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CUSTOMS VALUATION:
Inclusion of the intangibles into the customs value

"To what extent are the recent EU decisions on when intangibles should be added to the transaction value aligned with WTO customs valuation rules?"

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June 2024
MCSCC 2020-2023
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1 Executive summary

The research focuses on the evolving landscape of customs valuation, particularly in the context of intangible assets, and how these are added or not into the customs value. The economic reality of international trade now heavily features intangible goods, necessitating their consideration for accurate customs valuation.

This research is based on three significant European Court of Justice (ECJ) decisions that delve into whether certain intangible costs incurred by the importer should be included as dutiable from a customs perspective, a subject of ongoing debate against the backdrop of WTO Regulations.

Key considerations of this research:

- **Research methodology**: This study has followed a theory-oriented, purely legal approach, analysing legislative regulations (both EU and WTO), ECJ decisions, advisory opinions, and the different customs valuation compendiums. It aims to ascertain the alignment of the EU practices with WTO Regulations and the potential need for reinterpretation of formal valuation rules to suit the current trade trends.

- **Customs regulations and intangibles:** The inclusion of intangibles in customs valuation presents a significant shift from traditional customs practices that focus on tangible goods.

  Thus, the analysis of the recent ECJ decisions in cases C-76/19 (Curtis Balkan EOOD), C-775/19 (5th AVENUE Products Trading), and C-509/19 (BMW Bayerische Motorenwerke AG) highlights the scrutiny of intangible goods and their dutiable status under customs law, indicating a significant shift towards recognizing the intangibles in customs valuation.

- **EU and WTO alignment:** The research critically examines the EU's implementation of WTO regulations concerning intangibles, exploring whether recent ECJ decisions align with global standards. It delves into specific aspects such as the treatment of assists and royalties, the conditions under which they are considered in customs value, and the broader implications for customs law and international trade.

We have determined the complexity of including intangibles in customs valuation highlighted the ECJ's pivotal role in interpreting and adapting legislation to reflect current trade realities. It has revealed a landscape where intangibles are increasingly recognized for their value and impact on customs duties, urging a careful reconsideration of customs valuation methodologies to ensure they remain fair, uniform, and neutral in a rapidly evolving economic context.

As we will see throughout this paper, and specifically in Chapter 10, our findings answered all the raised questions, and determined if the WTO and EU regulations are aligned.

2 Research proposal

2.1 Introduction to the thesis research

1. Background

When traders releasee goods into the EU for free circulation, they must determine the customs value to accurately declare and pay the correct customs duties. These duties can be levied per unit or based on the value of the goods (ad valorem). The aim of customs valuation is to establish the monetary value exchanged for the goods, ensuring a fair assessment, especially when using the ad valorem method.

Due to the complexities involved, importers are required to obtain approval for the declared customs value from the Customs Authorities. To ensure consistency, the World Trade Organization (WTO) introduced the Agreement on Customs Valuation (part of the General Agreement on Tariffs and Trade, GATT), which establishes a single, fair, uniform, and neutral system for valuing imported goods for customs purposes[1].

According to GATT, if the transaction value cannot be used as the method to determine the customs value, it will instead be determined using one of the following methods of valuation (secondary methods of valuation)[2]:

- Transaction value of identical goods.
- Transaction value of similar goods.
- Deductive value method.
- Computed value method.
- Fall-back method.

The above valuation methods must be used in hierarchical sequence[3].

Once the customs value is determined, it should be adjusted under the provisions of Article 8 of WTO Regulations. That article defines certain adjustments that should be made to the customs value (price paid or payable for the goods) to account for certain costs (related to the imported goods) not included in the purchase price but which the buyer is obliged to cover.

Therefore, the customs value for the importation of goods is determined mainly by the following formula[4]:

[paid or payable selling price] +/- [Adjustments of Article 8 of the Agreement]

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[1] Introduction to WTO Valuation Agreement (http://www.wcoomd.org/en/topics/valuation/overview/wto-valuation-agreement.aspx (Accessed 13/04/2023).
[2] WTO Valuation Agreement (World Customs Organization (wcoomd.org) (Accessed 06/05/2023).
[3] Introduction to WTO Valuation Agreement (http://www.wcoomd.org/en/topics/valuation/overview/wto-valuation-agreement.aspx (Accessed 13/04/2023).
[4] M. Lux "*The Customs Treatment of Royalties and Licence fees with Regard to Imported Goods*". Global Trade and Customs Journal, volume 7, 2012.

