placed in that area. He said if you wore the pant without the pad, it would be extremely uncomfortable in that area.
- (x) He reiterated that when the pant is stretched over the body, it is entirely transparent providing no coverage or dignity, unlike normal underwear. He mentioned that the pants have an expiry date, which is clearly marked on the packaging, as all medical devices are required by European law, to have an expiry date. The pants have no back or front, for ease of care givers and should be disposed of after 50 washes, but are generally disposed of before time. In terms of the packaging, he stated that it was presented at the point of customs in the same packaging as is presented at the hearing. He mentioned that the packaging clearly states that this is to be used with a [REDACTED] incontinence pad.
- (xi) Reference was made to the various documentation submitted in relation to [REDACTED] products, including information in respect of pull ups which are a complete product, and once used, they are disposed. The witness went through the details of the workings of the two-piece system. He mentioned the importance of fixation, for example, when a pad is full, which is about 800 millilitres of liquid, there are chemicals within the pad called super absorbents, which will absorb all the liquid and put it into a gel. He stated that they have to test what is called the breaking strength or the burst strength of the product. Normal retail pants do not go through such tests.
- (xii) In order to produce this product and export it to the USA, you must be Federal Drug Administration (“FDA”) registered. In Europe, this product has to comply with the Medical Device Regulations. The products have to be tested for what is called bioburden which is skin sensitisation, skin irritation and cytotoxicity testing. It is an ISO standard for testing medical products and it is a requirement for incontinence products. It is done by an independent external testing facility such

as a laboratory like Eurofins. He mentioned Medical Device Directive 2017 and said that all medical device products are now required to have a Unique Device Identifier (“UDI”). An application is made to a European body called EUDAMED, and providing you have fulfilled the criteria in EUDAMED's view, they will then issue you with a UDI.

- (xiii) Under cross examination, he denied that the product was made to look like pants. He pointed out that they took the human form and hence resembled underwear pants due to that portion of the human body that they manufactured for. It was put to him that normal pants would never be worn over these pants. However, he stated that in fact he was aware that those who wear the two piece incontinence system, wear their own pants over the pant and pad. He accepted that it was possible to buy a smaller pack of five online, and when asked whether these were used in hospital for post-partum care after a woman has had a baby via caesarean section to secure post-partum pads, he denied that they would be used for anything other than incontinence. He pointed out that they took the human form and hence resembled underwear pants due to the position on the body.
- (xiv) He referred to email of 10 December 2018, from [REDACTED] of the Respondent which states “It is also possible, however unlikely it may be, that the fixation pants could be worn without the pads and therefore considered as an article of apparel.” He said that these are fixation pants and people who wear them are suffering from incontinence. He informed the Commissioner that he finds it offensive to say that ordinary people walk around with incontinence fixation pants as underwear, when they do not. He said people wearing incontinence pants are usually people in care homes or those who are mentally or physically disabled. He said he has never seen them being used for anything else except the intended use, in 30 years of business. The witness had brought along a previous version manufactured of fixation pants from 1990 and explained the new technology which had advanced the previous version.
- (xv) He gave further evidence in relation to the characteristics of a product called Pouch Pants. He said that he is very aware of the product and that the plastic channel is a PU membrane, which is not absorbent. He said that its intention is to have a membrane under the pad to stop liquid passing through the pad and to

prevent leakage. He stated that these are incapable of being worn on their own, as they also offer no absorbency.

64. Legal submissions were made by Counsel for the Appellant and it was stated that in addition, to the submissions made, the Appellant was relying on the Appellant's Composite Written Legal Submissions, furnished prior to the hearing and which are contained in the appendices to this Determination. The Legal Submissions are extensive and hence they are contained in Appendix 1 to ensure their fullest extent is captured.

Respondent

65. Mr. ██████ gave evidence for the Respondent. The Respondent had intended to proceed on the basis of legal submissions only. The Commissioner questioned this approach, as it was not apparent how legal submissions could explain and cover the decision making approach by the Respondent on the initial application for a BTI and at the first level appeal. In addition, there had been several letters that the Respondent was relying on and the Commissioner wanted to ensure the decision making process inherent in these letters was explained.

66. Following questions from the Commissioner in relation to that approach, Counsel for the Respondent indicated that evidence would be given by ██████ of the Respondent. This proved helpful to the Commissioner. A summary of ██████ evidence is set out hereunder as follows:-

- (i) He has been employed by the Respondent since 2010 and has since 2018, been assigned to the classification unit within the Customs Division.
- (ii) The product was presented as the fixation pants on their own and the application itself is for the pants on its own. He said a sample of the pant and pad was provided and the documentation referred to at Tab 1C of the bundle of documentation, such as the product description, brochure, qualities and applicable legislation for Heading 9619. He explained the classification system of goods used both internationally and in Europe. He said the time period to make a decision by the classification unit is 180 days in total.
- (iii) He said that in relation to this application, he sought the material specifications of the product, a sample of the product had already been provided and other Member States' BTIs and Cross Rulings at an international level were considered before determining the application. He said that consideration was given also to

defending any decision the Respondent and Ireland had made, should there be a challenge to the BTI at European level.

- (iv) Reference was made to GIR 1 at Tab 5 of the Respondent's bundle of documents. He stated that the GIRs are his guide to interpretation. He said that having considered GIR 1, you move to GIR 2. However, he mentioned that GIR 2 did not apply to this product because he determined it to be a complete article and GIR 2 deals with incomplete or unfinished articles.
- (v) He said that he **accepted that this was part of a two piece system** but presented at the point of import, the product is packaged separately to any pads and therefore does not contain any absorbency, as is required by Heading 9619 of the CN. He stated that the absorbent pad is what determines whether it is an article of incontinence wear or not. In addition, these products are not disposable as they last for up to 50 washes, which is also not in accordance with Heading 9619 of the CN. He stated that the product could not fall within Heading 9619 00 89 for two reasons namely, **that it was not absorbent and it was not disposable**.
- (vi) He said that he determined that the items were capable of being worn as underwear and that they should be classified as a unisex item under Heading 6108 of the CN, as it did not fit within the male headings. He explained that the female heading is used when items can be classified as unisex. He said that he would have looked at the item and considered whether it could be worn without the pad, and while it **would not have been his choice to wear** the product as underwear, he had deal with how the product was presented. He said that the product has the objective characteristics of underwear, despite not having a gusset. The witness was shown fixation pants from 1990, and confirmed that in respect of the pants from 1990, that it is likely that they would also be classified as apparel and women's underwear.
- (vii) He said that it may not be everyone's opinion that this is a piece of underwear, but it has no absorbent pad and is not disposable. Therefore, it is classified as an article of apparel namely, underwear, as per the Customs Code. He stated that the pants have the objective characterises of underwear, as in they cover a certain intimate area of the body. He mentioned that the purpose of underwear is to cover the area of the body below the waist, traditionally elasticated around the waist, used to provide protection from outer garments and from the elements, to

prevent spoilage from bodily functions and to provide protection to the outerwear as well. He said that underwear comes in all different styles and types, depending on a person's shape or preference. He stated that when you looked at the pants in question they have all of those characteristics. He reiterated that it does not have an absorbency function, so it does not come within products specifically designed for incontinence care. He later stated that disposable underwear can go under Heading 9619 of the CN, provided there is absorbency. He maintained that something that might be seamless, see-through and without a gusset can still be classified as apparent pants, namely under Heading 61.

- (viii) He said in evidence that if the pants and the pad were packaged together it is quite possible that Heading 9619 of the CN could have been considered and that GIR 2 may have become applicable, as a non-assembled item. He said that from a customs point of view these are a complete product as at the point of entry they are a single product. He gave an example of a non-assembled bike, as something GIR 2 might apply to. When asked had he given any consideration as to whether this was an unfinished product, he stated that he did give the product that consideration. However, as it was packaged on its own, he considered that it is a complete and finished article in his opinion and from a classification viewpoint the product, as presented at the point of import, does not contain the objective characteristics of incontinence care. He said that if a product arrives in such a way and you are told that there is a separate product that is sold separately, that can be used with the product, you are not entitled to consider that product if it is not before you at the point of entry. He stated that his understanding of incomplete is where all the relevant parts and pieces are presented at the point of entry but just not assembled or complete. He confirmed that he did not have a definition of complete or incomplete. He had not looked one up.
- (ix) He said that a Medical Device classification has no bearing on classification in terms of the CN.
- (x) He stated following questioning that he asked his colleagues in the office whether the product could be considered a pair of pants and his colleagues agreed that it could. He further confirmed on questioning that he had also asked the female members of staff about whether they considered it a pair of pants (as in underwear) and they confirmed that they also considered them underwear pants. He said that whilst they may not be to everyone's taste, and it is not the intended

use of the product, the product is usable as an article of apparel. He gave evidence that the Respondent considered that any reasonable person would classify this item as underwear.

- (xi) Under cross examination, he accepted that the Chapter notes to Heading 96 do **not** exclude non-absorbent items. Further, it was accepted that the HSEN do not have the same status as the Heading, sub headings and chapter notes. It was put to him that the CJEU has held that the HSEN do not have the status of the headings, sub headings and chapter notes and that the HSEN can often be wrong. In response the witness agreed but reemphasised that they are an important aid to classification.
- (xii) Reference was made to various previous BTIs and Cross Rulings in assisting the Respondent in coming to their decision. Further details in relation to the specific evidence on those BTIs and Cross Rulings are set out in the section dealing with same.

67. Legal Submissions were made by Counsel for the Respondent and it was stated that the Respondent was relying on the entirety of the legal submissions made prior to the hearing, in addition to the legal submissions made at the hearing. The Respondent's response to the Appellant's Composite Written Legal Submissions are contained in the Appendix 2 to this Determination. Again, they are voluminous and so are enclosed for completeness.

VI. Material Facts

68. Having considered the evidence adduced and submissions of both parties, the Commissioner makes the following finding of material facts:-

- (i) The Appellant's witness is a specialist in the area of incontinence care (in particular those relating to the elderly and most vulnerable in society), having developed new and progressive incontinence care products for over 25 years.
- (ii) The product is made from a knitted textile and manufactured using specialist machines to ensure fixation, such that when the product is on the body it fixates to hold the pad in place. Fixation is a key characteristic of this product.

- (iii) The product has distinguishing features namely, it is transparent when on the body, the waistband and material is created using specialist knitted bands, it is seamless on the sides with no pressure points with the only seam being in the crotch area, there is no back or front to the product, there is an area for the wearer's name/room and it contains no gusset.
- (iv) The product is packaged and sold separately to the incontinence pad providing for a choice of absorption. Both are needed to be an effective product for the management of incontinence.
- (v) The product, without the pad, does not have any absorbent characteristics.
- (vi) The product's packaging clearly identifies it is specially designed to be used with an incontinence pad (with the name of the brand name of the pad referred to on the packaging).
- (vii) The product's packaging sets out all the various regulatory rules and tests it has had either to comply with or pass inspection in relation to.
- (viii) The product's packaging clearly has instructions on the outer cover on how to insert the incontinence pad for use with the product, both when the individual is able to stand (by the use of drawing of a Zimmer frame) and also if the individual is bed-bound (by use of drawing of a bed).
- (ix) The product has no side seams so there are no pressure points (as stated on the packaging) to assist those who are infirmed and/or bed-bound and prevent pressure sores.
- (x) The product has a pronounced seam that runs across the crotch area and down the side of the legs of the product, such that any wearer would suffer chafing to both the crotch and legs by the pronounced seam, if worn without a pad.
- (xi) The product is designed for use as part of a two part incontinence system namely, a pant and pad.

- (xii) The product is designed to be reusable for a limited number of washes and/or period of time, such that the product could also be described as having a certain “shelf life”.
- (xiii) The product is designed to be used solely for the management of incontinence and has no dual purpose.
- (xiv) The product is classified as a medical device in accordance with the Medical Device Directive 93/42/EEC and carries the CE mark.
- (xv) In addition to the aforementioned findings of material fact, the Commissioner finds that the facts as set out in the document entitled “[Draft] Statement of Agreed Facts” at paragraph 1 to 7 inclusive of that document and which is attached herein in Appendix 3 to this Determination and contains extensive detail on the technical specifications of the product, are also material facts found in relation to the product.

VII. The Preliminary Ruling Mechanism

69. The Commissioner contemplated that it may be necessary to make a preliminary reference to the Court of Justice of the European Union (“CJEU”) and refer a question in relation to the issues arising in this appeal under Article 267 of the TFEU. The appeal relates to the classification of goods under the CN, which is complex and involves reference to the HS, HSEN, EU Regulations, the CN, BTIs and various Cross Rulings from the US Customs and Border Patrol.
70. The reference procedure for preliminary rulings allows national courts and decision making bodies to ask questions on EU law to the CJEU. The reference for a preliminary ruling mechanism is one of the key instruments enabling the CJEU to provide this guidance, and to ensure consistency across national courts and tribunals in the Member States. Indeed, many of the most foundational rulings on EU law (and hence the widening of the scope of domestic law across the European Union), including Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1 (“*Van Gend & Loos*”) and Case C-26/62 *Costa v. E.N.E.L.* [1963] ECR 1, EU:C:1963:1 were given in preliminary reference proceedings. Indeed, the case of *Van Gend & Loos* involved the Netherlands Inland Revenue and the application of customs duties in directives. This illustrates the importance of this mechanism. Article

267 of the Treaty on the TFEU states that a preliminary question may be asked by ‘any court or tribunal of a Member State’.

71. Article 267 of the TFEU states that:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;*
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to **enable it to give judgment**, request the Court to give a ruling thereon”.* (emphasis added)

72. So, a reference by a court or tribunal sets out the questions raised and the subsequent decision is undertaken to “*enable it to give judgment*”. It is common sense that a tribunal can only refer a question to the CJEU if it needs the answer in order to make a judgment. A preliminary ruling has binding force on the court of tribunal that referred the matter. It cannot ignore the preliminary ruling (*EU Parliament Briefing July 2017 Preliminary Reference Procedure*).

73. It follows that if a court or tribunal has the right to make a preliminary ruling request, and the ruling is binding on it, the same court or tribunal must have jurisdiction to give judgment on the matter in question. There are several helpful guidance notes from the European Union on the preliminary ruling mechanism and the European Court of Justice (“CJEU”) (*Recommendations from the Court of Justice of the European Union on Preliminary Rulings*)⁸. In the CJEU, *Information note from national courts for a preliminary ruling*, 5 December 2009, OJ C 2009 C 297/01, (para. 9)⁹ it confirms that the “*status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law*”. All these guidance manuals from the EU confirm the importance of the status of

⁸ EU Parliament Briefing July 2017 Preliminary Reference Procedure
[https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI\(2017\)608628_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf)

⁹ Preliminary ruling proceedings – recommendations to national courts
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114552>

which courts and tribunals can make a referral. The also confirm the nature of such a referral being in order to enable such a court or tribunal to make a judgment, the referral having to relate to interpretation of EU law on the dispute and the binding nature of the preliminary ruling on the referring body.

74. The leading case on the interpretation of what constitutes a court or tribunal is Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* EU:C:2000:367. The CJEU has confirmed in multiple cases that to qualify as a court or tribunal, a body must meet all, or at least most, of the following criteria to a high degree:

- i. It has to be established by law;
- ii. It has to be permanent;
- iii. It must have compulsory jurisdiction;
- iv. It must deal with procedures *inter partes* or follow an adversarial procedure (although the latter is not an obligatory factor (see Case C-54/96 *Dorsch Consult*, para. 31));
- v. It must apply rules of law;
- vi. And lastly it must be independent. (Case C-14/86 *Pretore di Salò* EU:C:1987:275, or more recently Case C-210/06 *Cartesio* EU:C:2008:723, CJEU, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, 17 September 1997, para. 23.

75. The Commissioner is satisfied that it comes within the definition of a tribunal in accordance with Article 267 TFEU. It was established by the Finance (Tax Appeals) Act 2015. It is a permanent entity, it has compulsory jurisdiction for matters relating to tax and appellants are obliged to lodge their appeals with it, it deals with procedures *inter partes*, namely between two parties, it must apply the rule of law (hence it can be appealed from on a point of law through the case stated process) and it is statutorily independent, as outlined in section 10 of the Finance (Tax Appeals) Act 2015.

76. The appeal arises out of the correct classification of an incontinence product. It is accepted by the Respondent that the product is part of a two piece incontinence system namely, a pant and a pad. However, on presentation to Customs officers, the pant is packaged separately to the pad and the Respondent considered it to be a complete product capable of classification under Heading 6108 of the CN, as apparel namely *briefs, panties*. The appeal raises issues as to the interpretation of the product and the application of the GIRs. The Respondent applied GIR 1 and 6, resulting in the classification of the product under

Heading 6108 of the CN, despite the Appellant arguing that the more appropriate classification is under Heading 9601 of the CN due to the nature of the product being incontinence care articles. Moreover, the argument of the Appellant is that GIR 2(a) is relevant to the classification of the product but the Respondent disagrees. The Commissioner is in the possession of extensive material and evidence. The Commission is also guided by the Advocate General Jacobs in *Case-338/95 Weiner SI GmbH v Hauptzollamt Emmerich* [\[1997\] ECR I-6495](#). He suggested a measure of self-restraint is required on the part of the national courts, if the Court of Justice is not to become overwhelmed and it may be counter-productive (para 60) :

“Excessive resort to preliminary rulings seems therefore increasingly likely to prejudice the quality, the coherence, and even the accessibility, of the case-law, and may therefore be counter-productive to the ultimate aim of ensuring the uniform application of the law throughout the European Union.”

77. A passage of his opinion is of particular relevance in the present context (see [\[1997\] ECR I-6495](#) at 6515-6516, para 61) –

‘...another development which is unquestionably significant is the emergence in recent years of a body of case-law developed by this court to which national courts and tribunals can resort in resolving new questions of Community law. **Experience has shown that, in particular in many technical fields, such as customs and value added tax, national courts and tribunals are able to extrapolate from the principles developed in this court’s case-law. Experience has shown that that case-law now provides sufficient guidance to enable national courts and tribunals – and in particular specialised courts and tribunals – to decide many cases for themselves without the need for a reference.**” (emphasis added)

78. On analysis of the evidence adduced and the arguments presented at the hearing of this appeal and the material findings of fact made by the Commissioner as set out above, the Commissioner has formed the view that a referring question is not necessary and the Commissioner can proceed to conclude this determination without obtaining a ruling under Article 267 from the CJEU. Hence, the Commissioner will proceed with the analysis.

VIII. Analysis

79. The appropriate starting point for the analysis in any appeal of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove his or her appeal on the balance of probabilities. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another*, [2010] IEHC 49, at paragraph 22, Charleton J. stated

“The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable”.

80. The Commissioner notes that this appeal is not relating to an assessment but relating to a decision of a customs’ classification. The Appellant appeals on the basis of its view that classification in subheading **9619 00 89 00 of the CN**, as an incontinence care article, should apply. The Appellant maintains that the product is designed as **part of the two-piece incontinence management system to effectively manage serious chronic incontinence problems and is therefore specifically designed to benefit health care institutions and the chronically incontinent patients they serve**. The incontinence pants are sold in two parts, the pants and the pad, and both are delivered and sold separately. However, both are needed to be an effective product for the management of incontinence.

81. The Appellant’s witness helpfully provided detailed evidence as to the products purpose and how the product was created. It is evident to the Commissioner that he is an expert in the area of incontinence products, having spent his entire career producing innovative goods for the incontinence market and mainly products which are classifiable as medical devices.

82. The Appellant maintains that the HSEN to the Heading 9619 should be referenced completely, in order not to take parts out of context. Furthermore, the Appellant states that the use of the word *“in general”* does not indicate that it must always be the case. The Appellant argues that the HSEN do not have legally binding force and that the wording of the HSEN cannot alter the scope of the headings in the CN. The Respondent does not disagree with that contention, but maintains that the HSEN to Chapter 96 requires a product to have absorbent qualities and that it is required to interpret the HSEN in such a way, so as to ensure uniformity across customs classification.

Definitions

83. It is trite law to state that the Commissioner is obliged to consider the application of words used in tax and customs legislation as to their plain and ordinary meaning. In addition, there are a number of terms and words that are important to define in formulating a decision in this appeal. It is important for the Commissioner to understand and set out the ordinary meaning of those words. Hence, there are a number of terms used throughout the Commissioner's analysis and the Commissioner considers it prudent to set out, the definitions from an English Dictionary of the terms used, at the commencement of the analysis of the issues arising in this appeal, as follows:-

- (i) *Gusset* – a second layer of cloth that is sewn into a piece of clothing to make it larger, stronger or more comfortable.
- (ii) *Underwear* – clothes worn next to the skin, under clothes.
- (iii) *Complete* - Having all its parts or members; comprising the full number or amount; embracing all the requisite items, details, topics, etc.; entire, full.
- (iv) *Incomplete* - Not complete; not fully formed, made, or done; not whole, entire, or thorough; wanting some part; unfinished, imperfect, defective.
- (v) *Composite* - Made up of various parts or elements; compound; not simple in structure.

Heading 6108 of the CN

84. On 18 February 2019, the BTI issued by the Respondent with Heading 6108 22 00 as an article of apparel, describes the goods as follows:-

“Unisex reusable incontinence fixation pants.

The Article is designed as part of the two piece incontinence management system to effectively manage serious chronic incontinence problems and therefore specifically designed to benefit health care institutions and the chronically incontinent patients they serve.

The incontinence pants are sold in two parts, the ‘pants and the pad’ and both are delivered and sold separately, however both are needed to be an effective product.

This classification is for one part of the system, the reusable incontinence fixation pants. The fixation pants have a specially knitted and constructed waistband to provide better fixation to the patient. The product is designed as seamless and when stretched is almost transparent, so it will not interfere with

the patient's regular underwear or outer garments. They are designed to be washable, breathable."

85. As set out above, Chapter 61 of the CN contains the Heading 6108 namely "women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, negligées, bathrobes, dressing gowns and similar articles, knitted or crocheted". The notes to Chapter 61 state "...Garments which cannot be identified as either men's or boys' garments or women's or girls' garments are to be classified under the headings covering women's or girls' garments."
86. The Appellant contends that the product is more appropriately classified in Heading 9619 of the CN, namely "*Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles of any material*" and consequently, the Appellant requested classification for its product under subheading 9619 00 89 of the CN which pertains to "*Other, (for example, incontinence care articles)*". The Commissioner deals with this heading in further detail below. In its application, the Appellant outlined that this product is supplied as part of a two piece incontinence management system. The said BTI application is concerned with the reusable incontinence fixation pants only. The Commissioner heard lengthy testimony from the Appellant's witness surrounding the reasons why the product (the pant) and the pad are sold separately and the said application for the BTI was for the product i.e. the pants only.
87. The first question that falls to be determined is whether the Respondent has properly classified the product in Heading 6108 of the CN. Aside from the suitability of Heading 9601 of the CN, it must first be considered whether the Respondent was correct to classify the product as an article of apparel namely, *women's or girl's...briefs, panties*" to be classified under Heading 6108 of the CN. If the Commissioner finds that the Respondent has incorrectly classified the product, then the Commissioner must proceed to consider the appropriateness of the heading for which the Appellant contends, namely Heading 9619 of the CN.
88. The Commissioner in determining this question has considered the full suite of cases referred to by the parties *inter alia* in the Books of Authority submitted by both parties, the Outline of Arguments of the parties and the Appellant's composite written submissions and the Respondent's response to the composite written submissions. Where a case is not referenced in the Commissioner's analysis, it should not be taken as having not been

considered by the Commissioner. The Commissioner has also, as stated above, researched the condition of incontinence to aid the general understanding of the condition.

The Test for Classification in the CN

89. It is accepted that the test to be applied in the assessment and classification of products and goods at the point of import, is to look at the products objective characteristics and properties. Moreover, the case law referred to establishes that **the intended use of a product may also constitute an objective criterion for classification, the question being whether the intended use of the product can be discerned from its objective characteristics at the point of import** (C-403/07 *Metherma GmbH & Co. KG v. Hauptzollamt Düsseldorf* EU:C:2008:657 (“Metherma”), C-556/16 *Lutz GmbH v Hauptzollamt Hannover* EU:C:2017:777 (“Lutz”), C-185/17 SASKA, C-677/18 *Amoena Ltd v HMRC* (“Amoena”), C-395/93 *Neckermann v Hauptzollamt Frankfurt-am-Main* (“Neckermann”), C-459/93 *Thyssen Haniel Logistic GmbH* EU:C:1995:160 (“Thyssen”), C-273/09 *Premis Medical BV v Inspecteur van de Belastingdienst/Douane Rotterdam, Kantoor Laan op Zuid* EU:C:2010:809 (“Premis Medical BV”), *Crystals v HMRC* [2016] UKFTT 29 (TC) “Crystals”).
90. In Case C-197/20 and C-216/20 *KAHL GmbH & Co. KG*, C-403/07 the CJEU held at paragraph 31 that:

“In the interests of legal certainty and ease of verification, the decisive criterion for the tariff classification of goods is generally to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the nomenclature and in the section or chapter notes. The intended use of a product may also 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 (judgment of 3 June 2021, Flavourstream, C-822/19, EU:C:2021:444, paragraph 34 and the case-law cited).”

Objective Characteristics of the product

91. The Respondent’s maintains the position that the product is an undergarment worn on the body and the intended use as incontinence wear is not inherent in the product, as it does not have any absorbent material. Further, it is argued that the intended use of the product cannot be discerned from the objective characteristics of the product, presented on its own. Moreover, the Respondent maintains that in addition to the lack of absorbency, the

fact that the product is not disposable is a relevant consideration in terms of its unsuitability for classification in Heading 9619 of the CN. In other words, the intended use of the product is not apparent at the point of entry, such that it could be readily describable, by any reasonable person, as an article of apparel i.e. underwear briefs/panties. The parties referred to the reasonable person test as set out in the *Crystals* decision.

