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Information document

CUSTOMS VALUATION

IMPLEMENTING ACT

ARTICLES 128, AND 136 IA

ARTICLE 347 IA

Draft guidance in relation to certain customs valuation rules in the UCC legal package is set out below.

This guidance is limited to UCC IA provisions on:

1) Transaction Value (Article 70 UCC and Article 128 IA)

and

2) Royalties and Licence Fees (Article 71 UCC and 136 IA).

Guidance on the full range of valuation topics in the UCC legal package will follow in due course. In this context, guidance which already exists (e.g., in the Customs Valuation Compendium) will remain largely applicable but of course the contents of the Compendium will be updated in a comprehensive manner in order to reflect the UCC legal package.

The draft is circulated for consideration and comments.

Disclaimer

It is stressed that this document does not constitute a legally binding act and is of an explanatory nature. The purpose is to ensure a common understanding for both customs authorities and economic operators and to provide a tool to facilitate the correct and harmonised application by MS.

Legal provisions of customs legislation take precedence over the contents of this document and should always be consulted. The authentic texts of the EU legal instruments are those published in the Official Journal of the European Union.

Legal References

UCC	Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10 October 2013, p. 1 – 101)
UCC DA	Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29 December 2015, p. 1 – 557)
UCC IA	Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29 December 2015, p. 558 – 893)
UCC TDA	Delegated Regulation (EU) 2016/341, establishing transitional rules for certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council, laying down the Union Customs Code where the relevant electronic systems are not yet operational

Introduction

1. Guidance is set out in terms of the structure and order of the relevant IA provisions, and focus on new elements of customs valuation rules.

2. Status of previous guidance: a full integration with existing guidance[1] will take place during 2016.

Transaction value
(Article 70(1) of the Code)

Article 128(1)

The transaction value of the goods sold for export to the customs territory of the Union shall be determined at the time of acceptance of the customs declaration on the basis of the sale occurring immediately before the goods were brought into that customs territory.

3. Article 128(1) establishes the principle that the relevant sale, for the application of the transaction value method, is the *sale occurring immediately* before the introduction of the goods into the EU customs territory, on condition that such sale actually constitutes a "sale for export" to the customs territory of the EU.

4. The relevant moment is when goods are brought into the customs territory of the Union (see Title IV UCC). The relevant sale for goods brought into the Union is the sale when crossing the border, i.e., the ultimate sale taking place, in performance of the contract of sale, at that time.

5. Article 128(1) UCC IA stipulates that the relevant sale to determine the value of goods is the sale that is a sale for export that brings the goods into the Union. This is the sale *occurring immediately before* the introduction of the goods into the customs territory of the EU).

6. This sale allows the application of the transaction value method in a manner that takes into account the substance of the entire commercial import transaction. It allows the proper application of other relevant provisions (e.g. provisions on additions and deductions). Where this is not possible, the application of the transaction value method is not possible.

[1] Customs Valuation Compendium

7. Therefore, this is the sale that allows economic operators and customs to actually apply the transaction value method.

8. A simple example is as follows:

   B buys from A and the goods are brought into the Union. This sale is the sale that is occurring (takes place) before the goods arrive into the Union.

   or

   B buys from A and B sells to C, and this latter sale (B to C) is the sale occurring before the goods arriving into the EU. The sale from B to C is therefore the sale which qualifies as the sale (immediately) occurring before introduction into the EU.

9. It is of course necessary to ensure that the transaction being used as the basis of the customs value under Article 70 UCC takes the form of an actual sale, with an actual buyer and seller. In other words, in order to determine a customs value under the provisions of Article 70 UCC, it must be established whether the parties to a transaction can be regarded as buyer and seller and thus whether the transaction constitutes a sale in legal terms as well as in a commercial sense.

10. Article 128 UCC IA does not introduce changes in the scope of what can be deemed a sale of goods for customs valuation purposes. The fundamentals of transaction value remain in place. The meaning (and concept) of what constitutes a sale is not altered, although it may now be more important to be able to distinguish between a sale and other formalities/arrangements which may precede a sale.

11. For example, it is not possible to consider that an actual sale occurs when the goods were imported on consignment, or were imported by branches of the same company which are not separate legal entities, goods imported under a hire or leasing contract (even if the contracts includes an option to purchase the goods). Furthermore, sales which are *domestic sales* within the EU do not qualify as sales for export to the EU.