Among others, the following intangible elements should be added:

> "*(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*
>
> *(i) Materials, components, parts and similar items incorporated in the imported goods.*
>
> *(ii) Tools, dies, moulds and similar items used in the production of imported goods.*
>
> *(iii) Materials consumed in the production of the imported goods.*
>
> *(iv) engineering, development, artwork, design work, plans and sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;*[1]
>
> *(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable*"[5].

Regarding the EU Customs legislation, the following elements should be added to the customs value according to the Article 71 of the UCC[6], which is similar to the wordings included in the WTO Regulations.

> "(*b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*
>
> *(i) Materials, components, parts and similar items incorporated into the imported goods.*
>
> *(ii) Tools, dies, moulds and similar items used in the production of the imported goods.*
>
> *(iii) materials consumed in the production of the imported goods; and*
>
> *(iv) Engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods.*

[5] Article 8 of the GATT (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 13/04/2023).
[6] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC).

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable[7]."

Recently, the European Union Court of Justice (ECJ) has issued several decisions analysing whether certain costs should be regarded dutiable from a customs perspective.

The recent decisions issued by the ECJ decisions on this matter are the following ones:

- Case C-76/19 (Curtis Balkan): the Court considered whether royalties paid by a company to its parent company for the supply of know-how, used for the manufacture of products, must be added to the price paid or payable for the importation of semi-finished products if certain conditions are fulfilled.

  Additionally, this decision delved into whether there is a close link between the royalties (paid to a parent company), and the imported semi-finished products (supplied by an independent supplier).

- Case C-775/19 (5th Avenue Products Trading Gmbh), the ECJ considered that the payments made for obtaining an exclusive right to distribute goods must be considered as a condition of sale.

- Case C-509/19 (BMW Bayerische Motorenwerke AG): the ECJ pondered whether that software developed within the EU, which is not necessary for the production of the product and provided free of charge by the buyer to the overseas supplier to be embedded on the finished product, should be considered as dutiable.

Customs duties are traditionally levied only on imported goods, reflecting a system designed to tax the introduction of goods (tangible goods). This is particularly relevant as there has been an exponential increase in cross-border trade of intangible items.

All the above issues pose a challenge for customs law, given that intangibles now constitute a significant portion of the value of imported goods.

Such complex scenario has required the intervention of ECJ, which has issued several decisions examining if certain intangible elements should be added to the customs value.

In this complex scenario, where the ECJ is striving to adapt and interpret the legislation to adhere to changes in trade trends. The key challenge is if the ECJ pronouncements are in line with WTO Regulations.

[7] Article 71 UCC Consolidated TEXT: 32013R0952 — EN — 01.01.2020 (europa.eu) (Accessed 10/03/2023).

2.2 Formulation of a research question

"To what extent are the recent EU decisions on when intangibles should be added to the transaction value aligned with WTO Valuation Agreement?"

To answer this question, the following sub-questions have been formulated:

1. Comparison between the WTO Valuation Agreement and the EU´s implementation of it regarding this issue?

2. To what extent is the ECJ still within the legislation´s boundaries?

3. Does the judge need to reinterpret the formal valuation rules to accommodate them to the present-day commercial environment?

2.3 Research Method

We will conduct a theory-oriented research, which constitutes a purely legal study. This study would be grounded in a thorough review of the legal doctrines and literature, employing a descriptive and analytical methods of writing to finally form conclusions.

Our analysis will focus on the legislative regulation of the concept of intangibles to be added to the customs value in the EU and, also to verify whether it is aligned with WTO Regulations.

We analyse the legislations enacted, review of the papers published by different authors and examine the ECJ regarding the customs value of imported intangible goods.

To confirm whether our theory is correct. The following research activities would be conducted:

1) **Customs valuation**: Provide a high-level explanation of the transaction value and the elements to be added to the customs value.

2) **Brief analysis of the imposition of customs duties on intangibles**: Examine how intangibles should be taken into account for the determination of the customs valuation.

3) **Analysis of the addition of intangibles under the GATT for customs value:** Investigate how GATT addresses the inclusion of intangibles in the customs value.

4) **EU implementation of the intangibles for customs value:** Focus on the current regulations in force regarding the EU's approach to intangibles in customs value.