92. It was evident from the submissions and evidence of the Respondent, that significant reliance was placed on the fact that this product, without the pad, did not contain the objective characteristics of absorbency such that Heading 9619 of the CN could not apply. In fact, the submissions of the Respondent went as far as to state that this is a mandatory requirement, having regard to the HSEN. The Respondent's witness stated that absorbency was critical, in terms of determining that this product could not appropriately be regarded as falling into the realm of incontinence products, on the basis of GIR 1 and 6. The Respondent argued that whilst not binding, these are important aids to interpretation and when it was informed that the heading does not cover non-absorbent articles, then that was when the Respondent felt obliged to consider another heading. This is despite the wording being in the terms "*in general*" and "*many of these articles*". During the hearing of the appeal, the **Respondent's witness conceded that in fact this is not a mandatory requirement of Heading 9619 of the CN.** The Respondent confirmed it is concerned as to the unequal treatment of products between it and other parties to the WCO, such that product cannot fall within the heading the Appellant contends for, due to the lack of an essential characteristic of incontinence wear namely, absorbency, having regard to the HSEN.
93. The Respondent confirmed that in coming to its decision on classification, it considered Heading 9619 of the CN first and then discounted it for the reasons set out above, namely that it lacks absorbency and its lack of disposability. The parties agree that there are no legal principles pertaining to this approach, but that each heading is worthy of equal consideration. The Respondent established that it reviewed the product, the packaging, the detailed description provided, previous BTI and Cross Rulings to assist with its classification of the product. The Commissioner heard submissions that there is an obligation on the Respondent to classify goods and products within 180 days, as accurately as it possibly can, and that this is an arduous task requiring consideration of the various headings of the HS, CN, sub headings of the CN, HSEN, previous BTIs and Cross Rulings.

94. It is clear from the evidence that the Respondent reviewed certain previous BTIs and Cross Rulings to seek out comparators to this product, to assist with its decision as to where the product should be classified appropriately. The Respondent placed significant emphasis on previous BTI and Cross Rulings that it states are relevant, in terms of consistency of classification and comparators of products. The Commissioner has considered the Respondent's reliance on previous BTIs and Cross Rulings in detail.

The Intended Use of the product

95. The Commissioner considered the evidence of the Respondent that the intended use of the product was considered but that the inherent characteristics was not that of incontinence wear, as it lacked the qualities of absorbency. Nonetheless, the Respondent does not dispute that the ultimate intended use of this product is with an incontinence pad as part of a two piece incontinence system.
96. Both parties referred the Commissioner to the decision in *Metherma* which states at paragraph 47 that:

“the intended use of a product may also constitute the objective criterion for classification if it is inherent in the product and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see Case C-459/93 Thyssen Haniel Logistic [1995] ECR I-1381, paragraph 13; Case C-201/99 Deutsche Nichimen [2001] ECR I-2701, paragraph 20; and Case C-142/06 Olicom [2007] ECR I-6675, paragraph 18).”

97. This is restated in the *Lutz* case (paragraph 47 to 50) and reaffirmed in a number of other cases from the CJEU referred to above. In *Lutz*, the CJEU held at paragraph 47 and 48 the following :-

“Also the intended purpose of the product at issue in the main proceedings must be taken into consideration, as that purpose may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see to that effect, judgment of 26 April 2017, Stryker EMEA Supply Chain Services, C51/16, EU:C:2017:298, paragraph 40 and case-law cited).”

98. The case of *Crystals* is also relevant which related to the classification of goggles. The company wanted to classify protective eye shields as goggles but HMRC wanted to classify them according to the constituent material, namely plastic. The company was successful and the protective eyewear was classified as goggles. In *Crystals*, the Court held at paragraph 58:

“in our view, the intended use, function and purpose of the goods constitute important characteristics of the goods considered objectively. That is their distinguishing trait or characteristic. That same characteristic distinguishes spectacles from goggles. Spectacles do not usually have a protective function but goggles have such a function.”

99. The Commissioner considered the testimony of the Appellant’s witness that not only was this product designed for a very specific use, it is manifestly unsuitable for use on its own, as underwear pants, and could not reasonably be described as a garment or articles of apparel. The witness stated that one of the critical design features that separate the product from retail underwear is the lack of a reinforced seam in the crotch, or in common parlance, a gusset, making it obvious to any reasonable person as to its unsuitability as underwear, when worn without a pad, due to the likelihood of irritation, and it being extremely uncomfortable and potentially unhygienic. The Appellant’s witness detailed the engineering expertise required to create the product such that *inter alia* it is of particular woven textile, seamless, the bands are of importance for fixation, the length of the legs to hold the pad in place, the name/room tag, it is transparent when worn and the product is unisex.

100. Nevertheless, the Respondent maintains in written submissions that this product is capable of being classified as articles of apparel, namely “*women’s or girl’s...briefs, panties*”. The Respondent’s evidence did not wain on that point and the Respondent’s witness was certain that the product has all the characteristics of unisex underwear. He mentioned that this is in accordance with paragraph 9 of the notes to Chapter 61 of the CN which state “*Garments which cannot be identified as either men’s or boy’s garments or as women’s or girl’s garments are to be classified in the headings covering women’s or girls garments*”. He stated that you must look at what the product does, such that it covers an area of modesty, it provides warmth and shields or protects outer clothing. This was despite the Commissioner reminding him that the product is entirely transparent when worn on the body and lacks a gusset or fly opening at the front of the pants, making it incompatible for wearing by either gender as underwear.

101. The Commissioner notes that she pointed out at the hearing to the witness for the Respondent that the seam would be incompatible for any member of the female sex to wear the product due to the most obvious considerable irritation and potential injury to genitalia and also the inner thighs. The Respondent's witness stated that whilst he does not have a definition of underwear, his opinion is it covers that area of the body. The Respondent's witness did not deviate from this particular vein of argument. In fact he said that there are a large variety of undergarments available in the market and what a person may consider comfortable/suitable as underwear can be very different. The Commissioner pointed out that the consistent facet of all female underwear of whatever variety is the inclusion of a gusset and no seam in that area. The Respondent's witness again did not deviate from the position that the product should be classified as apparel, namely underwear. This is not consistent with the BTI ruling for NOBAPANTS, which classified that product as garments/surgical wear rather than apparel/underwear despite having "pants" in the name and all the appearance of pants.

102. It was put to the Appellant's witness, by the Respondent that the product is made to look like pants. Notably, the Appellant's witness response was that this product is nothing like pants in the normal sense of a garment, given the products constituent characteristics. He said that simply because the product has two leg holes and a waist, does not make the product a pair of pants, as in underwear. In the Respondent's evidence they stated that the product even has "*pants*" in the title. The Commissioner is reminded of the "Duck Test" and referred to this "test" at the hearing. The Commissioner asked the Respondent's witness did he consider the "Duck Test" in that as the product looked like a pair of pants and had pants in the name, they were a pair of pants. The Respondent's witness confirmed in the affirmative.

103. The Commissioner notes that the Duck Test is often cited as a form of abductive reasoning. The test is usually expressed that "*If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck*". The Respondent was asked about the "Duck Test" at the hearing and confirmed that as the product looked like a pair of pants, it should be classified in that way. Abductive reasoning implies that a person can identify an unknown subject by observing that subject's habitual characteristics. It is a form of logical, intuitive reasoning to deduce the nature of an uncertain thing or situation, usually in the absence or in spite of concrete evidence.

104. The Commissioner, however, notes that the original “Duck Test” relates to a French automaton maker Jacque de Vaucanson who made a mechanical duck. The mechanical duck looked like a duck, quacked like a duck but it was not a duck because it lacked the essential characteristic of a duck, namely it was not a living thing. The Commissioner considers that it is important not to apply the Duck Test without common sense as to the essential characteristics and confine any item to how it looks. The product may have the appearance of a pair of pants (underwear) due to the position it goes on the human body but that is the only resemblance. It does not have the essential characteristics of underwear and indeed if worn as underwear would cause chaffing and potential injury to female and male bodies. The Commissioner finds that the characteristics of both female and male underwear is to provide warmth but also to provide protection to the body and outer clothing. The Commissioner considers that this should not be a controversial statement. The Commissioner notes that the protective qualities of female underwear is evidenced by the use of a particular type of material in the gusset. The Commissioner finds that in female underwear, cotton is used in the gusset. This is due to it being a breathable natural material which is hygienic and does not cause irritation. The reason for the cotton gusset is to protect the female body from bacterial and yeast infections. In addition, male underwear is also constructed to protect testes and ensure that it does not cause irritation. The essential characteristic of underwear is that it does not cause injury.

105. The Respondent argues that the HSEN to Chapter 61 is relevant in that it refers to “*Garments*”. The dictionary definition of “*Garment*” is set out above. So, the Respondent, by classifying the product under this heading, deems the product to be an item of clothing. The usual use or function of an item of clothing is to clothe the wearer, not to hold an incontinence pad in place. In addition to the decision letter from the Respondent, referring to the NOBAPANTS, the Respondent’s witness also sought to rely on the NOBAPANTS at the hearing. This formed a pillar of the Respondent’s decision making. The Respondent’s witness made reference to a BTI decision relating to a product NOBAPANTS, which are classified in Heading 6210 10 98 of the CN, as single use gowns for surgical use, also a CN heading that applies to garments. A photograph of the product known as NOBAPANTS, which the Respondent referenced as being influential in its decision to classify in Chapter 61 of the CN, was provided in the document. It was an item that looked like a pair of pants, albeit they were transparent. But despite them looking and having the appearance of pants/briefs they were not classified as an article of apparel (briefs/panties) as they were used in the context of an item used when the wearer was in surgery. Again, despite NOBAPANTS having pants in their name, they are not classified

as underwear. In addition, they have multiple purposes including modesty in surgery, as set out in their technical information on their website.

106. However, the Respondent's witness seemed unaware of the significance that this product was classified, not as an article of apparel namely, *women's or girl's...briefs, panties* but as gowns for surgical use. Hence, this classification confirmed that an item is not classified based on what it resembles. If this had been the case, the NOBAPANTS would have been classified as an item of apparel (briefs/panties). But this was not the case. In addition, the item had the word "pants" in its name but again that did not convert to the classification. So, the fact the product is called a "pant" is not determinative in relation to classification.

107. Nevertheless, the Respondent considered the NOBAPANTS a comparator due to it being non-absorbent and capable of classification in the textile chapters. The Respondent argued that these were capable of classification under garments not dissimilar to the product at issue in this appeal. The BTI was translated from German to English using Google translate when relied upon as a comparator during the Respondent's decision making process. However, it was accepted in evidence that the witness was unaware of that product's purpose and that the Respondent had regard to the photograph of the product named NOBAPANTS, which was not dissimilar to the product herein.

108. The witness for the Respondent gave lengthy testimony as to his considerations in terms of the classification of the product but stated that it remained his view that the product had the essential characteristics of unisex underwear, such that the appropriate classification was in Heading 6108 22 00 of the CN. It is accepted that the product is unisex, in fact it is a feature of its design and an objective characteristic of the product. The Commissioner agrees with the Appellant's contention that "*it would seem that the unisex nature of this product is an inherently incongruous characteristic of something said to conform to the definition of 'briefs' or 'underwear'*". The Commissioner notes that underwear is usually sold separately as either for the female or male body due to the different anatomical features of those body types. The Commissioner noted that she is not aware of unisex underwear being a common product types sold in the shops.

109. The Commissioner considers what was most striking about the evidence of the Respondent's witness was that he stated "whilst they may not be to everyone's taste, and it is not the intended use of the product, they are usable as an article of apparel". The Commissioner does not consider this evidence to be grounded in reality. Common sense and reality do not have to be dispensed with in terms of Customs classifications.

110. This product is not a matter of taste and no sensible person would have a “taste” for such a product. The product is purchased for a specific function, namely to work with incontinence pads and it is not a reasonable assumption that an individual would purchase the product as underwear. It would be an expensive exercise to purchase this product as underwear when it only lasts 50 washes. It would not work as underwear for a male body due to the lack of the usual fly opening to assist urination. It would not work as underwear for the female body, due to the lack of gusset and the middle seam, which would cause considerable irritation and potential injury to female genitalia and inner thighs. Even underwear is bound by EU rules on safety and various EU regulations concerning safety including the EU General Product Safety Directive 2001/95/EC. The Commissioner appreciates that there are many types of underwear from the “sensible” cotton brief to those sold as erotic wear. The product due to the lack of essential elements of underwear (as described above for both male and female bodies) could not be described as either of the sensible variety or of the erotic. In addition, it is likely that if any person wore the product as underwear and suffered the likely injury to genitalia, they would be able to sue under the EU Product Safety Directive. The product is not marketed as underwear but as an incontinence product to be worn with a pad. That is the intended use and purpose of the product.

111. The fact that the Respondent used the term “taste” seems indicative that there was a lack of consideration given to the purpose and function of the product. Taste cannot be a due factor in an item not manufactured to be worn without the pad. The product is a medical device (as classified). The Appellant is entitled to consider the use of an expression such as “taste” as potentially derogatory with respect to such a highly engineered item. The Commissioner considers that such evidence demonstrates a lack of understanding of the origin and manufacture of the product. Nevertheless, it seems that it was a part of the Respondent’s decision making as to the item being unisex apparel as confirmed in the witness evidence and the letters sent to the Appellant with respect to the decision on classification.

112. Part of the Respondent’s consideration in terms of classification was that it concluded that it is possible, however unlikely it may be, that the product could be worn without the pads and therefore considered to be articles of apparel. The Respondent was asked by the Commissioner if the Respondent’s female staff has been included in this deliberation and it was confirmed that female staff had also taken the same view. The Commissioner does not agree that the product could be worn without the pads without causing irritation or potentially injury to the human body (especially females) and it is highly unlikely any male

person would be prepared to wear the product as underwear due to the lack of a fly and again potential irritation due to the seam to testes.

113. The Respondent endeavoured to argue that the product is capable of being worn by women following childbirth, for holding a maternity pad in place for post-partum bleeding. During Cross Examination of the Appellant's witness, Counsel for the Respondent put it to the witness that some women, as a result of a Caesarean Section birth, will need a particular type of pant that will not interfere with stitches. This was then put again to the Respondent's witness who stated that he was not in a position to give evidence in relation to that. Moreover, there was no evidence of such use before the Commissioner, such as evidence of a treating clinician in obstetric care or an employee of the HSE responsible for procuring such products. The Respondent's witness confirmed that this was a consideration in terms of classification of the product, yet he confirmed that no contact was made with the medical profession or HSE to establish the use of the product in such circumstances.

114. The CJEU in *Neckermann* at paragraph 8 held that:

"...if the objective can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas. It follows that, for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which the product is intended".

115. In addition to *Neckermann*, the decisions of *Theyssen* (see para. 16 and 17) and *Premis Medical BV* (see paragraph 47) state that a decision to classify a product on the basis of an assumed theoretical possibility, rather than the accepted principal and intended functions of the product is not correct. It is significant to note here that in the Respondent's BTI decision and in its written submissions the Respondent states that "*it is also possible however unlikely it may be, that the fixation pants could be worn without the pads and therefore considered an article of apparel*".

116. The Commissioner considers that the Respondent has misapplied the test and assumed a theoretical possibility rather than the intended function is not correct. This has led to a misguided classification of the product. It would be incorrect for the Commissioner to indulge in some theoretical possibility when all common sense and ordinary day-to-day knowledge confirms that no-one (male or female) could wear the product as underwear.

117. At the hearing of the appeal, the Respondent further undermined its own argument that the product could also be used in post-partum care by producing a photograph of another product it said are used in hospitals for post-partum care. It is apparent to the Commissioner from the photograph produced that these “pants” are made of a loose mesh and do not fixate to the body akin to the product in this appeal. Whilst the Commissioner is not a medical professional in obstetric care, it seems reasonable that the post-partum care product is made of loose mesh rather than being made of a tight fixated material, in such circumstances where it is to be worn over stitching, so as not interfere with the stitches when being pulled on to and off the body. A copy of the photograph submitted by the Respondent was noted by the Commissioner. The Commissioner is confident that if the product was used by women in post-partum care and the fixation characteristics of the product, it would likely cause injury and rip apart stitches. Hence, any medical establishment would be liable for any injury caused. Again, the product is produced and designed to work as an incontinence device and is not sold or marketed as having any other function.

118. The Respondent in considering the products description, determined that this product does not have the features that would distinguish it significantly from the products in Heading 6108 of the CN. The testimony of the Respondent’s witness was that he considered these goods to fall under Chapter 61 of the CN as the goods were in his opinion “*underwear*”. He said that the classification was approached from the viewpoint of the products objective characteristics and its essential character. Having regard to the above analysis, the Commissioner determines that the Respondent erred in classifying the product as articles of apparel namely, *women’s or girl’s...briefs, panties* under Heading 6108 of the CN. Likewise, the Commissioner is satisfied that no reasonable person could consider the product to be “**women’s or girl’s....briefs, panties**”, having regard to its essential characteristics and intended use.

119. Having conducted an exhaustive review of the decisions of the CJEU, the Commissioner is of the view that the Respondent erred significantly in its approach to the classification of this product, such that it failed to take account of the products objective characterises as detailed above, to include its intended use. Moreover, the Respondent made a manifest error in classification in that it assumed some theoretical possibility of other uses rather than the accepted principle and intended functions of the product, as detailed above.

120. In addition, it appears no consideration was given to the packaging and marketing material (*Honeywell* decision), given the detailed description of the product and its objective

characteristics and intended use, that such items provide to the decision maker. In *Honeywell Sales LJ* held that:

“it is in my clear view that the FTT in our case was fully entitled to take into account the manuals and other information about the product presented by Honeywell to consumers in the way that the FTT did. Conversely, the Upper Tribunal was wrong to leave these materials out of account when undertaking its own assessment of classification as between heading 8531 and heading 9026. Such material forms part of the objective characteristics and properties of the goods in question for the purpose of applying the classification headings in the tariff regulation. The relevance to tariff classification of the objective manner in which an item is presented to consumers or users is also confirmed by the judgement of the CJEU in joined cases C-288/09 and C-289/09 British Sky Broadcasting Group [2011] STC 1519 at [77]-[79]. Indeed, given the importance for tariff classification under various headings of the use to which an item is intended to be put, it seems to me that it would be most odd and contrary to principle to leave out of account the way in which consumers are encouraged to use the item in question by materials placed into the public domain and objectively verifiable for the purposes of tariff classification.”

121. The Commissioner is satisfied that incorrect weight was attributed to the non-binding HSEN and previous BTI and Cross Rulings, which were interpreted or used as comparators incorrectly, the result being that the primary consideration and determinative factor in the decision as to classification of the product, was the lack of absorbency and disposability. The Commissioner is satisfied that the Respondent proceeded to classify the product simply on the basis that as the product did not have absorbent qualities and was not disposable, Heading 9108 of the CN did not apply.

122. It then proceeded to determine that the product was therefore underwear briefs/panties, as that is what it most resembled. The Commissioner finds that this was an incorrect methodology and hence determines that the Respondent's approach to classifying the product was incorrect. *Crystals, KAHL, Lutz* and the above referenced cases from the CJEU, all confirm that the two relevant criteria for the classification of an article are its material composition and its intended use, the intended use being determined by recourse to objective criteria. The case law also established the HSEN are a useful guide to interpretation but are non-binding and for legal purposes, classification shall be

determined according to the terms of the headings and any relative section or chapter notes.

123. The Commissioner is satisfied that its intended use, as an incontinence product, can most certainly be discerned from the product as it was presented at the point of entry, in the accompanying packaging and relevant documentation as demonstrated in the material facts. Further, the Commissioner considers the decision in *Lutz* pertinent to this appeal and agrees that this decision is also significant, given that the product in *Lutz* could initially be described as pants/underwear (shapewear), but because of the products design, function and intended use, it was held to be classifiable elsewhere, namely girdles. Hence, just because it looked like “pants” did not mean it was classified as such.

124. In *Lutz*, the CJEU considered a product which had been classified in Heading 6108 22 00 of the CN (the same heading as is contended in this appeal). In finding that the product was in fact classifiable in Heading 6212 20 00 of the CN, the Court held at paragraph 47 that the :

“intended purpose must be taken into consideration, as that purpose may constitute an objective criterion for classification if it is inherent in the product and that inherent character must be capable of being assessed on the basis of the products objective characteristics and properties....

Having regard to the intended purpose of the product at issue in the main proceedings, classified as sculpting knickers by the referring court and seamless shape wear by the main customs office in Hanover, it appears that, by its action, that product is intended to support and sculpt the human body. Therefore, that product has, subject to verification by the referring court, the essential characteristics of very restricted horizontal elasticity in order to support the human body and to create the objective effect of a slimmer silhouette...

Thus, it must be held that the panty girdle at issue may be distinguished from ordinary underwear by much reduced horizontal elasticity, in order to support the human body and achieve a slimmer silhouette... Therefore, it is clear from the objective characteristics and properties of the knickers at issue in the main proceedings that they may fall within 621220 00 of the CN.”

125. The Commissioner, having determined that the Respondent erred in its classification and that classification of the product in Heading 6108 00 89 of the CN is not correct, the question now arises what is the appropriate heading of the CN?

126. Before considering Heading 9619 of the CN, it is useful to note that the Respondent applied GIR 1 and 6 to conclude that the appropriate classification is in Heading 6108 22 00 of the CN. Moreover, the Respondent stated that it considered GIR 2(a), but concluded that as the product arrived at the point of customs on its own, it was a complete product and therefore could **not** be considered under GIR 2(a) as an incomplete or unassembled product. It is accepted by all the parties that this is **not** an unassembled article. However, critically, the Respondent accepts that the product is **part of a two piece incontinence system**. However, the parties differ on the interpretation of incomplete and the application of GIR 2(a). The Commissioner now deals with Heading 9619 of the CN and the application of the GIRs hereunder.

Heading 9619 of the CN

127. The Appellant contends that the product is properly classifiable in Heading 9619 of the CN namely, “*Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles of any material*” and the subheading 9619 00 89 in which classification is specifically sought is:-

-“of other materials,

--“Napkins and napkin liners for babies, and similar articles”,

---“other (for example, incontinence care articles)””.

128. The Appellant argues that “it is of great significance that the “for example, incontinence care articles” is part of the wording of the sub-heading under which classification is sought, it is not merely the wording of the explanatory note”. The Appellant points out that the case law referred to establishes that classification shall be determined according to the terms of the Headings and any relative section of chapter notes. The Commissioner notes the use of the word “shall” in GIR 1.

129. On 10 December 2018, the Respondent wrote to the Appellant’s representative thanking him for the requisite documentation and in response, provided certain previous BTI and Cross Rulings, which the Respondent stated supported its classification. The Appellant does not accept the reliance placed on these previous BTI or Cross Rulings and argues that this appeal cannot be decided by reference to these, as the heading for which the Appellant contends, was not introduced until 2013. Therefore, classification of a product prior to 2013 cannot speak to the question of whether the Heading 9619 of the CN is appropriate. The Appellant states that the product is a unique product and there has been

no BTI issued in respect of the product. The Commissioner notes that all parties agree that there is no BTI with respect to the product across any Member State.

130. The Respondent argues that there are two aspects to the non-application of GIR 2(a), namely:-

- (i) that the product must be presented together in order for the Respondent to take a view that they form a complete whole and
- (ii) that the product is already complete, such that it is not an incomplete product being presented and packaged as the pant.

131. The Appellant argues that the Respondent is wrong in relation to both of its arguments.

GIR 1 & 2(a) & 6

132. It is submitted that GIRs are hierarchical in structure. The Appellant contends that GIR 1, 2 and 6 are of general application and that they must be considered in all cases. However, the Respondent maintains that GIR 1 must be considered in all cases and if a product can be classified according to GIR 1 then progression onto GIR 2, 3, and 4 is not required. GIR 5 relates to packaging and not always applicable. GIR 6 is required to determine the subheading for classification after the heading has been determined by the previous GIRs 1-4. The Respondent's evidence was that GIR 2 was considered but it quickly determined that the product is a complete product. Therefore, GIR 2 was not applicable and did not require further consideration. Accordingly, the Respondent applied GIR 1 and 6, having discounted GIR 2.

133. The testimony of the Respondent's witness was that an "incomplete" product is something where all the relevant parts and pieces must be presented at the point of entry. He stated that he considered this product to be complete, based on the fact that it is packaged on its own and imported separately. However, following questioning as to the meaning of complete, he accepted that he did not look up the dictionary definition of the word "complete". In addition, he said that as the product was capable of being worn on its own as underwear as presented, it was a complete product. Consequently, he determined GIR 2(a) not to apply. The Commissioner notes that this is despite the Respondent accepting that the product is part of a **two piece incontinence management system** and the definition of complete and incomplete as aforementioned above. The Respondent maintains that the application was for the product on its own and did not include an application for the pad. Moreover, the Respondent argues in its submissions of 7 June 2022 at page 24 of 27 that "*GIR 2(a)...does not apply where products are imported*

separately, but applies to incomplete/unfinished articles or articles presented unassembled/disassembled, all components presented together”.

134. On 3 March 2019, in response to the Appellant’s appeal, a representative of the Respondent wrote to the Appellant stating that *“in my opinion the product entitled reusable incontinence fixation pants does not lend itself to classification under heading 9619. Although they are designed for use with the incontinence pads they are not packaged together with the pads. This is due to the variety of pads available. Regarding the invoking of GIR 2(a) as grounds for classification under heading 9619, I would not support this assertion as the product in question does not have the essential character of the complete item as they do not contain absorbent material and they are also reusable. As per the explanatory notes to the general interpretive rules specifically GIR 2(a) which deals with what is meant as an assembled and disassembled what it takes to mean assembly by fixing devices or other means therefore they do not in my opinion meet the criteria for classification under heading 9619”.*

135. Another tenet of the Respondent’s argument is that if classification is possible under GIR 1, then that is where the exercise ends and there is no requirement to consider GIR 2. The Appellant argues the opposite and states that GIR 2 is of general application and must be considered in all cases. The Appellant referred the Commissioner to the non-binding but persuasive UK decision, of the FTT in C00256: *The Bear Factory Ltd v the Commissioners for Her Majesty’s Revenue & Customs*, which explains at paragraph 19 the relationship between the GIRs as follows:-

"Rule 2 reads as a provision of general application which in appropriate situations, such as the classification of incomplete or unfinished articles, must be employed. The explanatory note 1 to rule 2A makes it clear that rule 2A actually extends the scope of any heading, the one and only qualification being that the article in question has the essential character of the complete or finished article."