International Guidance

While the concept of sale for export is not defined in the WTO Agreement, there are two WCO Technical Committee instruments (Advisory opinion No 14.1 and Commentary No 22.1) which provide guidance.

WCO TCCV Advisory Opinion 1.1 states that:

> *the WTO Agreement does not contain a definition of "sale", but for reasons of uniformity of interpretation and application, it is important that the term 'sale' is taken "in the widest sense" so that the customs value of the imported goods can be determined under the transaction value method as often as possible. This means that all transactions that economically and legally qualify as sales should, to the greatest extent possible, be used for customs valuation purposes to make sure that the valuation of the goods reflects as close as possible their actual market value.*

Article 128 (2) Sales of goods held under special (suspensive) regimes and before entry to free circulation

NB: Article 128(2) must be read in conjunction with Article 128(1).

"Article 128(2)

2. Where the goods are sold for export to the customs territory of the Union not before they were brought into that customs territory but while in temporary storage or while placed under a special procedure other than internal transit, end-use or outward processing, the transaction value will be determined on the basis of that sale."

1. This relates to the customs value of goods, inter alia, in a customs warehouse, when these are declared for release for free circulation. This rule is not limited to goods sold while held in a customs warehouse. Other procedures (for goods in temporary storage or for goods placed under a special procedure other than internal transit, end-use or outward processing) are also eligible. However, for ease of reference and because the customs warehouse procedure is the most common procedure used in this context, this guidance will refer to customs warehouse only.

2. Article 128(2) covers cases where the goods are deemed to meet the criterion of goods "sold for export" in accordance with Article (128(1), but in the context (circumstances) of Article 128(2). In other words, this rule covers the case of a sale of goods in warehouse, and in the absence of a sale related to the same goods which covered the goods on arrival into the Union.

3. Therefore, the circumstances covered are those where, on entry into the Union, the goods are not declared for release for free circulation, but placed in temporary storage or under a special procedure (warehousing, inward processing, external transit) for which the payment of customs duties is suspended.

4. If a proper sale for export exists when the goods arrive into the EU, that is the basis for the customs value (Article 128(1) IA).

5. Alternatively, when no such sale exists, the sale (deemed to be a "sale for export") taking place during the warehousing operation will the relevant basis for the declarant to use as a basis to declare a customs value under the transaction value method.

In such situations, where the goods are the subject of a sale and fulfil the conditions laid down in Article 70 UCC after being placed under a special (suspension) procedure, such a sale (and provided the sale is not a "domestic" one i.e., between two EU parties) shall be used for the determination of the customs value under the transaction value method.

6. In more general terms, customs value should be based on a transaction value of a sale taking place in / from a customs warehouse within the EU territory only if the following conditions are met:

- there is no sale for export in accordance with under Article 128(1);
- there is a sale in the customs warehouse that is not a domestic sale; and
- the sale in the customs warehouse meets the requirements of Article 70(3) of the UCC.

Practical examples to illustrate the relevant sale for the determination of the transaction value in accordance with Article 128 (1) and (2) (where goods are placed under a suspensive procedure (e.g., warehousing))

Situations where Article 128 IA (paragraphs (1) and (2)) commonly apply are illustrated as follows:

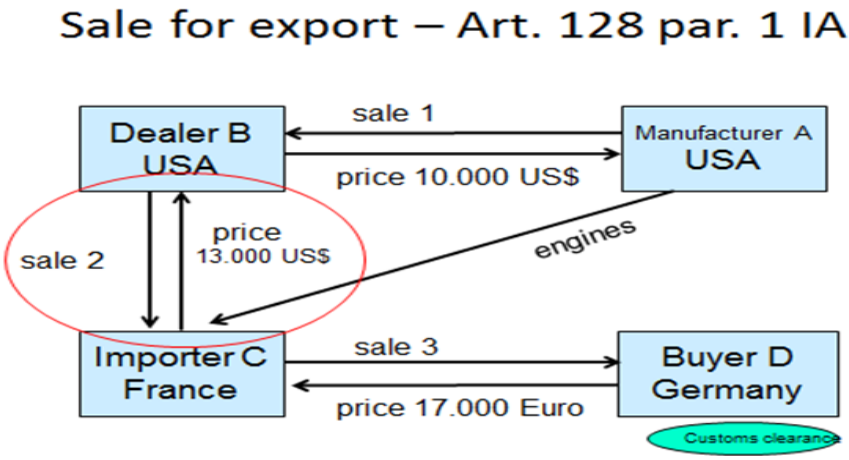
Situation 1:

