

# AmCham EU calls for swift amendments to the European Commission's draft guidance on customs valuation

## *Current draft does not provide the clarity and legal certainty needed*

### Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the initiative of the European Commission to prepare draft guidance on the Union Customs Code (UCC) Implementing Regulation with respect to transaction value and royalties and licence fees. However, AmCham EU is concerned that the guidance in its current state does not provide the clarification needed by customs authorities and industry alike, and in some case actually increases the ambiguity of the legal provisions. AmCham EU regrets that there has been no cooperation with industry in the production of these guidelines. In this position paper AmCham EU highlights a number of pressing issues concerning the draft guidance and proposes concrete amendments to ensure legal certainty and predictability for all stakeholders.

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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 US investment in Europe totalled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.*

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## Introduction

AmCham EU understands that the European Commission has recently prepared draft guidance<sup>1</sup> on the UCC Implementing Regulation with respect to transaction value and royalties and licence fees, and has discussed this with the Member States' customs valuation experts during the meeting of the Customs Valuation Committee on 3 and 4 March 2016. AmCham EU also understands that the Commission wishes to finalise this guidance by the end of March 2016 based on feedback from the Member States.

While AmCham EU welcomes the production of guidance, it fears that the guidelines in their current state do not provide the clarification needed by customs authorities and industry alike. In some instances, because the guidelines are couched in very general terms and in the absence of clarification of the status of the previous guidance, they in fact increase the ambiguity of the legal provisions.

## Issues with draft guidance on the UCC Implementing Regulation

AmCham EU regrets that there was no cooperation with industry in providing the direly-needed clarification, notwithstanding the close and long involvement of the trade community in constructive discussions with the Commission on the development of the UCC rules on valuation (notably on the two topics covered in the guidance). **As the UCC, and in particular its Implementing Act, change the rules significantly, business should have been asked for its input on these guidelines.**

Moreover, throughout the development of the legislation, when businesses (including AmCham EU in various meetings and letters and position papers) raised concerns about ambiguous language, the Commission has repeatedly indicated that such concerns would be addressed through guidelines. For example, with respect to royalties and licence fees, the Commission stated that it would make clear that the condition of sale test would continue to apply so as to avoid that Member States would interpret the new rules in an overly broad manner.

Not only has this not been done, but the draft guidance seems to say that the burden of proof of non-dutiability rests on the importer without customs being required to review contractual arrangements or the circumstances of the payment of the duties and royalties. That approach should not be a proxy for rendering all royalties and duties dutiable. **The UCC and the World Trade Organization (WTO) provisions on which it is based clearly require that the royalties and license fees relate to the goods imported and are a condition of their sale before they can be included in the customs value.**

The draft guidance also *confuses* rather than clarifies, as it does not make clear if and how it interacts with existing guidance. On the cover page, the Commission merely acknowledges that there is a relationship with existing guidance in the EU's Valuation Compendium and that 'where the treatment of issues has evolved, for example on the basis of legal rules, new guidance is of particular relevance and importance'. It does not clarify whether that means any parts of the existing guidance are no longer relevant or – on the contrary – continue to be valid. In that respect, the draft guidance totally misses the purpose of assisting customs and businesses in understanding how the rules are to be

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<sup>1</sup> Provisions on Customs Valuation Implementing Act, Articles 128, 347 and 136 IA, reference Taxud B4/(2016)808781, 25 February 2016.

interpreted. **The guidance in its current form will, in other words, not achieve the goal of achieving a uniform application of the new rules.**

Finally, the very basic examples given in the draft guidance do not clarify in very practical terms what is meant and do not address more complex situations that are now very common in international trade. It therefore misses the opportunity to provide a tool that is of *practical* use.

### **Recommended amendments to the draft guidance on the UCC Implementing Regulation**

Based on AmCham EU's strong belief in making constructive contributions seeking to ensure legal certainty and predictability for all stakeholders, and even though the Commission has not requested direct input from the organisation, **AmCham EU proposes a number of concrete amendments to the guidance**, as follows:

#### *1. Article 128(1) guidance – last sale before goods enter the EU*

- The draft states (on page 4) that '[t]he relevant sale for goods brought into the Union is the sale when crossing the border, i.e. the ultimate sale taking place at that time' (emphasis added). This would be better phrased to read '[t]he relevant sale for goods brought into the Union is the sale **when closest in time to the crossing of the border**' (change in red bolded font). This is because sales seldom occur *precisely* at the time goods cross the border, as Article 128(1) itself acknowledges when it refers to the 'sale occurring immediately before the goods were brought into that customs territory' (emphasis added).
- The draft (on page 4) states with respect to the last sale that '[t]his 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 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' (emphasis added).

