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(Information)

COURT OF AUDITORS

SPECIAL REPORT No 23/2000**concerning valuation of imported goods for customs purposes (customs valuation), together with the Commission's replies***(pursuant to Article 248(4), second subparagraph, EC)**(2001/C 84/01)***CONTENTS**

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SUMMARY

Customs valuation is a procedure applied to determine the value of imported goods for the purpose of calculating *ad valorem* duties. The procedure is intended to provide a fair, uniform and neutral basis for the valuation of imported goods.

Customs valuation is important to the Community for two reasons. Firstly, customs duties are an important source of European Community revenue, representing in 1999 some 11 706 million euro, or 13,5 % of the Community's total own resources. Secondly, customs valuation is important for the Member States since it also provides a baseline for determining national taxes (including value added tax and excise duties) on imported goods.

In principle, for all trade in goods the Community should operate as a real customs union and the Member States' customs authorities should act uniformly in their treatment of imported goods. Consistent application of the customs rules on customs valuation would be an important component in ensuring that the customs union operates as intended.

This audit has identified difficulties experienced by the Member States in operating uniformly within a customs union and by the Commission in supervising and monitoring the individual authorities making up the customs union.

Such a lack of uniformity is detrimental to the financial interests of the European Community.

The Commission and the Member States need to take appropriate legislative and administrative action to overcome the following weaknesses:

- the absence of common control standards and working practices,
- the absence of common treatment of traders with operations in several Member States,
- the absence of Community law provisions allowing the establishment of Community-wide valuation decisions,
- the absence of a database of binding valuation decisions.

The Commission needs to strengthen its monitoring and inspection activities, so that it can contribute more effectively to ensure a level playing field for Community operators. The Valuation Committee cannot be relied on to ensure equality of treatment of operators.

Arrangements must be made for a systematic exchange of information on valuation questions between the Commission and the Member States and among the Member States themselves.

INTRODUCTION

1. Customs valuation is a procedure applied to determine the value of imported goods where customs duties are calculated in *ad valorem* terms, as it is estimated by the Court for about 95 % of the duties on imports into the European Community.

2. Customs valuation in the European Community can mainly be affected by two kinds of problems: inconsistencies in the application of the Community rules by national customs administrations and irregularities⁽¹⁾. The present report deals only with the problems of inconsistency. The financial implications of this type of problem have not been quantified. The major obstacle to any attempt at quantification is the fact that the choice of a benchmark, representing the right administrative practice, is arbitrary.

3. The rules for calculating customs value are set out in the World Trade Organisation (WTO) Valuation Agreement on the implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994. This lays down the general principles for an international system of valuation.

4. Having been a member of the GATT, the organisation that preceded the WTO, the European Community approved the original GATT Valuation Agreement⁽²⁾ that is now incorporated in the Community Customs Code and its Implementing Provisions⁽³⁾. Under the Valuation Agreement, the World Customs Organisation (WCO) acts as the technical adviser to the Valuation Committee of the WTO. The WCO sponsors conclusions on interpretation of the WTO Valuation Agreement and whilst these do not have the force of law, they provide persuasive guidance on how the Valuation Agreement should be applied in specific circumstances as described in an index of conclusions.

⁽¹⁾ In respect of the irregularities the Commission issued a report on the communications by the Member States on their inspection activities (COM(2000) 107 of 29 February 2000). This report indicates that in 1998 the total amount of customs irregularities relating to the release of goods for free circulation identified across the European Union was 306 860 262 euro of which 52 682 753 euro concerned irregularities in customs valuation, 28 265 530 euro undeclared imports, 64 327 823 euro wrong tariff classification, 29 774 574 euro origin, 1 412 380 euro quantity and 130 397 205 euro unspecified irregularities.

⁽²⁾ Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ L 71, 17.3.1980, p. 1).

⁽³⁾ Respectively: Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1) and Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1).

5. The Commission and the customs authorities of the Member States represented in the Customs Code Committee play a major role in the development of the Valuation Agreement within the WTO and WCO, and have contributed to the WCO's index of conclusions. At the same time they also consider common European customs valuation issues.

6. At the centre of this system is the notion that the value of imported goods for customs purposes should be based on the actual value of the imported merchandise: put simply, the price actually paid or payable for the imported goods. The system is intended to provide a fair, uniform and neutral basis for the valuation of imported goods.

7. Customs valuation is important to the Community for two reasons. Firstly, customs duties are a significant source of European Community revenue, representing in 1999 some 11 706 million euro, or 13,5 % of the Community's total own resources. Secondly, customs valuation is important for the Member States, since it also provides a baseline for determining various national taxes (including value added tax and excise duties) on imported goods.

8. In principle, for all trade in goods the Community should operate as a real customs union and the Member States' customs authorities should act uniformly in their treatment of imported goods, thereby contributing to the proper functioning of the single market. Consistent application of the rules on customs valuation would be an important component in ensuring that the customs union operates as intended.

THE COURT'S AUDIT

The scope of the audit

9. The audit took place at the Commission and in all Member States except the three that joined the Union on 1 January 1995 (Austria, Finland and Sweden). Visits were also made to the World Trade Organisation and the World Customs Organisation.

10. The audit included an examination of documents handled in the Commission Valuation Committee, customs authority valuation audit files, written valuation rulings, decisions of appeal tribunals and the actual customs declarations. Files and documentation concerning customs valuation procedures for more than 200 companies and groups of companies were examined.

11. In order to select its sample the Court used a predetermined list of the 50 most important trading companies worldwide, combined with lists, obtained in each Member State visited, of the 50 most important companies in terms of customs duties established.

Audit objectives

12. The general objective of the audit was to examine the accuracy and consistency of the valuation for customs purposes of goods imported into the European Union. The audit sought to establish:

- (a) how international rules on customs valuation have been incorporated into Community legislation;
- (b) what steps the Commission or Member States take to ensure proper application of Community rules on customs valuation and what control procedures the customs authorities of the Member States have put in place to comply with the requirements of Community legislation;
- (c) to what extent the Community legislation is applied consistently to imports, in particular to imports by companies with operations in more than one Member State.

INCORPORATION OF INTERNATIONAL RULES ON CUSTOMS VALUATION INTO COMMUNITY LEGISLATION

13. In order to examine the incorporation of the WTO Valuation Agreement into Community law, a comparison was made between the WTO Valuation Agreement and the corresponding text as incorporated into Community law.

14. The WTO Valuation Agreement is a single, coherent text which, in Community legislation, has been split into two texts of different legal status. A number of articles of the Valuation Agreement have been incorporated into the Community Customs Code (a Council Regulation). The other articles of the Agreement have been integrated into the Implementing Provisions (a Commission Regulation). Finally, the explanatory notes to each article of the Valuation Agreement have been incorporated into the Annexes to the Implementing Provisions irrespective of whether the Articles to which the notes refer are included in the Customs Code or the Implementing Provisions.

