

European Court of Justice rules value of free of charge supplied software should be added to customs value

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Executive summary

On 10 September 2020, the European Court of Justice (ECJ) published its decision in the *BMW Bayerische Motorenwerke AG v Hauptzollamt München*-case.¹ The ECJ ruled that the value of free of charge supplied software should be added to the customs value of imported goods irrespective of the fact that the software was developed in the European Union (EU).

This Alert summarizes the background of this case, the ECJ's ruling and how this case might impact importers in similar cases in this era of digitalization.²

Detailed discussion

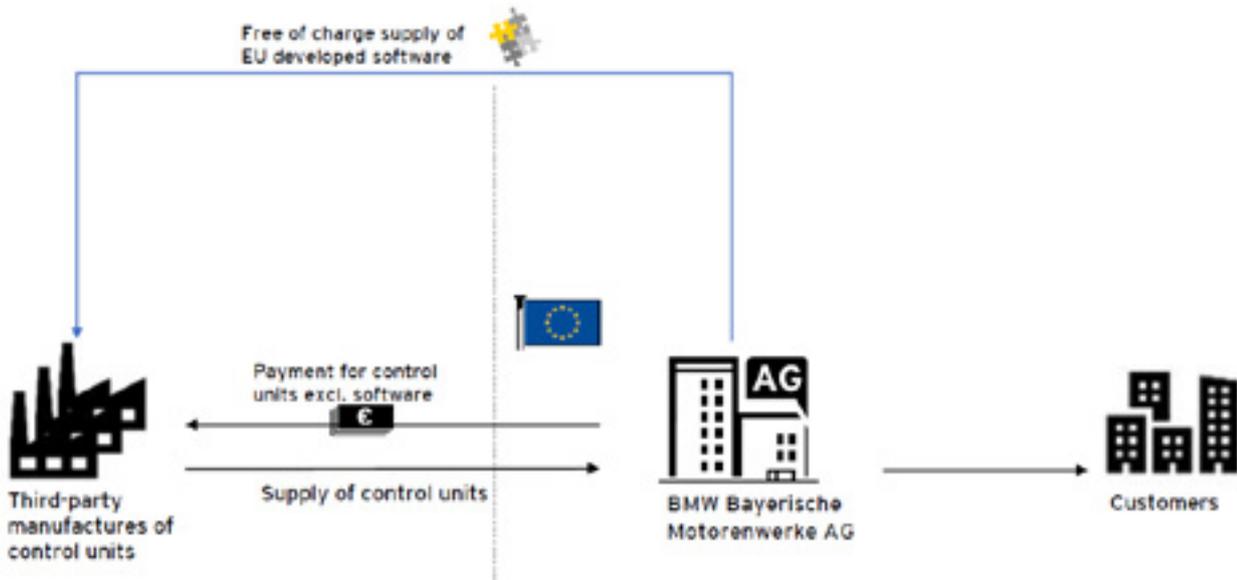
Background

BMW Bayerische Motorenwerke AG (BMW) is an automotive company established in Germany. BMW purchases control units from third-party manufacturers outside of the EU. The third-party manufacturers install software on the control units 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. The software is provided by BMW to the third-party manufacturers free of charge. They also use it to perform a functionality test prior to the delivery of the control units.

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The transaction value of the control units upon importation into the EU in the past did not include the value of the free of charge provided software. During an inspection, the German customs authorities determined that the value of the free of charge provided software should be added to the transaction value of the control units for determining the customs value. In their view, the provided software constitutes a dutiable assist under article 71(1)(b) of the Union Customs Code (UCC).

The facts and circumstances are illustrated in the graphic below.



ECJ ruling

The ECJ considers that the customs value is in principle based on the transaction value which is, in short, the invoice price settled between the buyer and seller of the imported goods into the EU. To ensure that the customs value reflects the economic value of the imported goods, price elements as enumerated under article 71 UCC should be added if their conditions are fulfilled.

The ECJ considers that in the instant case the software was provided free of charge by BMW to the seller of the control units and that the value was not included in the transaction value. Although software is not separately mentioned in the list of article 71(1)(b)(i) to (iv) UCC, this does not limit the possibility that the value of the software should be added to the transaction value of the imported control units as the wording of article 71(1)(b) refers to "goods" and "services." It does, in other words, also include intangible assets like software.

The ECJ continues to assess whether the value should be added under article 71(1)(b)(i) or (iv) UCC. Article 71(1)(b)(i) covers "materials, components, parts and similar items incorporated into the imported goods" and cannot be interpreted as excluding intangible assets according to the ECJ. Software can, however, under the analysis of the ECJ also qualify as an assist mentioned in article 71(1)(b)(iv) UCC which covers "engineering, development, artwork, design work, and plans and sketches."

The distinction between article 71(1)(b)(i) and (iv) UCC is important, because the value of goods and services under (iv) should only be added if the goods or services are undertaken elsewhere than in the EU. Under reference to Conclusion No 26 of the Compendium of Customs Valuation Texts issued by the Customs Code Committee, the ECJ considers that the software is an integral part of the end product (i.e., control units), as they are connected to, or incorporated in them and make it possible for them to function or improve the way in which they function. Therefore, the value of the software should be added to the transaction value of the imported control units under article 71(1)(b)(i) and it is immaterial that the software was developed in the EU.

Impact on businesses

The ECJ explicitly states that the value of software should be added to the customs value as an assist provided the conditions of article 71(1)(b) UCC are fulfilled. As previously mentioned, assists as referred to in article 71(1)(b)(iv) should only be added if undertaken elsewhere than in the EU whereas this exception does not apply to article 71(1)(b)(i) UCC. In other words, assists referred to in article 71(1)(b)(i) UCC should also be added if developed inside the EU. It is therefore, in cases where the buyer of imported goods provides in the EU developed software free of charge or at reduced cost, of the utmost importance that evidence is available showing whether the software is an integral part of the imported product or is necessary for the production of the imported good. As in the instant case, the facts seems to indicate that the software is integrated, but also used and necessary in the production process, it can even be important to split the costs of the provided software to prevent that the full value of free of charge supplied software should be added to the transaction value of imported goods. Furthermore, companies should especially review their provision of software to non-EU manufacturers and also train their people to in detail identify and correctly assess situations involving the provision of software.

Endnotes

1. ECJ 10 September 2020, C-590/19 (*BMW Bayerische Motorenwerke AG v Hauptzollamt München*), ECLI:EU:C:2020:694.
2. In an earlier edition of TradeWatch a contribution was included about the pending preliminary requests, see: [European Court of Justice: preliminary ruling request on customs valuation of software provides opportunity to file refund applications, TradeWatch 2020\(1\)](#), p. 50-52.

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