Goods are sent from a third country to the EU. They are sold (sale 1) to the EU importer only after being declared for warehousing, and resold by the EU importer to a buyer (customer in the EU) before being declared for free circulation (sale 2). In this case, in application of Article 128(2) IA, the relevant sale for the determination of the transaction value is sale 1, because sale 2 (occurring between two EU residents) is a domestic sale and cannot be considered as a sale for export.

Situation 2:

Goods are sent from a third country to the EU. They are declared for warehousing, and subsequently sold to the EU customer. In this case, if such sale occurs before the release of the goods for free circulation, then this sale provides the basis for the application of the transaction method in accordance with Article 128(2) IA. If such sale occurs *after* the release of the goods for free circulation, the customs value will have to be determined in accordance with a secondary method valuation.

Practical examples



In the example above, the goods are ultimately the subject of three sales in commerce:

1. from manufacturer A to dealer B (both located in a third country);
2. from dealer B to importer C in France;
3. from importer C in France to the final buyer D in Germany.

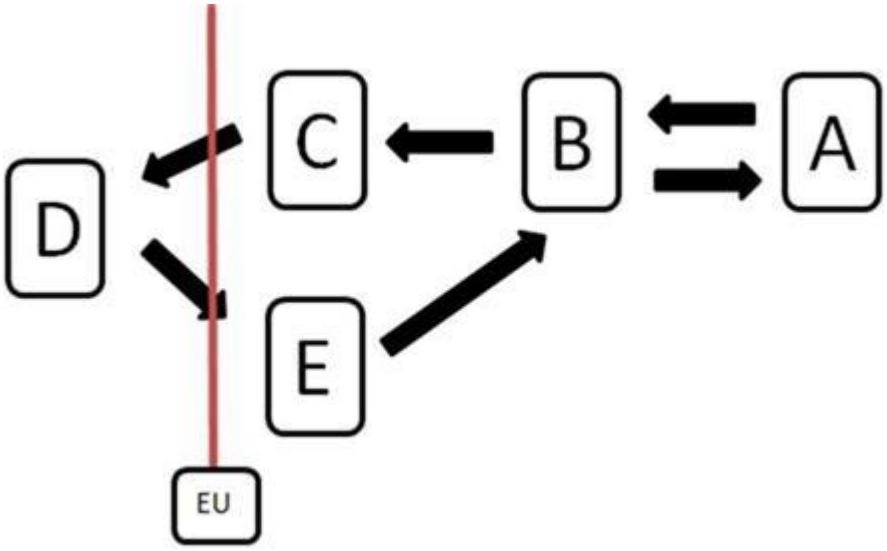
The goods are transported directly from Manufacturer A (third country) to importer C in France.

In this case, the sale relevant for the determination of the transaction value is, in accordance with Article 128 (1) IA, the sale between dealer B and importer C.

[Note: Article 128 (1) refers to time at time of entry of the goods into the EU customs territory, and not to the moment (or place) of their release for free circulation. Consequently, in the case at hand, the fact that the goods are declared for free circulation after being sold to the final buyer B is not relevant for the determination of the relevant sale.]

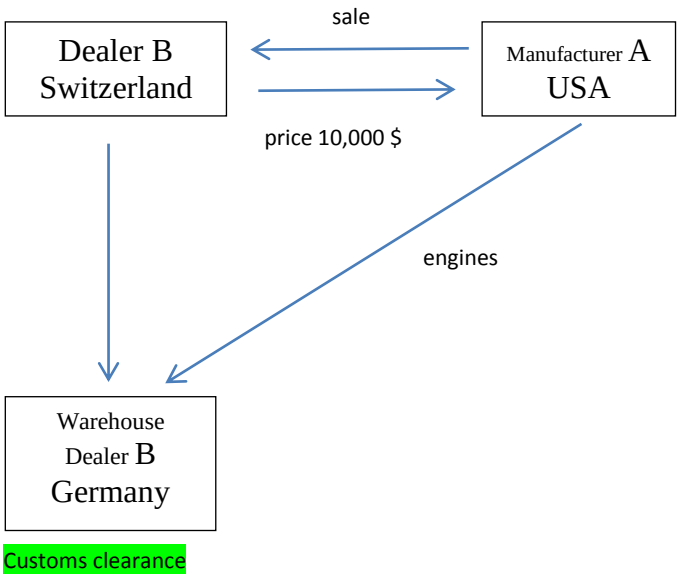
Example of order processing and sale of goods