5) **Comparison between the WTO Regulations and the EU implementation:** Review the enacted WTO Regulations concerning the addition of intangibles to the customs value. Compare these with the enacted EU regulations to determine any material differences between both regulations.

6) **ECJ decisions and the EU legislation**: Assess whether the ECJ decisions stay within the boundaries of the EU legislation. Analyse the customs treatment before the ECJ´s decisions, including a review of previous ECJ decisions and comments from the EU´s Expert Valuation Group.

   Finally, this analysis will help determine if the ECJ's decisions align with WTO Regulations.

7) **ECJ's Potential Reinterpretation of Formal Valuation Rules**: Examine if the ECJ has reinterpreted the formal valuation rules to align with the current commercial and technological environment, considering:

   1. How intangibles have materially changed the customs valuation.

   2. Is there a statutory obligation for the ECJ to re-interpret the rules?

3. Verification if the ECJ decisions are in line with the WTO Regulations.

We will analyse if the ECJ has re-interpreted the valuation rules, taking into consideration:

- Conclusions of the EU Customs Expert Group (Valuation section) of the European Commission.

- The Advisory Opinion of the Technical Committee on Customs Valuation of the World Customs Organization (hereinafter, WCO Technical Committee).

8) **Conclusions and recommendations:** Drawing on the findings from this we will present our conclusions and recommendations regarding the impact of the ECJ´s decisions.

9) **Answer the research question**: Based on the analysis contained in this research paper, we address all the research questions raised.

My research objective is to focus on intangibles (incorporated in imported goods, such as royalties and licence fees), mainly due to the challenges posed by new technologies in international trade. I will analyse the impact of these changes in international trade and determine what concepts should be added to customs value.

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3 Customs valuation: transactions value and elements to be included.

When traders releasee goods into the EU for free circulation, they must determine the customs value to accurately declare and pay the correct customs duties. These duties can be levied per unit or based on the value of the goods (ad valorem). The aim of customs valuation is to establish the monetary value exchanged for the goods, ensuring a fair assessment, especially when using the ad valorem method.

Due to the complexities involved, importers are required to obtain approval for the declared customs value from the Customs Authorities. To ensure consistency, the World Trade Organization (WTO) introduced the Agreement on Customs Valuation (part of the General Agreement on Tariffs and Trade, GATT), which establishes a single, fair, uniform, and neutral system for valuing imported goods for customs purposes[8].

According to GATT, if the transaction value cannot be used as the method to determine the customs value, it will instead be determined using one of the following methods of valuation (secondary methods of valuation)[9]:

- Transaction value of identical goods.
- Transaction value of similar goods.
- Deductive value method.
- Computed value method.
- Fall-back method.

The above valuation methods must be used in hierarchical sequence[10].

Once the customs value is determined, it should be adjusted under the provisions of Article 8 of WTO Regulations. That article defines certain adjustments that should be made to the customs value (price paid or payable for the goods) to account for certain costs (related to the imported goods) not included in the purchase price but which the buyer is obliged to cover.

Therefore, the customs value for the importation of goods is determined mainly by the following formula[11]:

[paid or payable selling price] +/- [Adjustments of Article 8 of the Agreement]

Among others, the following intangible elements should be added:

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[8] Introduction to WTO Valuation Agreement (http://www.wcoomd.org/en/topics/valuation/overview/wto-valuation-agreement.aspx (Accessed 13/04/2023).
[9] WTO Valuation Agreement (World Customs Organization (wcoomd.org) (Accessed 06/05/2023).
[10] Introduction to WTO Valuation Agreement (http://www.wcoomd.org/en/topics/valuation/overview/wto-valuation-agreement.aspx (Accessed 13/04/2023).
[11] M. Lux "*The Customs Treatment of Royalties and Licence fees with Regard to Imported Goods*". Global Trade and Customs Journal, volume 7, 2012.

"*(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*

(v) Materials, components, parts and similar items incorporated in the imported goods.

(vi) Tools, dies, moulds and similar items used in the production of imported goods.

(vii) Materials consumed in the production of the imported goods.

(viii) engineering, development, artwork, design work, plans and sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;1

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable"[12].

Regarding the EU Customs legislation, the following elements should be added to the customs value according to the Article 71 of the UCC[13], which is similar to the wordings included in the WTO Regulations.

"(*b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*

(v) Materials, components, parts and similar items incorporated into the imported goods.

(vi) Tools, dies, moulds and similar items used in the production of the imported goods.