AmCham EU believes that this paragraph does not fit in guidance to clarify which sale must be used. It is clear from the WTO Customs Valuation that if making additions or deductions to a transaction value is not possible, then other valuation methods must be used. The use of an earlier, as opposed to a later, sale does not necessarily mean that making additions and deductions is impossible. It is therefore wrong for the guidance to suggest that it does. As the EU has clearly chosen to reject an earlier sale in the legislation itself, there is no reason to justify this in this guidance.

- The draft (on page 5) states that '[t]he fundamentals of transaction value remain in place. The meaning (and concept) of what constitutes a sale is not altered, although it may now be important to be able to distinguish between a sale and other formalities/arrangements that may precede a sale' (emphasis added). The draft helpfully refers to World Customs Organization Technical Committee on Customs Valuation (WCO TCCV) Advisory Opinion 1.1 which discusses the distinction between sales and certain other operations. To provide more clarity as to what the broad interpretation of a 'sale' means and does not mean, AmCham EU would propose that the following phrase be added: '(notably goods imported on

consignment, goods imported by branches which are not separate legal entities, goods imported by intermediaries, goods imported under a hire or leasing contract (even if the contract includes an option to purchase the goods)'.

## 2. Article 128(2) guidance – sales after entry of good into the EU

- The draft (on page 7) states: ‘This provision covers cases where the goods are deemed to meet the criterion “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, in the absence of a sale related to the same goods which covered the goods on arrival into the Union’. On the same pages it is stated that ‘[In such situations, where the goods are the subject of a sale and fulfil the conditions laid down in Article 70 UCC (and the sale is not a “domestic” one), only after being placed under a special procedure, such sale shall be used for the determination of the customs value under the transaction value method. However if a proper sale for exports exist when the goods arrive into the EU, that is the basis for the customs value (Article 128(1)IA)’.

While the final sentence quoted here is helpful in clearly stating that sales from customs warehouses are not to be used as the relevant sale when there has in fact been a valid sale before the goods entered the customs territory of the European Union, the other **parts quoted above could be clearer if amended to read as follows** (also in light of the minutes prepared by the Commission on the meeting of 23 and 24 September 2015 of the Trade Contact Group and finalised on 11 December 2015, which clarify which domestic sales could not be used as the relevant transaction value): ‘This provision covers cases where the goods are **not** deemed to meet the criterion “sold for export” in accordance with Article 128(1), but **are sold** in the context (circumstances) of Article 128(2). In other words, this rule covers the case of a sale of goods in warehouse, in the absence of a sale related to the same goods which covered the goods on arrival into the Union. [...] In such situations, where the goods are the subject of a sale and fulfil the conditions laid down in Article 70 UCC (and the sale is not a “domestic” one **between two EU parties**), only after being placed under a special procedure, such sale shall be used for the determination of the customs value under the transaction value method. However if a proper sale for exports exist when the goods arrive into the EU, that is the basis for the customs value (Article 128(1)IA)’.

- The draft (on page 7) states that ‘[t]here are obvious and clear benefits for customs and economic operators’. AmCham EU does not see why this statement is made in guidance and would suggest its deletion.

## 3. Article 136 guidance - royalties and licence fees

- It is unclear whether existing Commentary 3 in the EU's Customs Valuation Compendium still applies with regard to when and how to include royalties and licence fees in the customs value. This should be made clearer. Likewise, it is unclear to what extent Commentary 11, which to some extent clarifies when the condition of sale test is met, still applies. **The draft does not assist in determining when the condition of sale test is met (or not). On the contrary**, as explained below.

- The draft guidance (on page 11) states as follows with respect to cases where the fee is paid to a third party other than the seller:

*‘In other situations, third person may be the owner or licensor of relevant rights. In such cases, the relevance (and therefore the application) of the “condition of sale” rule may not be directly applicable, because the commercial circumstances are outside of the circumstances governed by the rule in the first place. However, it is advisable to apply the same basic approach and that is what is set out in the IA’ (emphasis added).*

The draft continues to say that ‘[e]ach individual situation must be analysed based on all facts surrounding the sale and import of the goods, including contractual and legal obligations of the parties, and other pertinent information. Thus the clause reflects basic elements of the sale of goods, including 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, goods in terms of independent criteria and without taking into account contractual provisions (including royalty contracts). Priority should be given to the commercial circumstances and the relevant contractual arrangements. The obligation to establish the case rests with the economic operator and the declarant. It is not expected that customs should interpret commercial contracts or reach conclusions on contractual intentions or obligation’ (emphasis added).

## **Conclusion**

AmCham EU is extremely worried about the recently prepared draft guidance on the UCC Implementing Regulation. AmCham EU urges the Commission to amend the guidance to ensure that the condition of sale test is applied, and that the customs authorities are not relieved of their part of the burden of proof and are not forced to interpret commercial contracts and reach conclusions on these, with which the economic operator can then agree or disagree. The guidance in its current form will inevitably lead to many more cases of administrative appeals and costly litigation. This will take away important human and financial resources on both sides and is not in the interest of EU businesses, which see this as a major impediment to engaging in international trade and remaining competitive while doing so.