A. a customer A goes to a car dealer and orders CAR X
B the dealer B places an order on NL CAR Co - C
C. NL CAR Co - C sends the order to the manufacturing plant JP CAR Co –
D. JP Car Co –D sells to EU CAR Import Co E
E. EU CAR Import Co E imports the car
F. the car is sold to the dealer B
G. the dealer sells the car to the final customer



This is an example of a purchase order trail leading to a sale. Here, the goods are sold from D to E, who declares them for free circulation, without placing them under a suspension procedure. In this case, this sale (sale between D and E) provides the basis for the application of the transaction method in accordance with Article 128(1) IA.

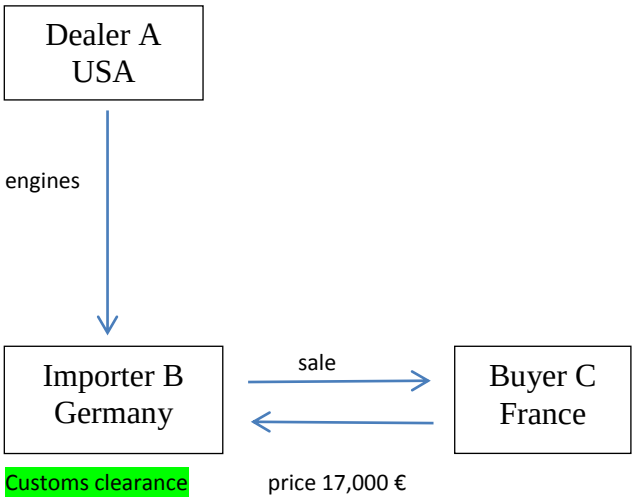
SALE FOR EXPORT ARTICLE 128 Paragraph 1 IA



In the example above, the goods are sold from manufacturer A (in a third country) to dealer B (again, in a third country), but directly transported to the premises of dealer B in the EU, in accordance with the immediate sales contract taking place.

In this case there is one sale (A to B), and this is an eligible sale, to serve as the basis for the determination of the transaction value in accordance with Article 128 IA.