(vii) materials consumed in the production of the imported goods; and

(viii) Engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods.

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued,

[12] Article 8 of the GATT (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 13/04/2023).
[13] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC).

to the extent that such royalties and fees are not included in the price actually paid or payable[14]."

3.1 Brief analysis of the imposition of customs duties on intangibles.

Customs law is only concerned with introducing or exiting of goods, understood as tangible goods. To the contrary, customs regulations does not levy on the supplies of international services. In principle, customs duties are only levied on goods as the European Court of Justice[15] stated on the Case C-1/77 (Robert Bosch GmbH):

> *"4. The Common Customs Tariff by its nature concerns only the importation of goods, that is, tangible property, and does not apply to the importation of incorporeal property, such as processes, services or knowhow, which are owing to their nature, already difficult for the customs mechanism to cover*[16]*".*

What implications arise when a trader imports goods that include intangibles?

If the customs value is determined based on the transaction value, according to Article 7 of the WTO Regulations, the transaction value would be the price paid by the importer. This definition implies that the customs value includes all the purchased concepts (or inputs) and services, in which case, the customs duties apply solely to the tangible goods. Consequently, intangibles incorporated into the imported products would be taxed indirectly[17].

[14] Article 71 UCC Consolidated TEXT: 32013R0952 — EN — 01.01.2020 (europa.eu) (Accessed 10/03/2023).
[15] Hereinafter, ECJ.
[16] ECJ Robert Bosch Case C-1/77 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61977CJ0001&from=EN) (Accessed 06/14/2023).
[17] Ibáñez Massilla, S. "GPS Aduanas" Ed. Tirant lo Blanc, 2022.

4 Analysis of the addition of intangibles under the WTO Regulations

As previously stated, customs duties do not apply to the cross-border supplies of services. Only the movements of goods are subjected to taxation under customs regulations.

So, what then occurs if a trader imports goods that encompass intangibles?

As early noted, Article 7 of the WTO Regulations defines the transaction value as the price paid by the importer. This definition suggests that the customs value should include all the purchased concepts (or inputs) and services.

Consequently, if the intangibles are incorporated into goods, by taxing these imported goods, the intangibles incorporated in them will be taxed indirectly[18].

However, given the economic complexities of international trade, the pricing agreement is complex, with the importer being charged for elements not directly included in the purchase price.

These concepts are detailed in Article 8 of the WTO Regulations, where intangibles are categorized into the following two categories:

1. The buyer provides certain goods or services to the manufacturer free of charge (assist) to be incorporated into the final product. As a result, the cost price of the product is significantly reduced.

   The WTO Regulations understand that these assists should be added to the transactional value, if specific requirements are met:

   "*Article 8:*

   1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods :

   (...)

   (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable :

   i. materials, components, parts and similar items incorporated in the imported goods;

   ii. tools, dies, moulds and similar items used in the production of the imported goods;

   iii. materials consumed in the production of the imported goods;

[18] Ibid.

iv. *engineering, development, artwork, design work, plans and sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods*"[19]

2. In case the buyer pays for the right to use an intangible property:

> "(*c*) *royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable*"

As Lux mentions, royalty payments are not inherently subject to duties in principle. Therefore, it is necessary to analyse the nature of the intangible property being conveyed, specifically:

- whether the royalty is related to the imported goods, and.
- the payment mechanism (to know if the royalty payment is a condition of sale)

before determining that the payment for intangible property is dutiable, within the parameters set forth by WTO Regulations[20].

The Interpretative Notes of Article 8 of the WTO Regulations provide further clarification on this Article. To avoid overextending this study, we would focus only on the topics essential for understanding the notions of assist and royalties. Consequently, we would not delve into the calculation method for the intangibles to be added to the customs value.

Based on the above, the addition of intangibles into the customs value is summarized as follows:

4.1 Assists (Article 8. 1 (b) WTO Regulations

Intangibles provided free of charge by the importer to the producer, which are not included in the purchase price, are addressed in Article 8. 1 (b) of the WTO Regulations. This article distinguishes between "*intellectual assists*" (necessary to produce the imported product) as outlined under Article 8. 1 (b) (iv) GATT, and other types of inputs that should be added to the customs value, as classified under the rest of categories of Article 8. 1 (b) WTO Regulations [21].

