

## European Commission publishes new Guidance on Customs Valuation

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### Executive summary

On 25 September 2020, the European Commission (the Commission) published a new version of its [Guidance Document on Customs Valuation](#) (the Guidance).<sup>1</sup> While not legally binding, the Guidance is considered to be an important interpretation of the European Union (EU) customs legislation and it is applied by most EU customs authorities. The most important changes relate to the removal of the domestic sale principle from the guidance document and the incorporation of new examples.<sup>2</sup> The removal of the domestic sale principle has as a consequence that a sale between two EU residing parties can be regarded as a sale for export and thus the transaction could be used as the basis to determine the customs value of imported goods in the EU if it is the last sale. In many supply chains this results in the situation that a later sale in the supply chain, which usually represents a higher value, is elected as the relevant sale for export. This may lead to an increase of import duties payable.

This Alert summarizes the background of this new guidance and how it can be of impact for importers with regard to determining the relevant sale for export.

## Detailed discussion

### Removal of the domestic sale

The customs value is one of the three elements used to determine a customs debt in addition to the origin and classification of the imported goods. In the case of a series of sales, the relevant sale for export should be determined. In the EU, the last-sale principle applies, meaning that the relevant sale for export is the sale occurring immediately before the goods were brought into the EU customs territory.

### Customs valuation under the prior Guidance document

On 28 April 2016, the Commission published a Guidance Document on Customs Valuation.<sup>3</sup> This legally non-binding document provided further guidelines to apply the last-sale principle and at the same time introduced the "domestic sale" principle. The Commission held that a domestic sale cannot constitute a sale for export. A transaction qualifies as "domestic sale" if the sale is concluded between two EU residing parties.

#### Example



In the above example the sale occurring immediately before the introduction of the goods into the EU customs territory - the last-sale - is the sale between the EU Trade Company Y and the EU Retailer (€120). However, this sale, based on the old Guidance Document on Customs Valuation, was to be treated as a domestic sale. Hence, such sale could not constitute a sale for export and subsequently the customs value should be based on the transaction between the US Trade Company X and EU Trade Company Y, provided of course that this transaction qualifies as a sale for export to the EU customs territory.

#### Example: customs warehouse



This same domestic sale principle applied to the situation where the goods were sold for export in a customs warehouse in the EU, where there was no sale which covered the goods on arrival into the EU. In those situations, the customs value should have been based on a transaction value of a sale “taking place in/from the custom warehouse”<sup>4</sup> within the EU customs territory provided that such sale(s) do(es) not qualify as domestic sale. Following that principle, in the above example, the customs value should be based on the transaction between the Manufacturer X China and EU Trade Company Y (€100).

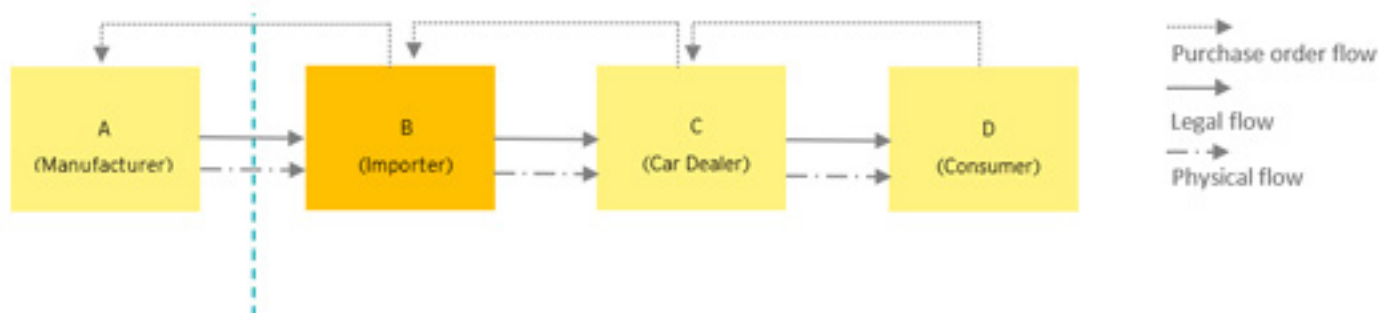
### Customs valuation under the new Guidance

