

24 April 2012

AmCham EU position on the proposed changes to EU customs valuation

Decision-makers should not allow the EU user industry and EU consumers to face higher prices for imported goods as a result of changes to EU customs valuation. The American Chamber of Commerce to the European Union (AmCham EU) urges them to insist that the European Commission revises its current proposal for draft Implementing Provisions to the Modernised Customs Code (as reflected in the latest consolidated version (TAXUD/MCCIP/2010/100-3) dated 25 November 2011) to ensure they **avoid** the following:

1. Making the last sale in a chain of transactions the reference price for customs valuation purposes; and
2. Extending the scope of customs value to capture almost all royalty and license fee payments.

Background

Finished goods and materials imported into the EU are in most cases subject to *ad valorem* customs duties, which are calculated on the basis of the ‘customs value’ of the goods. Therefore, the higher the customs value, the greater the amount paid by the importer, the EU user industry and ultimately the EU consumer. For over 95% of all EU imports, the ‘transaction value’ (the price paid for the goods) is used to determine the customs value. The transaction value can be used when there is a sale for export to an importing country. Certain elements are typically added to the transaction value pursuant to international rules (i.e. World Trade Organization’s Customs Valuation Agreement or ‘CVA’) to account for items which are not always included in the transaction value stated on an invoice, but are considered part of the value of the goods.

As part of its ongoing implementation of the Modernised Customs Code, the European Commission has drafted implementing provisions (MCCIPs) that would fundamentally change the way that customs value has been established by EU Member States for decades. However, there is no binding international legal requirement to amend the present EU valuation rules and the proposals could be interpreted as a breach of the WTO CVA. Most importantly, the draft MCCIPs could potentially cost EU businesses and consumers millions of euro per year. Surprisingly when compared to practice in other areas, the exact amount is unknown as the Commission has not conducted an impact assessment for the proposed changes.

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Concerns of Business

For businesses operating in the EU there are two aspects of the MCCIPs that raise concern.

Firstly, by proposing to define a ‘sale for export’ as the *last* sale before goods are introduced into the EU customs territory, it eliminates the possibility to use an *earlier* sale in a chain of sales, even when the earlier sale meets the established criteria. There is extensive EU guidance covering the earlier sale definition and it has been used without problems for a long time in many EU Member States. By introducing the ‘last sale’ concept,¹ the EU would not only force EU users and consumers to pay more for imported goods (as the later sale normally is at a higher price), but also introduce a new concept that is not defined by the CVA or the EU. This will compromise the goal to achieve uniformity in customs processes throughout the EU. The existence of a non-binding WCO Commentary supporting last sale should not stop the EU from deciding to maintain a system that contributes to EU competitiveness and purchasing power, and follows the legally binding ‘sale for export’ rule of the CVA. The United States has decided to preserve the use of an earlier sale definition precisely for these reasons. The European Parliament in a resolution adopted on 1 December 2011 on the modernisation of customs also clearly calls for the continuation of the current rules allowing an earlier sale to be used.²

The second concern with the draft MCCIP is the proposed language relating to the inclusion of royalties and license fees in the customs value. The CVA clearly states that such fees can only be included in the customs value if they are related to the goods *and* are paid as a condition of the sale of the goods. When these conditions do not apply, then they should not be subject to duties. By proposing that the payment of fees by anyone to a licensor (even if totally unrelated to the seller), constitutes a condition of sale, the draft MCCIP³ leads to a very significant and unwarranted inflation of the customs value, particularly in sectors where intellectual property rights are important. The EP in its resolution also calls for the maintenance of current rules on royalties and licence fees, stating that ‘*unwarranted changes to these provisions will result in a higher customs value and thus a higher tax burden*’.⁴

Moreover, the change violates EU obligations with respect to the WTO CVA. Finally, EU businesses exporting to third countries may encounter spillover effects of such a change if other jurisdictions start including all royalties and

¹ See the second sentence of draft Article 230-02(1) which reads as follows: ‘*In the case of successive sales, the transaction value is determined on the basis of the last sale in the international commercial chain before the goods are brought into the customs territory of the Community*’.

² See paragraphs 40 and 46 of the resolution, at: [http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/12-01/0546/P7_TA-PROV\(2011\)0546_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2011/12-01/0546/P7_TA-PROV(2011)0546_EN.pdf).

³ See draft Article 230-11(4)(c), which reads as follows: ‘*4. Royalties and licence fees are considered to be paid as a condition of sale for the imported goods when [...] (c) the goods cannot be sold to, or purchased by the buyer without payment of the royalties or licence fees to a licensor*’.

⁴ See paragraph 40 of the Resolution of 1 December 2011.

license fees paid in the customs value of their goods. This would make EU goods more expensive outside of the EU and reduce the global competitiveness of European businesses.

Recommendation

AmCham EU urges decision-makers to insist that the draft MCCIPs be revised either to avoid the effects listed above or to maintain the current provisions as they are. The European Commission has been offered compromise drafting language by the business community and many of these suggestions have found support from a significant number of EU Member States. Yet, the latest consolidated version of 25 November 2011 does not take these into account. MCCIPs on customs valuation should not be adopted in haste to meet a deadline in the Modernised Customs Code. This is particularly true in the absence of a legal obligation to change the rules, and in the absence of an assessment of the impact the proposed changes would have on EU businesses and consumers. The case studies below provide a short illustration of the impact of last sale vs. first sale, and the payment of royalties and license fees to a third party IP owner. The Commission has recently proposed a delay in the implementation of the MCC in the so-called 'recast proposal',⁵ and the extra time⁶ should be used to make further efforts to reach a compromise with Member States and business, or to keep the existing rules in place unamended.