Intellectual assists[22] imply that duties should be paid on services provided free of charge, such as engineering, development, artwork, and design services. However, assists under Article 8. 1 (b) (iv) WTO Regulations should not always be added to the customs value,

[19] Article 8 of the GATT (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 13/04/2023).
[20] Lux, M. "*The Customs treatment of royalties and licence fees with regard to imported goods*" Ed. Global trade and Customs Journal, 2012.
[21] Cernat, L. "*Thinking in a Box: A 'Mode 5' Approach to Service Trade*". Ed. Kluwer Law International BV, 2014.
[22] Or, (iv) category of assist.

especially if they have been undertaken in the country of importation (in this case, the EU).

According to Article 8.4 WTO Regulations[23], we can conclude that Article 8. 1 (b) GATT provides a "*numerus clausus*" list of concepts that can be considered as assist. Concepts not explicitly detailed in that Article, even if provided free of charge by the importer (directly or indirectly), should not be considered an assist and, therefore, they should not be added to the customs value.

Thus, it is critical to determine whether the intangibles fall into any of the other categories of Article 8. 1 (b) WTO Regulations or can only be classified under Article 8. 1 (b) (iv) GATT.

An analysis of the decisions made by the Technical Committee on Customs Valuation of the WCO [24] (hereafter referred to as the WCO Technical Committee) is necessary.

Attention will be given to the following case studies by the WCO Technical Committee to understand the practical application of Article 8.1(b) of the WTO Regulations:

a.) *Commentary 18.1 "Relationship between Articles 8.1 (b) (ii) and 8.1 (b) (iv)"[25].*

Technical Committee analysed the case where moulds or tools were provided free of charge by the importer.

Usually, the value of the tools or moulds, along with some engineering, development, and design work (undertaken in the country of importation) is included in the purchase costs.

The Technical Committee recognises that the materials provided (moulds or tools) should be classified under the category of Articles 8.1 (b) (ii), and so, they should be added to the customs value. However, the engineering should not be added to the customs value because it should be classified under Article 8.1 (b) (iv) and was undertaken into the country of importation[26].

b.) *Case Study 5.2 "Application of Article 8.1 (b)"*

This case study is significant as the Technical Committee analyses the assist supplied for manufacturing racing cars. According to the statement of facts, the importer provides to the manufacturer, free of charge or at a reduced price, with the carburettors, electronic checking equipment, fuel for the racetrack tests and the plans and sketches necessary to produce the racing cars.

The Technical Committee analyses which components or services that should be included under each of the four categories of Article 8 (1) b) WTO Regulations, concluding that:

[23] Article 8.4.: "*4. **No additions shall be made** to the price actually paid or payable in determining the customs value **except as provided in this Article***".

[24] World Customs Organization.

[25] Commentary 18.1 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 13/04/2023).

[26] As we will analyze later in this paper, we can see that this criterium differs with the current one of the EU.

- The carburettors, as components incorporated into the imported cars, fall under Article 8.1(b)(i) of the WTO Regulations.

- The electronic checking equipment, including tools, dies, moulds and similar items used producing the imported goods; is an adjustment under Article 8.1 (ii) WTO Regulations.

- The fuel supplied for the racetrack tests, as material consumed in the production of the imported cars, is an adjustment under Article 8.1 (b) (iii) WTO Regulations;

- The plans and sketches of the car's bodywork, necessary for producing the imported cars; falls under Article 8.1 (b) (iv) WTO Regulations.

4.1.1 CONCLUSIONS - in which cases intangibles provides free of charge should be added to the customs value based on the WTO Regulations

The WCO Technical Committee concludes that the intangibles, provided free of charge can be classified as assists only under category (iv) of Article 8. 1 (b) WTO Regulations.

Based on Diaz Gavier perspective, we can advocate that the value of the intangible (provided free of charge or at a reduced price) is not dutiable under the terms of Article 8. 1 (b) WTO Regulations unless the service is "*necessary for the production of the imported good*" [27]. This implies that the service would be dutiable if the manufacturer could not produce the good without that intangible.

This conclusion directly impacts the dutiability of free-of-charge intangibles, indicating that even they are needed for the production of the imported good, they should not be added to the customs value when those intangibles are not undertaken in the country of importation (in our case, in the EU).

As discussed, not all intellectual assistance provided is classified under Article 8 WTO Regulations, only <u>those necessary for production</u>[28] and, not undertaken into the country of importation (as clearly stated by the WCO Technical Committee).

