



## ECJ: Value of software supplied free of charge by the buyer to be included in the customs value

### 1 Facts

In the case at issue (decision of 10.09.2020, C-509/19 – *BMW*), the applicant imported control units for vehicles from various third countries. These units use software to control various vehicle functions. The software required was developed by the applicant itself or the applicant arranged for development by commissioning this work within the EU. The manufacturers of the control units were provided with the software by the applicant, free of charge for download via a portal. The manufacturers installed the software on the units prior to delivery and carried out functional tests. When importing the control units into the EU, the applicant did not take into account the development costs of the software when making the customs value declaration.

### 2 Background

Goods to be recorded in EU foreign trade are only movable goods and electricity (see Art. 2 lit. a) of Regulation (EC) 471/2009 – *ExtraStatVO - external trade statistics regulation*). As an intangible asset, software is, in principle, not considered to fall within the category of “goods”, in terms of customs law (see ECJ, judgment of 14 July 1977 (C-1/77) *Bosch*). Software only has its own separate customs value in circumstances where it enters the EU in an embodied form on a data carrier. A prominent German example of the customs related problem of data imported on a data carrier is the so-called Swiss “tax evader CDs”. These CDs were purchased by the state tax authorities for millions of euros. It is not known whether the authorities declared the CDs for import to their customs colleagues.

One problem associated with the lack of qualification as goods is that no customs procedures are available for software. In the case described above, the outward processing procedure would have helped the applicant.



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Intangible assets are thus, in principle, irrelevant from a customs point of view, but they can influence the customs value of a physical good. For example, Art. 71 para. 1 lit. b) subpara. iv) of the UCC provides for the transaction value of goods to also include the techniques and development necessary for their manufacture. However, this only applies in the instance where this development took place outside the Union. This restriction is not included in the add-back criteria as defined in Art. 71 para. 1 lit. b) subpara. i) of the UCC. Accordingly, the value of “the materials, components, parts and the like contained in the imported goods” must also be added to the transaction value, irrespective of where such goods originate. It is not clear from this wording whether only tangible goods are meant or whether intangible goods are also included. If the software cannot be classified under one of the items listed in Art. 71 para. 1 of the UCC, its value must be disregarded when determining the customs value of the goods (Art. 71 para. 3 of the UCC).

### 3 ECJ judgment

Based on the ECJ decision, the value of software may, in principle, be added to the transaction value in accordance with Art. 71 para. 1 lit. b subpara. i) of the UCC. The introduction to Art. 71 para. 1 lit. b) of the UCC explicitly mentions “goods and services”. The term “service” not only refers to those in subpara. iv), but subpara. i) also allows intangible assets to be added. The prerequisite is that these enable or improve the functionality of the goods. According to the ECJ, the customs value must reflect the actual economic value of the imported goods. Therefore, all elements adding value to the goods must be taken into account. In this respect, it is important to consider whether the software installed on the control units prior to import results in an actual value of the goods which is higher than the transaction value. Whether this is the case here, has not been explicitly decided by the ECJ. In the present case, manufacturers had already used the software to carry out tests on the control units in the third country. These tests provided the applicant with findings, which were relevant to the applicant. It is therefore likely that control units containing software have added value for purchasers compared to control units without software.

### 4 Effects in practice

By means of this judgment, software finds itself put in a worse position than the other intangible goods (techniques, developments, designs, plans and sketches) expressly mentioned in Art. 71 of the UCC. It is therefore unsurprising that this judgment is now being criticised. Nevertheless, as a decision of the highest European court, it must be observed. However, the judgment’s effect is not limited to software. All intangible assets, which do not meet the conditions of Art. 71 para. 1 lit. (b) subpara. iv) of the UCC could now, by virtue of subpara. i), nevertheless be relevant from a customs valuation point of view. It is questionable whether the special conditions, as laid down in Art. 71 para. 1 lit. b) subpara. iv) of the UCC, to take account of the value of intangible assets, are still relevant. Companies which make intangible property available to manufacturers in third countries free of charge should therefore examine whether the value of such “assists” should be taken into account under subpara. i) when the goods are subsequently imported. In practice, the negative consequences could be avoided by deleting the software after testing in a third country and reinstalling it in the EU.

The decision may also have an impact on the preferential origin of a product. If software is regarded as a material, component or the like contained in the goods, it may be relevant for determining the goods’ origin. For example, it may be permissible to use goods without preferential origin up to a certain percentage. However, where software is used as a raw material, the origin cannot be determined. The conditions that a product must meet in order to qualify as preferential origin are determined by the customs tariff number of the product, but software does not have a customs tariff number because it is not considered a product under customs law.