15. The Commission's justification for the different legal status in Community law given to parts of the same legal text in the WTO Valuation Agreement is that when the Community Customs Code was adopted a decision was made to attain the objective of creating transparency in Community customs law on an overall level. The view was that despite their importance, the valuation rules represent only one chapter amongst a total of more than 25 chapters which make up the Community Customs Code. Notwithstanding this fragmentation of the text, the Court is satisfied that the WTO Valuation Agreement has been duly incorporated into Community law.

THE PROPER APPLICATION OF COMMUNITY RULES ON CUSTOMS VALUATION

Role of the Commission

16. The Commission has three principal responsibilities regarding customs valuation.

17. The first is to participate, as the European Community's representative, in the work of the WTO and the WCO committees on customs valuation. An important part of this work is to ensure a common approach to customs valuation by the Community and its Member States in their dealing with the Community's major trading partners.

18. The second concerns the Member States' customs authorities. Here the Commission needs to obtain assurance that the Member States apply the rules on customs valuation consistently. The Commission does so by advising and encouraging the customs authorities of the Member States in their efforts to develop a common approach, by adopting implementing legislation, by identifying best practice, and by ensuring that the customs authorities have the correct legal information and support framework.

19. The third responsibility concerns the protection of the Community's financial interests. It is the Court's view that the Commission should seek assurance that the correct amount of customs duties (own resources) are established through oversight of the Member States' implementation of the customs rules on valuation⁽¹⁾. This involves inspections in the Member States, which invariably cover aspects of customs valuation.

20. The Commission also considers that one of the objectives within its own resources inspection role is the maintenance of equivalent conditions in the Member States to ensure a level playing field for economic operators.

21. Apart from these inspections, the only means the Commission has of monitoring the extent of Member States' implementation of the customs rules on valuation is through the work of the Customs Code Committee (Valuation Section)⁽²⁾ and the cases that are presented to it, normally by the Member States.

22. It is this Committee that provides the principal vehicle used by the Commission to carry out its first two responsibilities.

Work of the Customs Code Committee (customs valuation section)

23. The Commission (DG TAXUD) provides the Chairman and administrative support to the Customs Code Committee (Cus-

toms valuation section), hereafter referred to as the Valuation Committee. This Committee is made up of representatives from all Member States and meets six to eight times a year to consider customs valuation matters. It must give an opinion on proposed legislation, and can discuss any matter concerning customs valuation. The Court has analysed the work carried out by the Valuation Committee since 1990.

24. WCO and WTO topics constitute significant elements of the agenda: the Valuation Committee discusses items for the approaching WCO Technical Committee meetings on customs valuation, as a means of ensuring a common Community position.

25. An important item of work concluded in 1997 was the creation of a compendium of customs valuation texts⁽³⁾. Whilst the document has no legal status it is available to all interested parties and has been used both within the Customs Union (by Member States' customs authorities) and outside as a key reference document in the valuation field.

26. The Commission uses the Valuation Committee to try to achieve its objective of ensuring that the valuation rules are applied correctly and in a uniform manner but has no powers to direct Member States to adopt a particular interpretation of the customs valuation legislation. The Commission views its mission as to encourage any form of convergence of practice between the administrations represented in the Valuation Committee, and has to rely on discussion, persuasion and encouragement as the means of achieving common treatment of identical problems in Member States. Although the Valuation Committee offers a platform for the Member States to establish a common approach to similar individual cases, inevitably, with 15 different customs authorities, progress towards achieving consensus is slow. The Valuation Committee frequently becomes entrenched in details and disagreements between the representatives of the Member States.

27. An example of the delays that can occur is represented by a company subject to a Community-wide customs valuation ruling concerning royalties expiring at the end of 1996. The revised duty assessment for the following two years, which involved a doubling of the uplift (increase in value), was not agreed until late 1999, and that for 1999 and 2000 was reached in June 2000. Some customs authorities had secured potential extra duty payments by taking guarantees, others had not. In January 2000, none of the extra duty payments had yet been collected by the individual customs authorities. In 1997, this company paid over 43 million euro in customs duty in just eight Member States. The Court estimates that over 4 million euro arrears of duty for that year have still to be collected.

⁽¹⁾ Article 18 of Council Regulation (EEC, Euratom) No 1150/2000 of 22 May 2000 (OJ L 130, 31.5.2000).

⁽²⁾ Articles 246 and 247(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 and Rules of Procedure Document XXI/2011/94 adopted 7 April 1997.

⁽³⁾ XXI/1229/96 — compendium of customs valuation texts of the Customs Code Committee, customs valuation section.

28. The efficiency of the Valuation Committee could be improved by better coordinating the work between the Member State representatives. For example, where one Member State has expertise in a particular aspect of customs valuation, this Member State would be invited to take the lead responsibility for examining and resolving problems in that aspect and the Valuation Committee would endorse the conclusions arrived at.

29. Many complex subject matters within the valuation area are not brought before the Valuation Committee. Besides that, the Valuation Committee is too cumbersome a vehicle to achieve the Commission objectives. In any case, the Commission has not the authority to enforce the results of the Valuation Committee's work.

Basic control procedures applied by national customs authorities

30. Community legislation ⁽¹⁾ requires the Member States to put in place an appropriate framework of customs controls. The application of the Community Customs Code valuation rules in individual cases is a matter for, and the responsibility of, the Member States customs administration.

31. Community law also indicates that in case of doubt about a transaction value a customs authority has the right to examine the customs value and to require the declarant to provide further information in support of the declared value ⁽²⁾.

32. Customs valuation is dealt with as part of the normal customs clearance procedures. This involves documentary checking of a risk-based selection of transactions at the clearance stage. All Member States' authorities recognise that this is insufficient and most have developed post-import audit-based controls. The Court notes and welcomes an increasing trend in most Member States towards post-import audit ⁽³⁾.

33. However, national authorities organise their customs valuation post-import control work in different ways. For example, some customs authorities employ qualified accountants to assist in this work (Belgium, Germany, the Netherlands, the United Kingdom), whilst at the other end of the scale in one Member State (Greece) customs officials do not have any legal auditing rights except in fraud cases. Depending on the complexity of the case and working methods used, audit visits can range from an inspection lasting a few hours to an audit lasting several weeks over several years.

34. The Commission recognises that common working practices are an essential part of the customs union and the Customs

2000 ⁽⁴⁾ and Fiscalis Decisions ⁽⁵⁾ indicate the commitment to ensure that working practices are of a high standard and based on best practices.

35. The Court noted ⁽⁶⁾ that despite its commitment, the Commission has no practical means of ensuring that tools considered to be well suited for customs valuation controls are used by all national administrations.

36. In a customs union that lacks a recognisable single customs authority it is difficult for the national customs authorities to apply identical working practices. National authorities' responsibilities and powers of access are different. Some customs authorities have only recently set up specialist post-import control inspection units. Others are unlikely to change their established, and felt to be satisfactory, methods based primarily on examinations at the time of importation or on a balance between these checks and post-importation controls.

37. As a consequence of the lack of common working practices, the individual customs authorities are reluctant to accept each other's decisions. This is a hindrance to the development of the customs union. Even when the customs authorities have agreed to work together, the different approaches of individual customs authorities result in inordinate delays for the achievement of commonly accepted decisions.