About the concept that the intangible provided is necessary for the production, Diaz Gavier notes: "*the fact that another manufacturer could have produced the imported product without the service from the buyer is irrelevant. Where the buyer supplier supplies the service but the manufacturer can manufacture the product without it, its value is not dutiable because such service is not for the production of the imported product*[29]".

Thus, we can conclude that the WTO Regulations limit the scope of the intangibles to be added to the customs value when they are provided free of charge (or at reduce price) by the importer to the manufacturer.

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[27] Diaz Gavier, P. "*On article 8.1 (b) of the Customs Valuation Agreement: When is the Value of Certain Services Supplied by the Buyer Relevant for the Customs Value (i.e., Engineering, Development, Artwork, Design Work, and Plans and Sketches)?*", Ed. Global Trade and Customs Journal, 2014.
[28] Article 8. 1 (b) (iv) GATT.
[29] Diaz Gavier, P. "*On article 8.1 (b) of the Customs Valuation Agreement: When is the Value of Certain Services Supplied by the Buyer Relevant for the Customs Value (i.e., Engineering, Development, Artwork, Design Work, and Plans and Sketches)?*", Ed. Global Trade and Customs Journal, 2014.

4.2 Royalties (article 8.1 (c) WTO Regulations)

In case of an importation of goods that also includes a fee for a right (an intangible) closely related to the goods[30] Therefore, in principle, these intangibles should also be added to the customs value of the imported goods.

Based on the literal wording of article 8.1 (c) WTO Regulations, "*the royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable*[31]".

In theory, this concept seems straightforward. However, the wording of the WTO Regulations and the explanatory notes do not clarify the following:

- What it is considered royalties and licence fees.
- When the royalties are considered related to the goods imported.
- When it is understood that the sale of the goods is conditioned upon the payment of the royalties.
- Who has the authority to impose such payment as a condition[32].

The absence of clear definitions for these concepts creates confusion and leads to misconceptions among the WTO member countries. This is because much of the language in the WTO Regulations is open to interpretation and implementation, with very little being directly inferable from a literal reading of the text[33].

The Interpretative Note of Article 8.1 c) of the WTO Regulations provides some examples of what is considered a royalty, including payments related to patents, trademarks, and copyright.

The Interpretative Note of Article 8.1 c) clarifies that the rights to reproduce the imported goods within the country of importation[34] and the right to distribute or resell the imported goods will be included on the customs value.

The WTO Regulations do not define what is considered royalties. Drawing from Lux´s publications, we can conclude that the term "*royalty*" generally refers to a payment made for the right to use an intangible property[35].

[30] Koul, K. "*Guide to the WTO and GATT*" Ed. Springer, 2018.
[31] Article 8 of the GATT (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 18/03/2023).
[32] Lascano, J., "*Ajustes del valor en aduana por el pago de regalías, precedentes internacionales*", Ed. V Foro Internacional sobre Valoración Aduanera, 2021.
[33] S. Sherman "*Customs Valuation: Commentary on the GATT Customs Valuation Code*" ICC, 1988.
[34] Commentary 19.1 of the Technical Committee provides a clarification of the meaning of the expression "*right to reproduce the imported goods*" within the meaning of the Interpretative Note to Article 8.1 (c).
However, insofar that is out of the scope of this research, we will not analyze this concept.
[35] Lux, m. "*The Customs treatment of royalties and licence fees with regard to imported goods*" Ed. Global trade and Customs Journal, 2012.

However, not all royalty payments (not included on the purchase price) automatically result in the payment of customs duties. The imposition of such duties is contingent upon meeting the following two criteria:

4.2.1 The royalties must relate to the imported goods.

The relationship between royalties and imported goods is complex, especially in situations where it is not clear whether the royalties (or intangibles) are "*embodied*" in the imported goods. This issue is particularly evident whenever royalties do not relate directly to the imported goods but to products or artifacts derived from them[36].

Moreover, the GATT does not define when a royalty is considered related to the imported goods. Rather than providing a proper definition, the WCO Technical Committee´s Advisory Opinions and Commentaries has provided some ad hoc examples.

The WCO Technical Committee, Commentary 25.1, outlines that the most common circumstances in which a royalty or licence fee may be deemed related to the goods being valued occur when the imported goods incorporate the intellectual property or are manufactured using the intellectual property covered by the licence fee.

For example, if the imported goods incorporate the trademark for which the royalty or licence fee is paid, this indicates that the fee relates with the imported goods[37].

