LES BRÈVES

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The European Court of Justice confirms the possibility of including in the customs value of a product the cost of an intangible good designed in the EU and made available free of charge to the third party seller by the purchaser

The Court of Justice of the European Union ("ECJ"), in a judgment of 10 September 2020 (*BMW Bayerische Motorenwerke AG*, case C509/19), interpreted Article 71-1-b of the Union Customs Code ("UCC") relating to adjustments made to the transaction value.

In this case, the European car manufacturer BMW buys order units from producers in various third countries. BMW owns a software which enables a communication among the applications and the systems of the vehicle included in the control unit. This software, developed in the EU, is provided free of charge to the manufacturers of the control units. In this way, they can ensure that the interaction between the control unit and the software works and understand any errors that might occur during delivery. Those units of commands equipped with the software were then imported by BMW.

For the customs value of the imported order units, BMW indicated the price paid to the sellers but did not include the cost of software development. In the dispute before the ECJ, the referring court wanted to know whether Article 71-1-b UCC allows the economic value of a software developed in the EU and made available to the seller free of charge to be added to the transaction value of the imported goods.

The question is therefore whether intangible goods can be considered as *"goods and services (...) supplied directly or indirectly by the buyer free of charge"* within the meaning of Article 71- 1-b of the UCC. In response, not only does the Court explicitly include immaterial goods in the definition of points i and iv but it considers that the value regulation allows any immaterial goods to be considered as being capable of constituting a contribution within the meaning of Article 71-1-b (as material costs, engineering and research and development costs, but also as a production tool or material consumed in the production process).

Yet, a careful reading of the value regulation does reveal a difference in the treatment to be accorded to tangible and intangible assets (the latter are subject to additional conditions for reintegration - studies and R&D work, royalties and license fees). Also, while the Court leaves open the question of whether a software is a service or a good, there is little doubt that contributions provided in the form of services can only be analyzed under Article 71-1-b-iv of the UCC.

This decision is part of a more general trend towards increasingly integrating the value of intangible assets into the customs tax base. Nevertheless, the Court's position could be detrimental to the economic activity of European operators, whose significant costs of research, design and studies carried out on EU territory could be more easily reintegrated into the customs value of the products they import.
The compatibility of this decision with Interpretative Note 7 under Article 8 of the WTO Agreement on

Customs Valuation, of which the European regulation is a transposition might be questioned. The Note states that in cases where the production of engineering work (such as a software) involves a number of countries and takes place over a certain period of time, the adjustment should be limited to the value actually added to this item outside the country of importation.

Following this statement, the Court seems to provide us, in what looks like a judgment of principle, the analytical grid of the texts applicable to the reinstatement of immaterial material:

1. It should first be checked whether the intangible good is 'necessary for the production of the imported goods'. In this case, reinstatement takes place on the basis of Article 71-1- b-iv of the UCC. Thus, the reinstatement of an intangible material under the visa of Article 71-1-b-i of the UCC is not automatic, and can only be made if the conditions of Article 71-1-b-iv of the UCC are not met.
2. Failing this, it is a question of looking at whether the good is connected or incorporated and makes it possible to operate or improve the goods produced. If this is the case, the reinstatement of the value of this intangible asset under the terms of Article 71-1-b-i of the UCC is possible.

It is therefore up to the operator to determine how these functionalities are such as to confer on the order units a real value greater than their transaction value, and to determine the said real value with regard to its internal data. Thus, an intangible good such as this software designed by the buyer, which is not commercialized, may have an economic value that must be taken into account for customs value purposes, even thought it doesn't have any market value. Even when the parties have, by virtue of the principle of freedom of contract, agreed not to attribute any value to this good.

The calculation of the value of such an intangible asset and its allocation to a specified number of goods will be technically complex and will require ever greater precision in the operators' internal data, on which this calculation will be based.

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The Customs and International Trade team of DS Avocats is at your disposal to provide you with any further information you may require.

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