136. The Commissioner is satisfied that the Respondent should have proceeded to consider the product under GIR 2 and by failing to do so erred in its approach to classification of the product. It is evident from the above decision and the Explanatory Note I to Rule 2(a) which provides *“The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished provide that as presented, it has the essential character of the complete or*

finished article”, that GIR 2 must be employed and that it extends the scope of any heading which refers to a particular article.

137. For that reason, the Commissioner is satisfied that in order to ascertain classification, GIR **1, 2(a) and 6 should have been considered**. The Commissioner finds that the Respondent was incorrect in its approach to classification, when it determined that GIR 2(a) was not applicable, on the basis that classification could be achieved having regard to GIR 1 and 6. Moreover, having accepted that the product is part of a two piece incontinence system, it seems clear to the Commissioner that the Respondent should have considered GIR 2(a) and proceeded to classify the product accordingly. It is incongruous for the Respondent to decide that a product is complete but at the same time acknowledge the product is part of a two piece incontinence system. The very definition of incomplete is wanting some part to make it complete. The two piece incontinence system is complete when it works together and so by virtue of same, one part is incomplete without the other. This is a matter of common sense. The Commissioner finds that any reasonable person would consider the same. The Respondent even acknowledges in its correspondence dated 3 March 2019 that *“they are not packaged together with the pads. This is due to the variety of the pads available.”* This is an acknowledgement by the Respondent that they are sold separately due to the various sizes of the pads (which is due to the level of incontinence). The Commissioner finds that it is somewhat of a tortuous argument by the Respondent to find that the product is complete but at the same time acknowledge it is part of a two part incontinence system. The Commissioner would be wrong to indulge this line of reasoning.

Requirement for products to be presented together at point of import

138. The Appellant contends that a number of CJEU decisions support its argument that a product may be presented on its own and it is not a complete product, simply because it is presented on its own in a package. The Appellant argues that there would be no need for an “incomplete” requirement if all products are together in one pack. The Appellant further argues that in fact, when items are presented in that manner (namely all in one package but separate distinct items), it relates to **unassembled** products not **incomplete** products. The Appellant further argues that unassembled products is not relevant to this appeal. Reference was made to a bicycle being incomplete without a saddle and it being accepted as a bicycle and an incomplete product. Nevertheless, the Respondent maintains the argument that as the pant is sold separately to the pad, they are treated as two separate products and this product, the pant, was treated as a complete product. Again, the Respondent maintains that as the product is capable of being used

independently, it is a complete product. The Commissioner notes that this position is despite the case law being unsupportive of this position, such that some theoretical use is not a relevant consideration in terms of classification. The Commissioner finds it a fallacy, as referred to above, that the product specifically designed as an aid to incontinency and approved as a medical device and designed to be worn with a pad, is capable of being used independently. The product is incomplete without the pad.

139. In considering Rule 2(a), and whether the products must be imported together as contended for by the Respondent, the Commissioner has had regard to the decision in C-280/97 *ROSE Elektrotechnik GmbH v Oberfinanzdirektion Köln* EU:C:1999:62 wherein the CJEU considered the classification of a junction box. The Commissioner considers it appropriate to set out the following paragraphs 18-20 of the decision of the CJEU, as the Commissioner agrees with the Appellant contention, that this an important decision in terms of this appeal:-

“it is apparent from Rule 2(a) of the general rules for the interpretation of the CN that, for the purposes of customs classification, an incomplete or unfinished article is to be treated in the same way as a complete finished article provided that it has the essential character of the complete or finished article. That rule of interpretation is itself clarified by the Customs Cooperation Council’s explanatory notes according to which the heading relating to the finished product covers blanks, that is to say, articles which, although not ready for direct use, have the approximate shape or outline of the finished article and can only be used for completion into the finished article.

The national court has found that the product in issue has the external appearance of a junction box and is designed to be fitted with electrical terminals. Subject to any more detailed findings of fact which that court may make, and having regard to the technical information which it has furnished to this course, it does not seem, as the Advocate General observes in point 30 of his Opinion, that the product in question could be used otherwise than as a junction box.

The absence of terminals cannot mean that the product lacks the essential characteristics of a junction box and that it cannot therefore be regarded as an incomplete junction box. It is not disputed that those terminals are fitted subsequently only because their form and dimensions depend on the industrial use to which the box is to be put. It follows that their absence does not alter the basic purpose which the product in question is intended to serve”.

140. The Respondent seeks to distinguish the decision in *ROSE* on the basis that the junction box was clearly incapable of being used on its own and as such, was an incomplete product. In addition, despite requiring further parts, it had the essential characteristics of a junction box, as presented to customs. The Appellant argues that this decision is analogous to the pants and the pad, such that the fittings on the junction box depend on the industrial use of the box, that the junction box is just a box without the fittings, and in the absence of such fittings, it does not alter the basic purpose for which the product is intended to serve. The Commissioner agrees with the Appellant in this regard. Moreover, and importantly, the Commissioner notes that the box and the terminals are not presented at the point of importation together and are sold separately. Again, the Commissioner agrees with the Appellant that the product is not used on its own and is incomplete without the pad. The Commissioner again considers that it is not a tenable position for the Respondent to decide that the product can be used on its own, when no right thinking person would use it on its own and would want to use it on its own. It is not “fit for purpose” as underwear for the reasons set out above.

141. As previously mentioned above, the Commissioner has considered the decision in *The Bear Factory Ltd* which concerned the classification of a stuffed toy (bear), which did not contain the stuffing and which HMRC contended that “*it fell to be classified as a stuffed toy as the classification relates to an incomplete or unfinished product i.e. partially stuffed skins, it must reflect to have regard to GIR 2(a) whose effect is to extend classification to unfinished products provided they have the essential characteristics of the finished product. The products are designed to take stuffing*”. In concluding that the empty bear had the essential character of a stuffed toy even though, at the point of importation it lacked stuffing, the FTT held that :

“21. the effect of GIR 2(a) in the present circumstances is that the expression “stuffed” toy will cover the products so long as (a) the product can properly be said to be an incomplete or unfinished stuffed toy and (b) at the time of presentation the product has the essential character of the complete or finished stuffed toy.

22. Our approach to that composite question of classification involves applying well-established principles. First, the objective characteristics and properties as defined in the heading are what count; and for that purpose the intended use of the product in questions may constitute an objective consideration. Second, the fact that the product in question may, as a purely theoretical possibility, be used

in the manner that is inconsistent with its intended use as objectively determined, cannot determine the proper classification: see Thyssen [1995] ECR 1-1381”

142. The Appellant contends that in *The Bear Factory Ltd* decision, the HMRC are effectively making the Appellant’s case, such that it does not matter that the skin is presented on its own, it is an incomplete product. The HMRC made the following argument (paragraph 16):-

“Customs say that the imported product are partially stuffed toys, possessing in each case the essential characteristics of a stuffed toy. It is they say, relevant and legitimate to have regard to GIRs 2-5; and where, as here, the classification relates to incomplete or unfinished products, namely the partially stuffed skins, it must be relevant to have regard to GIR 2(a) whose effect is to extend classification to unfinished products provided they have the essential characteristics of the finished product...”

143. The Appellant contends that the Respondent’s argument is not correct, namely that in order for the products to be classified in accordance with GIR 2(a), the products must be imported together. The Respondent argues that it cannot classify the product with another product that is not before it and treat it differently. Notably, the Respondent did not present any evidence or case law to support this position in respect of incomplete products. On the other hand, the Appellant, as set out above, has submitted a number of authorities in support of its argument that in order for GIR 2(a) to apply, there is no requirement that the goods be imported together or application made for both items. The Respondent sought to argue that the decision in *C-2/13 Humeau Beaupreau SAS* supports importation together, but the Commissioner is satisfied that this decision is distinguished on the basis that it relates to unassembled products under GIR 2(a) and not incomplete products, which what is pertinent and applicable in this appeal.

144. Having carefully considered the argument of the Respondent in this regard and the decisions of the CJEU as referred to above, the Commissioner finds that the Respondent’s argument that the products must be presented together at the point of importation has no foundation. In addition, the very nature of GIR 2(a) is that the product is incomplete or unfinished on importation. GIR 2(a) states that :

“Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled”.

145. Notably, neither GIR 2(a) nor the Explanatory Note to GIR 2(a) make reference to products being presented together as contended for by the Respondent. Of further note, is HSEN to Chapter 90 General Part II ‘*Incomplete or unfinished machines, apparatus, etc*’ which seems to envisage incomplete goods being presented separately and which states:

“Provided they have the essential character of the complete or finished article, incomplete or unfinished machines, appliances, instruments or apparatus are classified with the corresponding complete or finished articles (for example, a photographic camera or a microscope presented without its optical elements or an electricity supply meter without its totalling device)”

146. Accordingly, the Commissioner finds that the Respondent again erred in its approach to classification by discounting the application of GIR 2(a) in the classification exercise, based on the fact that the pad was not presented at the point of import with the pant. Once more, despite the product stating that the product is part of a two piece incontinence management system in both the packaging and marketing material submitted, it seems the Respondent ignored this crucial consideration, in terms of the application of the GIRs and the classification of the product.

147. The Commissioner has considered the decision in *C-2/13 Humeau Beaupreau*, which relates to the importation of various components of shoes, such as inner and outer soles, laces and where the tax authority took the view that there was duty at a particular rate on each of the components. The case turned on whether the products imported separately, were each to be classified as an incomplete or unfinished article of footwear for the purpose of GIR 2(a), which depended on whether they had the essential character of the finished article, footwear and whether or not insignificant processing to which they were subjected after importation, constituted more than mere assembly. The Appellant states that it relies on this decision in support of the approach to the question of whether the product in this appeal has the essential character of the finished article. The Court held at paragraph 34 that :

“The character of a shoe lies in essence in the combination of an upper and outer sole. Those components represent the greater part of the complete article for which they are intended and give that article the appearance of a shoe. In addition, they surround and protect the foot, thus enabling the shoe to fulfil its primary function”.

148. The Respondent points out that in fact this decision relates to unassembled/disassembled items as the component parts of the goods were presented together at customs, and the shoe was therefore considered to be an unassembled item. This argument is despite its reliance on the decision, as set out above, in the context of incomplete goods. The Respondent submits that this can be distinguished from the present product and does not support the Appellant. In addition, the Respondent submits that there is no definition of the concept of unassembled or incomplete in any jurisprudence cited. The Commissioner considers that the fact that there is no definition of unassembled or incomplete means that it relies on common sense and the ordinary meaning of the words. They are not complex or unknown words.

149. The Commissioner agrees that the *Humeau Beaupreau* decision is a relevant decision in terms of considering two components and whether together, they fulfil the essential function of the complete article, in this appeal, being the pant and pad as part of a two piece incontinence system. The Commissioner is in no doubt that when considering the product as a two piece incontinence system and when considering both of those components, they represent the complete article for which they are intended and give the article the appearance and utility of an incontinence management system. Accordingly, the Commissioner is of the view that the product in this appeal, is an incomplete product and the product is complete when considered in tandem with the pad.

150. The Commissioner is satisfied that it is correct to apply GIR 2(a), in addition to GIR 1 and 6, for the reasons set out above. The jurisprudence of the CJEU in relation to incomplete products supports this position. Moreover, the Commissioner is satisfied that no rule or requirement exists that the product, being incomplete, must be presented together at the point of importation. In fact, the Commissioner is of the view that it would seem to defy the logic if an incomplete product was presented together, as this would suggest an unassembled product, as dealt with in the decision in *Humeau Beaupreau*.

151. The Respondent argues that the product could not be considered to exhibit the essential character of the complete or finished article, given that it does not contain any absorbent

material/core and that the product has the objective characteristics of apparel, namely *briefs, panties* at the point of import, not the objective characteristics of incontinence wear. Moreover, the Respondent considered that the product is ruled out of meeting the criteria as provided for in Heading 9619 00 89 of the CN as the product is reusable up to 50 times. However, applying GIR 1, 2(a) and 6 and when consideration is given to the product as a complete product, the sum of the two parts, pants and pad, the Commissioner is satisfied that this product is capable of being classified in **Heading 9619 00 89 of the CN**. The product as presented, is an incomplete item, despite the Respondent's persistent argument to the contrary.

152. Notwithstanding that view and finding, if the Commissioner has erred in her interpretation and application of GIR 2(a), the Commissioner has considered classification of the product in accordance with GIR 1 and 6 only, as contended for by the Respondent. The Commissioner's analysis is set out below.

GIR 1 & 6

153. GIR 1 states that "the titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or notes do not otherwise require, according to the following provisions....."

154. It is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the CN and in the notes of the sections and chapters (see *Crystals, Lutz, Amoena*). Moreover, the intended use of a product may also 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 products objective characteristics. (see *KAHL, Metherma, Crystals, Lutz*). In addition the Commissioner's attention was drawn to the decisions in cases C-339/09 *Skoma- Lux*, C-145/16 *Aramax Nederland BV*, and *SASKA* and that these cases establish that "*the intended use of a product is a relevant criterion only where the classification cannot be made on the sole basis of the objective characteristics of the product*". The Commissioner noted the error in the English translation in the wording such that *cannot* is the correct translation, not *can* which has appeared in the English translation version submitted and which is incorrect. This was helpfully identified by Counsel for the Appellant.

155. Applying GIR 1 and considering the headings and any relative section or chapter notes, it is apparent from the Appellant's submissions that it relies on the wording of Heading 9619 00 of the CN namely, "*and similar articles, of any material*". The Commissioner agrees that the issue of specificity is important when GIR 6 is being considered, as it relates to the sub-headings. The HSEs are a useful guide to interpretation, however are non-binding and should not be afforded any more status than that.
156. The General HSE for Chapter 96 provides for "*and various other articles not more specifically covered by other headings in the nomenclature*". Further, the Appellant states that it references "in general the articles are disposable" but importantly it goes on to state that "this heading also includes similar traditional articles made up solely of textile materials which are usually reusable following laundering. The Respondent argues that the fact that the product is described as a "reusable incontinence fixation pant", is criterion identified to take it out of Chapter 96.
157. The Commissioner is satisfied that this contention is incorrect, given the above entitled paragraph. Accordingly, it is apparent to the Commissioner that the Respondent erred in placing any reliance on this criterion, namely, that the product is reusable, in terms of classification to remove the product from eligibility from Chapter 96 of the CN. The Commissioner is satisfied that products that are reusable are clearly included. The Commissioner also accepts the converse that as this product has an expiry date and life span of up to 50 washes (however, in reality it is much less) it could also be capable of being considered a disposable product, which is far removed from the life span of underwear available in the retail market. Additionally, the heading states that "*the articles of this heading are usually shaped so that they may fit snugly to the human body*". The Commissioner is of the view that this accurately describes the function of the Appellant's product, namely fixation.
158. The Respondent's task in classification under GIR 1 was to consider the objective characteristics of the product and its intended use. The Respondent placed much weight on the fact that the product was not absorbent. Having regard to the principles of GIR 1 and the approach to classification, the Commissioner cannot accept that absorbency characteristics are mandatory for inclusion in Chapter 96 of the CN, having regard to the wording as set out above in the headings. In addition, it was accepted by the Respondent's witness that the fact that the product is not disposable, was another key characteristic that the Respondent determined the product to be lacking, such that it was removed from further consideration under Chapter 96.

159. The Appellant argues that the intended use of the product is key to classification and detailed evidence was given in relation to the objective characteristics and properties of the product. The Appellant submits that all of those objective characteristics inherent in the product at the point of importation allows the Respondent to have regard to the intended use of the product. The Commissioner is satisfied that the objective characteristics of this product illustrate and confirm its intended use. The Respondent's own BTI makes reference to fixation, a two piece incontinence system, that the product is sold in two parts, the pants and the pad and both are delivered and sold separately, however both are needed to be an effective product.

160. The Commissioner is satisfied that the Respondent had all the objective characteristics, properties and intended use in its own BTI yet maintained the argument that "*the objective characteristics/properties of the Fixation Pants as presented at the point of import are not that of incontinence wear, but in fact support that they (pants) can be worn independently of the pads, if desired, as a pair of underpants (apparel)*" thus incorrectly classifying the product as a complete product and an article of apparel. The Commissioner notes that the Respondent considered the packaging and brochures yet determined that the objective characteristics are not that of incontinence wear but an article of apparel, *women's or girl's...briefs, panties*. The Commissioner notes the decision in *HMRC v Honeywell Analytics Ltd* [2018] EWCA Civ 579 ("Honeywell"), referred to by the Appellant and which is not disputed by the parties. Sales LJ held at paragraph 68 that :

"There is also a principle that, where the objective characteristics and properties of an article are capable of falling within more than one heading, a use which is "theoretically conceivable but highly improbable" is to be ignored. That was the situation in C-459/93 Hauptzollamt Hamburg-St Annen v Thyssen Haniel Logistic GmbH [1995] ECR I-138 (especially at para. 16). It was also the situation, and the reason for the decision, in C-480/13 Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafen 17 July 2014 ECLI:EU:C:2014:1097 (especially at para. 42)".

161. The Commissioner notes the parties reliance on the decision in *Amoena* which considered the application of GIR 1 and 6 to a mastectomy brasserie which was designed to accommodate inserts to be worn by mastectomy patients, but which was designed also to accommodate padding for aesthetic rather than for purely medical purposes such that it was classified as a brassiere in Heading 6212 of the CN. The CJEU held at paragraph 43 that "*such a purpose is not intrinsic to these goods since the objective characteristics and*

properties of those goods do not appear to be such as to elude a use therefore as an ordinary brassiere...” The Respondent states that this is highly relevant both in relation to the duality of purpose and the requirement that the intended use must be inherent in the product at the time of import. The Commissioner is satisfied that this decision only supports the Respondent if its argument is that “*fixation pants can be worn independently of the pad*”. But the product is not made, marketed or sold to have a dual purpose, namely underwear and an incontinence product. The product at issue is wholly unsuitable for use as underwear, as is established above.

162. The Commissioner has considered the decision in *Lutz* which related to “sculpting pants” and the significance of this BTI to support the Appellant’s argument that these goods are not an article of apparel. In *Lutz* it was held that the product could be distinguished from ordinary underwear “*by the much reduced horizontal elasticity on order to support the human body and achieve a slimmer silhouette*”. The Commissioner has considered that the product in *Lutz*, which was classified not as underwear given its function, design and intended use, is relevant to the present circumstances of this appeal.

163. The Commissioner has considered the decision in *Neckermann* which concerned the classification of pyjamas. The Court held that :

“...it follows that for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed, it suffices that it is in the main use for which it is intended”.

164. When the Respondent issued its BTI decision and in written submissions in this appeal, the Respondent states “it is also possible however unlikely it may be that the fixation pants could be worn without the pads and therefore considered as an article of apparel”. The Commissioner finds this is a fundamental error on the Respondent’s part, not only on the basis of the evidential deficit in terms of its assertions but also that it failed to consider the CJEU views in this regard. Again, the decision in *Premis Medical BV* supports the principle that one should not classify products based upon purely theoretical possibilities, which the Respondent seems to have applied to the product the issue of this appeal.

165. It is clear from the objective characteristics of the product itself, its transparency, the bands on the waist and on the legs and the mesh material, the lack of a gusset or front opening, the stretch of the product, the length of the leg, the colour coding, the expiry date on the packaging, that the product only works with the pad and the pad only works with the

product. When there are two potential headings that need to be considered, the intended use becomes critically important. This is established by the jurisprudence from the CJEU.

166. The Commissioner notes the reliance placed on the HSEN and previous BTI and Cross Rulings by the Respondent. The Commissioner is satisfied that such reliance was misconceived, given that it resulted in an incorrect interpretation of the appropriate headings and caused the Respondent to err in this approach to classification. The Commissioner is satisfied that the Respondent had considerable time, namely 180 days to classify this product yet exceptional weight was attached to previous BTI and Cross Rulings, including misinterpretation of such BTI and Cross Rulings, the result being incorrect classification of the product. Both previous BTI and Cross Rulings are dealt with separately, in detail, hereunder.

167. The Commissioner has also considered the decisions in C-182/19 *Pfizer Consumer Healthcare Ltd* and C-547/13 *Oliver Medical* where the CJEU held that classification of a product under the Medical Devices Directive was “*one factor amongst others to be taken into consideration*” in the classification of the products in question. The Respondent states that this classification is irrelevant and that the Medical Device Directive 93/42/EEC has no bearing on the Respondent’s decision as to whether the product in question comes within the scope of Heading 9619 of the CN. The Commissioner notes that the position of the Respondent. This is despite the above views of the CJEU in both of the aforementioned decisions. It is inconceivable that a manufacturer is put to the considerable expense of testing and certification of a product as a medical device and all that entails as evidence by the many certificates on the packaging, and that is ignored in the classification. In the same way, it is inconceivable that the fact that the product if worn as underwear without the pad, would cause harm and so not comply with the EU Product Safety Directive and yet that is also ignored. The EU is not set up to cause confusion for traders and a holistic view should not be ignored.

168. Accordingly, having considered the submissions and applicable case law, the Commissioner is satisfied that applying the settled interpretive criteria identified by the CJEU with regard to classification in the CN and in accordance with GIRs 1 and 6 for the interpretation of the CN, the product should be afforded a classification in the Heading 9619 of the CN, based on its objective characteristics and intended use. The Commissioner is satisfied that the product is capable of being described as “*similar articles of any material, of other textile materials....napkin and napkin liners for babies, and similar*

articles, other (for example, incontinence care articles)". This is based on the application of GIR 1 & 6 as follows:-

Heading 9619:-

"and similar articles of any material"

3 dash subheading 9619 00 89:-

- "of other textile materials"

-- "napkins and napkin liners for babies, and similar articles".

--- "other (for example, incontinence care articles)

The Commissioner accepts as logical the interpretation of "*and similar articles*" in the two dash subheading, being that of incontinence care articles.

BTIs and Cross Rulings

169. The Respondent places significant reliance on previous BTIs issued by other member states, in addition to Cross Rulings issued by the United States. The Respondent submits that the rules are based on the EU Regulations, the CN, binding on all member states, but in addition to that, there is an international system, the HS. So, whilst the HSEN are at international level, there is an obligation to make sure that they are followed to ensure consistency in approach to the classification of goods and products. The Respondent submits that it seeks to find comparators by way of previous BTI and Cross Rulings that may assist it in its interpretation of a product for the purposes of classification in the CN.

170. The Respondent submits that there is no particular BTI or Cross Ruling in this appeal that was decisive in terms of classification, it was simply seeking something that might compare to the product, the subject of this appeal. The Respondent states that it looked at the HSEN and considered what might be suitably classified under Heading 9619 of the CN. The HSEN for Chapter 96 namely states "*this heading does not cover products such as.....or other non-absorbent articles in general classified by their constituent materials*".

171. The Respondent states that it interpreted the HSEN to Chapter 96 to mean that it does not cover non-absorbent articles which in turn, caused it to decide that the product cannot be classified under Heading 9619 of the CN and must be classified according to its constituent material, which in this case is textile, placing it within the garment parts of the CN. Whilst these rules are non-binding, the Respondent argues that it is guidance that the Respondent must follow as best it can. The Respondent relies on the decision of *Humeau Beapruau* which at paragraph 39 restates the importance of the HSEN, being an important

means of ensuing uniform application of the common customs tariff and may be interpreted as useful aides to interpretation. The Commissioner is satisfied that the HSEN is a useful guide to interpretation but that it should not interfere with the interpretation according to the terms of the headings and relative chapter or section notes, as set out in the GIR 1.

172. Notably, the Appellant submits that there are two very significant features that are required to be considered when having regard to previous BTIs and Cross Rulings, namely:-

- (i) that Heading 9619 00 89, which specifically lists “incontinence care articles” was first introduced into the CN (in headings 9619 00 29) in 2012 and reorganised in 2013 and accordingly, no BTI issued prior to 2012 could have considered classification under heading 9619 00 89, as incontinence care articles were not classifiable in that heading at that time and
- (ii) that Cross Rulings relate to the HS and not the CN. The HS does not contain an equivalent of Heading 9619 00 89 and does not make reference to incontinence care articles.

173. The Respondent relied on a number of previous BTI decisions, as the Respondent argues that it is required to abide by the BTI decisions of other customs administrations across the EU and divergence is not an option. The Commissioner is of the view that the following are worth elaboration for various reasons as set out below.

174. DEBT112084/18-1. This is a German BTI relating to a product called NOBAPANTS which issued on 26 April 2018 and is valid for a period of 3 years. The Respondent’s witness gave evidence that this BTI had a positive influence on his decision in terms of classification. He said that “*they do not have an absorbent core..., they are not an article of incontinence care articles*”. However, the witness, despite having 180 days to consider such BTIs, was unsure of the NOBAPANT’s purpose other than the NOBAPANTS is not an incontinence care product, that the product is used in a medical setting and “*because they don’t contain any absorbent material they can move into the textile chapters....So from the point of view of the product as it is, they are an equivalent product*”.

175. It was established by the Commissioner at the hearing of the appeal that the witness considered that this product was an equivalent product based on a photograph of the product and the description, but without actually knowing the purpose of the NOBAPANTS. It was submitted by the Respondent that they are used in a medical setting and contain no absorbency, therefore, are similar to the product in this appeal. This is despite the product known as NOBAPANTS never seeking classification in Heading 9610 as

incontinence wear. In addition, as stated above, NOBAPANTS were classified as garments and surgical wear in Heading 6210 10 98. They were never classified as women's briefs.