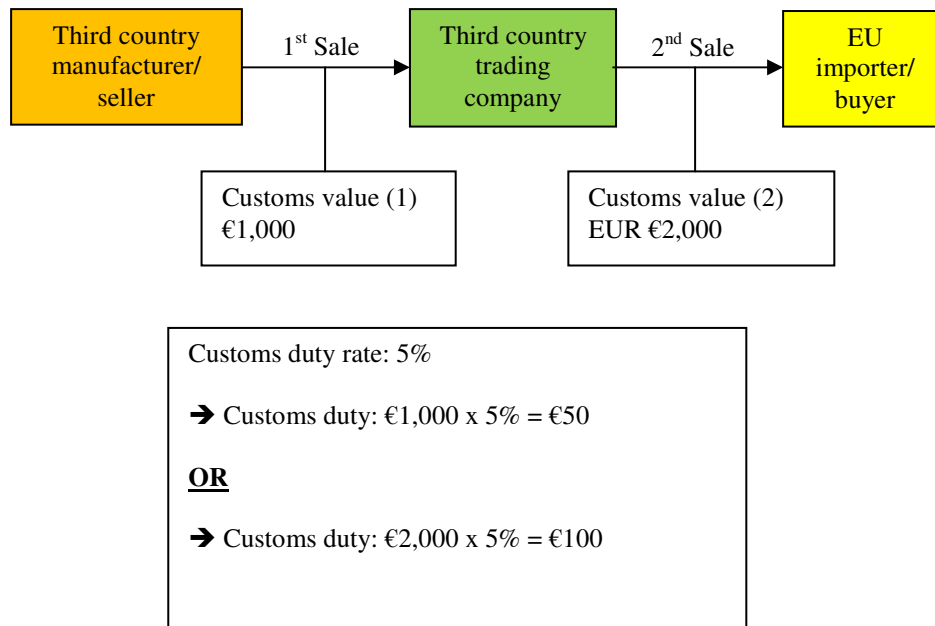
We have also noted that the Commission in its recast proposal proposes that all the detailed provisions on customs valuation are adopted under delegated powers rather than as implementing acts. AmCham EU insists that the use of this procedure should not reduce the opportunity for a detailed discussion with Member States, who have been discussing the valuation IPs for a considerable amount of time. It notes from the Recast's explanatory memorandum that *'Member States will be involved in the preparation of the future Commission delegated acts through meetings of a group of experts [...]*', and therefore calls on Member States to fully exercise this right and continue to participate in the discussions.

⁵ See COM(2012) 64 of 20 February 2012.

⁶ Although the recast proposal does not set a precise new implementation date, the delay could amount to 18 months, i.e. late December 2014, and this would mean the implementing provisions would have to be adopted some time before that date.

Case study 1: The impact of last sale versus first sale

For many years the EU has allowed customs duties to be calculated on the basis of the first of a chain of successive sales of goods that are destined for the EU, on the condition that the eventual sale for export to the EU was clear from the point of first sale. The example below shows how this leads to a lower customs duty:

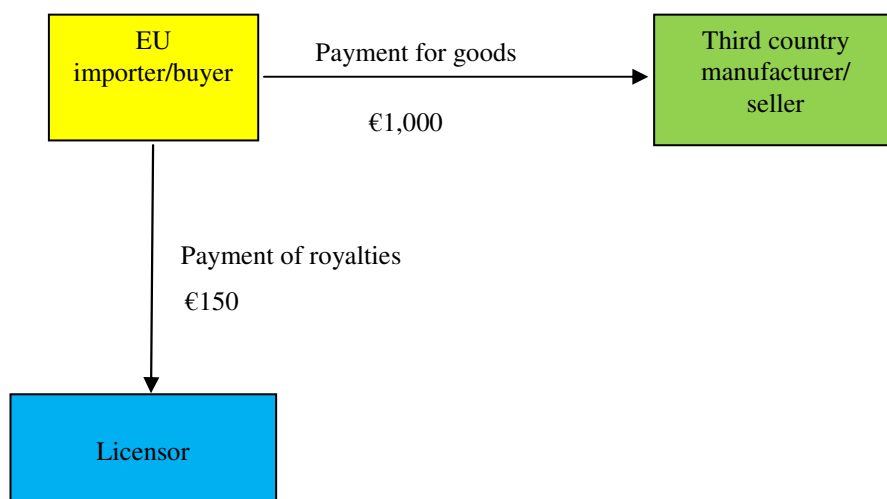


The European Commission is currently considering prohibiting the calculation of customs duties based on the first sale and requiring the customs value to be based on the last sale before the goods enter the EU. In the example above, this would double the customs duty. As a result, the amount of import VAT paid (which is calculated on the basis of the customs value) would also increase.

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Case study 2. : The impact of royalties and license fees paid to a third party IP-owner

Under current EU provisions, no customs duties are levied over the royalties that an importer pays a third-party licensor, if this licensor exercises no control over the seller. The following illustration may clarify the situation at hand:



This raises the question of whether the customs value is €1,150 (€1,000 + €150) or €1,000? The European Commission's draft MCCIPs propose that royalties must be included in the customs value if the goods cannot be sold to, or purchased by the buyer without payment of the royalties to a licensor. That requirement is open to interpretation and could result in customs duties *always* being levied over royalties. In the example above, the dutiable value would increase from €1,000 to €1,150.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled \$2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.

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