PARTICULAR ASPECTS OF THE APPLICATION OF COMMUNITY CUSTOMS VALUATION LEGISLATION

38. In its simplest form the customs value which is used for the vast majority of imports is based on the transaction that takes place between importer and supplier. However, this becomes more complicated when other factors have to be taken into account ⁽⁷⁾, for example:

- any influence that the relationship between supplier and importer might have,
- the various elements that may need to be added in order to determine the customs value (e.g. goods and services supplied by the buyer, royalties and licences).

39. In order to test the consistency of the application of Community customs valuation in these matters the Court

⁽¹⁾ Article 8 of Council Decision 94/728/EC and Article 18 of Council Regulation (EEC, Euratom) No 1150/2000 of 22 May 2000.

⁽²⁾ Annex 23 to and Article 181a of Commission Regulation (EEC) No 2454/93 of 2 July 1993.

⁽³⁾ This trend has increased significantly since the Court's previous audit concerning post-import controls in general (see the Court of Auditors' Annual Report concerning the financial year 1993, Chapter 1, paragraphs 1.3 to 1.38 (OJ C 327, 24.11.1994)).

⁽⁴⁾ OJ L 13, 19.1.2000.

⁽⁵⁾ OJ L 206, 23.7.1998, p. 43.

⁽⁶⁾ For example at the Mattheaus seminar on customs valuation, Madrid, July 1998, the conclusion concerning common auditing standards was that a particular control approach as presented by one Member State could provide a basis for establishing a common approach throughout the Member States. However to date no action has followed.

⁽⁷⁾ Article 32 of Council Regulation (EEC) No 2913/92.

concentrated its audit on imports by companies with operations in more than one Member State.

Valuation decisions

The role of international organisations and the Commission

40. There is a significant body of valuation opinions and conclusions that have been concluded at both WCO ⁽¹⁾ and Valuation Committee level ⁽²⁾. Taken together, these represent a relatively comprehensive treatment of valuation issues.

41. Such rulings may usefully narrow down the scope for inconsistent application in different Member States of valuation rules to specific cases (for example costs relating to royalties, research and development, tooling, etc.). However, the results, when set against the yardstick of the Community working as one single administration, remain unsatisfactory. The final responsibility for a trader's customs debt lies with the individual customs administrations. In valuation matters they are not obliged to accept the decisions or opinions of any other authority.

42. The Commission does not make or issue valuation decisions to individual traders. A significant moment in the customs union's history was reached in 1975 when a proposal by the Commission ⁽³⁾, for it to be attributed competence to act in this field, was rejected by the Council when it adopted the new valuation Regulations ⁽⁴⁾. The Commission had proposed that it should have the delegated power to establish, in individual cases, values or uplifts in order to avoid differences in establishing the customs value.

43. Notwithstanding the legal limitations, the Commission has over the years obtained the agreement of the national administrations to issue uniform valuation decisions for particular traders, albeit a diminishing number.

Valuation decisions issued by the Member States' authorities

44. Whenever the Member States' customs authorities accept a customs declaration they are implicitly making a valuation decision as to the basis on which they will assess liability for customs duty. However, a 'valuation decision', as generally understood by the trading community and customs authorities, is a written decision given to an importer on the customs value of the imported goods. Such decisions can be applied to subsequent imports of identical goods made in the same circumstances by the same importer and may be valid for a fixed or indefinite period.

⁽¹⁾ WCO compendium of customs valuation instruments (advisory opinions, commentaries, explanatory notes and case studies).

⁽²⁾ Community compendium of customs valuation texts.

⁽³⁾ OJ L 127, 5.12.1972.

⁽⁴⁾ Council Regulation (EEC) No 338/75 of 10 February 1975 (OJ L 39, 13.2.1975, p. 5) amending Regulation (EEC) No 803/68 (the former basic valuation text) (OJ L 148, 28.6.1968, p. 6).

45. Such a written decision is, for example, necessary when an uplift is applied to the invoice/transaction value to arrive at the correct customs value. Such an uplift, expressed in percentage terms, is usual when there are additional dutiable payments, e.g. dutiable annual insurance premiums, royalty payments, payments for research and development costs.

46. The Court found noteworthy differences in the number and circumstances when such written decisions are made and issued. For example, in Belgium, the customs authority always gives the trader a written valuation decision following an audit visit. This decision has a five-year validity and, providing that circumstances do not change, is binding. The Netherlands' customs authorities have a similar procedure. Certain Member States only issue such decisions when there are specific adjustments that have to be made (France, Ireland, Portugal, the United Kingdom). Others rarely make such written decisions (Denmark, Spain, Italy, Luxembourg). In Germany, the valuation decision does not exist as a separate written document. However, the detailed report that is given to the importer after an audit will normally contain the substance of a valuation decision.

47. Furthermore, Member States' customs authorities differ in how they make available information on valuation decisions to other interested parts of their customs service. In Belgium and the Netherlands, the customs authorities have national trader-based compendiums of valuation decisions with supporting control notes. These compendiums provide a database for customs officials to apply as guidance in other cases involving similar circumstances. No other Member States have such compendiums. Some Member States' customs authorities distribute valuation decisions within their own administrations, others only inform the importer and the customs office concerned, on a 'need to know' basis. All these decisions relate to individual traders.

The limited nature of valuation decisions

48. The fact that a valuation decision which is legally enforceable in one Member State is not legally binding in all other Member States causes problems to the trading community.

49. The Court's findings indicate that Member States have not been able to reach uniform conclusions on the valuation decisions to be applied to identical imports by the same companies in different parts of the customs union.

50. In one example, a major trading company had since 1992 been attempting to obtain Community-wide valuation decisions. The Commission advised the company to obtain separate decisions in each Member State. The Court examined the resulting basis of valuation used in eight Member States. All differed to some degree despite the fact that the relationship between the parent company and its European distributors was identical in all Member States.

51. Another example involved a company trading in all Member States and its progress through the Valuation Committee. In 1996 a single audit was requested to satisfy the customs union authorities concerning the proper application of the valuation provisions. This case led to a discussion on the possibility of joint or multinational controls concerning other candidate companies, but ended with the members of the Valuation Committee limiting their action to exchanging information concerning proposed audit visits. By 1999 the particular problem for this company had been solved, with each Member State working independently of the other Member States.

52. The lack of Community-wide binding valuation decisions is one of the problems arising where a customs union does not have a single customs administration. The Member States should establish uniform working methods through the application of common auditing standards, as a step towards the exchange and acceptance of binding valuation decisions. A thorough treatment of firms with subsidiaries in several Member States would imply a comprehensive examination of financial and production records. The acceptance of results based on audit requires, at least in the initial stages, a mutually participative approach based on common, joint audit actions. The long-term solution for the customs union is to introduce binding valuation decisions, for which at present there is no provision in Community law.