176. IE16NT-14-4311-06. This is an Irish BTI issued in 2016 for a product known as Poise pants. The evidence of the Respondent was that "*these are a designed as an incontinence brief. So they go over an incontinence pad and hold a pad in place*". It was also submitted that they are capable of holding hip protectors in the pockets in the hips and that as there is no absorbent core, it is not classifiable as an incontinence article. The Commissioner enquired as to the possibility of a dual function in terms of this product being a hip protector and a fixation pant for incontinence pads, but that it also is capable of being worn on its own due to the opening in the front. The Respondent concurred, but restated that as this is capable of use on its own it determined that it was akin to the product in this appeal and so is directly comparable. This is despite the Poise pants being cotton and there appearing to be no issue in terms of use by a man or a woman, in stark contrast to the pants the subject of this appeal.

177. DE BTI 2547/21-1. This is a German BTI and classified in subheading 9619 00 50 10 as "nappies and napkin liners for babies and similar articles, of any material, of textile materials other than textile wadding, knitted or crocheted". The BTI describes the product as a cloth diaper set consisting of two components, a cloth diaper with a diaper insert. The Respondent submits it is classified in this heading of the CN as the product is a "composite article whose essential character is determined by the value of the cloth nappy made of knitted fibre". The Commissioner has considered this BTI relating to the product known as Babylove. It appears from open source information (and which was available to the Respondent) that this is a product consisting of a reusable baby diaper which is a knitted textile, but which is sold with a nappy liner, which is absorbent and capable of reuse. It appears that that products intended function is that the pants are reusable, with the absorbent liner that is inserted in the pants also being reusable. The justification for classification appears from the BTI, to be the essential character of the cloth diaper, not the absorbent liner. Similarly, this product is not disposable akin to the product in this appeal and would be in line with the current focus on environmentally friendly products and the desirability of goods being reusable and not being single use products. In recognising that companies are using innovation to create products that are reusable, it makes sense not to infer that Heading 9619 makes it a mandatory requirement that a product is disposable, which approach the Respondent took to classification and which it accepted was incorrect at hearing.

178. The Commissioner considers it notable, that that this product is in fact directly comparable to the product in the present appeal. However, the difference being that the pad is not included with the product herein. If the Appellant had sold the product with the pads, it is likely the Respondent would have been obliged to decide that it came within the heading. In relation to a child's nappy liner, "one size fits all". The products relating the babies and their sizing is dependent on the age of the baby, as opposed to incontinence. However, with adults the pads cannot be sold together as the size of the pad (unlike a baby's nappy liner) is not dependent on the size of the adult but on the type and level of the incontinence (hence that critical evidence given at the start of the hearing). It cannot be sold as a composite "set" like BTI 2547-21-1 due to the complexity of the medical condition unlike a baby's inability to be toilet trained. It appears to the Commissioner that when you consider this BTI and the basis on which the classification was afforded to the product it only serves to support the Appellant's appeal. The product is a composite product and an incomplete product, capable of being classified in this heading, when considered with the pad in accordance with GIR 2(a).

179. The Commissioner determines that the Respondent should have considered in detail this product and the basis for its classification, as being reflective of the approach to be taken to the product herein, such that both are a composite product, with the only exception being that the Babylove product is packaged together with the absorbency insert, as opposed to not being packaged together making the Appellant's product an incomplete product, for the cogent reasons as set out in detail in the Appellant's application for BTI.

180. The Respondent also considered Cross Rulings during the 180 days, as guidance in terms of classification of the product at issue. The Commissioner considers that the Cross Ruling at 7B of the bundle of documents referred to by the Respondent, is notable. This Cross Ruling relates to a product called Pouch Pants the description being "*...designed to effectively manage serious chronic incontinence problems and therefore specifically benefit healthcare institutions....lightweight durable stretch cotton or polyester shell with a water resistant elasticated channel system which is formed....the diaper with its channel system is used with a super absorbent ...pad that is sold separately from the diaper and is not imported...*" The applicant in the Pouch Pants case is attempting to secure the application of the Nairobi Protocol in this decision and the company appealed the initial decision as to classification. The Nairobi Protocol relates to the classification of products for disabled persons. The applicant was successful at having the product reclassified as an article of incontinence wear.

181. The Respondent's witness confirmed that he took account of the Cross Ruling when making the decision and that "it gave us pause for thought but the product that we have does not have an absorbing core which these products have, that's removable, which is stitched in there..." The witness went on to confirm that in his view this product "had the absorbent core in there...". When pressed by the Commissioner whether this product in fact did have absorbency, having regard to the language in the description, Counsel for the Respondent confirmed the description as "the patent pending channel is stated to serve as a temporary container for moisture not yet absorbed by the pad or as a final barrier against leaks if a pad is filled to capacity" and stated that the channel is an extra layer of absorbency. The witness stated that "*the moisture channel in there fits within the description of the HSEN for...incontinence care articles, that it would wick moisture away from the skin, it would keep moisture or trap moisture with an outer plastic layer, which the product that we were presented with does not have that outer plastic layer to trap moisture in or to absorb additional moisture*". He confirmed that the product in this appeal does not have absorbency or the objective characteristics of incontinence care articles. However, when questioned by Counsel for the Appellant, the witnesses conceded that Pouch pants without the pad, have no absorbency.

182. In light of that evidence, the Appellant's witness was recalled. It has already been established that the witness is an expert in the area of incontinence care articles having worked in the industry throughout his career. He stated that the Pouch pants have a polyurethane ("PU") membrane sewn in to the shape of a pocket and into the pocket a disposable pad is placed. He said the PU membrane is under the pad and its sole purpose is to stop liquid passing through the pad and to stop leakage. He confirmed that there is no absorbency in the PU membrane and it cannot be worn as pants due to the plastic lining being extremely uncomfortable. He stated that the product is suitable for light incontinence and are freely available for purchase online.

183. It is plainly clear from the evidence that this product is distinctly comparable to the product in this appeal, such that it has no absorbent qualities yet it is classified as an incontinence care article. It is the Commissioner's view that had the Respondent given due consideration to the Cross Ruling and the characteristics inherent in Pouch pants, it would have understood that it does not support the Respondent's views, in terms of the absorbency requirement of incontinence care articles under Chapter 96.

184. The Commissioner is cognisant that the Respondent had 180 days, a significant period of time, in order to make a decision and properly understand what comparators it was using.

Yet in respect of the evidence given, there were no photographs sought or queries raised with the US authorities or no research was carried out it seems as to the characteristics of the product namely, Pouch pants. Had this occurred, it would have been evident that the product has no absorbent qualities. The Commissioner notes that 180 days is a significant period of time in order for a decision making body to come to a conclusion. It is clear to the Commissioner that in this instance, that the Respondent did not undertake sufficient diligence with respect to the accuracy or attention to detail in weighing comparators.

185. Accordingly, the Commissioner is satisfied that whilst previous BTI and Cross Rulings are worthy of some consideration, they cannot distract from the task at hand namely to classify the product in accordance with the headings of the CN and any relevant section or chapter notes, using the GIRs and the principles laid down by the CJEU. In addition, the previous BTI and Cross Rulings only assist the Appellant, once an understanding of incontinence wear is fully understood.

186. The Commissioner is satisfied, as set out above, that undue weight was afforded by the Respondent to such previous BTI and Cross Rulings and a misunderstanding of the products, such that it blindsided the Respondent into determining that this product was an article of apparel namely, *women's or girl's...briefs, panties*, capable of classification under Heading 6108 of the CN. The Respondent appears to have ignored its objective characteristics and intended use, which would have more appropriately provided for classification in Heading 9619 of the CN. It seems to the Commissioner that the Respondent took the view that this product was just pants and used comparators to confirm this and support that decision, rather than using comparators as an analytical tool.

187. Moreover, had the Respondent understood the detail of the previous BTI and Cross Rulings, it would have been apparent that in fact, they do not support its conclusions, rather the previous BTI and Cross Rulings support the Appellant's assertions i.e. *Babylove and Pouch pants*. The Commissioner is of the view that reliance on the previous BTI and Cross Rulings herein was misconceived on the part of the Respondent from the outset and progressively deteriorated in terms of their support for the Respondent's position. The Commissioner is satisfied that no reasonable person, having analysed the product, could classify the product as an article of apparel namely, *women's or girl's...briefs, panties*, given the products objective characteristics and intended use. The Commissioner cannot support the view that a customs classification that ignores a medical device certification and ignores the health and safety lacuna of the product as an item of apparel without the

pad could be correct. The Commissioner notes that all parties agreed that the product is part of a two piece system in the management of incontinence.

188. Accordingly, the Commissioner concludes that having regard to the previous BTIs and Cross Rulings, in light of the aforementioned conclusions, that they do not serve to dissuade the Commissioner in any way, that this product should be appropriately afforded classification under Heading 9619 00 89 of the CN.

IX. Determination

189. As such and for the reasons set out above, the Commissioner finds that the appropriate tariff classification for the Appellant's product is classification within Heading 9619 00 89 of the CN. The Appellant succeeds in its appeal.

190. This appeal is hereby determined in accordance with Part 40A TCA 1997 and in particular, section 949 thereof. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.



Marie-Claire Maney
Chairperson
Appeal Commissioner
12th October 2022

X. Appendices

Appendix 1 Appellant's Legal Submissions

TAX APPEALS COMMISSION

BETWEEN:

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

APPELLANT'S COMPOSITE WRITTEN LEGAL SUBMISSIONS

1. The Appellant's application for its BTI, its notice of appeal, its statement of case and the submissions delivered on 30 September 2019 put forward the basis upon which the Appellant contends that this product is properly classifiable in Heading 9619 and why it is not correctly classified in headings 6108. However, in light of the passage of time, the comprehensive written legal submissions delivered by the Revenue Commissioners and the instruction of Counsel in this matter, the Appellant has brought together in one document its various arguments which we trust is in ease of the Appeal Commissioner and the Revenue Commissioners.
2. The BTI issued by the Revenue Commissioners in this case correctly describes the goods as follows:

"Unisex reusable incontinence fixation pants.

The Article is designed as part of the two piece incontinence management system to effectively manage serious chronic incontinence problems and therefore specifically designed to benefit health care institutions and the chronically incontinent patients they serve.

The incontinence pants are sold in two parts, the 'pants and the pad' and both are delivered and sold separately, however both are needed to be an effective product.

This classification is for one part of the system, the reusable incontinence fixation pants. The fixation pants have a specially knitted and constructed waistband to provide better fixation to the patient. The product is designed as seamless and when stretched is almost transparent, so it will not interfere with the patient's regular underwear or outer garments. They are designed to be washable, breathable."

3. The BTI confirms, in box 9, that the product has been classified on the basis of General Interpretative Rules ("GIR's") 1 and 6 only (see below). GIR 2 has been considered by the Revenue Commissioners to be inapplicable. This position has been repeated and restated in the Respondent's written legal submissions.
4. For the avoidance of any doubt the product as used by the patient will be referred to in these submissions (as it is in the BTI) as the "two-piece Incontinence Management System" (or the "Incontinence Management System" or "IMS") and the two separate parts of that system referred to as the Pads and the Fixation Pants respectively. It is common ground that it is the Fixation Pants which have been presented for customs classification but also common ground that those pants are part of the Incontinence Management System along with the Pads.
5. The Pads and the Fixation Pants are sold by the healthcare distributor to healthcare institutions and healthcare authorities as the [REDACTED] two-piece incontinence management system. The Pads are sold in separate packaging and different pack sizes to the Pads, but this is a function of the fact that the Pads are designed for only a single use whereas the Pants are designed to be reused. The precise Pad which is to be used will vary from patient to patient and from time to time and the extent to which the Fixation Pants can be reused (or will become soiled and require laundering) cannot be definitively predicted. Accordingly, it would not be practical to sell Pants with only a specific number of pads of specific sizes. Instead, customers buy a specific number of Fixation Pants and a specific number and variety of Pads and create from those items, the IMS which they require. For example, the Fixation Pants choice for a patient is determined by their waist size, whereas the Pad type/size to be used is determined by the level of incontinence.

6. In setting the scene for the task of classification it is respectfully submitted that the Appellant cannot improve on that provided by Commissioner Gallagher in her Decision in 33TACD2021. This has been replicated at paragraphs 7 to 14 below with the deletion of certain paragraphs that are not relevant in the present case.

The Combined Nomenclature

7. The Customs Cooperation Council, now the World Customs Organisation (WCO), was established by the convention creating that council, concluded in Brussels on 15 December 1950. The Harmonised Commodity Description and Coding System ('the HS') was drawn up by the WCO and established by the International Convention on the Harmonised Commodity Description and Coding System ('the HS Convention') concluded in Brussels on 14 June 1983 and approved, with its amending protocol of 24 June 1986, on behalf of the European Economic Community by Council Decision 87/369/EEC of 7 April 1987.
8. Under Article 3(1) of the HS Convention, each Contracting Party undertakes to ensure that its customs tariff and statistical nomenclatures are in conformity with the HS, to use all of the headings and subheadings of the HS without addition or modification, together with their related numerical codes, and to follow the numerical sequence of that system. Each Contracting Party also undertakes to apply the General Rules for the interpretation of the HS and all the section, chapter and subheading notes of the HS, and not to modify their scope.
9. Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the common customs Tariff (hereafter 'the 1987 regulation') and, Commission Implementing Regulation (EU) 2018/396 of 13 March 2018 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (hereinafter "the 2018 Regulation" represent EU legislation directly applicable in Member States.
10. The combined nomenclature of the common customs tariff ('CN') is set out and established in Annex I to the 1987 regulation as amended. Customs classification of goods imported into the European Union is governed by the CN. The general rules for the interpretation of the CN, which are set out in Part One, Section I, of the CN, state that classification of goods in the Combined Nomenclature shall be governed by six principles.
11. The Appeal Commissioner then set out the six General Interpretative Rules ("GIR") to which we will return shortly.

12. The nomenclature is governed by the HS Convention, which was elaborated under the auspices of the World Customs Organisation ('WCO'). In the EU the HS Nomenclature was given the force of law in the 1987 Regulation.
13. As an aid to the correct classification of goods, the WCO has produced explanatory notes ('HSEs').
14. In addition to the fact that there are Explanatory Notes which are applicable to the headings contended for by the parties to this appeal, the GIR's themselves are the subject of Explanatory Notes.

The Principles of Interpretation

15. Insofar as they are relevant to this appeal, the GIRs and their Explanatory Notes are set out below and the Appellant has set these out in two parts for the following reason. GIRs 1, 2 and 6 are of general application meaning that they must be considered in every case. GIR 3, however, only arises if a product is classifiable in two headings. The classification of a product in two headings is a relatively unusual occurrence and occurs most frequently with what are referred to as 'composite goods', namely a single article which is comprised of two or more different materials and which, as a result, is theoretically classifiable in both the headings corresponding to those items made from each of those materials. GIR 3 provides the basis upon which one determines the heading which is most appropriate. Neither the Appellant nor the Respondent in this case contends that two headings apply i.e. both parties contend that classification can be determined in accordance with GIR's 1, 2 and 6 only. The Appellant contends that only 9619 00 89 is applicable and the Respondents contend that only 6108 22 00 is applicable. In the event, however, that the TAC were to decide that the Fixation Pants were classifiable in both headings the Appellant has set out, at the end of this submission, how GIR 3 would apply in that instance. The Appellant's principle submission, however, is that these goods are classifiable in Heading 9619 00 89 alone. The complete GIR and explanatory notes are to be found at Tab 5 of the Book of Authorities and the Appellant has included here only those rules and notes said by the parties to be of relevance to the appeal.

"General rules for the interpretation of the harmonized system

Classification of goods in the Nomenclature shall be governed by the following principles:

Rule I

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

Explanatory note

- (I) The Nomenclature sets out in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover. In many cases, however, the variety and number of goods classified in a Section or Chapter are such that it is impossible to cover them all or to cite them specifically in the titles.*
- (II) Rule 1 begins therefore by establishing that the titles are provided "for ease of reference only". They accordingly have no legal bearing on classification.*
- (III) The second part of this Rule provides that classification shall be determined:
 - (a) according to the terms of the headings and any relative Section or Chapter Notes, and*
 - (b) where appropriate, provided the headings or notes do not otherwise require, according to the provisions of Rules 2, 3, 4, and 5.**
- (IV) Provision (III) (a) is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules (e.g., live horses (heading 01.01), pharmaceutical goods specified in Note 4 to Chapter 30 (heading 30.06))*

(V) *In provision (III) (b), the expression "provided such headings or Notes do not otherwise require" is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, ie, they are, the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate only to particular goods. Consequently those headings cannot be extended to include goods which otherwise might fall there by reason of the operation of Rule 2(b).*

Rule 2

(a) *Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.*

(b) ...

Explanatory note

Rule 2(a)

(Incomplete or unfinished articles)

(I) *The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished provided that, as presented, it has the essential character of the complete or finished article.*

(II) *The provisions of this Rule also apply to blanks unless these are specified in a particular heading. The term "blank" means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used other than in exceptional cases, for completion into the finished article or part (e.g. bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a*

screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).

Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".

(III) In view of the scope of the headings of Sections I to VI, this part of the Rules does not normally apply to goods of these Sections.

(IV) Several cases covered by the Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section XVI, and Chapters 61, 62, 86, 87 and 90).

...

Rule 6

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those sub-headings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

Explanatory note

(I) Rules 1 to 5 above govern, mutatis mutandis, classification at subheading levels within the same heading.

(II) For the purposes of Rule 6, the following expressions have the meanings hereby assigned to them:

(a) "Subheadings at the same level": one-dash sub-headings (level 1) or two-dash subheadings (level 2)

Thus, when considering the relative merits of two or more one-dash subheadings within a single heading in the context

of Rule 3 (a), their specificity or kinship in relation to a given article is to be assessed solely on the basis of the texts of the competing one-dash subheadings. When the one-dash subheading that is most specific has been chosen and when that subheading is itself subdivided, then, and only then, shall the texts of the two-dash subheadings be taken into consideration for determining which two-dash subheading should be selected.

(b) "unless the context otherwise requires": except where Section or Chapter Notes are incompatible with subheading texts or Subheading Notes.

This occurs, for example, in Chapter 71 where the scope assigned to the term "platinum" in chapter Note 4 (B) differs from that assigned to "platinum" in Subheading Note 2. for the purpose of interpreting subheadings 7110.11 and 7110.19, therefore, Subheading Note 2 applies and Chapter Note 4(B) is to be disregarded.

(III) The scope of a two-dash subheading shall not extend beyond that of the one-dash subheading to which the two-dash subheading belongs; and the scope of a one-dash subheading shall not extend beyond that of the heading to which the one-dash subheading belongs."

16. As regards the relationships between the various GIRs the FTT in C00256: *The Bear Factory Ltd* explained this as follows:

"19. There is an evident priority in the GIRs. Rule 3 comes into effect given that the goods are classifiable under more than one heading. Rule 4 relates to goods which cannot be classified under Rules 1-3. (Rule 5 is not applicable here.) By contrast to Rules 3 and 4 however, there is nothing in the wording of Rule 2(a) or in its Explanatory Notes that can be construed as excluding its application where the classification can be determined by operation of Rules 1 and 6. Rule 2 reads as a provision of general application which, in appropriate situations (such as the classification of incomplete or unfinished articles), must be employed. The Explanatory Note (1) to Rule 2(a) makes it clear that Rule 2(a) actually extends the

scope of “any” heading, the one and only qualification being that the article in question has the essential character of the complete or finished article.”

17. The basic principles of interpretation have been repeated *ad infinitum* by the CJEU, most recently, in Joined Cases C-197/20 and C-216/20, *KAHL GmbH & Co. KG* where the CJEU held:

31 *As regards the interpretation of the CN sought, it should be noted that, in accordance with the general rules for the interpretation thereof, the classification of goods is to be determined according to the terms of the headings and any relative section or chapter notes to that nomenclature. In the interests of legal certainty and ease of verification, the decisive criterion for the tariff classification of goods is generally to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of that nomenclature and in the section or chapter notes. The intended use of a product may also 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 (judgment of 3 June 2021, *Flavourstream*, C-822/19, EU:C:2021:444, paragraph 34 and the case-law cited).*

32 *Furthermore, the Court has repeatedly held that, although they do not have legally binding force, the Explanatory Notes to the HS and CN are an important means of ensuring the uniform application of the Common Customs Tariff and, as such, may be regarded as useful aids to its interpretation (judgment of 18 June 2020, *Hydro Energo*, C-340/19, EU:C:2020:488, paragraph 36 and the case-law cited).” (emphasis added)*

18. Although in near identical terms, it is worth noting that in C-403/07 *Metherma GmbH & Co. KG v Hauptzollamt Düsseldorf*, the CJEU set out the principles in the following terms:

“46 *It is settled case-law of the Court that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case 145/81 *Wünsche* [1982] ECR 2493, paragraph 12; Case C-15/05 *Kawasaki**

Motors Europe [2006] ECR I-3657, paragraph 38; and Case C-310/06 FTS International [2007] ECR I-6749, paragraph 27).

- 47 *In addition, the intended use of a 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 (see Case C-459/93 Thyssen Haniel Logistic [1995] ECR I-1381, paragraph 13; Case C-201/99 Deutsche Nichimen [2001] ECR I-2701, paragraph 20; and Case C-142/06 Olicom [2007] ECR I-6675, paragraph 18).*
- 48 *Furthermore, it should be recalled that, according to the case-law of the Court, the explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the World Customs Organisation may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (see Case C-35/93 Develop Dr. Eisbein [1994] ECR I-2655, paragraph 21, and Case C-400/05 B.A.S. Trucks [2007] ECR I-311, paragraph 28). The content of those notes must therefore be in accordance with the provisions of the CN and may not alter their meaning (Case C-280/97 ROSE Elektrotechnik [1999] ECR I-689, paragraph 23; Case C-495/03 Intermodal Transports [2005] ECR I-8151, paragraph 48; and Case C-445/04 Possehl Erzkontor [2005] ECR I-10721, paragraph 20)."*
19. This case is noteworthy because the Revenue Commissioners cite and rely upon paragraph 48 of this Judgment but do not refer to paragraph 47. It should be acknowledged, however, that at paragraph 112 of their written legal submissions the Respondents – so far as we are aware, for the first time in the classification of this product – have conceded that the intended use does constitute a criterion for classification. Their riposte at paragraph 113, however, does not address the intended use at all and instead states that the Fixation Pants have “*the objective characteristics of an article of underwear/apparel at the point of import and does not have the objective characteristics of incontinence wear at that point.*” This is, with respect, an answer to the wrong question, the question is whether the intended use of the product can be discerned from its objective characteristics at the point of import. If it can, then this intended use itself constitutes a criterion for the classification of the product.

20. The Revenue Commissioners' stated approach to this case has been to classify the product on the basis of what they regard as its "constituent materials" i.e. without any regard to its unique properties, functions or intended use. It is submitted that this was a basic error in approach which precluded any possibility of properly applying the General Rules.

21. The UK case of *Crystals Ltd v HMRC* [2016] UKFTT 29 (TC) contains an admonishment of the UK tax authority for doing precisely the same thing. There the FTT noted:

"55. HMRC seek to minimise the notion of function, and effectively to ignore it, concentrating instead, exclusively on physical characteristics. No authority was cited to support that approach which seems to us to raise a question of law. Is the fundamental or principal function and purpose of the Goods relevant to their classification in this appeal? And if it is, does it outweigh the absence of certain physical similarities to goggles.

56. The answer to the first question is not in doubt. In Ikegama, Advocate General Kokott, in the opinion cited to us by HMRC, stated that the two relevant criteria for classification of an article are its material composition and its intended use, the intended use being determined by recourse to objective criteria. We therefore reject the submission that the classification cannot be determined to any significant extent by reference to the intended use of the Goods.

57. The decisive criterion for the customs classification of goods must be their objective characteristics and properties as defined by the wording of the headings of the Common Customs Tariff and to the notes to the sections or chapters.

58. In our view, the intended use, function and purposes of the Goods constitute important characteristics of the Goods, considered objectively. That is their distinguishing trait or characteristic."

22. Indeed, in C-556/16 *Lutz GmbH v Hauptzollamt Hannover* the CJEU considered a product which was said by the tax authorities to be classifiable in Heading 6108 22 00 (the same heading for which the Commissioners contend in this case). In finding that the product was in fact classifiable in Heading 6212 20 00, for which the taxpayer in that case contended, the Court held:

“47 Also the intended purpose of the product at issue in the main proceedings must be taken into consideration, as that purpose may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see, to that effect, judgment of 26 April 2017, *Stryker EMEA Supply Chain Services*, C-51/16, EU:C:2017:298, paragraph 40 and the case-law cited).

48 Having regard to the intended purpose of the product at issue in the main proceedings, classified as ‘sculpting knickers’ by the referring court and ‘seamless shapewear’ by the main customs office in Hanover, it appears that, by its action, that product is intended to support and sculpt the human body. Therefore, that product has, subject to verification by the referring court, the essential characteristic of very restricted horizontal elasticity in order to support the human body and to create the objective effect of a slimmer silhouette.

49 In that connection, Lutz claims essentially that, unlike traditional corsets and girdles, in which the effects of supporting and sculpting the human body are generally achieved by a rigid stitched front panel and elastic side panels, which involves the assembly of the various parts by a sewing machine, the new system of knitted support belt knitted with circular stitching in those under garments, which is a patented technical innovation, automatically incorporates the slimming panels in those garments, so that a graduated corseting effect is incorporated into it.

50 Thus, it must be held that the girdle or panty-girdle at issue may be distinguished from ordinary underwear by much reduced horizontal elasticity, in order to support the human body and achieve a slimmer silhouette.”

