Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

10 September 2020*

(Reference for a preliminary ruling – Customs Union – Union Customs Code – Regulation (EU) No 952/2013 – Article 71(1)(b) – Customs value – Imports of electronic products equipped with software)

In Case C–509/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht München (Finance Court, Munich, Germany), made by decision of 6 June 2019, received at the Court on 4 July 2019, in the proceedings

BMW Bayerische Motorenwerke AG

v

Hauptzollamt München,

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, F. Biltgen and N. Wahl (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BMW Bayerische Motorenwerke AG, by U. Möllenhoff, Rechtsanwalt,

– the Hauptzollamt München, by G. Rittenauer, acting as Agent,

– the French Government, by E. Toutain and A.-L. Desjonquères, acting as Agents,

– the European Commission, by F. Clotuche-Duvieusart and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 71(1)(b) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('the Customs Code').

2 The reference has been made in proceedings between BMW Bayerische Motorenwerke AG ('BMW') and the Hauptzollamt München (Principal Customs Office, Munich, Germany; 'the Principal Customs Office') concerning the taking into account, in respect of customs value, of the software development costs supplied free of charge by the buyer to the producer for use in the production and sale for export of the goods.

Legal context

3 Article 70(1) of the Customs Code concerning the determination of the customs value on the basis of the transaction value provides:

'The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.'

4 Article 71 of that code, entitled 'Elements of the transaction value', provides:

'1. In determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by:

…

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
  (i) materials, components, parts and similar items incorporated into the imported goods;
  (ii) tools, dies, moulds and similar items used in the production of the imported goods;
  (iii) materials consumed in the production of the imported goods; and
  (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

…

2. Additions to the price actually paid or payable, pursuant to paragraph 1, shall be made only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.'

The dispute in the main proceedings and the question referred for a preliminary ruling

5 BMW manufactures vehicles containing control units. They come from various third countries and are similar to an on-board system which controls physical devices within vehicles.

6 BMW developed – or arranged for the development by commissioned undertakings in the European Union of – software which provides smooth communication of applications and systems in a vehicle and is required to execute various technical processes to be carried out by the vehicle's control unit. As the software's owner, BMW does not have to pay licence fees for it.

7 That software is made available to manufacturers of control units free of charge. They use it to perform a functionality test prior to the delivery of the control units. The test protocol documents the fact that the interaction between the control unit and the software functions smoothly. It also makes it possible to ascertain whether any errors that have arisen upon delivery were caused during transport or in the course of implementation of the software. The entire procedure is the subject of contracts between BMW and the manufacturers of control units.

8 BMW imports the control units which include the software installed on them outside the European Union by the manufacturer and has them released for free circulation in the European Union.

9 During a customs inspection carried out by the Principal Customs Office, it became apparent that BMW indicated, in respect of the customs value of the imported control units, the price paid to the manufacturers of control units, which did not take account of the development costs of the software. Taking the view that those costs should be incorporated into the customs value, the Principal Customs Office, by decision of 25 September 2018, set, by notice of assessment for import duties, a customs debt of EUR 2 748.08 for the goods released for free circulation in January 2018.

10 BMW instituted proceedings against that decision before the referring court.

11 It is in those circumstances that the Finanzgericht München (Finance Court, Munich, Germany), having doubts as to the interpretation of Article 71(1)(b) of the Customs Code, as regards the taking into account of the development costs of software, and, where relevant, as to the need to take into account the contractual provisions binding the importer to the producer, in order to determine which point of Article 71(1)(b) of the Customs Code should be relied upon for the purposes of adjusting the customs value in the present case, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Should the development costs for software that has been produced in the European Union, made available to the seller by the buyer free of charge and installed on the imported control unit be added to the transaction value for the imported product pursuant to Article 71(1)(b) of the Customs Code if they are not included in the price actually paid or payable for the imported product?'

Consideration of the question referred

12 By its question, the referring court asks, in essence, whether Article 71(1)(b) of the Customs Code must be interpreted as meaning that, for the purposes of determining the customs value of imported goods, it allows the economic value of software designed in the European Union and made available free of charge by the buyer to the seller established in a third country to be added to the transaction value of imported goods.

13 As a preliminary point, it must be recalled that it is clear both from the wording of Article 70(1) and Article 71(1) of the Customs Code and from the case-law of the Court that the purpose of customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious

customs values. The customs value must therefore reflect the real economic value of imported goods and take into account all of the elements of those goods that have economic value. Thus, although, as a general rule, the price actually paid or payable for the goods forms the basis for calculating the customs value, that price is a factor that potentially must be adjusted where necessary in order to avoid the setting of an arbitrary or fictitious customs value (judgment of 20 June 2019, *Oribalt Rīga*, C–1/18, EU:C:2019:519, paragraphs 22 and 23 and the case-law cited).

14 In the first place, it should be noted that Article 71(1)(b) of the Customs Code requires the value of certain goods or services supplied directly or indirectly by the buyer free of charge or at reduced cost and used in the production or sale for export of the imported goods, in so far as that value was not included in that price, to be added to the price actually paid or payable for the imported goods.