53. In the short term, the Court's view is that the Community — as a customs union — needs an index of decisions relating to individual traders. The creation of a Community-wide database of customs valuation decisions, to cover at least the 50 largest importers of dutiable goods into the Community, would go some way to addressing this problem and would be a means of ensuring that consistent valuation treatment is applied by the Member States to identical imports in similar circumstances.

54. The present system is inefficient and does not ensure that there is a level playing field for all economic operators. Major international companies have seized the opportunity offered by the Member States granting the most favourable valuation treatment and have relocated their import operations accordingly. This is an example (like the case mentioned in paragraph 58) of how the absence of valuation decisions that are binding at Community level may affect the amount of own resources collected.

Treatment of royalties and licence fees

55. Royalties and licence fees may be included in the invoice price of imported goods or shown separately on the invoice as an addition to the basic price. They may also be calculated yearly as a percentage of the total value of sales of imported goods. A high proportion of the valuation decisions discussed above concerns royalty payments. The process of determining the correct cus-

tom valuation to be applied to royalties and licence fees and other payments related to imported goods is complex ⁽¹⁾. Legislation cannot keep up with commercial and financial practices which are constantly adjusted in order to slip through fences just set up.

56. The only way for customs authorities to obtain the information necessary to deal with royalties is by auditing the importers' underlying accounts. Most customs authorities are already doing this. However, such work requires specialist skills and understanding of the principles of accounting, financial reporting and auditing. This work could be assisted by:

- (a) encouraging the exchange of customs valuation decisions;
- (b) agreeing a legal basis for joint multinational audits.

57. The Commission has invested considerable effort to ensure uniform application of the rules. Even so the Court found several cases of apparently different treatment between the Member States. Given the present diversity of control methods within the customs union this is not surprising.

58. In one case, the customs authority of the Member State where the headquarters of the company was based considered that three different transaction situations might apply for customs valuation purposes. All of them were legal and in some cases royalties and other payments would be included in the customs valuation. If the analysis of this customs authority is correct it is quite likely that the customs valuation of the imports by the company in six of the seven Member States examined by the Court are incorrect. In 1997 the company concerned paid more than 43 million euro in customs duties in these seven Member States. Uplifts for royalties applied by the different national customs ranged from 0 % to 10 % of the value of the imported goods.

59. None of the Member States has brought this case up for discussion in the Valuation Committee. At Community level the Commission's current view is that retrospective recovery of duty would normally be possible only in cases where administrations had not communicated a decision to the company. It is thus likely that even where wrong decisions have been made post-importation recovery of duties is not possible.

60. In another case the majority of a company's Community imports passed through a distribution centre in one Member State. The customs authority in that Member State decided that none of the royalty payments made by the company formed part of the customs value. The Court found that in five of the Member States to which the importer had previously imported, the customs authorities had charged duty on at least part of the royalty and other additional payments made by the importer.

⁽¹⁾ Article 32(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992, Articles 157 to 162 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 and conclusion No 24 of the compendium of customs valuation texts.

61. In this case some Member States had exchanged information. However, even taking into account the different solutions and the extended timescale involved, the Member States authorities clearly had difficulties in accepting that the principal valuation questions were the same. The company paid over 33 million euro in customs duty in 1998. Notwithstanding its declared objective of maintaining equivalent conditions for operators in the Member States (see paragraph 20) the Commission did not examine the valuation treatment of this company.

The successive sales provision ⁽¹⁾

62. An earlier sale in a series of sales can be used as a 'transaction value' for customs valuation purposes. The earlier sale can only be accepted if the declarant can justify the details of the sale and provide evidence to confirm that at the time of the sale the goods were destined for export to the Community. Importers, usually multinationals, use the procedure to obtain a lower customs valuation of their imported goods. The successive sales provision is in line with the trade policy guidelines adopted by the Commission in consultation with the Council ⁽²⁾.

63. The Commission and the Member States' customs authorities have however endeavoured to limit its impact on the valuation of goods, in view of the consequent reductions in own resources.

64. The Court was unable to identify the full extent to which importers use or seek to use the successive sales provision. One reason for this is that, in order to apply the successive sales provision, unlike some other customs provisions, there is no legal requirement for an importer to obtain prior permission or authorisation. However, the Court found that, in practice, some customs authorities do impose a form of prior approval even though this has no basis in Community law. As in other aspects of customs valuation the Court found variations in the extent to which customs authorities allow the use of the provision or consult with each other. The Court has established that certain importers use the successive sales provision in one or more Member States but not in others and has drawn some significant examples of inconsistency to the attention of the Commission.

65. As customs procedures move towards less paperwork at customs clearance stage, the Court considers it essential that prior notification of the use of the successive sales provision is introduced and that Member State authorities keep records of companies making regular use of the successive sales provision or where use of the provision has been disallowed. The maintenance of such records would allow exchange of information between customs authorities of Member States.

The relationship between transfer pricing and transaction values

66. The Customs Code contains provisions under which inter-company sales transactions (transfer prices) have to be considered when establishing the value for customs duty ⁽³⁾.

67. Transfer prices that are acceptable under the Customs Code as a customs value are not necessarily acceptable to the national tax authorities as a value for company taxation purposes.

68. The Court noted instances where, when considering transaction values, customs services find themselves in conflict with company taxation services, especially concerning Far East-based multinationals. The national tax authority is concerned by overvaluation to avoid high national taxation on company profits, the exact opposite to the customs valuation problem of undervaluation.

69. Under current Community legislation the customs value and the national taxation value do not have to be the same. The former must be established by means of the criteria of the Community customs legislation and not on the basis of profit tax criteria.

70. Valuation of goods under transfer pricing is an essential element in the proper assessment and collection of revenue. The different criteria and methodology will need to be aligned if there is to be a truly harmonised approach between the Community taxation of imports and the national taxation of company profits.

Manufacturers' guarantees

71. Manufacturers often give a guarantee or warranty with their products. Such guarantees mean that if the goods are later shown not to be in accordance with the sales specification the buyer will be compensated. Manufacturers' guarantees are intended to compensate the importer of goods for defects which can be attributed to the production process. The Community Customs Code provides the possibility of rejecting the goods and obtaining repayment of the customs duties on their export. It also allows defective goods to be temporarily re-exported under outward processing and, if repaired free of charge, to be re-imported with total exemption from duty. In the Customs Code, goods which do not meet the contractual specifications are distinguished from defective goods ⁽⁴⁾.

72. The treatment of manufacturers' guarantees for imported cars is a prime example of an area where the individual customs authorities of the Member States apply different interpretations of Community legislation.

⁽¹⁾ Article 147 of Commission Regulation (EEC) No 2454/93.

⁽²⁾ The Committee operating in the Council under Article 133 of the EC Treaty.

⁽³⁾ Article 29(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992.

⁽⁴⁾ Articles 155 and 238 of Council Regulation (EEC) No 2913/92 and Commission Document XXI/1038/97.