23. It is submitted that this case is of some significance as it was a case where the product could accurately be described as ‘briefs’ and garment but, because of its design, function and intended use was held to be classifiable elsewhere.

24. The relevance of intended use has since been reaffirmed on countless occasions. See, *inter alia*, Case C-495/03, *Intermodal Transports BV v Staatssecretaris van*

Financiën, at paragraph 55 and Case C-445/17 *Agenzia delle Dogane e dei Monopoli v Pilato SpA* at paragraph 25 for two further instances.

25. With the foregoing general introduction to the process of classification in mind it is now appropriate to set out and examine the Headings for which the parties respectively contend.

The Headings

26. The Appellant contends that the Fixation Pants are properly classifiable in Heading 9619 00 89 namely “*Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles of any material*” (Emphasis added). The three level Code in which classification is specifically sought is – “*of other materials*”, -- “*Napkins and napkin liners for babies, and similar articles*” --- “*other (for example, incontinence care articles)*”. It is of great significance that the “*for example, incontinence care articles*” is part of the wording of the sub-heading under which classification is sought, it is not merely the wording of an Explanatory Note. The case law referred to above is clear that classification must take place primarily in accordance with the wording of the headings and sub-headings.
27. Chapter 96 is a part of Section XX to the EU CN. There are no section Notes. The Notes to Chapter 96 provide that:

“Subheadings 9619 00 71 to 9619 00 89 include goods of paper pulp, paper, cellulose wadding or webs of cellulose fibres. Those subheadings also include composite goods consisting of the following:

- (a) an inner layer (for example, of nonwovens), designed to wick fluid away from the wearer's skin and thereby prevent chafing;*
- (b) an absorbent core, for collecting and storing the fluid until the product can be disposed of; and*
- (c) an outer layer (for example, of plastics), to prevent leakage of the fluid from the absorbent core.”*

28. In addition to this, the WCO Explanatory Notes to the Harmonised System (the “**HSEN**”) for Chapter 96 (see Tab 11(d) of the Hearing Bundle) provide that:

General

This chapter covers... certain sanitary absorbent products (sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles of any material) and various other articles not more specifically covered by other headings in the Nomenclature.

Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles, of any material.

This heading covers sanitary towels (pads) and tampons, napkins (diapers) and napkin liners and similar articles, including absorbent hygienic nursing pads, napkins (diapers) for adults with incontinence and pantyliners, of any material.

In general, the articles of this heading are disposable. Many of these articles are composed of (a) an inner layer (e.g., of nonwovens) designed to wick fluid from the wearer's skin and thereby prevent chafing; (b) an absorbent core for collecting and storing fluid until the product can be disposed of; and (c) an outer layer (e.g., of plastics) to prevent leakage of fluid from the absorbent core. The articles of this heading are usually shaped so that they may fit snugly to the human body. This heading also includes similar traditional articles made up solely of textile materials, which are usually re-usable following laundering.

This heading does not cover products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material)."

29. The Heading for which the Respondents contend is 6108. It applies to:

"Women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles, knitted or crocheted."

The sub-heading for which they contend is 22 00, namely, "*of man-made fibres*".

30. The only Chapter Note that is considered to be of relevance is Note 9 which provides, inter alia, that:

“Garments which cannot be identified as either men’s or boy’s garments or as women’s or girls’ garments are to be classified in the headings covering women’s or girls’ garments.”

31. This Note is of some importance to the present case because the incontinence pants in this case are unisex. A few points arise from this. First, in order to rely upon Note 9, the Respondents must contend that Heading 6108 applies to “garments” and that the Appellant’s product is “garment”. If it is not a garment, then note 9 cannot apply.
32. It is submitted that the term ‘garment’ clearly connotes clothing and this product is not a garment or item of clothing. It is not an item whose purpose, use or function is to clothe the wearer but merely to function as a means of holding the absorbent pad in place.
33. In any event, notwithstanding the fact that Note 9, were it applicable, results in a given item of clothing being classified as an article of women’s clothing rather than men’s clothing (to which the same rate applies) it is submitted that the unisex nature of this product is an inherently incongruous characteristic of something said to conform to the definition of ‘briefs’ or ‘underwear’.

GIR 1

34. As we have seen, the intended use of a product is an important criterion in its classification under GIR 1 provided that 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”*.
35. As the CJEU held in Joined Cases C-532/14 and C-533/14, *Toorank Productions BV v Staatssecretaris van Financiën*:

35 ... *it is common ground that the intended use of products may constitute an objective criterion for classification if it is inherent to those products, having regard to the objective characteristics and properties of those products (see judgment of 30 April 2014 in Nutricia, C-267/13, EU:C:2014:277, paragraph 21 and the case-law cited). Nevertheless, the intended use of a product is a relevant criterion only where the classification can be made on the sole basis of the objective characteristics and properties of that product (see judgment of 16 December 2010*

in Skoma-Lux, C-339/09, EU:C:2010:781, paragraph 47 and the case-law cited).”

36. It is submitted that in the present case, the intended use is inherent in the product and are capable of being assessed on the basis of the product’s objective characteristics and properties.
37. Whilst a physical examination of the product will perhaps demonstrate its distinct character better than words ever could, there are a number of key features of the product which are clear manifestations of its intended use:
 - i. A cursory review of the product immediately tells one that this product, though worn around the waist and legs are not briefs or underwear in any normal sense of the word.
 - ii. The fixation pants are constructed of Knitted Polyester and Elastane (knitting direction from waistband to leg with close stitches incorporated into crotch seam). (See more on this at paragraph 38 below where we explain why this crotch seam makes the product unsuitable as underwear.)
 - iii. It contains a High ribbed waistband, extra body elastic and pad fixation leg, Sewing and Hydro-Fixation. Percentage material content: 96% polyester, 4% elastane, with sewing specification: High dense over lock stitching 24N +1-5. The knitted in high ribbed waistband is specifically designed to reduce slippage of the Fixation Pant on the body, thereby assisting pad fixation. (See more on this at paragraphs 39 and 40 below where we explain why this construction makes the product unsuitable as underwear.)
 - iv. The waistband is knitted with rows of elastic /spandex yarn fully integrated and running across the full waistband to hold the place on the midriff portion of the body. The extra elastic in the body of the Fixation Pant is designed to support the pad closer to the body, again to help prevent pad leakage. This is a feature not found in normal underwear
 - v. Elastic /spandex bands are knitted in the base of the leg of the pant to prevent the leg being loose or moving upwards on the leg. This is

essential to maintain the integrity of the pad function and prevent slippage of the pad and, therefore, prevents leakage.

- vi. The packaging of the Fixation Pants clearly indicates that these are incontinence fixation pants, specifically designed and intended for use as part of the [REDACTED] branded two-piece incontinence management system (i.e. The Fixation Pants and the absorbent pad).
- vii. The Fixation pants are used as a medical device and so must meet certain standards that do not apply to items of regular apparel. The Testing necessary includes the patient safety test criteria that have to be satisfied -Skin Sensitisation Test - ISO 10993 - Skin Irritation Test- ISO 10993 - Cytotoxicity Test- ISO 10993 and STANDARD 100 by OEKO-TEX®, a worldwide consistent, independent testing and certification system for raw, semi-finished, and finished textile products at all processing levels, as well as accessory materials used. In addition, the manufacturing plant for this product is certified to the medical device standard ISO 13485: 2016 which is a specific industry and customer requirement for a Class 1 medical device product. In this regard, in both C-182/19 *Pfizer Consumer Healthcare Ltd*, at paragraph 51 and in C-547/13, *Oliver Medical* at paragraph 53 the CJEU held that the classification of a product under the Medical Devices Directive (Directive 93/42/EEC) was “*one factor amongst others to be taken into consideration*” in the classification of the products in question. At paragraphs 98, 109, 115, 120 and 136 of their submissions the Revenue Commissioners say that classification under Directive 93/42/EEC “no bearing” on the classification of the products at issue. This, we respectfully submit, is wrong. The product’s classification under Directive 93/42/EEC and other Regulations (such as EU 2017/745) is certainly not determinative of the customs classification but it is submitted that it is one factor amongst others which is required to be taken into consideration.
- viii. The reusable fixation pants have to be industry tested to be operationally effective to hold the pad in place securely for a minimum of fifty uses. In normal practice, however, they are disposed

of in less than eight to ten pad uses. They also have an expiry date of five years from date of production.

- ix. The Fixation Pants are unisex designed, to be used by both men and women. There is no designated front or back to the Fixation pants.
 - x. As a result of the open mesh structure the pants become almost transparent when stretched on the body so that they can be worn underneath underwear.
 - xi. The pants come with an attached label on which the Room number and name of a patient can be written. They are recommended to be washed at 60 degrees to ensure hygiene-safe compliance.
 - xii. Although required to be able to withstand fifty uses before being disposed of the pants do not have strengthened seams or double stitching and so have an obviously finite lifespan.
 - xiii. Appendix 1 to the BTI application details the various configurations of the Pad and Pant system and Appendix 2 contains three different sets of instructions for the use of the pant and pad system depending upon whether the user is in bed, sitting, or standing.
38. Not only is the product designed for a very specific use, as outlined above, it is also manifestly unsuited, on its own, for use as 'clothing', 'briefs', or 'panties' and could not reasonably be described as a 'garment'.
39. Whereas normal underwear are always made with a reinforced sewn in crotch the incontinence pants contain only a centre seam. Whilst this centre seam is covered by the pad when in use, it renders the incontinence pants peculiarly unsuitable for use as underwear when the pad is not in place as they cannot be placed against middle of crotch area since they would be very uncomfortable, irritating and, potentially, unhygienic.
40. Another feature of briefs, panties or underwear generally is that they are designed to afford dignity to the user by keeping the lower body area covered and not visible. Because they are designed with an open knitted mesh structure, the incontinence pants are designed to be transparent when pulled onto the body. This transparency would result in the genitalia being clearly visible without the absorbent pad in place, so

that user dignity is non-existent without the absorbent pad being in place. Patient dignity is provided by the absorbent pad which shields the genital area.

41. Next, normal underwear is made from a much more densely knitted structure than that which has been used to manufacture this product. The crotch area is usually reinforced when stitched together and often with an extra layer to absorb any light urine drip, which prevents liquid pass through and stain on outer clothing. The fixation pants, on the other hand, are made from a lightweight knitted open mesh structure. The material is textured polyester and spandex with no extra material in crotch area. This material will not absorb any liquid drops. Without the pad being in place, any urine drip will immediately pass through and stain outer clothing.
42. Whilst issues of design, fashion and aesthetics are clearly subjective, the fixation pants are clearly designed without any such considerations. It is available only in off-white colour in fixed leg style with industry standard colour coded stripe on waist for health care providers to quickly distinguish the size in a care setting.
43. The fixation pants have an expiry date the fixation pants have an expiry date a standard requirement for medical device products, and have a limited number of reuses due to the degradation, over time, of their elasticity. These, again, are not features common to clothing or garments.
44. Finally, the fixation pants are non-gender specific and have no designated front and back features. Whilst the Chapter Note to Headings 61 provides that garments which are not distinguishable as having been designed for men or women are to be classified under the heading applicable to the corresponding women's item, underwear, by definition, is designed to fit the male or female form and a product which is designed to fit both equally (or unequally) does not readily conform to the notion of 'briefs' (being the term used in the relevant heading) at all.
45. Whilst all of the foregoing characteristics are features of the pants themselves it is also clear that regard may be had to marketing materials in order to establish this intended use of a product. In *HMRC v Honeywell Analytics Ltd* [2018] EWCA Civ 579 Sales LJ held that:

“ it is in my view clear that the FTT in our case was fully entitled to take into account the manuals and other information about the product presented by Honeywell to consumers in the way that the FTT did. Conversely, the Upper Tribunal was wrong to leave these materials out of account when

undertaking its own assessment of classification as between heading 8531 and heading 9026. Such material forms part of the objective characteristics and properties of the goods in question for the purposes of applying the classification headings in the tariff Regulation. The relevance to tariff clarification of the objective manner in which an item is presented to consumers or users is also confirmed by the judgment of the CJEU in Joined Cases C-288/09 and C-289/09 British Sky Broadcasting Group [2011] STC 1519, at [77]-[79]. Indeed, given the importance for tariff classification under various headings of the use to which an item is intended to be put, it seems to me that it would be most odd and contrary to principle to leave out of account the way in which consumers are encouraged to use the item in question by materials placed into the public domain and objectively verifiable for the purposes of tariff classification.”

46. The other Lords Justice unanimously agreed with this conclusion (see Davis LJ at paragraph 98 and Sir Terence Etherton MR at paragraph 89).
47. As the evidence before the TAC will demonstrate the marketing material pertaining to the fixation pants presents them for use *exclusively* as part of the two-piece IMS.
48. The Revenue Commissioners’ written legal submissions state, at paragraph 68, that *“the classification [of the product at issue] was approached from the viewpoint of the product’s objective characteristics and its essential character (from both its form and construction being that of an item of apparel).”* It is not entirely clear to the Appellant that is in fact the approach which was taken when the BTI was issued but what is clear is that no regard was had to the intended use of the product and, accordingly, the Revenue Commissioners’ approach to the task of classification was flawed from the outset.
49. The Respondents, surprisingly, now place reliance on C-677/18 *Amoena v HMRC* in support of the BTI. This is, it is submitted, surprising because that case turned on a detailed analysis of the use to which the product was designed to be put, which is entirely at odds with the basis on which the present product was classified, namely, on the basis of its constituent materials only and without regard to use. That case conclusively demonstrates that the approach to classification adopted in this case was wrong.

50. In any event, the CJEU in that case considered the application of GIRs 1 and 6 to a brassiere that was designed so as to accommodate inserts to be worn by mastectomy patients but which was also capable of use as an ordinary brassiere (without any inserts) and was designed also to accommodate padding for aesthetic, rather than purely medical, purposes. It was held, therefore, that at the point of importation it was not possible to discern whether the product was to be used as a medical device (as a bra designed exclusively for mastectomy patients would have been). In the present case the fixation pants are not suitable for use without the Pads and they have no alternative use other than for the fixation of the absorbent pads designed and sold by the Appellant. Accordingly, *Amoena* is authority for precisely the proposition on which the Appellant's claim classification should be made, namely, a consideration of the use to which the product is to be put provided that the use is discernible from the objective characteristics of the product. On the facts, however, the multi-purpose brassiere and the single purpose fixation pants are wholly different. It should also be noted, for completeness, that GIR 2(a) (considered below) did not arise for consideration in that case.
51. A further manifest error in the classification exercise was the decision to classify the product on the basis an assumed theoretical possibility rather than the accepted principal and intended functions of the product. In their BTI decision and in their written submissions the Revenue Commissioners have repeatedly stated "*it is also possible, however unlikely it may be, that the fixation pants could be worn without the pads and therefore considered as an article of apparel.*" [emphasis added]
52. Without prejudice to the Appellant's argument that the fixation pants (i.e. the Incontinence System absent the Pad) are wholly unsuited to use as clothing, garments, apparel, pants or similar, it has long been clear that the mere theoretical possibility of such a use would not, even if it existed, consign them to classification under heading 6108.
53. The Combined Nomenclature contains thousands of different classifications and the task of classification is to find the heading which – on an application of the rules – is most appropriate. Put another way, the possibility of classification under heading 6108 does not need to be categorically excluded in order for classification under Heading 9619 to be preferred. This, to be clear, is not an example of a product being classifiable under two headings and subject to the tie-breaker rules in GIR 3 but rather the requirement to identify the appropriate headings in the first instance on an application of GIRs 1 and 6.

54. In *C-395/93 Neckermann v Hauptzollamt Frankfurt-am-Main* the ECJ (as it then was) considered a case analogous to the present one. There, certain items of clothing had been imported during 1988 and 1989. The garments, which had been declared as pyjamas, were reclassified by the German authorities as “*upper garments and trousers*” and, in one case, as “*an ensemble*”, with the result that a higher rate of customs duty was chargeable. Obviously, pyjamas are theoretically amenable to being described as “*upper garments and trousers*” or as “*an ensemble*” but the very purpose of the General Rules of Classification is to ascertain how a given product might be most accurately described as between various competing descriptions. The Court held:

“It is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters (judgment in Case 40/88 Weber v Milchwerke Paderborn-Rimbeck [1989] ECR 1395, paragraph 13). Likewise, for the purpose of interpreting the Common Customs Tariff, the Court has consistently held that both the notes which head the chapters of the Common Customs Tariff and the Explanatory Notes to the Nomenclature of the Customs Cooperation Council are important means for ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation (judgment in Case 200/84 Daiber v Hauptzollamt Reutlingen [1985] ECR 3363, paragraph 14).

The wording of heading 61.08 of the Common Customs Tariff ('women's or girls' ... pyjamas, ..., knitted or crocheted') does not provide a definition. Nor is a definition of pyjamas to be found in the Explanatory Notes on the Common Customs Tariff or in the Explanatory Notes to the Nomenclature of the Customs Cooperation Council.

In the absence of such a definition, the objective characteristic of pyjamas, which is capable of distinguishing it from other ensembles, can be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear.

If that objective characteristic can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas.

It follows that, for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which it is intended.” [emphasis added]

55. Accordingly, the fact that one might theoretically choose to wear pyjamas to the shops, or that they are capable of being described as an “upper garment and trousers” does not change the fact that the task of classification is to identify the heading in which they most properly belong. In the same vein, the fact that this product is designed to be worn under clothing and, in that sense, might conceivably be described as ‘underwear’ does not end the task of classification. See also paragraphs 16 and 17 of C-459/93 *Thyssen Haniel Logistic GmbH* for a further example of this principle where the Court held that “a purely theoretical possibility” of the product being used in one way did not outweigh the “naturally intended” use which was decisive in its classification.¹
56. A further example of the principle that one should not classify products based upon purely theoretical possibilities, can be seen in Case C-273/09 *Premis Medical BV*, the CJEU considered whether a ‘walker-rollator’ was to be classified as an orthopaedic appliance (akin to crutches) or a non-mechanically propelled vehicle. The Court addressed the fact that it could, in theory, conform to some extent to both definitions in the following terms:

“44 In the present case, according to the description set out in the order for reference, the walker-rollator consists of an aluminium frame on four wheels, with two front swivel wheels, handles and brakes and it includes a seat and basket. The product can easily be folded for transport. As Premis Medical confirmed at the hearing, there is no standard walker-rollator, as the device can be purchased without a basket and without a seat. Likewise, the carrying

¹ It should be noted here that these cases (as with almost all of the other cases cited by the parties) are examples of products with respect to which two competing headings were contended but which the CJEU held were classifiable only in one heading. The products in these cases were not classifiable in two headings and then subject to GIR 3.

capacity, the height and width of the seat, and the weight and diameter of the wheels can vary.

45 *Furthermore, it is common ground that that product is designed to assist persons who have difficulty in walking and enables such persons to move forward by pushing the walker-rollator, which provides support.*

46 *With regard to heading 8716 of the CN, which covers, inter alia, 'other vehicles, not mechanically propelled', it is apparent from the HS explanatory notes relating to that heading that, in order to be classified under that heading, a vehicle with one or more wheels must be designed to transport persons or goods. However, it appears that the walker-rollator does not correspond to those characteristics, since it was specially designed to allow persons suffering from a defect of the legs, muscles or joints to walk by themselves.*

47 *In that regard, the mere fact that that walker-rollator may at the same time allow those persons to carry goods and, should the need arise, to rest by sitting on the seat does not call that finding into question. On the assumption that that walker-rollator, which is specially designed to assist people in walking, may serve several different functions, as the Commission contends, it must be classified in accordance with its main overall function.*

57. It is clear that the Respondents concluded – and continue to argue – that simply because the product could, in their view, theoretically function as underwear (and it is denied that it could or would ever be used as such in isolation) this is, in their view, of decisive importance in its classification. It is respectfully submitted that there is no basis in law for such an approach.
58. In the context of the General Rules of Interpretation this is an error in the application of GIRs 1 and 6. It is a basic error in the manner in which the Headings and sub-headings are to be applied and interpreted. The Appellant submits, therefore, that even on an application of GIRs 1 and 6 alone the fixation pants are properly classifiable in Heading 9619 00 89 and not 6108 22 00.
59. It is submitted that although the application of GIR's 1 and 6 demonstrate that Heading 6108 is unsuitable and Heading 9619 falls to be applied, GIR 2(a), to which we will now turn, reinforces this conclusion. As stated at the outset, GIR 2 is of general application. It informs, in all cases, the manner in which the Headings and sub-

headings are to be applied and interpreted. Accordingly, it is somewhat artificial to approach this case on the basis of classification under GIRs 1 and 6 only since GIR 2 must also be considered before a final classification can be ascertained.

60. The Respondents contend, however, that GIR 2(a) is inapplicable, the BTI and their written submissions refer to only GIRs 1 and 6. If they are correct in their position that GIR 2(a) is inapplicable, which is denied, then the Appellant relies on its submissions above as to the correct classification under GIRs 1 and 6. Accordingly, and importantly, classification of this product in Heading 9619 00 89 is not dependent upon application of GIR 2(a), it is merely the case that application of GIR 2(a) – if it is deemed applicable (as the Appellant submits it is) – produces the same result.

GIR 2(a)

61. GIR 2(a), as set out above, provides that:

“Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.”

62. It is important to emphasise at the outset that whereas GIR 3(b) (to which the Revenue Commissioners refer in their submissions) applies only when goods are sold together as a set; GIR 2(a) applies where products are imported separately.

63. As Explanatory Note I to Rule 2(a) provides:

“The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished provided that, as presented, it has the essential character of the complete or finished article.”

64. The key question, therefore, (insofar as the applicability of GIR 2(a) is concerned) is whether the Fixation Pants are an “incomplete or unfinished” incontinence care article.

65. In C-280/97 *ROSE Elektrotechnik GmbH v Oberfinanzdirektion Köln* the CJEU considered the classification of a junction box which was imported without cables or

contacts and even without holes in which those cables or contacts could be inserted. The ECJ held that:

“it is apparent from Rule 2(a) of the General Rules for the interpretation of the CN that, for the purposes of customs classification, an incomplete or unfinished article is to be treated in the same way as a complete or finished article, provided that it has the essential character of the complete or finished article. That rule of interpretation is itself clarified by the Customs Cooperation Council's explanatory notes, according to which the heading relating to the finished product covers blanks, that is to say, articles which, although not ready for direct use, have the approximate shape or outline of the finished article and can only be used for completion into the finished article.”

The national court has found that the product in issue has the external appearance of a junction box and is designed to be fitted with electrical terminals. Subject to any more detailed findings of fact which that court may make, and having regard to the technical information which it has furnished to this Court, it does not seem, as the Advocate General observes in point 30 of his Opinion, that the product in question could be used otherwise than as a junction box.

The absence of terminals cannot mean that the product lacks the essential characteristics of a junction box and that it cannot therefore be regarded as an incomplete junction box. It is not disputed that those terminals are fitted subsequently only because their form and dimensions depend on the industrial use to which the box is to be put. It follows that their absence does not alter the basic purpose which the product in question is intended to serve.”

66. In C-2/13 *Humeau Beaupréau SAS*, the trader was a vendor of shoes who separately imported uppers, outer soles, inner soles and laces and paid duty at rates between 3% and 6% on the various components. The tax authority took the view that duty applicable to footwear at 17% was applicable to each of these products imported separately. The case turned, essentially, on whether the products imported separately were each to be classified as an ‘incomplete or unfinished article’ (*viz.* footwear) for the purpose of GIR 2(a). This, in turn, depended on two matters (1) whether they had the ‘essential character’ of the finished article (the footwear) and (2) whether the not

insignificant processing to which they were subject after importation constituted more than mere assembly. On the first issue the CJEU considered held:

“33 ... the referring court thereby asks, in essence, whether General Rule 2(a) for the interpretation of the CN is to be interpreted as meaning that an upper, an outer sole and an inner sole, as an article presented unassembled having the essential character of footwear, come under heading 6404 of the CN where, following their import, the upper and the outer sole must be roughed prior to their assembly and a counter, inserted into the upper, must be shaped by humidification.

34 *The character of a shoe lies in essence in the combinations of an upper and an outer sole. Those components represent the greater part of the complete article for which they are intended and give that article the appearance of a shoe. In addition, they surround and protect the wearer’s foot, thus enabling the shoe to fulfil its primary function.”*

67. It is submitted that precisely the same can be said of the fixation pants in this case. The essential character of the complete product is as an incontinence care article. To perform that function the product in this case contains an absorbent pad which is required to be positioned securely against the body. It is important that it can be easily and accurately positioned by the patient or, more usually, a healthcare worker. The two parts of the product work in unison; one is redundant without the other. In *Humeau Beaupréau*, it was the combination of the upper and outer sole which gave the product its character, in this case, it is the combination of the fixation pants and the pad which give the incontinence care product its character.

68. In *The Bear Factory Ltd* (Decision Number: C00256) the Appellant was importing toys which did not contain stuffing (as they were to be stuffed by customers in store) which HMRC contended fell to be classified as a stuffed toy. The contentions of the parties (notably the converse of the positions adopted by the tax authority and taxpayer in the present appeal) were as follows:

16. *Customs say that the imported products are partially stuffed toys possessing, in each case, the essential characteristics of a stuffed toy. It is, they say, relevant and legitimate to have regard to GIRs 2-5; and where, as here, the classification relates to incomplete or unfinished products, i.e. the partially stuffed skins, it must be relevant to have regard to GIR 2(a)*

whose effect is to extend classification to unfinished products provided they have the essential characters of the finished product. The products are designed to take the stuffing. They have the size and outward appearance of a stuffed toy. They have preset holes for stuffing and pre-threading to facilitate sewing up. All those demonstrate that the products possess the essential characters of stuffed toys...