In the new Guidance on customs valuation, all references to domestic sales (a concept that does not exist in the customs legislation) have been deleted. For the first example described above, this would mean that the customs value should be based on the transaction between the EU Trade Company Y and EU Retailer (€120) provided that this transaction constitutes a sale for export. For the second example, the customs value should be determined, according to the Commission, on the sale that took place closest to the moment of the introduction of the goods into the EU customs territory. This would be the sale between Manufacturer X and EU Trade Company Y (€100). If the importer under this example does not have possession over the invoices relating to the relevant sale for export, the customs value should be determined on an alternative valuation method.

### Purchase orders

Since the introduction of the Union Customs Code on 1 May 2016, some customs authorities have taken the view that a purchase order (an official offer submitted to a potential buyer by a potential seller) can constitute a sale for export. In the new Guidance on customs valuation, however, it is made very clear that a purchase order **cannot** serve as the basis for the determination of the customs value for the imported goods. Only when the future seller confirms (e.g., accepts) the purchase order, a sale agreement is deemed to be concluded between the buyer and the seller.

Example 5 of the new Guidance illustrates how the customs value should be determined in a back-to-back ordering situation.



In the example, a succession of purchase orders takes place with respect to the acquisition of a car (successively the purchase orders are issued from D to C, C to B and from B to A). The purchase order flow is followed by the corresponding acceptance of such orders, which leads to a succession of sales. Irrespective of the fact that the purchase orders have been placed before the physical arrival of the goods in the EU customs territory, it is the sales transaction between A and B that constitutes the relevant sale for export as this is the last sale occurring immediately before the goods were brought into the customs territory of the Union. In other words, the customs value of the imported car is based on the sales transaction between A and B.

### Impact on businesses

The customs valuation position of companies are under scrutiny in the EU because of the publication of this new Guidance, as well as recent case law of the European Court of Justice on the inclusion of royalty payments in the customs value of imported non-licensed semi-finished products (Curtis Balkan<sup>5</sup>) and the inclusion of the value of free of charge supplied software (BMW<sup>6</sup>).

Taxpayers should evaluate their supply chain to ascertain if determining the customs value of the goods being imported in the EU customs territory is impacted as a result of the deletion of the domestic sale principle. Especially in the event that currently a transaction between two EU residing parties in a company's supply chain qualifies as a "last-sale-for-export," it should be considered whether the removal of the domestic sale principle has an impact. This could, for example, mean that going forward the customs value should be determined on a later sale within the supply chain. Accordingly, using a later sale will result in higher customs duties being payable upon import by a party subject to such duties. Additionally, taxpayers should carefully access the companies' purchase/sales ordering process (e.g., timing of acceptance of the purchase orders) to prevent that a later sale is regarded as the relevant sale for export.

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## Endnotes

1. European Commission, 17 Sept. 2020, Guidance Document on *Customs Valuation Implementing Act Arts 128 and 136 UCC IA*, and Art. 347 UCC IA, 17 September 2020, TAXUD/2623395rev2/2020.
2. The intention to remove the domestic sale from the Guidance Document on Customs Valuation was previously announced in 2018. For background, see EY Global Tax Alert, [European Commission deletes "domestic sale" principle from guidance document on customs valuation](#), dated 4 December 2018.
3. European Commission, 28 April 2016, Guidance Document on *Customs Valuation Implementing Act Arts 128 and 136 UCC IA*, and Art. 347 UCC IA, 28 April 2016, Taxud B4/ (2016) 808781 revision 2.
4. European Commission, 28 April 2016, Guidance Document on *Customs Valuation Implementing Act Arts 128 and 136 UCC IA*, and Art. 347 UCC IA, 28 April 2016, Taxud B4/ (2016) 808781 revision 2, page 9.
5. EY's Global Tax Alert on this court case: [European court of justice rules royalty paid for know-how required for manufacture of finished products in the EU may need to be added to customs value of imported semi-finished products](#), dated 15 July 2020.
6. EY's Global Tax Alert on this court case: [European Court of Justice rules value of free of charge supplied software should be added to customs value](#), dated 16 September 2020.

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