73. In its annual report on the financial year 1990 ⁽¹⁾, the Court drew the Commission's attention to the practice of the German customs authority of granting value reductions on imports of motor vehicles against repair costs covered under warranty arrangements. The Court considered that these reductions were outside the provisions of Community law in force at that time. Ten years later, similar value reductions are still being applied by the German customs authority. The Court continues to consider this procedure as not conforming to the provisions of Community law.

74. Similar situations are treated differently in other Member States. The customs authorities of three Member States (Italy, the Netherlands, the United Kingdom) have refused similar claims from importers of motor vehicles. The different approaches of Member States' customs administrations to this question may be one of the elements leading to trade diversion inside the Community.

75. This is a clear indication of the lack of cohesion within the customs union, and one which may have resulted in losses of own resources. Regardless of any ultimate revision of the regulations, the fact remains that for over 10 years a practice of rebates, unchallenged by the Commission, has existed.

Transport costs

76. The WTO agreement on customs valuation allows members to provide for the inclusion in or the exclusion from the customs value, in whole or in part, of transport and related costs ⁽²⁾. The Community and the majority of WTO members include the cost of transport to the port or place of importation. Thus the cost of transport of imported goods to the place of introduction into the customs territory of the Community is one of the additions to the price paid for the goods when determining the customs value.

77. Compared to road and sea transport, the case of air transport is less clear as to where the Union frontier is crossed. The Commission regards this as the point in mid-air where a Community frontier is crossed and has made calculations of the proportions of air freight costs to be included in the customs value on routes between approximately 230 non-Community airports (or groups of airports) and around 60 Community airports; altogether about 14 000 routes are covered ⁽³⁾. Difficulties arise because on occasion routes pass over Community territories situated far from the European continent: for example, goods arriving in France (Paris) from Brazil (São Paulo) are regarded as arriving in the Union as the aircraft overflies the Azores.

78. The calculation for air transport made by the Commission is questionable not only because of its approximation but also because of its complexity. This system is a source of heavy administrative work and becomes too cumbersome for many importers. The Court considers that not all modes of transport are treated on equal terms and questions whether the valuation of air transport costs does not unjustifiably reduce the import duties for the Community.

Exchange of information between Member States' customs administrations

79. In several Member States visited during the audit, the Court found little evidence of contacts between authorities of different customs administrations of the Member States. However there are some notable exceptions, such as bilateral cooperation agreements (Spain, Portugal) and spontaneous information exchanges concerning the completion of company audits.

80. Much of the information that the customs authority obtains in order to reach a customs valuation decision comes from the trader. Given that it is likely that traders will only volunteer information that is favourable to themselves, it is important that customs authorities exchange information for companies trading in several Member States.

81. A particular area that at present is not fully addressed is the situation of an importer based in one Member State but releasing goods for free circulation in another. The importer avoids having to have an office in the port of entry by employing the services of a fiscal representative empowered to make the customs declaration. However, any audit-based control work would need to be done by the customs authority in the Member State where the importer is based. The Court found little evidence that the Member State customs administrations are addressing this situation, even though in some cases information is available. For example, in two Member States the respective customs authorities established, as a result of analysing value declarations, that a significant number of declarations were made by operators based in other Member States (Belgium, Luxembourg). This basic information was not passed on to the Member States where the importers were based, except in a few irregularity cases.

82. An example of the use of exchanges of information concerning fiscal representatives was a case examined in Denmark by the Court during the audit. It involved a fiscal agent representing 63 different traders. What started out as a fairly routine enquiry involving two other Member States eventually became a case involving 10 Member States. Although the case has not yet been concluded, the Danish customs estimate that between 2,5 and 3 million euro of customs duties will be recovered.

⁽¹⁾ The Court of Auditors' Annual Report concerning the financial year 1990, Chapter 2, paragraph 2.52(a) (OJ C 324, 13.12.1991).

⁽²⁾ Article 8.2 of the General Agreement on Tariffs and Trade 1994.

⁽³⁾ Annex 25 to Commission Regulation (EEC) No 2454/93.

CONCLUSION

83. The Court's audit has identified difficulties for the Member States in operating uniformly and for the Commission in supervising and monitoring the individual authorities making up the customs union.

84. Further action is required if the Commission intends to ensure equivalent trading conditions in the Member States. To date not enough has been done in the field of customs valuation. This is underlined by the results of the audit, in particular with regard to the treatment applied to companies trading in more than one Member State. The Community is still some way from achieving the harmony of approach to customs valuation implied by the creation of the customs union.

85. The Commission needs to establish a proper monitoring role. The Commission considers that its role is to contribute to a level playing field for operators within the Community through its inspection procedures. The Court considers that the Commission should strengthen this aspect of its inspection role. Using the Valuation Committee as its main monitoring tool is no longer viable (see paragraphs 16 to 29).

86. The Commission and the Member States need to take appropriate legislative and administrative action to overcome the following weaknesses:

- the absence of common control standards and working practices (see paragraphs 30 to 37),
- the absence of common treatment of traders with operations in several Member States (see paragraphs 55 to 61),

- the absence of Community law provisions allowing the establishment of Community-wide valuation decisions (see paragraphs 48 to 52),
- the absence of a database of binding valuation decisions (see paragraph 53),
- the absence of prior notifications and records of the use of the successive sales provision (see paragraphs 62 to 65).

87. The Commission needs to take urgent action to resolve the question of manufacturers' guarantees (see paragraphs 71 to 75).

88. The customs treatment of air transport costs needs to be reconsidered (see paragraphs 76 to 78).

89. The Commission and the Member States should encourage a greater level of exchanges of information on valuation questions (see paragraphs 79 to 82).

90. The report also draws attention to the fact that in the case of 'transfer pricing' the value taken into consideration for customs purposes may differ from the value used for the calculation of direct national taxes (see paragraphs 66 to 70).

91. As a final conclusion, the Court stresses that the Community can only operate as a real customs union if the Member States customs authorities act uniformly in their treatment of imported goods.

This report was adopted by the Court of Auditors in Luxembourg at its meeting of 14 December 2000.

For the Court of Auditors

Jan O. KARLSSON

President

THE COMMISSION'S REPLIES

SUMMARY

Even if the customs valuation procedure is intended to provide a fair, uniform and neutral basis for the valuation of imported goods, the rules adopted in 1980 give increased emphasis to trade policy considerations.

The objective that for all trade in goods the Community should operate as a real customs union with uniform treatment of imported goods can be fully obtained only if this customs union is operating on the basis of a single customs administration, which is not the case.

The Commission agrees that lack of uniformity in application would be detrimental to the financial interests of the European Community in cases where a customs authority deviates from established practice or standard norms of interpretation with respect to the rules in force.

As regards the legal and administrative actions requested by the Court of Auditors:

- in the framework of Decision No 210/97/EC of the European Parliament and of the Council, the Commission within the means at its disposal, supports and encourages the development of common control standards and working practices,
- on the basis of its legislative and administrative action, the Commission's Customs Code Committee will act in order to overcome the absence, where duly established, of common treatment of traders operating in several Member States,
- the Commission takes the view that 'Community-wide' approaches ('decisions') in individual case management can only best be attained by the agreement of all national authorities concerned on the handling of the case in question,
- the Commission does not see the significant added value a 'database of binding valuation decisions' would confer in the context of the working of the Customs Code Committee. Furthermore its creation, maintenance and operational exploitation would exceed the Commission's resources.