17. *For The Bear Factory it is argued that GIR 2(a) has no application. The products can be classified using GIRs 1 and 6; those rules therefore have priority to Rules 2-5. Specifically, the first step is to look at the heading which best classifies the product. It is common ground that the appropriate heading is 9503 00, i.e. "toys, representing animals ...". Then in comparing the subheadings "stuffed toys" and "other toys" GIRs 1 and 6 lead to the straightforward conclusion that because the products are not stuffed toys at the point of importation, they must therefore be classed as "other". The Bear Factory further contends that even if GIR 2(a) were in principle applicable, it would not apply here because the products do not have the characters of stuffed toys. The essential character of a stuffed toy is the combination of the outer skin plus the stuffing; the empty skins as imported cannot be regarded as having the essential character of that final product. This is because filling out the skins is essential to creating the shape and appearance of the product. At the point of importation neither the stuffing nor any of the essential characters or characteristics are present. Thus GIR 2(a) cannot be invoked to affect the classification of the product."*

69. Having concluded, as referred to earlier, that GIR2(a) was of general application the FTT continued.

21. *The effect of GIR 2(a) in the present circumstances is that the expression "stuffed" toy will cover the products so long as (a) the product can properly be said to be an incomplete or unfinished stuffed toy and (b) at the time of presentation the product has the essential character of the complete or finished stuffed toy.*
22. *Our approach to that composite question of classification involves applying well-established principles. First, the objective characteristics and properties as defined in the heading are what count; and for that purpose the intended use of the product in question may constitute an objective*

consideration. (That comes from paragraphs 23 and 24 of BVBA, Case C-486/06.) Second, the fact that the product in question may, as a purely theoretical possibility, be used in a manner that is inconsistent with its intended use as objectively determined, cannot determine the proper classification: see Thyssen [1995] ECR I-1381. Third, when asking whether a particular product, being a part, is to be treated in the same way as the complete or finished article, it may not be so treated where, to enable the part to be used, the finished article needs modifying by a complex method which may involve buying in some specialised ingredient (such as software). See Medion, Case C-208/06. Fourth, the product falls to be classified at the point of importation.”

70. Ultimately, the FTT concluded – on the facts of that case – that the empty bear had the essential character of a stuffed toy even though, at the point of importation, it lacked stuffing. Whilst the facts of that case and the facts of this case were very different it is submitted that in precisely the same way, the fixation pants in this case have the essential character of the completed incontinence system notwithstanding the fact that they are presented for importation separately to the Pads in the same way that the bear was classifiable as a stuffed bear notwithstanding the fact that it was presented empty and separately to the stuffing.

BTIs and CROSS Rulings

71. Over the course of the past two years both parties have called in aid BTI's and CROSS rulings issued by other countries with respect to other products. It is submitted, however, that these BTIs and CROSS rulings are somewhat of a distraction, since the task at hand is to classify the product before the TAC in accordance with the General Rules of Interpretation and the principles set down by the CJEU rather than by reference to BTI's issued for other products.
72. For completeness, however, the Appeal Commissioner may wish to note the following comments of the ECJ in C-495/03 *Intermodal Transports BV* as to the relevance of BTI's. It is relevant to note that this Judgement written in the context of a national court's discretion to make a preliminary reference pursuant to article 234 TEU (now 267 TFEU) with respect to which, of course, different principles apply depending upon whether there is a right of appeal from the decision of the Tribunal or Court in question. As the Commissioner will be aware, a court or tribunal from which there is no appeal and which is called upon to decide a question of EU law must refer that question to the

CJEU unless the matter is *acte clair* i.e. unless there is no reasonable doubt as to the correct answer:

“34 *The fact that the customs authorities of another Member State have issued to a person not party to the dispute before such a court a BTI for specific goods, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN, taking account, in particular, of the three criteria cited in the preceding paragraph.*

35 *On the other hand, contrary to the contentions of Intermodal and the Commission, and as the Netherlands and Austrian Governments have rightly claimed, the existence of such a BTI cannot, in itself, prevent the national court from concluding, after an examination fulfilling the requirements noted in paragraphs 33 and 34 of this judgment, that the correct application, in a given case, of a CN tariff heading is so obvious as to leave no scope, particularly in the light of the settled interpretative criteria identified by the Court with regard to classification in the CN, for any reasonable doubt as to the manner in which the question raised is to be resolved or prevent it, in such a case, from deciding to refrain from seeking a preliminary ruling from the Court and to take upon itself the responsibility for resolving that question (Cilfitand Others, cited above, paragraph 16).”*
(See also, C-677/18 *Amoena*, at paragraph 60)

73. Accordingly, the existence of a BTI classifying a similar product in a different heading is not, as such, a legally relevant consideration in the classification of the goods before this or any other Tribunal or court. Rather it is a factor which may be taken into consideration by a court or tribunal from whom no right of appeal exists in deciding whether there is reasonable doubt as to the correct interpretation of EU law and, consequently, whether it is obliged to refer a question to the CJEU. As the CJEU put it in *Amoena*, a Court or Tribunal from which there is no appeal but which is minded to classify the product before it in a different heading to a that which a BTI has applied to a similar product in another member state “*must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN*”.

74. It is submitted, that as the TAC is not a body from which there is no appeal, the existence of BTIs with respect to other products is of very limited utility and the parties' focus is better applied to the application of the rules of classification to this product rather than by analogy as to how other customs authorities saw fit to classify other products.
75. In any event, there are two very significant factors which need to be borne in mind were the TAC to have regard to any BTI's or CROSS Rulings.
76. First, Heading 9619 00 89, which specifically lists "incontinence care articles" was first introduced into the Combined Nomenclature (in Heading 9619 00 29) in 2012. These Headings were subsequently reorganised by European Council Regulation (EU) No 1326/2013 of 9 December 2013 which noted that prior to 2012 the articles in Chapter 9619 had been classified in a variety of different headings. Accordingly, no Regulation or BTI issued prior to 2012 can even touch on the question of whether Classification under Heading 9619 is appropriate as a matter of EU law because incontinence care articles were not classifiable in that heading at that time.
77. Secondly, as regards the CROSS Rulings, these are rulings of the US Customs and Border Protection as to the interpretation and application of Harmonised Tariff Schedule (the HS), not the CN. The HS does not contain an equivalent of Heading 9619 00 89 and does not make any reference to "incontinence care articles". It is, therefore of no value in ascertaining whether products are properly classifiable as such.
78. The Appellant has previously set out in its written legal submissions of the various BTI's and CROSS rulings to which it wishes to draw attention and explained why – in addition to the points set out above – those on which the Revenue Commissioners have relied are inapposite. The Appellant continues to rely on those submissions and we do not propose to say anything further about them here.

Products in two headings

79. It is submitted that either on an application of GIRs 1 and 6 or on an application of GIRs 1, 2(a) and 6, the Fixation Pants are clearly classifiable in 9619 and not in Heading 6108. Should the Appeal Commissioner agree with either or both of those submissions, the Appellant must succeed on its appeal. There is, however, a theoretical possibility that the Appeal Commissioner would decide that the product is classifiable in both Heading 6108 and 9619 and although this is not a possibility for

which either party contends, for completeness, it is appropriate to say a few words about this.

80. GIR 3 provides that:

“When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.*
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.”*

81. Even assuming that Rule 3 were engaged, Rule 3(b) is of no application in this case. This is so because the Fixation Pants are not *“Mixtures, composite goods consisting of different materials or made up of different components, [or] goods put up in sets for retail sale”*. Whilst the pants and the pads might be regarded as a “set” in the sense that they are normally supplied together and normally marketed together, it has been held that application of this rule requires that they parts of the set be presented together for customs clearance which the Pants and Pads in this case were not (see paragraph 36 of C-499/14, *VAD BVBA v Belgische Staat*).

82. Accordingly, we have set out below the explanatory notes for paragraphs (a) and (c) only.

Explanatory note

- (I) This Rule provides three methods of classifying goods which, prima facie, fall under two or more headings, either under the terms of Rule 2 (b) or for any other reason. These methods operate in the order in which they are set out in the rule. Thus Rule 3 (b) operates only if Rule 3 (a) fails in classification, and if both Rules 3 (a) and (b) fail, Rule 3 (c) will apply. The order of priority is therefore (a) specific description; (b) essential character; (c) heading which occurs last in numerical order.*

- (II) The Rule can only take effect provided the terms of headings or Section or Chapter Notes do not otherwise require. For instance, Note 4(8) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.05 shall be classified in one of the former headings. Such goods are to be classified according to Note 4 (B) to Chapter 97 and not according to this Rule.*

Rule 3 (a)

- (III) The first method of classification is provided in Rule 3 (a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.*

- (IV) It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that:*
 - (a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self- contained electric motor).*

 - (b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.*

Examples of the latter category of goods are:

- (1) *Tufted textile carpets, identifiable for use in motorcars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.*
- (2) *Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods of heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.*

(V) ...

Rule 3(c)

(XII) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they are to be classified in the heading which occurs last in numerical order among those which equally merit consideration in determining their classification.

83. Although the Appellant fundamentally disputes that the Fixation Pants could be classifiable in Heading 6108 in addition to being classified in Heading 9619, if the Appeal Commissioner were to come to that view, it is clear that on an application of either Rule 3(a) or Rule 3(c), the classification would be within Heading 9619. Assuming both Headings were applicable “Incontinence Care Articles” in 9619 00 89 is an infinitely more specific description of the goods than “briefs... and similar articles... of man-made fibres.” One need only consider the wide variety of articles which might theoretically fall within that 6108 22 00 description compared to the very specific category of product which might be classified in 9619 00 89. Should authority be required for this approach, the Appellant would recommend to the Commissioner the CJEU Judgment in C-91/15 *Kawasaki Motors Europe NV v Inspecteur van de Belastingdienst/Douane*. Whilst cases on the application of Rule 3 are extremely fact specific that case involves the application of GIR3(a) at the three digit sub-heading level.

84. The CJEU held:

- “54. ...in accordance with General Rule 1, for legal purposes, the classification is to be determined according to the terms of the headings and any relative section or chapter notes, in addition to other general rules, provided such headings or notes do not otherwise require. General Rule 6 provides that, for legal purposes, the classification of goods in the subheadings of a heading is to be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, according to the other general rules. Finally, it follows from General Rule 3(a), that where goods are *prima facie* classifiable under two headings, the most specific description is to be preferred to headings providing a more general description.
- 55 *In the present case, it is undisputed that commercial vehicles such as those referred to in paragraph 2 of the annex to Regulation No 1051/2009 must be categorised as ‘tractors’ within the meaning of subheading 8701 90, which concerns only commercial vehicles. The main distinction within that subheading is based on the intended use — agricultural, forestry or other — of the tractors covered.*
- 56 *According to the Court’s case-law, the intended use of a product may also 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 (judgment of 17 July 2014, *Systemx Europe*, C-480/13, EU:C:2014:2097, paragraph 31 and the case-law cited).*
- 57 *Moreover, in view of the scope of General Rule 3(a), if a tractor has such objective characteristics, it should be classified under the most specific subheading.*
- 58 *In the present case, as is apparent from the CN Explanatory Notes, the agricultural or forestry use of tractors may derive from their design and the presence of devices or equipment which make them suitable for use in the context of agricultural or horticultural holdings, without there being any need to link a priori the presence of certain devices or equipment exhaustively listed to that intended use.*

59 *As is clear from the description of the types of vehicles referred to in the judgment of 27 April 2006, Kawasaki Motors Europe (C-15/05, EU:C:2006:259), which corresponds, in essence, to that of the vehicle referred to in paragraph 2 of the annex to Regulation No 1051/2009, the vehicles referred to in that judgment are characterised, in addition to their high towing capacity, by their special design, in particular as regards the engine, tyres and suspension, which allow them to move in difficult natural terrain, in combination with equipment which may be attached to them by means of various coupling devices. All of those characteristics are general, objective and visible.*

60 *In the third place, it is irrelevant that, as mentioned by the Commission, tractors apparently intended for agricultural or forestry purposes may have a recreational use. It should be recalled that if the objective characteristic of a product can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for that product will not preclude its classification for legal purposes. For its classification for customs purposes, that product does not have to be solely or exclusively intended for use corresponding to that objective characteristic. It suffices if that is the main use for which it is intended (judgment of 13 July 2006, Anagram International, C-14/05, EU:C:2006:465, paragraph 26). In any event, that objection cannot justify the classification of the types of vehicles concerned under subheading 8701 90 90, which, like all the subheadings under CN heading 8701, covers commercial vehicles.”*

85. In any event, if the TAC were to consider that neither of headings 6108 22 00 nor 9619 00 89 were more specific, classification, under rule 3(c) would occur under that Heading which occurs last in numerical order, namely, 9619. As has been repeatedly stated, the Appellant submits that GIR 3 is never engaged in this case – because Headings 6108 is not, *prima facie*, applicable – but, if it were, it would clearly result in classification in Heading 9619 on the application of GIR3(a) and, in any event, 3(b).

Frank Mitchell SC

7 June 2022

Appendix 2 Respondent's Legal Submissions

THE TAX APPEALS COMMISSION

BETWEEN:

[REDACTED]

[REDACTED]

Appellant

AND

REVENUE COMMISSIONERS

Respondent

THE RESPONDENT'S RESPONSE

to

THE APPELLANT'S SUPPLEMENTAL SUBMISSIONS OF 7 JUNE 2022

BACKGROUND / INTRODUCTION

1. This document is a response to the Appellant's Composite Written Legal Submissions (hereinafter, the "Appellant's Supplemental Submission"). The Appellant contends that these Supplemental Submissions are a "composite" of submissions already made, however, a number of new arguments are made and new cases are cited, which had not been referenced heretofore by the Appellant.
2. In the paragraphs that follow, to assist the Commissioner, Revenue sets out its response to certain paragraphs of the Appellant's Supplemental Submission. However, failure to address any specific point made in the said Supplemental Submission is not to be taken as acceptance of same.
3. For the avoidance of doubt, Revenue continues to rely on and repeats its Outline Arguments dated 5 December 2019. Revenue reserves the right to object to new grounds made now which are not part of the grounds of appeal.

RESPONSE TO PARAGRAPH 3

4. The Appellant states at §3 of the Appellant's Supplemental Submission: "*The BTI confirms, in box 9, that the product has been classified on the basis of General Interpretative Rules ("GIR's") 1 and 6 only (see below). GIR 2 has been considered by the Revenue Commissioners to be inapplicable. This position has been repeated and restated in the Respondent's written legal submissions.*"
5. For the Commissioner's ease of reference, GIR 2(a) on the classification of "*incomplete or unfinished articles*" is set out at §30 of the Respondent's Outline Arguments. The Appellant's product, the "Reusable Incontinence Fixation Pants", is imported as a complete article in its own packaging and is not an incomplete/unfinished article. GIR 2 was ruled out by Revenue as the product, as presented by the Appellant to Customs at the point of import for the purposes of this BTI decision, could not be considered an

“incomplete or unfinished article” exhibiting the essential character of a complete or finished article of incontinence wear, as required for customs classification under GIR 2(a). The fact that the product does not contain any absorbent material/core does not render it an incomplete or unfinished article. In other words, the product “Reusable Incontinence Fixation Pants” could not be considered as an “incomplete or unfinished article” presented unassembled or disassembled just because they are not presented together with the incontinence pad at the point of import as required for customs classification under GIR 2(a). This is set out already in the Respondent’s Outline Arguments at §§46-52 and §§101-106.

6. To explain this further, Explanatory Note V (b) of the HSEN relating to GIR 2(a) (as set out in §46 of the Respondent’s Outline Arguments) provides an example of:
 - (a) Goods presented incomplete or unfinished (e.g. a bicycle without saddle and tyres); and
 - (b) Goods presented unassembled or disassembled (e.g. a bicycle unassembled or disassembled, all components being presented together) whose components could individually be classified in their own right (e.g. tyres, inner tubes) or as parts of those goods.
7. Such goods are to be classified as if they were those goods in a complete or finished state, provided the terms of GIR 2(a) are satisfied, and the headings or notes do not otherwise require.
8. An example of an incomplete article in the HS General Notes to Chapter 61 is *“shaped knitted or crocheted fabric for making such articles”* (see §49 of the Respondent’s Outline Arguments). Explanatory Note (VII) of the HSEN (see §52 of the Respondent’s Outline Arguments) relating to GIR 2(a) on articles presented unassembled or disassembled states that:

“For the purposes of this Rule, ‘articles presented unassembled or disassembled’ means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting and welding Unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately”.
9. This means that any extra components presented at import that are not required to assemble the complete articles are to be classified separately, e.g., extra tyres must be classified as tyres. The assembly here means assembly of the components presented together to Customs and fixing devices are devices to secure the components into the complete article.
10. In the present case, the Fixation Pants are imported as a complete article -without the incontinence pads- in its own packaging and are not an incomplete article. It is the Fixation Pads on their own that are being classified for customs purposes.

RESPONSE TO PARAGRAPH 4

11. The Appellant states at §4 of the Appellant's Supplemental Submission: *"For the avoidance of any doubt the product as used by the patient will be referred to in these submissions (as it is in the BTI) as the 'two-piece Incontinence Management System' (or the 'Incontinence Management System' or 'IMS') and the two separate parts of that system referred to as the Pads and the Fixation Pants respectively. It is common ground that it is the Fixation Pants which have been presented for customs classification but also common ground that those pants are part of the Incontinence Management System along with the Pads."*
12. It is important that such nomenclature does not serve to confuse the Commissioner in this appeal. The Appellant's BTI application is for the *"Reusable Incontinence Fixation Pants"* only and was classified as such. As stated, Customs can only classify goods as presented as the point of import.
13. Revenue, for its part, refers to the product as either the *"Reusable Incontinence Fixation Pants"* or the *"Fixation Pants"* in this document.

RESPONSE TO PARAGRAPH 9

14. Paragraph 9 of the Appellant's Supplemental Submission refers to Commission Implementing Regulation (EU) 2018/396 of 13 March 2018, however, this Regulation relates to fermented beverages and Revenue is at a loss as to why it is quoted here. Indeed, it is not quoted in 33TACD2021 (at §6 of the Appellant's Supplemental Submissions, the Appellant purports to "replicate" the decision in §§7 to 14).

RESPONSE TO PARAGRAPH 15

15. At §15 of the Appellant's Supplemental Submission, the Appellant states: *"GIRs 1, 2 and 6 are of general application meaning that they must be considered in every case."*
16. The GIRs are hierarchical in structure and the hierarchy is established by the wording of the rules themselves.
17. GIR 1 must be considered in every case because it is the first rule, but if a product can be classified according to GIR 1 then progression onto the following GIRs 1, 2, 3 and 4 are not required.
18. GIR 5 deals with packing materials and packing containers for products (which will not apply to all products) and GIR 6 is required to determine the subheading for classification after the heading has been determined (by GIRs 1-4).
19. HSEN (explanatory note) under GIR 1 provides at (III) (this is set out at page 5 of the Appellant's Supplemental Submission):

(III) The second part of this Rule [i.e. GIR 1] provides that classification shall be determined:

(a) according to the terms of the headings and any relative Section or Chapter Notes, and

(b) **where appropriate**, provided the headings or Notes do not otherwise require, **according to the provisions of Rules 2, 3, 4, and 5**.

(emphasis added).

20. HSEN explanatory note under GIR 1 provides at (IV) (this is set out at page 5 of the Appellant's Supplemental Submission):

(IV) Provision (III)(a) [cited above] is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules (e.g., live horses (heading 01.01), pharmaceutical goods specified in Note 4 to Chapter 30 (heading 30.06)).

21. It is further stated at §15 of the Appellant's Supplemental Submission that: "*In the event, however, that the TAC were to decide that the Fixation Pants were classifiable in both headings the Appellant has set out, at the end of this submission, how GIR 3 would apply in that instance.*"
22. In response, Revenue's position is that the Fixation Pants as presented to Customs are a complete item with the objective characteristics, from its form, shape, nature and construction, of an item of apparel, namely underwear. They do not have the objective characteristics of incontinence wear. An essential objective characteristic of incontinence wear is absorbency, which the Fixation Pants plainly do not have when presented as they are.

RESPONSE TO PARAGRAPH 17 (internal §31)

23. In response to §31 of the Appellant's Supplemental Submission, where the **Flavourstream** case is cited, Revenue submits that as is clear from the passage quoted, the important point is that, "*The intended use of a product may also 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***" (emphasis added).
24. Revenue contends that the objective characteristics/properties of the Fixation Pants as presented at the point of import are not that of incontinence wear, but in fact support that they (pants) can be worn independently of the pads, if desired, as a pair of underpants (apparel).

RESPONSE TO PARAGRAPH 18 (internal §47)

25. The Appellant cites from the cases of, inter alia, **Metherma** and **Thyssen Haniel Logistic**, at internal §47 (of §18) of the Appellant's Supplemental Submission such that: "*The intended use of a 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.** (emphasis added)".

26. In the present case, the Fixation Pants do not have the inherent characteristics of incontinence wear at the point of import. As such, the Customs Officer could not classify the Fixation Pants as presented on their own as incontinence wear under heading 9619.

RESPONSE TO PARAGRAPH 19

27. The Appellant states at §19 of the Appellant's Supplemental Submission, referring again to **Metherma**:

"This case is noteworthy because the Revenue Commissioners cite and rely upon paragraph 48 of this Judgment but do not refer to paragraph 47. It should be acknowledged, however, that at paragraph 112 of their written legal submissions the Respondents – so far as we are aware, for the first time in the classification of this product – have conceded that the intended use does constitute a criterion for classification. Their riposte at paragraph 113, however, does not address the intended use at all and instead states that the Fixation Pants have 'the objective characteristics of an article of underwear/apparel at the point of import and does not have the objective characteristics of incontinence wear at that point.' This is, with respect, an answer to the wrong question, the question is whether the intended use of the product can be discerned from its objective characteristics at the point of import. If it can, then this intended use itself constitutes a criterion for the classification of the product."

28. However, the Respondent's Outline Arguments do in fact provide as follows:

"110. The Appellant maintains that it knows of no instance where these fixation pants can or would be used as apparel.

111. The Respondent accepts that the intended use for the product is that it should be worn with the absorbent pads. Notwithstanding that this BTI Decision concerns only the 'Reusable Incontinence Fixation Pants' and not the pads, and it therefore could be possible to wear the fixation Pants on their own without an absorbent pad.

*112. The intended use of a product, as per manufacturer/distributors guidelines etc., may be considered as an objective criteria in association with other significant factors for customs classification. However as per Paragraph 25 ECJ C-44/15 (26 November 2015) [this is the case of **Hauptzollamt Frankfurt am Main v Duval GmbH & Co. KG**] paragraph 43 of ECJ C-273/09 (22 December 2010) [this is the case of **Premis Medical BV v Inspecteur van de Belastingdienst/Douane Rotterdam, kantoor Laan op Zuid**]: 'It must be noted that the intended use of a*

product may also 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.'

113. However, the 'Reusable Incontinence Fixation Pants' has the objective characteristics of an article of underwear/apparel at the point of import and does not have the objective characteristics of incontinence wear at that point."

29. Revenue's position is that it is clear that the intended use of the product cannot be discerned from the objective characteristics of the Fixation Pants presented on its own. The Fixation Pants as presented are a complete item with the objective characteristics, from both their form and construction, of an item of apparel, namely underwear. The objective characteristics of the Fixation Pants indicate that the item is an undergarment worn on the body.

RESPONSE TO PARAGRAPH 20

30. The Appellant states at §20 of the Appellant's Supplemental Submission that: "*The Revenue Commissioners' stated approach to this case has been to classify the product on the basis of what they regard as its 'constituent materials' i.e. without any regard to its unique properties, functions or intended use. It is submitted that this was a basic error in approach which precluded any possibility of properly applying the General Rules.*"
31. The HSEN (explanatory notes) to CN heading 9619 (as set out in paragraph 45 of the Respondent's Outline of Arguments) concludes that: "*This heading **does not cover** products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).*" (bold emphasis in original)
32. The emphasis on "does not cover" is included in the HSEN itself. As is apparent, the "does not cover" extends to "or other non-absorbent articles". The "Reusable Incontinence Fixation Pants" is a non-absorbent article with no absorbent material and thus cannot be classified at heading 9619.
33. Also as outlined above in the comment to §19 of the Appellant's Supplemental Submission, the intended use as incontinence wear is not inherent in the Fixation Pants as it does not have any absorbent material.

RESPONSE TO PARAGRAPH 21

34. The Appellant refers at §21 of the Appellant's Supplemental Submission to the case of **Crystals Ltd v HMRC** and it is not accepted that a decision of the Tax Tribunal in the UK has any special relevance in this jurisdiction especially given the large body of CJEU authority directly applicable in Ireland, particularly the key authorities of **Amoena Ltd** and **SASKA** cited below (see the response to paragraph 54 of the Appellant's Supplemental Submission below). In addition, national rulings are not binding on other

Member States within the EU. Without prejudice to that, there is perhaps no major dispute between the parties arising from the principles of that case; the Appellant does not cite the concluding paragraphs of that case, which state that:

*“60. There are some physical characteristics of the Goods that are similar to goggles. When worn, the Goods cover each eye and have a similar size and shape to the human eye socket. It is within common experience that some goggles do so, too. The Goods are made of a form of transparent tinted plastic. It is within common experience that some goggles or parts of them are so made. When worn (ie when being used as intended) the Goods, to some extent at least, have the appearance of, and the look and feel of an article akin to goggles (the like). **If asked to describe what a user of the Goods was wearing, any reasonable person might readily say some form of goggles or eye protection.**”*

61. The Goods are also the subject of a patent at the forefront of which is the design, purpose, function and use of an article for eye protection from a hazard in a particular environment, namely UV light.