15 Thus, it will be for the referring court to determine whether the conditions laid down in Article 71(1)(b) of the Customs Code are met in the dispute pending before it, by assessing whether the economic value of the software must be added to the transaction value of the control units, in order to reflect their customs value. It will therefore be for the referring court to determine whether the fact that that software makes it possible, first, to test the operation of the control units and, secondly, to ascertain whether any errors may have arisen upon delivery, during transport or in the course of implementation of the software, is such as to confer on the control units a real value higher than their transaction value.

16 In the second place, the argument that Article 71(1)(b) of the Customs Code is not applicable to this dispute on the ground that software does not appear in the list in Article 71(1)(b)(i) to (iv) of the Customs Code, while Article 71(3) limits the possibility of adjusting the customs value solely to the items provided for in that article, cannot be accepted.

17 In that regard, the Court has already had occasion to reject the argument that software does not fall within any of the categories which may be the subject of an adjustment to the customs value, by holding that, in order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable (see, to that effect, judgment of 16 November 2006, *Compaq Computer International Corporation*, C–306/04, EU:C:2006:716, paragraphs 23, 24 and 37).

18 It is therefore irrelevant, for the purposes of determining the customs value of the imported goods, that the product to which the value should be added is an intangible asset, such as software. It follows from the wording of that provision, which expressly refers to ‘goods’ or ‘services’, that its scope is not limited to tangible assets.

19 Thus, contrary to what is claimed by the applicant in the main proceedings, Article 71(1)(b)(i) of the Customs Code, which covers ‘materials, components, parts and similar items incorporated into the imported goods’ cannot be interpreted as excluding intangible assets. Such an exclusion does not follow either from the wording of Article 71(1)(b) or from the scheme of that provision. Under that scheme, the customs value of imported goods is supplemented by the value of the goods, but also by services which meet the conditions laid down therein. An interpretation such as that suggested by the applicant in the main proceedings would lead not only to limiting any adjustments to the customs value solely to the situation referred to in Article 71(1)(b)(iv), where adding the value of a service is at issue, but also to covering only services which, first, relate to ‘engineering, development, artwork, design work, and plans and sketches’ and, secondly, are ‘necessary for the production of the imported goods’. Such an interpretation cannot be accepted, since intangible assets may be covered by both Article 71(1)(b)(i) and Article 71(1)(b)(iv) of the Customs Code.

20 Furthermore, in order to determine whether software falls under Article 71(1)(b)(i) or Article 71(1)(b)(iv), Conclusion No 26 of the Compendium of Customs Valuation Texts issued by the Customs Code Committee, referred to in Article 285 of that code, distinguishes between, first, the intellectual services necessary for the manufacture of the goods, which fall within the scope of Article 71(1)(b)(iv) of the Customs Code, and, secondly, the intangible components incorporated into the imported goods to make them function and which are not necessary for their production. According to the Customs Code Committee, those components are however an integral part of the end products, since they are connected to, or incorporated in, them and make it possible for them to function or improve the way in which they function. In addition, they add new functionality to those end products and thus contribute significantly to the value of the imported goods. They therefore fall, according to the Customs Code Committee, within Article 71(1)(b)(i) of that code.

21 The conclusions of the Customs Code Committee, although they do not have legally binding force, nevertheless constitute an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such may be regarded as a valid aid to the interpretation of the Code (judgment of 9 March 2017, *GE Healthcare*, C–173/15, EU:C:2017:195, paragraph 45 and the case-law cited).

22 In the third place, it should be noted that, although the Court took account of the contracts between an importer in the European Union and a third party producer, it did so for the purpose of assessing the status of a 'buyer' (see, to that effect, judgment of 16 November 2006, *Compaq Computer International Corporation*, C–306/04, EU:C:2006:716, paragraph 29). It cannot however be accepted that parties may rely on contractual provisions in order to limit the possibilities of adjustment provided for under Article 71(1)(b) of the Customs Code without disregarding the case-law according to which the customs value must reflect the real economic value of imported goods and therefore take into account all of the elements of such goods that have economic value (judgment of 9 March 2017, *GE Healthcare*, C–173/15, EU:C:2017:195, paragraph 30 and the case-law cited). Consequently, the adjustment of the customs value of imported goods, pursuant to Article 71(1)(b) of the Customs Code, is based on objective criteria and cannot be affected by contractual provisions.

23 In the light of all the foregoing considerations, the answer to the question referred is that Article 71(1)(b) of the Customs Code must be interpreted as allowing, for the purposes of determining the customs value of imported goods, the economic value of software designed in the European Union and made available free of charge by the buyer to the seller established in a third country to be added to the transaction value of imported goods.

Costs

24 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 71(1)(b) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code must be interpreted as allowing, for the purposes of determining the customs value of imported goods, the economic value of software designed in the European Union and made available free of charge by the buyer to the seller established in a third country to be added to the transaction value of imported goods.

[Signatures]