SALE FOR EXPORT ARTICLE 128 paragraph 2 IA

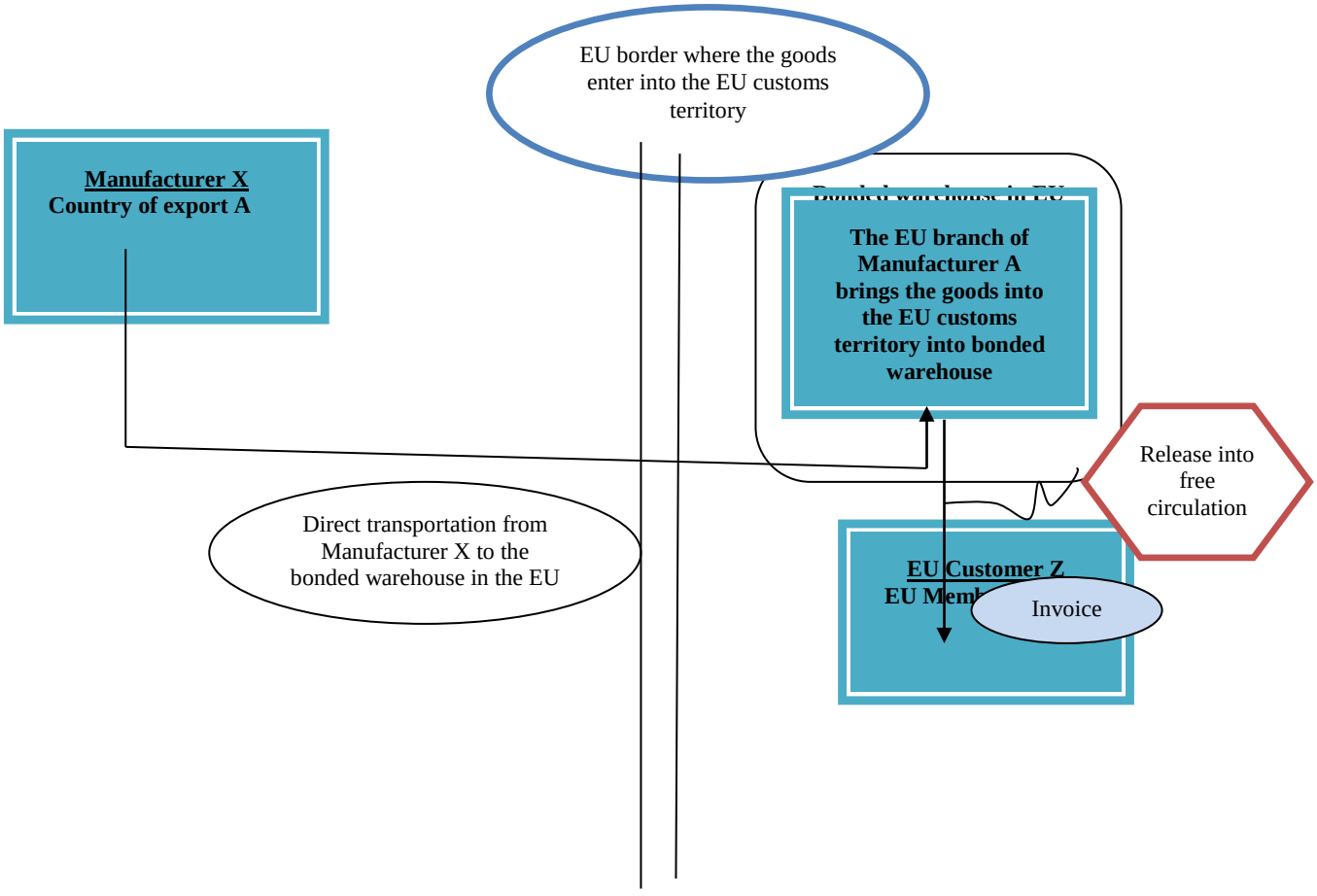


In the example above, the goods are sent by dealer A (in a third country) to importer B in the EU. While in temporary storage, the goods are sold by A to B, who sells the goods to buyer C (again in the EU).

Here, the goods are bought by B from A (otherwise he could not resell them).

In this case, the sale relevant for the determination of the transaction value in accordance with Article 128(2) IA is the sale between A and B.

Sale for Export – Article 128(2)



In the above example, there is no sale at the time that the goods enter the EU customs territory. However, a sale while the goods are under a suspensive procedure provides

the basis for the application of the transaction method in accordance with Article 128(2) IA.

Transitional Measure

1. Article 347 IA introduces a temporary measure (applicable until 31.12.2017) allowing importers to take into account (honour) their bona fide contracts in place at the date of 18 January 2016 (time of entry into force of the new Regulation) and to provide them with reasonable time to adapt, where necessary, their relevant trade patterns.

2. The reference to a "relevant contract" is not intended to be restricted to a sales contract between buyer and seller: such a contract may be concluded between parties such as between the buyer of the goods and parties with whom this buyer has forward contractual commitments and engagements. Economic operators are allowed "legitimate expectations" in relation to contractual arrangements in this regard.

3. No specific conditions are set out in relation to the form or structure of the contract in question. As a consequence, this contract must not relate exclusively to a product, a precise delivery date, quantity and a purchase price. Therefore, so-called "framework contracts" may be covered by this provision.

4. As a result of this temporary measure, the importer is allowed to use a sale other than the sale indicated by Article 128(1) - including for example, an "earlier" sale (a sale occurring before the sale specified in Article 128(1)) - where the economic operator is constrained or bound in this respect by any contract concluded before the entry into force of the new legislation.

5. If such contract assumed the use of a specific sale (including an earlier sale) under the previous legislation (Article 147 CCIP), then the same sale can still be used, provided that the contract remains in force, until 31.12.2017.

Article 71 UCC and Article 136 IA

Royalties and licence fees

Article 71 UCC

Elements of the transaction value

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

..

..