With regard to the role that the Customs Code Committee can play in order to ensure equality of treatment of operators, the Commission is of the opinion that within the limits of the conditions of its functioning, this Committee can and does make a valuable contribution to consistent application of the customs' valuation rules.

The Commission uses a panoply of tools to monitor uniform application of Community rules thus contributing to equality of treatment between economic operators. Amongst these tools are

on-the-spot inspections. However, faced with limited resources and a great variety of possible topics the Commission uses risk-analysis techniques to allocate its resources to the areas considered to present the highest risk in terms of own resources. Valuation is and will continue to be included in this selection process. Over the last few years, valuation has been addressed in around one quarter of the Commission inspection reports.

The Commission will continue to encourage information exchange with the Member States and among the Member States themselves.

INTRODUCTION

1 and 2. The Commission shares the view of the Court of Auditors on the difficulties which can sometimes arise in choosing a benchmark representing the right administrative practice or precise interpretation. It appears therefore that there is no general possibility of deducing negative financial implications from inconsistencies in the application of such rules. In other words, if different customs administrations do not apply the rules in the same way, it is not necessarily the valuation determination that gives rise to the highest duty amount that is to be considered the correct one.

The Commission interprets the word 'irregularity' to also include the concept of fraud.

5. Community customs valuation issues represent in fact the most important part of the Community Customs Code Committee's activities; coordination of valuation issues dealt with in the WTO and WCO also falls under its responsibilities.

6. As an explanation of the 'system' of customs valuation this point calls for further development. Indeed the basic notion of 'actual value of the imported merchandise' is found in Article VII of GATT (1947 and 1994). Community legislation was based until 1980 on the 'Brussels definition' of 1950⁽¹⁾ which defined the notion of 'actual value' as the 'normal price' of the imported merchandise.

The GATT Agreement referred to in point 4 replaced this definition by the notion of the 'transaction value' which introduced a major change in the underlying philosophy, trade policy considerations (including trade facilitation) being seen as largely dominating.

⁽¹⁾ Convention on the Valuation of Goods for Customs Purposes, Brussels, 15 December 1950.

It is not surprising that the shift in approach that materialised under the GATT Agreement has had an impact also on the administrative environment. The introduction of the 'transaction value' criterion had the probably intended effect of inverting the 'balance of power' between the operators and the customs administrations in this field. No longer is it in principle the declarant's burden to prove that the paid price is in agreement with the notion of a 'normal price', but the price indicated by the declarant is in principle the correct one unless challenged by customs.

Such basic considerations cannot be left aside when addressing questions relating to the application of customs valuation in general.

8. The Commission agrees with the Court of Auditor's views. However, inconsistent application of rules may cause concern only in so far as it leads to significant competitive distortions or has financial implications.

THE PROPER APPLICATION OF COMMUNITY RULES ON CUSTOMS VALUATION

Role of the Commission

19. Under the current Community legislation providing for transaction-oriented compliance controls, the Commission cannot give the assurance that the correct amount of customs duties (own resources) is established in all cases. Nevertheless, in spite of the enormous quantity of underlying transactions and the limited number of inspections, the Commission, using system-based controls, can give a fair indication about the situation in the Member States regarding the application of Community law.

Work of the Customs Code Committee (customs valuation section)

23 to 26. Since as the Court states (point 30) the application of the valuation rules in individual cases is a matter for, and the responsibility of, the Member States' customs administrations, the Commission's role must be to narrow down as much as possible the scope of divergent or incorrect application by agreeing on common rules or guidelines in the Customs Code Committee.

This policy, however, is not facilitated by the particular nature that characterises the basic valuation rules. These rules are to a large extent based on simple but imprecise concepts which the WTO legislator has tried to clarify in particular by establishing a range of subconcepts, without however the margin of appreciation for the customs authorities being in reality significantly reduced.

As an example may be given the rule that when established between related parties, the transaction value must be 'acceptable'. That is the case when the relationship has *not influenced* the price. The interpretative notes set up under the GATT Agreement,

Article 141 CCC-IR referring to Annex 23 of that Regulation, indicate that such an influence does not exist e.g., 'if the price has been settled in a manner consistent with the *normal pricing practices of the industry in question*' or if it contains, besides the costs, 'a profit which is *representative* of the firm's overall profit' (interpretative notes, point 3 to Article 29(2)).

The declarant for his part may demonstrate that the 'transaction' value *closely approximates* other reference values. For this to be the case a 'number of factors' must be taken into consideration according to point 4 of the interpretative notes to Article 29(2). These conclude by indicating that: 'Since these factors may vary from case to case, it would be *impossible to apply a uniform standard* such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable'.

Guidance to be obtained from such rules being limited, in 'borderline situations' the authority competent to decide such cases has the entire responsibility for their interpretation in individual cases. Competent customs authorities may, even within a single Member State, have different appreciation of the same case. Total consistency in application can only be reached either by investing in one authority the competence to decide, or, if different authorities are to decide, by providing for a common approach among themselves.

The conclusion to be drawn from this is that, since individual case management is a matter for the Member States' customs administrations, the Customs Code Committee does not represent the appropriate structure for such management to occur on a Community-wide basis. This Committee can only offer the platform for the Member States to establish common approaches to a certain number of questions, and this under difficult conditions as the Court of Auditors has already ascertained.

The Commission furthermore observes that inspections of traditional own resources are also aimed at verifying that equal treatment is applied to identical problems by the Member States in the respect of the current Community legislation.

27. In this case, the Committee took up a comprehensive review of the existing arrangement which comprised a Community-wide uniform valuation treatment of the firm as coordinated by the Committee. As a separate matter, a number of administrations decided to carry out their own investigations at national level in order to ensure that own resources were being protected. Difficulties relating to information and audit data were encountered by the national authorities in concluding these investigations, so that delegations to the Committee had to delay several times their agreement to a revised arrangement. A revised basis of assessment was reached at the end of 1998, but this was in turn appealed by the company. A new arrangement applied retrospectively (from 1997) was subsequently concluded in 1999 on the basis of a proposal from the Commission.

Concerning the collection of own resources, the Commission is giving proper follow-up to the fact mentioned by the Court and intends to charge belated interest where applicable.

28. The 'lead responsibility' approach, whose results cannot of course be made compulsory for other administrations, has already been tried by the Customs Code Committee in its current examination and review exercise of particular cases highlighted by the Court (see points 58 to 61). Experience has however shown that administrations are often reluctant to give up their autonomy of decision and take shelter behind stated concerns relating to commercial secret protection and lack of a legal basis. This 'lead responsibility' approach provides a solution on a very selective basis only. Experience shows that its dynamic and its benefits are easily nullified as soon as an appeal is introduced against the lead administration's action.