*62. Overall, we consider that the issue before us is finely balanced. However, the objective characteristics of the Goods as we have found them to be, tip that balance in favour of Crystals. The Goods are worn in front of the eyes. Like glasses and goggles they do not need to be hand-held. They cover the eye sockets. They are transparent. Their sole function, like goggles, is to provide eye protection. Eye protection is an element of the relevant classification heading. **They are readily describable by any reasonable person as a form of goggles or eye protection.**”*

63. All this and the other physical characteristics mentioned in paragraph 60 seem to us to outweigh the absence of certain physical similarities to spectacles and goggles. This answers the second question posed above in paragraph 55, and seems to us to bring the Goods just within the classification for which Crystals contend, particularly as we find no support in the authorities or in the classification heading itself for putting to one side or minimising the importance of the sole intended use of the Goods. In these circumstances, we consider that the appeal must be allowed.” (emphasis added)

35. Thus the determination found that the intended use was inherent in the product being classified, which is the product present to Customs, in this case the Fixation Pants. The Fixation Pants are readily discernible by any reasonable person as pants at the point of presentation. The Respondent’s position, in other words, is that the intended use of the product, namely the “Reusable Incontinence Fixation Pants”, which is described by the Appellant as an “*article of incontinence wear*” is not apparent as an inherent use at the point of entry such that it could be “**readily describable by any reasonable person**” as an article of apparel, i.e. underwear.

RESPONSE TO PARAGRAPHS 22 & 23

36. The Appellant has quoted from the case of **Lutz** at §§ 22 and 23 of the Appellant's Supplemental Submission. In **Lutz**, the issue before the Court was whether a girdle or panty-girdle (a shaping garment) fell within CN heading 6108 "*Women's or girls' slips, petticoats, briefs, panties, nightdresses, pyjamas, négligés, bathrobes, dressing gowns and similar articles, knitted or crocheted*" or CN heading 6212: "*Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted*". The referring court described the product as follows:

"That court states that the article at issue is shaping knickers designed as hip panties in knitted fabric with vertical and horizontal elasticity. It states that if the knickers are pulled by hand they are less stretchy horizontally than vertically, and the degree to which horizontal stretchability is restricted may be the subject of different assessments based on individual perceptions. The referring court observes that that article does not contain any specific non-elastic components incorporated horizontally."

37. The Appellant has quoted from **Lutz**. as follows:

*"47. Also the intended purpose of the product at issue in the main proceedings must be taken into consideration, **as that purpose may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties** (see, to that effect, judgment of 26 April 2017, Stryker EMEA Supply Chain Services, C-51/16, EU:C:2017:298, paragraph 40 and the case-law cited)." (emphasis added)*

38. Therefore, applying that to the present case, the intended purpose of the Fixation Pants must be taken into consideration as that purpose may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties.

39. The Appellant also cites from internal §50 of the **Lutz** decision as follows:

"Thus, it must be held that the girdle or panty-girdle at issue may be distinguished from ordinary underwear by much reduced horizontal elasticity, in order to support the human body and achieve a slimmer silhouette."

40. The remaining paragraphs of the **Lutz** decision not quoted by the Appellant are:

"51. Furthermore, the CN Explanatory Notes, set out in paragraphs 13 and 34 of the present judgment, do not seek to make classification of a girdle or panty-girdle under subheading 6212 20 00 of the CN dependent on a complete lack of horizontal elasticity."

52. Therefore, it is clear from the objective characteristics and properties of the knickers at issue in the main proceedings that it may fall within subheading 6212 20 00 of the CN.

53. It is for the referring court to check the physical characteristics of the product at issue in the main proceedings, and the claims of the parties in the main proceedings relating to that product.

54. Having regard to all of the foregoing considerations, the answer to the questions referred is that the CN must be interpreted as meaning that knickers characterised by reduced horizontal elasticity, but which do not contain inelastic elements incorporated into them, may be classified under subheading 6212 20 00 of the CN if an examination establishes that they have substantially reduced horizontal elasticity in order to support the human body and create a slimming effect on the silhouette.”

41. At §23 of the Appellant’s Supplemental Submission, the Appellant contends:

“It is submitted that this case is of some significance as it was a case where the product could accurately be described as ‘briefs’ and garment but, because of its design, function and intended use was held to be classifiable elsewhere.”

42. However, in making that submission, the Appellant appears to have overlooked the Explanatory Notes to the CN relating to subheading 6212 20 00, which is worded as follows:

“Girdles and panty girdles

*This subheading covers panty girdles, whether or not knitted or crocheted, cut in the form of **briefs** with or without legs or high-waisted briefs with or without legs.*

They must be characteristic of the variety.

(a) hug the waist and hips and have side panels of 8 cm or higher (measured from the leg to the top);

(b) have vertical elasticity and restricted horizontal elasticity. Reinforcements or a stomach insert, even with applied lace, ribbons, trimmings or the like, are acceptable if the elasticity remains vertical;

(c) be composed of the following textile materials:

– blends of cotton with an elastomer yarn content of at least 15%, or

*–blends of man-made fibres with an elastomer yarn content of at least 10%,
or*

–blends of cotton (not more than 50%) and a high proportion of man-made fibres with an elastomer yarn content of at least 10%.” (emphasis added)

45. In any event, as is set out above, the intended use of the product described in the **Lutz** case was found to be inherent in the objective characteristics of the product, as set out in §50 of the Judgment, which states:

“Thus, it must be held that the girdle or panty-girdle at issue may be distinguished from ordinary underwear by much reduced horizontal elasticity, in order to support the human body and achieve a slimmer silhouette.”

46. This is in effect stating that the product has the inherent characteristics of underwear with the intended purpose to achieve a slimmer silhouette.
47. In the case of the *“Reusable Incontinence Fixation Pants”*, the intended use as described by the Appellant as an article of incontinence wear, is not inherent in the objective characteristics of the product, as presented at the point of entry.

RESPONSE TO PARAGRAPH 26

48. At §26 of the Appellant’s Supplemental Submission, the Appellant submits:

“The Appellant contends that the Fixation Pants are properly classifiable in Heading 9619 00 89 namely ‘Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles of any material’ (Emphasis added). The three level Code in which classification is specifically sought is – ‘of other materials’, -- ‘Napkins and napkin liners for babies, and similar articles’ --- ‘other (for example, incontinence care articles)’. It is of great significance that the ‘for example, incontinence care articles’ is part of the wording of the sub-heading under which classification is sought, it is not merely the wording of an Explanatory Note. The case law referred to above is clear that classification must take place primarily in accordance with the wording of the headings and sub-headings.”

49. Heading 9619 covers *“Sanitary towels (pads) and tampons, napkins (diapers), napkin liners and similar articles of any material”*.

50. Subheading 9619 00 89 is the three-dash subheading as follows:

- of wadding of textile materials

- of other textile materials

-- Sanitary towels, .. and similar articles

-- Napkins ... and similar articles

- **of other materials**

-- Sanitary towels, .. and similar articles

-- **Napkins and napkin liners for babies and similar articles**

- Napkins and napkin liners for babies
- **Other (for example, incontinence care articles)**

(emphasis added)

51. Thus, subheading 9619 00 89 applies to incontinence care articles of other non-textile materials and does not apply to articles of any material as stated in §26 of the Appellant's Supplemental Submission.
52. GIR 6 provides: *"For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, **mutatis mutandis**, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires."* (emphasis in original)
53. The HS explanatory note to GIR 6 states:

(I) Rules 1 to 5 above govern, mutatis mutandis, classification at subheading levels within the same heading.

(II) For the purposes of Rule 6, the following expressions have the meanings hereby assigned to them:

- (a) **"Subheadings at the same level": one-dash sub-headings (level 1) or two-dash subheadings (level 2)***

*Thus, when considering the relative merits of two or more one-dash subheadings within a single heading in the context of Rule 3 (a), their specificity or kinship in relation to a given article is to be assessed solely on the basis of the texts of the competing one-dash subheadings. **When the one-dash subheading that is most specific has been chosen and when that subheading is itself subdivided, then, and only then, shall the texts of the two-dash subheadings be taken into consideration for determining which two-dash subheading should be selected.***

(b) "unless the context otherwise requires": except where Section or Chapter Notes are incompatible with subheading texts or Subheading Notes.

This occurs, for example, in Chapter 71 where the scope assigned to the term "platinum" in chapter Note 4 (B) differs from that assigned to "platinum" in Subheading Note 2. for the purpose of interpreting subheadings 7110.11 and 7110.19, therefore, Subheading Note 2 applies and Chapter Note 4(B) is to be disregarded.

(III) The scope of a two-dash subheading shall not extend beyond that of the one-dash subheading to which the two-dash subheading belongs; and the scope of a one-dash subheading shall not extend beyond that of

the heading to which the one-dash subheading belongs.” (emphasis added).

54. Logically, the scope of the three-dash subheading likewise cannot extend beyond that of the two-dash subheading to which it belongs.
55. Heading 9619 does not apply to the Fixation Pants as set out in the comment above to §20 of the Appellant’s Supplemental Submission because it does not have any absorbent material.
56. However, even if it could be considered, the one dash subheadings of Heading 9619 would have to be considered first namely:
- of wadding of textile materials
 - of other textile materials
 - of other materials.
57. As the fixation pants are made of textile materials and not of “other materials”, i.e. non-textile materials, only the two dash heading 9619 00 50 -- napkins and napkin liners for babies and similar articles could be considered, which is clearly not what the Applicant’s product is.

RESPONSE TO PARAGRAPH 27

58. At §27 of the Appellant’s Supplemental Submission, the Appellant refers to the Notes to Chapter 96 which are:

“Additional note

1. Subheadings 9619 00 71 to 9619 00 89 include goods of paper pulp, paper, cellulose wadding or webs of cellulose fibres. Those subheadings also include composite goods consisting of the following:

(a) an inner layer (for example, of nonwovens), designed to wick fluid away from the wearer’s skin and thereby prevent chafing;

*(b) an absorbent core, for collecting and storing the fluid until the product can be disposed of;
and*

(c) an outer layer (for example, of plastics), to prevent leakage of the fluid from the absorbent core.”

59. The Fixation Pants at the point of entry do not contain any of these features or materials. The Fixation Pants are made of a textile material.

60. It should be noted that napkins of other textile material (other than of wadding of textile materials - 9619 00 30) e.g. terry cloth nappies, are classified in subheading 9619 00 50.

RESPONSE TO PARAGRAPH 28

61. At §28 of the Appellant's Supplemental Submission, the Appellant refers to WCO Explanatory Notes and the last paragraph of the quote provides (which is of particular note for present purposes): "**This heading does not cover products such as disposable surgical drapes and absorbent pads for hospital beds, operating tables and wheelchairs or non-absorbent nursing pads or other non-absorbent articles (in general, classified according to their constituent material).**" (emphasis added).
62. The Fixation pants are not absorbent as presented to Customs.

RESPONSE TO PARAGRAPH 31

63. At §31 of the Appellant's Supplemental Submission, the Appellant submits:

"This Note is of some importance to the present case because the incontinence pants in this case are unisex. A few points arise from this. First, in order to rely upon Note 9, the Respondents must contend that Heading 6108 applies to 'garments' and that the Appellant's product is 'garment'. If it is not a garment, then note 9 cannot apply."

64. It is accepted, and long established, that unisex items fall within "women's" clothing categories.

RESPONSE TO PARAGRAPH 32

65. At §32 of the Appellant's Supplemental Submission, the Appellant submits: "*It is submitted that the term 'garment' clearly connotes clothing and this product is not a garment or item of clothing. It is not an item whose purpose, use or function is to clothe the wearer but merely to function as a means of holding the absorbent pad in place.*"
66. If the definition of garment is an item of clothing, i.e. clothes or items worn to cover the body, then it is relevant that the Fixation Pants as presented are a complete item with the objective characteristics, from both their form and construction, of an item of apparel, namely underwear. The objective characteristics of the Fixation Pants indicate that the item is an undergarment worn on the body.

RESPONSE TO PARAGRAPH 37

67. At paragraph §37(i) of the Appellant's Supplemental Submission, the Appellant submits: "*(i) A cursory review of the product immediately tells one that this product, though worn around the waist and legs are not briefs or underwear in any normal sense of the word.*" At paragraph §37(iv) of the Appellant's Supplemental Submission, the Appellant submits: "*(iv) The waistband is knitted with rows of elastic /spandex yarn fully*

integrated and running across the full waistband to hold the place on the midriff portion of the body. The extra elastic in the body of the Fixation Pant is designed to support the pad closer to the body, again to help prevent pad leakage. This is a feature not found in normal underwear”.

68. It should be noted that briefs and underwear are produced in many different shapes, sizes and specifications with no set standard. Customs Officers are required to examine many different types of underwear.
69. At paragraph §37(vi) of the Appellant’s Supplemental Submission, the Appellant submits: *“(vi) The packaging of the Fixation Pants clearly indicates that these are incontinence fixation pants, specifically designed and intended for use as part of the [REDACTED] branded two-piece incontinence management system (i.e. The Fixation Pants and the absorbent pad).”*
70. The BTI Application is for the Fixation Pants only - not the two part system. The Fixation Pants ***as presented at the point of import*** have the inherent characteristics of underwear and not have the inherent characteristics of incontinence wear as they have no absorbent material as required by heading 9619.
71. At paragraph §37(vii) of the Appellant’s Supplemental Submission, the Appellant submits, inter alia: *“At paragraphs 98, 109, 115, 120 and 136 of their submissions the Revenue Commissioners say that classification under Directive 93/42/EEC ‘no bearing’ on the classification of the products at issue. This, we respectfully submit, is wrong. The product’s classification under Directive 93/42/EEC and other Regulations (such as EU 2017/745) is certainly not determinative of the customs classification but it is submitted that it is one factor amongst others which is required to be taken into consideration.”*
72. Revenue repeats its submission that the Medical Devices Directive has no bearing on the classification of this product. The product was not considered as a medical device for customs purposes or for customs classification.
73. At paragraph §37(viii), the Appellant submits, *“The reusable fixation pants have to be industry tested to be operationally effective to hold the pad in place securely for a minimum of fifty uses. In normal practice, however, they are disposed of in less than eight to ten pad uses. They also have an expiry date of five years from date of production.”*
74. However, regarding the words, *“[i]n normal practice, however, they are disposed of in less than eight to ten pad uses”*, it must be noted that this matter has no bearing on classification for customs purposes.
75. At paragraph §37(xii), the Appellant submits: *“Although required to be able to withstand fifty uses before being disposed of the pants do not have strengthened seams or double stitching and so have an obviously finite lifespan.”*
76. Most garments could be said to have a finite lifespan.

RESPONSE TO PARAGRAPHS 38 & 39

77. At §§38 and 39 of the Appellant's Supplemental Submission, the Appellant states:

38. *Not only is the product designed for a very specific use, as outlined above, it is also manifestly unsuited, on its own, for use as 'clothing', 'briefs', or 'panties' and could not reasonably be described as a 'garment'.*

39. *Whereas normal underwear are always made with a reinforced sewn in crotch the incontinence pants contain only a centre seam. Whilst this centre seam is covered by the pad when in use, it renders the incontinence pants peculiarly unsuitable for use as underwear when the pad is not in place as they cannot be placed against middle of crotch area since they would be very uncomfortable, irritating and, potentially, unhygienic."*

78. There are a large variety of undergarments available and what persons may consider comfortable / suitable as underpants or underwear can be very different. Paragraph 42 of the Appellant's Supplemental Submission supports this view ("*issues of design, fashion and aesthetics are clearly subjective*"). The product in question here even has "Pants" in its title.

79. "*Unsuitable*" is, of course, not the same as "*unusable*". There are many examples of underwear that could be considered to be unsuitable or uncomfortable but that are used anyway for various reasons, including fashion.

RESPONSE TO PARAGRAPH 41

80. At §41 of the Appellant's Supplemental Submission, the Appellant submits:

"Next, normal underwear is made from a much more densely knitted structure than that which has been used to manufacture this product. The crotch area is usually reinforced when stitched together and often with an extra layer to absorb any light urine drip, which prevents liquid pass through and stain on outer clothing. The fixation pants, on the other hand, are made from a lightweight knitted open mesh structure. The material is textured polyester and spandex with no extra material in crotch area. This material will not absorb any liquid drops. Without the pad being in place, any urine drip will immediately pass through and stain outer clothing."

81. It is important to clarify for the benefit of the Commissioner arising from the submission above that the Fixation Pant clearly has no absorbent material as required by heading 9619.

RESPONSE TO PARAGRAPH 44

82. At §44 of the Appellant's Supplemental Submission, the Appellant submits:

“Finally, the fixation pants are non-gender specific and have no designated front and back features. Whilst the Chapter Note to Headings 61 provides that garments which are not distinguishable as having been designed for men or women are to be classified under the heading applicable to the corresponding women’s item, underwear, by definition, is designed to fit the male or female form and a product which is designed to fit both equally (or unequally) does not readily conform to the notion of ‘briefs’ (being the term used in the relevant heading) at all.”

83. There are now unisex versions of practically everything and in many cases, even when not intended, it is difficult to determine if a garment is designed for men or women.

RESPONSE TO PARAGRAPH 47

84. At §47 of the Appellant’s Supplemental Submission, the Appellant submits: *“As the evidence before the TAC will demonstrate the marketing material pertaining to the fixation pants presents them for use exclusively as part of the two-piece IMS.”*
85. The Fixation Pants and similar products are sold separately online. There is nothing to prevent them being used independently of each other. The pad could also be held in place by other similar types of underwear e.g. the pants the subject of CROSS Ruling H297341 mentioned at §62 of the Respondent’s Outline of Arguments identified as *“Medical Stretch briefs”*.

RESPONSE TO PARAGRAPH 48

86. At §48 of the Appellant’s Supplemental Submission, the Appellant submits: *“The Revenue Commissioners’ written legal submissions state, at paragraph 68, that ‘the classification [of the product at issue] was approached from the viewpoint of the product’s objective characteristics and its essential character (from both its form and construction being that of an item of apparel).’ It is not entirely clear to the Appellant that is in fact the approach which was taken when the BTI was issued but what is clear is that no regard was had to the intended use of the product and, accordingly, the Revenue Commissioners’ approach to the task of classification was flawed from the outset.”*
87. The intended use of a 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. The Fixation Pants do not have the inherent characteristics of incontinence wear at the point of import. They contain no absorbent material as required by heading 9619.
88. The product was deemed an item of apparel from its inherent characteristics and could be used as such whether or not this is intended. The intended use of the product is not inherent in the product at the point of import.

RESPONSE TO PARAGRAPH 49

89. At §49 of the Appellant's Supplemental Submission, the Appellant states:

"The Respondents, surprisingly, now place reliance on C-677/18 Amoena v HMRC in support of the BTI. This is, it is submitted, surprising because that case turned on a detailed analysis of the use to which the product was designed to be put, which is entirely at odds with the basis on which the present product was classified, namely, on the basis of its constituent materials only and without regard to use. That case conclusively demonstrates that the approach to classification adopted in this case was wrong."

90. Appendix 1 to Respondent's Outline of Arguments refers for the relevant reasoning. Paragraph 46 of the ECJ Judgment in this case states:

"It follows that the Commission was entitled to consider, as is apparent from column 3 of the table in the annex to Implementing Regulation 2017/1167, that, 'at the time of importation, the objective characteristics of the product... do not give any indication of the final use (for aesthetic or medical purposes)'."

RESPONSE TO PARAGRAPH 50

91. At §50 of the Appellant's Supplemental Submission, the Appellant states, referring to the case of **Amoena Ltd** (which case concerned mastectomy bras and is also considered further below):

"In any event, the CJEU in that case considered the application of GIRs 1 and 6 to a brassiere that was designed so as to accommodate inserts to be worn by mastectomy patients but which was also capable of use as an ordinary brassiere (without any inserts) and was designed also to accommodate padding for aesthetic, rather than purely medical, purposes. It was held, therefore, that at the point of importation it was not possible to discern whether the product was to be used as a medical device (as a bra designed exclusively for mastectomy patients would have been). In the present case the fixation pants are not suitable for use without the Pads and they have no alternative use other than for the fixation of the absorbent pads designed and sold by the Appellant. Accordingly, Amoena is authority for precisely the proposition on which the Appellant's claim classification should be made, namely, a consideration of the use to which the product is to be put provided that the use is discernible from the objective characteristics of the product. On the facts, however, the multi-purpose brassiere and the single purpose fixation pants are wholly different. It should also be noted, for completeness, that GIR 2(a) (considered below) did not arise for consideration in that case."

92. A number of points in response must be made.

93. First, the Fixation Pants can be worn independently of the / a pad. To state that the Fixation Pants have no alternative use without the pad is incorrect.

94. Second, GIR 2(a) was not applicable to the mastectomy bra in **Amoena Ltd** as it was a complete article as presented at import even though its intended use was with inserts as a mastectomy bra and it was designed and marketed specifically for this intended use. Here, GIR 2(a) is likewise not applicable as the Fixation Pants are not an incomplete item – they are a complete item in their own right and imported complete.
95. Finally, the Appellant was previously informed in 2018 that Revenue did not consider using GIR 2(a) as the fixation pants do not have the characteristics of an incomplete item, they have no absorbent material and are reusable.

RESPONSE TO PARAGRAPHS 51 & 52

96. At §51 of the Appellant's Supplemental Submission, the Appellant submits: *"A further manifest error in the classification exercise was the decision to classify the product on the basis an assumed theoretical possibility rather than the accepted principal and intended functions of the product. In their BTI decision and in their written submissions the Revenue Commissioners have repeatedly stated 'it is also possible, however unlikely it may be, that the fixation pants could be worn without the pads and therefore considered as an article of apparel'."*

97. At §52 of the Appellant's Supplemental Submission, the Appellant submits:

"Without prejudice to the Appellant's argument that the fixation pants (i.e. the Incontinence System absent the Pad) are wholly unsuited to use as clothing, garments, apparel, pants or similar, it has long been clear that the mere theoretical possibility of such a use would not, even if it existed, consign them to classification under heading 6108."

98. However, this was not based on any assumed theoretical possibility but on actually seeing a patient in hospital wearing what appeared to be a fixation pant without pads as an undergarment. On further enquiry, it was confirmed by a hospital employee that these type of articles are used in hospitals but not just with the incontinence pads.
99. The incontinent pants can be worn on their own, independently of the absorbent pad, regardless of whether this is the intended use or not. As is seen at page 6 of Cross Ruling H297341 at Annex 37 of Revenue's Annexes, similar type pants to the pants the subject of the ruling, that are used with incontinence pads, are marketed for and used by women after childbirth. They are also provided to postpartum women by hospitals due to their comfortable, lightweight, stretchable, breathable, knit fabric. Revenue cannot thus agree with the claims made.

RESPONSE TO PARAGRAPH 53

100. At §53 of the Appellant's Supplemental Submission, the Appellant submits:

"The Combined Nomenclature contains thousands of different classifications and the task of classification is to find the heading which – on an application of the rules – is most appropriate. Put another way, the possibility of classification under

heading 6108 does not need to be categorically excluded in order for classification under Heading 9619 to be preferred. This, to be clear, is not an example of a product being classifiable under two headings and subject to the tie-breaker rules in GIR 3 but rather the requirement to identify the appropriate headings in the first instance on an application of GIRs 1 and 6.”

101. However, this is not relevant unless the product is considered equally classifiable under more than one heading. As the Fixation Pants do not have the objective characteristics and do not have the absorbent material required for classification in heading 9619, it does not apply and therefore 9619 is excluded.

RESPONSE TO PARAGRAPH 54

102. At §54 of the Appellant’s Supplemental Submission, the Appellant cites from the **Neckermann** case and the fourth paragraph of the quotation reads as follows: *“If that objective characteristic can be established at the **time of customs clearance**, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas.”* (emphasis added by the Respondent)

103. Thus, it should be noted that it must be possible to establish the objective characteristics at the time of customs clearance. This is also confirmed in ECJ Case C-677/18 **Amoena Ltd** (see §5 of Appendix 1 of the Respondent’s Outline of Arguments), referred to above. The case concerned the tariff classification of mastectomy bras. The referring court described the brassieres as mastectomy bras designed to be worn by women who have undergone surgical removal of one or both breasts. They are specially designed to hold silicone breast forms and have left and right pockets to hold the breast forms firmly in place. The other characteristics which distinguish a mastectomy bra from ordinary brassieres are the broad padded straps, positioned centrally over the breasts, which help support the weight of the breast form and help to avoid undue stress associated with neck and shoulder problems for the post operated women. They are also designed to ensure the breast form itself does not show and therefore has a special cut and shape dissimilar to a conventional bra.

104. **Amoena Ltd** and the case of mastectomy bras is highly relevant in relation to the requirement that the intended use must be inherent in the product at the point of import for tariff classification. The ECJ stated at §§41 to 46:

“41. Those objective characteristics and properties of products must be capable of being assessed at the time of customs clearance (judgment of 22 February 2018, SAKSA, C-185, EU:C:2018:108, paragraph 31 and the case-law cited).

42. In that regard, it should be noted that Chapter 62 of the CN includes Heading 6212, entitled ‘Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted’. Subheading 621210 is entitled ‘Brassières’. The wording of

subheading 62121090 refers to brassieres ‘other’ than those ‘in a set made up for retail sale containing a brassière and a pair of briefs’.

43. Therefore, on the basis of the description in column 1 of the table in the annex to Implementing Regulation 2017/1167, relating to the objective characteristics and properties of the goods covered by that regulation, the Commission was entitled to consider that, in accordance with general rules 1 and 6 for the interpretation of the CN, as that is set out in the reasoning in column 3 of the table in the annex to that regulation, that product ‘has the objective characteristics (the form and the construction) of a brassiere of heading 6212 [of the CN]’.

44. In that regard, it must be noted that although the intended use of a product may, admittedly, constitute an objective criterion for classification, that is only to the extent that that use is inherent in that product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (see, to that effect, judgment of 15 May 2019, *Korado*, C-306/18, EU:C:2019:414, paragraph 37 and the case-law cited). However, even assuming that the bras covered by Implementing Regulation 2017/1167 are, as is claimed by Amoena, exclusively or, at least, principally used by women who have undergone surgical removal of one or both breasts allowing them to insert a breast form, that use is not such as to invalidate the finding made in the previous paragraph of the present judgment.