(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;

This provision is implemented by Article 136 of the UCC-IA

1. Article 136 IA contains some new provisions which are relatively minor, and for the most part these do not go much further than to simply re-state some basic and self-evident aspects of the major rules in the UCC. The more significant changes relate to the fact that some rules were which found in the CCIP are no longer provided in the UCC legal package.

Royalties and Licence Fees

2. Imported goods often incorporate elements (e.g., intellectual property rights) which are compensated for (paid for) by means of *payments which are described as royalties or licence fees*.

3. Article 71 UCC recognises that these payments are part of the customs value of goods. Where such payments are already included in the price of the goods, then such value is automatically included in the customs value.

4. Article 71 UCC also provides that, where the value of such elements are *not included* in the price of the goods, then the inclusion of such payments in the customs value is foreseen, in terms of an adjustment of the price of the goods.

5. Therefore, in accordance with Article 71 UCC payments to use the rights (i.e., intangible property) in question are to be taken into consideration when the customs value of the imported goods is determined.

6. There is an implicit recognition that the commercial practices, and the related legal framework related to intellectual property rights, relating to royalties and licence payments ,are relevant and applicable. However, EU customs legislation[2] will not provide a definition of royalties and licence fees.

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Scope

7. A general definition of "royalties and licence fees" can be found in Article 12(2) of the OECD Model Double Taxation Convention on Income and on Capital (2012), as follows:

   "payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial, or scientific experience (commonly referred to as "know-how")".

8. The above definition is useful[3] and indicates that royalties and licence fees are payments for a range of rights (intangibles). The UCC does not distinguish between the various rights and the IA does not do so. Therefore, royalties and licence fees payments for the right to use, for example, a trade mark can no

[2] The WTO Valuation Agreement does not set out the scope of royalties or licence fees

[3] This definition was included in the previous legislation (Article 156 CCIP).

longer be the subject of specific provisions, but fall under the general provisions of Article 71 of the UCC and 136 of the UCC IA.

9. The scope of licensing arrangements are not addressed in valuation rules, as these come under the relevant commercial contracts. However, typical examples include: the manufacture and/or sale for export of imported goods (incorporating, e.g., patents, designs, models and manufacturing know-how, trademarks), the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods).

Contracts and Licensing

10. When royalties and licence fees are payable, the arrangements are often set out in a separate formal written contract or agreement – usually defined as "licence agreement" - which specifies in detail the licensed product, the nature of the rights assigned and know-how provided, the responsibilities of the licensor and the licensee, the methods of calculation and payment of the royalties or licence fees, the legal consequences of their non-payment etc.

Examination of the licence agreement will provide sufficient information on the relevance of the royalty or licence fee to the customs value of goods imported. However, it is also necessary to take into account the terms of the sale contract and the link which may exist between the sales contract and the licence agreement.

In many cases, the contract of sale for the goods does not explicitly mention that a payment for royalties or licence fees has to be made for the goods.

11Article 71(1)(c) UCC states that

royalties or licence fees must be added to the price paid or payable when:

- **they are not included in the price paid or payable;**
- **they are *related to the goods being valued*; and**
- **the buyer must pay them, either directly or indirectly, *as a condition of sale of the goods being valued*.**

Related to the goods being valued

12. Article 136(1) of the UCC-IA states that royalties or licence fees are related to the imported goods where, in particular, *the rights transferred under the licence or royalties agreement are embodied in the goods*.

13. A direct link to the imported goods is particularly clear where the imported goods are themselves the subject of the licence agreement (i.e. if the imported goods incorporate the trademark for which the licence fee is paid, this must be considered as related to the imported goods). The same link may also exist where the imported goods are ingredients or components of the imported goods.

Existing guidance

14. In order to establish whether a royalty relates to the goods to be valued, the key issue is to determine what the licensee receives in return for the payment. For instance, "Know-how" provided under a licence agreement will often involve the supply of designs, recipes, formulae and basic instructions as to the use of the licensed product.
Where such know-how applies to the imported goods, any royalty or licence fee payment therefore will need to be considered for inclusion in the customs value.

15. A licence agreement (for example in the area of "franchising") sometimes involves the supply of services such as the training of the licensee's staff in the manufacture of the licensed product or in the use of machinery/plant. Technical assistance in the areas of management, administration, marketing, accounting, etc. may also be involved. In such cases the royalty or licence fee payment for those services would not be eligible for inclusion in the customs value.