29. Under the rules of the Customs Code regarding the Valuation Committee the Commission has no power to ask Member States' administrations to render account of the treatment applied to a given operator in each of these States. The Code Committee tries to establish rules, guidelines or other conclusions, usually without examining individual cases.

Basic control procedures applied by national customs authorities

31. Article 181a CCC-IR, applicable since 1995, followed an agreement concluded at GATT level during the Uruguay Round to accommodate concerns of developing countries. Member States' administrations do not always have totally identical views on the degree of trade facilitation that is appropriate.

34 and 35. Seminars offer to the participating national and Commission officials the opportunity to learn from each other. Although Member States are solely competent to adopt or modify their working practices, the Customs Code Committee has in earlier meetings made provision for the consideration of appropriate follow-up to seminar activities.

36 and 37. Post-import audit-based controls undertaken by Member States are best suited to control customs valuation. Acceptance of each other's decisions does not necessarily bring about more consistency in the nature of the decisions taken. For that to be achieved, certain decisions should not be accepted in the first place, while others deserve to be widely promulgated. The fact that one decision has been adopted first, is not in itself considered sufficient legitimacy for compliance by other decision-makers.

In the Customs 2002 programme (monitoring exercises and project groups), the Commission continues to bring together the relevant functional resources of Member States' administrations in order to identify, establish and develop common working methods and best practice.

PARTICULAR ASPECTS OF THE APPLICATION OF COMMUNITY CUSTOMS VALUATION LEGISLATION

Valuation decisions

The role of international organisations and the Commission

41 to 43. The Commission has promoted and facilitated, in cases where this was requested by operators, the adoption of administrative arrangements on common treatment of specific valuation questions.

However, the Member States' administrations are responsible for the application of the valuation rules to individual cases.

Since there is no hierarchical relationship between Member States' customs administrations, there is no way to oblige them to follow each other's opinions or decisions.

Valuation decisions issued by the Member States' authorities

44 to 47. In the relationship between the customs administration and the operator, the Code recognises *decisions* which consist in the communication of the amount of duty entered into the accounts (Article 221(1)) in relation to the normal release-for-free-circulation procedure. The customs value is one of the factors that determine the amount of duty. Whether the valuation factor can in itself be made the subject of separate decisions is a question of administrative practice in the Member States.

The interest of the operators to obtain legal security with regard to valuation questions may be satisfied by 'decisions', written information, audit reports, statements or similar acts constituting self-binding administrative activity. Such self-binding action may however have an affect on the financial interests of the Community. By virtue of the principle of legitimate expectation even administrative practice which is non-compliant with the correct application of the rules may have to be tolerated under certain conditions. Under point 58, the Court has pinpointed such a situation. The form in which administrative practice of a self-binding nature is cast is not of a primary importance. What is important for obtaining consistent application of the customs valuation rules in different Member States is that, with regard to a similar individual case, the appreciation margins in the applicable rules are all interpreted in an identical way.

The limited nature of valuation decisions

48. With the exception of the few cases where the Commission has explicitly been asked to promote administrative arrangements of the kind referred to under point 27, the Commission has no manifest evidence that the trading community has a strong interest in the availability of such 'binding decisions'.

Such binding effect would not always mean that the correct interpretation of the rules would be applied Community-wide; it would indeed have a negative multiplier effect on correct interpretation in the case of an incorrect 'decision'. Generally speaking, the 'legitimacy' in other Member States of a binding decision should flow from the mutual confidence that a 'decision' is based on a prior agreed common approach. However once such an approach has been reached among the Member States' administrations, then the point could be made that the taking of a 'decision' that should be 'binding' becomes a tautological issue.

50. The Commission gave the advice to seek separate value determinations in a case where the question asked was whether sales between an American company and its Swiss subsidiary were acceptable as a basis for the determination of the customs value. The Commission at that time considered that a review of the provisions on successive sales was necessary (the debate in fact only started one year later) and that an agreement on Community level in that case would pre-empt the outcome of the review (see also points 62 to 64).

51 and 52. Single audit operations in which all or groups of Member States' administrations participate were always recommended as an ideal solution to delegations in the Customs Code Committee. The Commission shares the view (52) that acceptance of results based on audit requires a mutually participative approach based on common, joint audit actions. The exchange of control programmes among the Member States was an initial step suggested by the Commission to go in this direction. Acceptance of the results of an audit without participating in the audit action itself would represent an advanced level of result-sharing, equivalent more or less in its effect to what the Court propagates as 'binding decisions'.

53 and 54. In the Commission's view, the problem is not, in the first place, one of lack of information.

For consistent application in different Member States to be always guaranteed, valuation issues must be examined together and coherent approaches established among the administrations concerned by the individual important cases. The Customs Code Committee represents a platform to set up solutions when significant cases are brought before it. There is however a quantitative problem. It has to be kept in mind that each of the 50 largest importers per Member State of dutiable goods may have a large range of goods sourced according to varying commercial arrangements. The case referred to under point 27 illustrates the diversity of circumstances that may exist. In this case, the national subsidiaries import intermediate products under four different types of possible commercial arrangement in some Member States, while in others the respective national subsidiaries imported only finished goods with a more limited range of possibilities.

Consistent application of valuation rules in individual cases can only be achieved if decisions are supported by the administrations involved which have to reach agreement among themselves. Within the limits determining its functioning, the Customs Code Committee can make a valuable contribution in this context.

Within the context of the working of that Committee, a comprehensive database of value determinations would not be of significant usefulness and its creation and continuous updating according to rapidly changing commercial circumstances would exceed the Commission's resources.

Treatment of royalties and licence fees

55. The difficulties mentioned by the Court for legislation to keep pace with the constant adjustment of business practices under the guidance of financial consultants are confirmed by the Commission.

56. With regard to joint multinational audits, some Member States voice reservations about confidentiality and the safeguarding of commercial secrecy, and this concern requires in their opinion an additional legal basis in Community law. In the Commission's view Article 10 of the Treaty constitutes a sufficient legal basis.

57. The efforts of the Commission aim at assisting the national administrations to put into place an adequate infrastructure for the uniform application of Community rules in order to avoid system errors. However even the most adequate infrastructure cannot prevent isolated errors occurring.

58 and 59. The Commission first obtained a picture of this situation in spring 2000. The information was circulated among the administrations and initial orientations with a view to ensuring consistent application in the Community were given in May 2000. The discussions will continue on the basis of a more detailed report submitted by one Member State.

60 and 61. The differences in appreciation with regard to this case are more reduced than in the case referred to under point 58. The Commission was first informed of this case by the Court's findings and noted that one Member State's practice was at variance with the general approach. The Member State in question was invited to justify its approach and its report, recently received, will be examined within the Customs Code Committee.

The successive sales provision

62 to 64. The successive sales situation is covered by the general terms in the Valuation Agreement: 'the price actually paid or payable for the goods when sold for export to the country of importation'. An important policy debate took place in 1994 at the Commission's initiative. As a result of this debate, Article 147 CCC-IR was amended. On the basis of the text adopted in 1995, the importer availing himself of an earlier sale has to demonstrate that the sale took place for export to the customs territory of the Community.