45. Such a purpose is not intrinsic to those goods, since the objective characteristics and properties of those goods do not appear to be such as to exclude a use thereof as an ordinary brassiere or to impose an exclusive use of those brassieres with a breast form. Although the bras referred to in Implementing Regulation 2017/1167 have particularly broad shoulder straps centrally positioned over each breast with side openings, it is apparent from the grounds in column 3 of the table of the annex to that regulation, without being contested by Amoena, that the specific positioning of shoulder straps is a common characteristic of bigger cup bras and that those side openings can serve to accommodate padding for aesthetic purposes.

46. It follows that the Commission was entitled to consider, as is apparent from column 3 of the table in the annex to Implementing Regulation 2017/1167, that, ‘at the time of importation, the objective characteristics of the product ... do not give any indication of the final use (for aesthetic or medical purposes)’.

105. As can be seen, the Court states at §41 that “those objective characteristics and properties of products must be capable of being assessed **at the time of customs clearance** (judgment of 22 February 2018, *SAKSA*, C-185/17, EU:C:2018:108, paragraph 31 and the case-law cited).” (emphasis added).
106. Paragraph 36 of ECJ case C-185/17 **SASKA** (as mentioned in §41 of the **Amoena Ltd** case) states:

“36 Furthermore, while SAKSA claims that the product in question was sold, after being imported, as gas oil (diesel fuel), it should be noted that **the intended use of a product is a relevant criterion only if the classification cannot be made on the sole basis of the objective characteristics and properties of the product** (judgment of 16 February 2017, *Aramex Nederland*, C-145/16, EU:C:2017:130, paragraph 23 and the case-law cited). That is not the case here, for it is clear from the distillation characteristics of that product that it does not, for the purposes of CN heading 2710, fall within the definition of gas oils, within the meaning of additional note 2(e).” (emphasis added)

RESPONSE TO PARAGRAPH 55

107. At §55 of the Appellant’s Supplemental Submission, the Appellant contends:

“Accordingly, the fact that one might theoretically choose to wear pyjamas to the shops, or that they are capable of being described as an ‘upper garment and trousers’ does not change the fact that the task of classification is to identify the heading in which they most properly belong. In the same vein, the fact that this product is designed to be worn under clothing and, in that sense, might conceivably be described as ‘underwear’ does not end the task of classification. See also paragraphs 16 and 17 of C-459/93 Thyssen Haniel Logistic GmbH for a further example of this principle where the Court held that ‘a purely theoretical possibility’ of the product being used in one way did not outweigh the ‘naturally intended’ use which was decisive in its classification.”

108. In the **Thyssen Haniel Logistic GmbH** case, the questions were raised in proceedings between the Principal Customs Office and Thyssen Haniel Logistic GmbH in connection with the classification for customs purposes of goods described as “*Amino Acid AA Mixture Peco*” presented as powdered sterile mixtures of various amino acids in measured doses for the manufacture of infusion solutions.

109. Paragraphs 16 and 17 of the **Thyssen Haniel Logistic GmbH** case provide that:

“... use of the amino acid mixtures in question as a foodstuff is theoretically conceivable but highly improbable from an economic point of view, because the product’s high level of microbiological and chemical purity obtained at great expense, as well as the fact that it is pyrogen-free, de facto preclude its use in that area, where recourse may be had to many other options which are much cheaper.

*Since the use of the product in question in human nutrition by way of mouth is a purely theoretical possibility **it would therefore appear that, on the basis of its objective characteristics and properties — being sterile, pyrogen-free, with a high level of purity and precise dosage of the various amino acids — the said product is naturally intended for medical use and more particularly for the preparation of infusion solutions by the addition of water.***” (emphasis added)

110. While the Court notes the above, it has also confirmed that it must be possible to establish the objective characteristics at the time of customs clearance (see the key authorities of **Amoena Ltd** and **SASKA** cited above (see the response to paragraph 54 of the Appellant's Supplemental Submission above).
111. The Court of Justice has repeatedly stated that the intended use of a 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. The intended use of the amino acid mixtures was found to be inherent in the product per the above paragraphs. The Fixation Pants do not have the inherent characteristics of incontinence wear at the point of import. The Customs Officer could not classify the Fixation Pants as presented on their own as incontinence wear under heading 9619.

RESPONSE TO PARAGRAPH 56 (internal §47)

112. At §56 of the Appellant's Supplemental Submission, the Appellant quotes from the case of **Premis Medical BV** and §47 thereof, which provides:

"In that regard, the mere fact that that walker-rollator may at the same time allow those persons to carry goods and, should the need arise, to rest by sitting on the seat does not call that finding into question. On the assumption that that walker-rollator, which is specially designed to assist people in walking, may serve several different functions, as the Commission contends, it must be classified in accordance with its main overall function."

113. In response, we refer the Commissioner to §§79 to 81 of the Respondent's Outline of Arguments which, for ease of reference, provide:

"79. In Premis Medical BV (ECJ C273/09), the Court in its ruling identified in paragraph 43 that 'the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties'.

80. In the case of "Reusable Incontinence Fixation Pants", the Respondent has determined that as the fixation pants on their own do not contain any absorbent material, they therefore do not comply with the HS Notes to Heading 9619. The 'Reusable Incontinence Fixation Pants', can be used with a variety of pads with different levels of absorbency and are thus sold on their own. The products do not form an incomplete or unfinished article for classification purposes. At the point of import, the products do not have the objective characteristics and properties of incontinence wear but rather have the objective characteristics of underwear. They are therefore deemed as an item of apparel and classified according to their constituent material, under subheading 6108 22 00 00.

81. Therefore, it is submitted that this decision does not support the Appellant's appeal".

RESPONSE TO PARAGRAPH 57

114. At §57 of the Appellant's Supplemental Submission, the Appellant contends: "*It is clear that the Respondents concluded – and continue to argue – that simply because the product could, in their view, theoretically function as underwear (and it is denied that it could or would ever be used as such in isolation) this is, in their view, of decisive importance in its classification. It is respectfully submitted that there is no basis in law for such an approach.*"

115. So that no confusion is created by the Appellant's submissions here, the basis for Revenue's decision is GIR 1 and GIR 6. Revenue assessed a completed, finished article having the objective characteristics of the fixation pants, as presented at import.

RESPONSE TO PARAGRAPH 58

116. We repeat what is set out above in response to paragraphs 3, 15, 17, 19, 20 and 26.

RESPONSE TO PARAGRAPHS 59 & 60

117. We repeat what is set out above in response to paragraphs 3 and 15.

RESPONSE TO PARAGRAPH 62

118. At §62 of the Appellant's Supplemental Submission, the Appellant contends that:

"It is important to emphasise at the outset that whereas GIR 3(b) (to which the Revenue Commissioners refer in their submissions) applies only when goods are sold together as a set; GIR 2(a) applies where products are imported separately."

119. GIR 3 provides that:

*"When by application of Rule 2 (b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the **materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale**, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*

*(b) **Mixtures, composite goods consisting of different materials or made up of different components, and** goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.*

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.” (emphasis added).

120. As set out in GIR 3(b) (above), it does not only apply to sets.

121. GIR 2(a) (as set out above already) does not apply where products are imported separately, but applies to incomplete / unfinished articles or articles presented unassembled / disassembled, all components presented together.

RESPONSE TO PARAGRAPH 66

122. At §66 of the Appellant’s Supplemental Submission, the Appellant cites from **Humeau Beaupréau SAS**, which concerned the classification of components of sports footwear. Paragraphs 16 - 18 of this case, indicates that the parts of a shoe, the subject of this case, were in fact imported together in identical quantities and subject to a customs control at which stage customs took the view that (applying GIR 2(a)) the goods should be classified as footwear presented unassembled. The ECJ agreed. In **Humeau Beaupréau SAS**, the Court stated at §§43-45:

“43. It follows from points VI and VII of the HSEN to General Rule 2(a) that, in the case of an incomplete article presented unassembled, the requirement that the assembly of the different components must involve only assembly operations with no working required in order to complete them into the finished state applies to the components which have been presented to the customs authorities for customs clearance.

44. However, it is not important that components which, like the counter at issue in the main proceedings, were purchased within the European Union are worked before being assembled with the imported components.

45. If the opposite were true, the tariff classification of the imported components would depend on a fact which not intrinsic to those goods, since the customs authorities are not in a position to ascertain whether components which were not presented to customs have to be worked or not before being capable of assembly with the imported components, which would undermine the objective of ease of verification by the customs and legal certainty which must govern that classification.”

RESPONSE TO PARAGRAPH 67

123. At §67 of the Appellant’s Supplemental Submission, the Appellant states:

“It is submitted that precisely the same can be said of the fixation pants in this case. The essential character of the complete product is as an incontinence care article. To perform that function the product in this case contains an absorbent pad which is required to be positioned securely against the body. It is important that it

can be easily and accurately positioned by the patient or, more usually, a healthcare worker. The two parts of the product work in unison; one is redundant without the other. In Humeau Beaupréau, it was the combination of the upper and outer sole which gave the product its character, in this case, it is the combination of the fixation pants and the pad which give the incontinence care product its character.”

124. We reiterate that there is no absorbent pad in the reusable fixation pant, for which the BTI was sought. Fixation Pants can be worn and used without pad. The Appellant contends that the “*two parts of the product work in unison, one is redundant without the other*”. However the two parts are not presented together at the point of import as required for tariff classification. In addition, there is nothing to impose an exclusive use of the Fixation Pants with an incontinence pad, let alone with the particular incontinence pads that are part of the two-part system. It is notable that various incontinence pads can be used with any fixation pants. There is nothing to prevent the fixation pants being used as underwear or to hold other articles, e.g. post-partum pads and nothing to prevent other articles/underwear being used to hold the incontinence pads in place (see, e.g., §45 of the ECJ case C-677/18 **Amoena Ltd** on mastectomy bras above).

RESPONSE TO PARAGRAPHS 68-70

125. The Appellant cites from **The Bear Factory Limited** case, however, the article in this case was found to be an incomplete / unfinished article and thus GIR 2(a) applied.

RESPONSE TO PARAGRAPH 72 ET SEQ

126. Revenue (TCU) is required under the UCC to abide by the BTI decisions of other Customs administrations across the Union and to ensure that all Irish BTIs are held in uniformity with those BTIs. Divergence is not an option. In that regard, we refer to other BTIs that are relevant to this matter, such as those that applied at the time the BTI Decision was made:

- DE12084/18-1 (§83-85 -Argument 1 – Respondent’s Outline of Arguments)
- BTI IE16NT-24-4311-06 (§86-88 - Argument 2 – Respondent’s Outline of Arguments)
- BTI GB503396655 & BTI GB503396557 (§92-94 - Argument 4 – Respondent’s Outline of Arguments)
- SK1439406/15/308 (§11– Respondent’s Outline of Arguments)
 - a. The product referenced in this Slovakian BTI is a “disposable absorbent panties for urinary incontinence (incontinence). [They are] Absorbent panties are perfectly breathable, made of paper and pulp containing superabsorbent.”. These were classified in 9619 00 89.

127. In the case of the Appellant’s “Reusable Incontinence Fixation Pants” do not contain any absorbent materials on their own as set out in Additional Note to Chapter 96 or HSEN to 9619 and as such are classified according to their constituent materials in 6108 22 00 00.

128. In recent months, BTIs have been published by other European Union Member States Customs Administrations which would provide additional support for the Respondent's position on articles classified in heading 9619:

- **NL BTI 2021-0899**
 - a. An example of a textile nappy liner (absorbent incontinence pad) classified in subheading 9619 00 50 as it is made of textile material;
- **DE BTI 18643-20/1**
 - a. An example of a single-use adult diaper pant consisting of double-layer cuts made of non-woven fabric of man-made fibres, with an absorbent layer embedded in the front and back up to the waistband. This is classified in subheading 9619 00 89 as "*other goods similar to nappies and napkin liners for infants and young children (e.g. articles for incontinence) not of textile wadding or other textile materials*", as the essential character is determined by the quantity/extent of the cellulose fibres of the absorbent layer.
- **DE BTI 2547/21-1**
 - a. An example of a cloth nappy set consisting of two components, a cloth nappy with a cloth nappy insert. This is classified in subheading 9619 00 50 10 as "*Nappies and napkin liners for babies and similar articles, of any material, of textile materials other than textile wadding, knitted or crocheted*", as it is a composite article, whose essential character is determined by the value of the cloth nappy made of knitted fibre.

129. BTIs issued by a Member State are binding on all EU Member States' Customs Authorities and the primary purpose of a BTI is to ensure uniform application of the customs legislation within the EU. Where there are differences of interpretation between Member States, the EU Commission issues a suspension on the issuing of BTIs for the relevant products under Article 34(10) of Regulation (EU) No. 952/2013 to allow consultation among all Member States with a view to agreeing uniform classification of these products within the EU. The outcome of the consultations at EU level affects the classification of the products by all Member States and may result in the issue of an EU regulation to specify the tariff classification of the relevant product.

130. National rulings are not binding on other Member States within the EU. According to ECJ case C-677/18 **Amoena**, following a previous appeal by the appellant, the Supreme Court of the United Kingdom in its judgment of 13 July 2016 held that mastectomy bras, such as those at issue in the ECJ case, should be classified in Heading 9021 of the CN. Following the judgment of 13 July 2016, Amoena submitted applications for BTI with respect to the bras at issue. HMRC notified Amoena that the issuing of BTIs in respect of those goods was suspended pending the examination of their classification by the Customs Code Committee with a view to the possible adoption of a classification regulation. As a result of the examination, it was agreed that a classification regulation should issue as the Supreme Court judgment was considered to be contrary to the classification practice followed in other Member States, according to which bras such as those at issue in the main proceedings are classified in Heading 6212 of the CN as a

result of their objective characteristics. On 26 June 2017, Implementing Regulation 2017/1167 was adopted by the Commission classifying the bras in Heading 6212. The BTIs were issued with classification in line with the Regulation and immediately appealed again by the company. The case was referred to the ECJ regarding the validity of the Commission Implementing Regulation. The ECJ judgement found that the examination of the questions referred had not revealed any elements capable of affecting the validity of Commission Implementing Regulation (EU) 2017/1167 of 26 June 2017 concerning the classification of certain goods in the Combined Nomenclature, i.e. the Regulation is valid.

SPECIFIC RESPONSE TO PARAGRAPH 76

131. BTIs are valid for a period of three years and thus cannot be relied on once they become invalid although they can be an aid to classification decisions. Regulations and case law remain valid unless they do not comply with subsequent laws. BTIs and regulations are revoked if they no longer comply with the law.

SPECIFIC RESPONSE TO PARAGRAPH 77

132. CROSS rulings are not binding but they are an aid to classification decisions.
133. Regarding the contention that, “*the HS does not contain an equivalent of Heading 9619 00 89*”, the HS (Harmonised System) will never have an equivalent to 9619 00 89 as the HS is only a six digit international classification & referencing system for the purposes of Customs. The HTS (Harmonised Tariff Schedule) is the USA’s version of the EU’s Combined Nomenclature and operates to an 8 and 10 digit level. The non-inclusion of the phrase ‘*incontinence care articles*’ from the subheadings of the US Customs & Border Patrol does not exclude the fact that CROSS rulings listed refer to relevant products (HQ557529, 085175, 085978)

RESPONSE TO PARAGRAPH 85

134. In the 85th paragraph of the Appellant’s Supplemental Submission, it is stated that:

“As has been repeatedly stated, the Appellant submits that GIR 3 is never engaged in this case – because Headings 6108 is not, prima facie, applicable – but, if it were, it would clearly result in classification in Heading 9619 on the application of GIR3(a) and, in any event, 3(b).”

135. However, GIR 3(a) is not applicable as there is no specific heading which covers reusable fixation pants. GIR 3(b), if applied -in view of the different materials (96% polyester / 4% elastic) -would see the fixation pant as a knitted or crocheted textile item of 6108.
136. The Respondent reserves the right to make such further submissions as may be necessary and puts the Appellant on full proof of all matters of fact that arise in this appeal.

Shelley Horan; 29 June 2022

Appendix 3 [Draft] Statement of Agreed Facts

THE TAX APPEALS COMMISSION



BETWEEN:






Appellant

and

The Revenue Commissioners

Respondents

[DRAFT] STATEMENT OF AGREED FACTS

1.  (‘the Appellant’) is based in the 
. the Appellant designs, develops, manufactures and supplies an extensive range of medical textile products to international healthcare institutions and medical retail companies.
2. One of the products which the Appellant sells is called ‘Incontinence Fixation Pants’ (the ‘Fixation Pants’). The article is designed as part of a two-piece incontinence management system to manage serious, chronic incontinence problems. The incontinence system is sold in two parts, the Fixation Pants and the ‘Pad’ and both are delivered and sold separately, however both are necessary to complete the product and enable use by the end-user.
3. The function of the Pad is dependent on being held securely in place by the Fixation Pants to prevent Pad slippage and leakage. The Pad is held securely in place with the reusable Fixation Pants to ensure a secure and effective fit. The premise is that only the pad part of the unit is discarded after each use and the appropriate configuration or type of pad can be changed, depending on the level of absorbance required for the patient, however the fixation pants part can be re-used for a finite period. The Fixation Pants are specially designed and constructed with this primary function only. This is achieved by the design and manufacturing features below -

- i. Manufacturing specification: Knitted Polyester and Elastane (knitting direction from waistband to leg with close stitches incorporated into crotch seam), High ribbed waistband, extra body elastic and pad fixation leg, Sewing and Hydro-Fixation. Percentage material content: 96% polyester, 4% elastane, with sewing specification: High dense over lock stitching 24N +1-5.
- ii. The waistband is knitted with rows of elastic /spandex yarn fully integrated and running across the full waistband to hold the place on the midriff portion of the body. Knitted-in elastic bands strategically placed in the pant are specifically designed to secure the shaped absorbent pads, which the Appellant sells separately. This is essential for the integrity of the shaped pad function. Elastic/spandex bands are knitted at various points across the body of the pant to support and hold the shaped pad close to the body.
- iii. Elastic /spandex bands are knitted in the base of the leg of the pant to prevent the leg being loose or moving upwards on the leg. This is essential to maintain the integrity of the pad function and prevent slippage and leakage.
- iv. The packaging of the Fixation Pants clearly indicates that these are incontinence fixation pants, specifically designed and intended for use as part of the [REDACTED] branded two-piece incontinence management system (i.e. The Fixation Pants and the absorbent pad). The design and manufacture of the Fixation Pants and shaped pads is undertaken to ensure maximum pad fixation. The elasticity and pad holding function of the Fixation Pant is checked and tested for function with both dry and wet absorbent shaped pads. The Fixation Pants are specifically designed and adapted to ensure the optimum pad fixation, either when the shaped pad is dry or wet.
- v. The Fixation pants are used as a medical device and so must meet certain standards that do not apply to items of regular apparel. The Testing necessary includes the patient safety test criteria that have to be satisfied -Skin Sensitisation Test - ISO 10993 - Skin Irritation Test- ISO 10993 - Cytotoxicity Test- ISO 10993 and STANDARD 100 by OEKO-TEX®, a worldwide consistent, independent testing and certification system for raw, semi-finished, and finished textile products at all processing levels, as well as accessory materials used. In addition, the manufacturing plant for this product is certified

to the medical device standard ISO 13485: 2016 which is a specific industry and customer requirement for a Class 1 medical device product.

- vi. The reusable fixation pants have to be industry tested to be operationally effective to hold the pad in place securely for a minimum of fifty uses. In normal practice, however, they are disposed of in less than eight to ten pad uses. They also have an expiry date of five years from date of production.
 - vii. The Fixation Pants are unisex designed, to be used by both men and women. There is no designated front or back to the Comfort pant and they are designed so as to be almost transparent when stretched on the body so that they can be worn underneath underwear.
 - viii. The pants come with an attached label on which the Room number and name of a patient can be written. They are recommended to be washed at sixty degrees for purposes of infection control. The product is durable for a minimum of fifty washes at this sixty degree temperature.
 - ix. Although required to be able to withstand fifty uses before being disposed of the pants do not have strengthened seams or double stitching.
 - x. Appendix 1 to the BTI application details the various configurations of the Pad and Pant system and Appendix 2 contains three different sets of instructions for the use of the pant and pad system depending upon whether the user is in bed, sitting, or standing.
4. The Fixation Pants are classified as per the Medical Devices Regulation (EU) 2017/745 (MDR), Annex VIII. as a Medical Device in Class I and are used by health care institutions and home care for chronically incontinent patients. Incontinence products are specifically mentioned in MDCG 2021-24 Guidance on classification of medical devices as examples of Class I products according to rule 1 in MDR.
5. The fixation pants (as part of the [REDACTED] branded two-piece incontinence management system) will only be marketed to hospitals, care homes, and acute and sub-acute health care facilities. The alternative product, an all-in-one absorbent pad, is not recommended to be issued for patients who are able or capable of being toileted/using a toilet; and should not be supplied to

inpatients/care home patients where 24 hour care is available, unless toileting is clinically contra-indicated. In such scenarios a Two-Piece System, such as the Appellant's, is recommended.

6. This is one of the most widely used incontinence care management systems used by people suffering from chronic incontinence, i.e. people in institutional or residential care. The Fixation Pants and pads are primarily sold in the EU by healthcare companies. The healthcare companies will win a public procurement tender for a multi-year supply contract with for example the HSE in Ireland, the NHS in the UK and equivalent national or regional health authorities across the EU. As part of this multi-year supply contract they will onward supply the Fixation Pants and pads to the relevant national/regional health authorities. The Fixation Pants and pads are also sold in smaller volume to independent health care distributors who supply private hospitals and care homes etc. In Ireland the HSE is by far the largest purchaser of incontinence fixation pants which it then distributes to hospitals, care homes and community care. These 25pcs packs of incontinence fixation pants are not sold to or available for purchase in any retail setting, including pharmacies etc.
7. Fixation Pants are not sold individually, they are primarily provided by the carton. Included in each carton is 8 plastic bags with 25pcs included in each plastic bag.

Schedule of events:

1. **8th October 2018:** The Appellant submitted a BTI Application for the Fixation Pants to the BTI Application Customs Division, Government Offices, Conlon's Road, Nenagh Co. Tipperary
2. **16th October 2018:** Revenue issued letter acknowledging receipt of BTI application.
3. **5th November 2018:** The Appellant received an e-mail from Revenue requesting additional information: "Please provide a full product specification, to include a percentage breakdown of the constituent materials of the 'Reusable Incontinence Fixation Pants'".
4. **29th November 2018:** The Appellant returned email to Revenue with additional product information including technical information attachments.

5. **10th December 2018:** The Appellant received an opinion e-mail from Revenue Stating the Fixation Pants would be classified under subheading 6108 22 00 00.
6. **2nd January 2019:** The Appellant sent a response email to Revenue with arguments regarding the opinion mail and ask for a meeting to discuss the views.
7. **18th January 2019:** [REDACTED] (On behalf of The Appellant) made follow up phone call to [REDACTED] in Revenue, BTI Application Customs Division.
8. **23rd January 2019:** [REDACTED] (On behalf of The Appellant) received an e-mail from Revenue that the The Appellant comments were not reviewed yet and will be responded to in a few days.
9. **31st January 2019:** [REDACTED] (On behalf of The Appellant) received an email from [REDACTED] of Revenue, BTI Application Customs Division stating “ Dear [REDACTED], I am still in the process of reviewing this application for BTI. In the interim could you please send me two samples each of the fixation pants and also the associated disposable pad? Regards, [REDACTED]”
10. **31st January 2019:** [REDACTED] (On behalf of The Appellant) responded to the email and asked for the address to send the samples to and also asked if he/The Appellant could bring them in person so the full information could be discussed.
11. **1st February 2019:** [REDACTED] (On behalf of The Appellant) received an email from [REDACTED] with address to ship samples too.
12. **5th February 2019:** Samples of the Fixation Pants were posted to the Revenue provided address.
13. **14th February 2019:** [REDACTED] (On behalf of The Appellant) received an email from [REDACTED] acknowledging the acceptance of the BTI application and informing it was his intention, as previously advised, to issue this BTI under subheading 6108 22 00 00
14. **18th February 2019:** [REDACTED] (On behalf of The Appellant) sent an email requesting a meeting with Revenue to discuss the BTI decision.
15. **19th February 2019:** [REDACTED] responded with the information that he had posted the decision letter and included a link to information on appeals.
16. [REDACTED] received letter **Reference IE BTI 18NT-14-7127** dated **18th February 2019** from [REDACTED] of Revenue enclosing BTI.
17. **1st March 2019:** The 1st stage appeal letter was posted to [REDACTED] in Revenue, BTI Application Customs Division..
18. **5th March 2019:** [REDACTED] (On behalf of The Appellant) received an e-mail from [REDACTED] stating, “I have forwarded your appeal of BTI decision 18NT-14-7127 on behalf of [REDACTED], to the revenue appeal section.”

19. **8th April 2019:** [REDACTED] (On behalf of The Appellant) sent follow up email to [REDACTED] to ask about progress of the appeal.
20. **9th April 2019:** [REDACTED] responded with “I have forwarded your query onto the appeals officer. If you do not receive any communication over the next few days let me know and I will try to follow it up “
21. **15th April 2019:** [REDACTED] (On behalf of The Appellant) sent another follow up email.
22. **16th April 2019:** [REDACTED] responded with “Dear [REDACTED], Sorry about this. “Could you confirm your correspondence address please. I have been advised that the appeal reply has been sent to your Irish address. Regards, [REDACTED]”
23. **16th April 2019:** Letter **Ref: N4/19 Dated 3rd April** is received by [REDACTED] (On behalf of The Appellant) from [REDACTED] the Designated Appeals Officer refusing the appeal.
24. **2nd May 2019:** [REDACTED] (On behalf of The Appellant) emailed The Notice of Appeal to the info@taxappeals.ie as well as a follow up mail with additional information.