16 The way the amount of royalties paid is calculated is not a decisive factor for the determination of their inclusion in the customs value.

Example:

in the case of an imported component or ingredient of the licensed product, or in the case of imported production machinery or plant, a royalty payment based on the realisation of sale of the licensed product may relate wholly, partially or not at all to the imported goods.

Condition of sale of the imported goods

Article 136(4) of the UCC-IA states that

> royalties and licence *fees are considered to be paid as a condition of sale for the imported goods* if
>
> - (a) the seller or a person related to the seller requires the buyer to make this payment, or
> - (b) the payment is made to satisfy an obligation of the seller, or
> - (c) the goods cannot be sold to, or purchased by the buyer without payment of the royalties or licence fees.

17. The criteria[4] applicable is whether the seller can sell or whether the buyer can buy the goods without the payment of a royalty or licence fee. The condition may be explicit or implicit. In some cases it will be specified in the licence agreement whether the sale of the imported goods is conditional upon payment of a royalty or licence fee. It is not, however, essential that it should be so stipulated.

18. A further indication is also now provided in Article 136(4) c) of the UCC-IA, which refers to payment of royalties to the licensor. This is not a major clarification, it simply makes explicit the fact that royalties are, by definition, paid to the owner (licensor) of the licenced rights and are usually paid by the buyer of the goods.[5]

The rule indicates that condition of sale provisions are based on commitments entered into, and binding on, by the buyer or the seller. This indicates that the "condition of sale" criterion refers not only to conditions imposed by or on the seller, but also the buyer, and this is a useful clarification.

This also reflects the wording of UCC Article 71(1)(c) which refers to:

> "*royalties and licence fees related to the goods being valued that the buyer must pay*", **as a condition of sale of the goods** being valued.

19. Therefore, the underlying *condition of sale test* will continue to play a role.

Royalties paid to 3rd parties

[4] Largely reflecting current guidance (see for example Commentary 3 (paragraph 12).

[5] Art. 136 para. 4 (c) also reflects Commentary No 25.1 of the TCCV [see point 7 of Commentary No 25.1] in this regard.

20. Royalties may be paid to the seller or to a third party. Royalties paid to a 3rd party may arise where the payment to the 3rd party is made, for example, to satisfy an obligation of the seller.

21. A 3rd party may be the owner or licensor of the relevant rights. In such cases, the relevance (and therefore the application) of the "condition of sale" test may not be directly applicable, because the commercial circumstances are outside of the circumstances governed by the "condition of sale" rule in the first place.

22. However, it is advisable to apply the same basic approach and that is what is set out in the IA.

Thus, this clause reflects basic elements of the sale of goods, including the transfer of title and all rights in the goods, within the contractual framework in force. It is not intended that customs should seek to determine whether a seller can sell, or a buyer can buy the goods, in terms of independent or new criteria, without taking into account contractual provisions (including royalty contracts). Therefore, priority should be given to the commercial circumstances and the relevant contractual arrangements.

23. All the circumstances surrounding the sale (and the import of the goods) should be examined if required. This includes, in particular, possible links between sale and licensing agreements and other relevant information.

24. Each individual situation must be analysed based on all facts surrounding the sale and import of the goods, including contractual and legal obligation of the parties, and other pertinent information.

25. Persons to whom royalties or licence fees are paid are not relevant, in terms of the place of residence of such persons. EU legislation has always made this clear.

26. Finally, Article 136 IA does not include an assumption that royalties and licence fees are *automatically includible* in the customs value.

Article 136 IA does not state that the basic conditions (i.e., *related to the goods* and a *condition of sale*) are assumed to have been met, and that royalties and licence fees are therefore includible in the customs value, *unless the declarant demonstrates the contrary*. [In other words, Article 136 IA does not place a burden of proof on the declarant in this respect]. At the same time, is not expected that customs should have to examine all commercial contracts or reach conclusions on contractual intentions or obligations.

International Guidance

27. There is substantial guidance available from the WCO Technical Committee on Customs Valuation. Notably, WCO Commentary N° 25.1 provides for a list (non-exhaustive) of factors that can be taken into account in determining whether the payment of an amount for royalties or licence fees constitutes a condition of sale of the imported goods.