The Court suggests that such a burden-of-proof provision is not enough and acceptance of an earlier sale should be made subject

to notification. Under current customs legislation, the Commission is not aware that such a requirement can be imposed in a similar situation. Anyway, according to the terms of the Valuation Agreement, there would be no justification for the singling out of the 'earlier sales' scenario in this way.

The Commission's view is that customs authorities in some Member States do not 'impose' such a notification.

The practice can be explained by the importer's interest to obtain legal security because otherwise he bears the risk that a declared price is rejected as transaction value for the entirety of the prescription period. To avoid later negative surprises of this kind, operators prefer in certain cases to get information (ruling) from the customs administration as to whether the price fixed in an earlier sale's contract will be accepted. Similar situations of insecurity arise also in the field of tariff preferences but without warranting the introduction of prior authorisation in order to grant the preference in question.

The relationship between transfer pricing and transaction values

66 to 70. The general problem of identifying reliable criteria in the field of transfer pricing has already been mentioned under point 26. The challenge that transfer pricing represents with respect to customs valuation is one of avoiding systematic undervaluation of the imported goods. Operators that see an interest in such a strategy, accept at the same time the possible negative consequences if this leads to the assessment of higher profits on the side of direct taxation. There may also be a reverse strategy to inflate the value of the goods in order to reduce the effects of direct taxation. This however would fall outside the scope of the valuation rules with regard to sales between related persons as addressed by Article 29(2) CCC. In that sense, 'overvaluation' is not a concern of customs valuation, as the European Court of Justice has already ruled in Case 65/79 (judgment of 24 April 1980) that the determination of the value for customs purposes in accordance with the Community's valuation law 'cannot have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than the application of the Common Customs Tariff'.

Manufacturers' guarantees

71 to 75. The Commission followed up the question on a factual basis, but however experienced difficulties in coming to a clear position in the absence of strong arguments related to valuation rules, including rulings or case-law on this question even at the international level. Codification of customs legislation led the Commission to situate the question in a wider context, leaving behind the mere valuation sector specific approach. On this basis the Commission considers the practice in question as being in compliance with Community customs legislation.

The Community's position on repairs under warranty has been settled as regards its customs aspects at the level of the Code itself

by Article 152. This Article allows such guarantees to be fully exploited for the purposes of repair free of charge *outside* the Community of goods without incurring import duties on reimportation.

In terms of consistency in the legal order, it would be a fundamental contradiction to this approach if customs valuation rules were considered to penalise the same economic operations taking place *inside* the Community without duty exemption. This consideration gives further support to the view that in the contractual situation, the declared value for the initially imported goods, if otherwise acceptable, contains as a price element the potential cost of operations which may be undertaken in the import country under warranty. In this context the relevant repair costs incurred may give rise to adjustment of the declared value by way of reimbursement of duties.

Considering the question of legality answered on this basis, the Commission since 1997 has attempted to align by means of implementing legislation diverging practices in the Community. In the absence of a qualified majority in the Code Committee in favour of a legal text confirming the position outlined above, a case study was initiated and is close to finalisation.

Transport costs

76 to 78. Differences in approach to the treatment of costs in sea and air transport raises in formal terms the question of equal treatment. The customs value of goods transported from New York to Hamburg by sea bear the full cost of that transport operation, whereas goods transported between the same locations by air bear only a proportion of that transport operation (established at 68 % of the costs). Such percentages are based according to long-established practice, in each case on the most direct air route, unless a less direct air route crosses the Community frontier at a place nearer the airport of departure ⁽¹⁾. Before the accession of Portugal to the Community, the percentage in the abovementioned route was established at 80 %.

Whilst it may be argued that there is formal discrimination between the two modes of transport, it is probably also true that the full cost of transport of e.g., a car by sea between New York and Hamburg is still much lower than 68 % of the cost that would be incurred by the same product in case of transport by air.

The Commission does not see ways of altering the present situation without getting either into conflict with the Valuation Agreement or making the system more complex than it is today.

⁽¹⁾ For an early example of this approach, see Commission Regulation (EEC) No 1033/77 (OJ L 127, 23.5.1977).

Exchange of information between Member States' customs administrations

79 to 82. The Commission encourages, within the means at its disposal, such exchanges of information concerning Member States' administrations.

CONCLUSION

83 and 84. The difficulties identified result to a large extent from the particular nature of the valuation rules which can contain considerable appreciation margins in particular when innovative and diverse commercial practices arise.

Besides the competences of the Commission, in the field of own resources control (Council Regulation (EC) No 1150/2000), the Commission can use the Customs Code Committee as a coordination platform whenever important cases are brought to its attention by Member States' administrations.

85. The Commission underlines the importance of a level playing field for economic operators. This objective is entirely coherent with the other main objective underlying its control activities, i.e. the protection of the financial interests of the Union. The Commission continues to explore how to improve the effectiveness of its actions.

86.

- Together with the Member States, the Commission is *also* involved in developing common audit standards. As a result of this voluntary cooperation, a number of structured audit modules on customs subjects have been obtained, which should contribute to improve working practices.

Common control standards and working practices are a field where the Commission's activities in the context of the Customs Code Committee are determined by Decision No 210/97/EC of the European Parliament and of the Council, in particular Articles 5 and 9. According to these rules the Commission can 'support' actions of the Member States and 'encourage' coordinated development by them of new working methods.

- On the basis of its legislative and administrative action, the Commission's Customs Code Committee acts and will act in order to overcome instances of the absence of common treatment of traders operating in several Member States.

The particular nature of the valuation rules and the complexity and variety of the commercial circumstances to be appreciated in a great number of cases (even if only firms operating in more than one Member State are taken into account), call for permanent adjustment of past determinations in the light of changing commercial practices.

- The Commission takes the view that 'Community-wide binding valuation decisions' in individual case management can only be attained by the agreement of all national authorities involved.

The Customs Code Committee can make a valuable contribution to reaching consistency in application. It can however only deal with a limited number of important cases that are brought before it.

- The setting-up, maintenance and operational exploitation of a database of valuation determinations would not be of significant usefulness in the context of the working of the Customs Code Committee and exceeds the Commission's resources.
- With regard to successive sales the Commission feels that the principle of *a posteriori* controls of import operations should not be deviated from because it is an essential element of trade facilitation policy.

The introduction of prior notification as a procedural requirement would logically call for extension to other 'critical' fields such as entitlement to preferential origin and would considerably complicate the system of procedures.

In addition, justifications for successive sales in individual cases are part of the normal records to be kept by the administrations in accordance with the rules applicable.

87. The Commission has resolved the question of manufacturers' guarantees in reaching agreement on guidelines on the basis of a case study.

88. The Commission will further examine alternative solutions with regard to the question of air transport costs.

89. The Commission will continue to encourage information exchanges on valuation questions among Member States.

91. The Commission is acting, within the means at its disposal, to attain that the Member States' customs authorities act uniformly in their treatment of imported goods.