Furthermore, we can find additional criterion on the following Advisory Opinions[38] issued by the WCO Technical Committee:

a) *Advisory Opinion 4.9.:*

This opinion addresses a scenario where the importer is required to pay a royalty to the seller the trademark holder for the rights to manufacture, use, and sell the "*licensed preparation*" within the country of importation, as well as for the rights and licence to use the trademark in connection with the production and sale these licensed preparations in the importing of country[39]. The imported product is a standard, non-patented anti-inflammatory agent.

The WCO Technical Committee considers that this scenario is unrelated to the imported goods. This is because the royalty payment is made for the right to manufacture the licensed preparations that include the imported product and eventually for the use of trademark with these preparations.

As the imported product is a standard, non-patented anti-inflammatory agent, the use of the trademark is not related to the goods being valued.

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[36] Rijo, J. "*Derecho Aduanero de la Unión Europea: Notas del marco normativo, doctrinario jurisprudencial*", Ed. Libros de la Fundación Aduanera, 2019.
[37] Commentary 25.1 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).
[38] The WCO advisory opinions answer a question about applying the GATT to a particular set of facts which all or some WTO Member States have raised.
When the facts are not identical, the advisory opinion merely provides guidance, in this case, of the concept of relationship with the goods (Canistra, D. "*The dubitability of royalty payments: the impact of the World Customs Organization´s Advisory Opinion 4.15*" Global Trade and Customs journal, 2014).
[39] Advisory Opinion 4.9 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 21/03/2023).

b) Advisory Opinion 4.12.:

This Advisory Opinion analyses the case where the imported is obliged to pay a license fee to the seller for the right to use the patented process. This process is executed through a technology that it is incorporated into the imported goods[40]. The royalty enables to perform of this patented process. So, the licence fee paid is related to the goods being valued.

The Technical Committee suggests that the method of calculating license fees needs to be examined to determine whether the royalties are related to the imported goods.

To establish if this requirement is met, a detailed assessment of the contractual provisions of the licence agreement is required[41].

c) Advisory Opinion 4.17:

The Advisory Opinion analyses a franchise agreement paid to operate stores under the franchisor´s brands within the importing country.

Under the franchise agreement, the importer is obliged to purchase inputs solely from the licensor or those authorized by them. These inputs are necessary for producing the products sold in the importer´s stores (in the country of manufacture).

These inputs are generally not patented or protected by any intellectual property rights. In addition, the importer has the option to buy these inputs from third party suppliers (at lower prices), where duly authorized by the licensor and meet certain quality requirements. The royalties would be calculated as a percentage of the gross sales of the final product, which is made using the imported products.

The WCO Technical Committee concluded that the payment of royalties is not related to the imported goods but to the usage of the franchisor´s brand and system in the manufacturing and sales of products that carry the franchisor´s intellectual property.

The royalties paid by the franchisee should not be added to the price actually paid or payable under the provisions of Article 8.1(c).

4.2.2 The payment of the royalties should be a condition of the sale of the goods.

WTO Regulations lack a clear definition of what constitutes a "*condition of sale*". Being defined using examples provided by the WCO Technical Committee. However, it leads to diverse interpretations.

Sherman and Glashoff pointed out that the ambiguity surrounding royalties is due to be the only subject not clearly defined in the WTO Regulations. This vagueness is largely because, during the Geneve negotiations, there was a substantial disagreement on this

[40] Advisory Opinion 4.12 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 21/03/2023).
[41] Rijo, J. "*Derecho Aduanero de la Unión Europea: Notas del marco normativo, doctrinario jurisprudencial*", Ed. Libros de la Fundación Aduanera, 2019.

subject among various governments.[42]. Resulting in an inconsistent application of the WTO Regulations by the countries.

Nevertheless, the "*condition of sale*" implies that the buyer cannot purchase the imported goods without paying the royalty or licence fee[43]. Alternatively, without such payment, the goods would not have been sold or, at least, would not have been sold at the same price[44].

Understanding the notion of "*condition of sale*" means recognizing that it is a requirement imposed by the seller. However, Advisory Opinions suggests that the different cases and conditions are broader than the preliminary analyses.

For a comprehensive understanding, it should be analysed WCO Advisory Opinions 4.1 to 4.16[45] in detail.

Thus, we conclude than in a sales contract, the buyer undertakes the obligation not just to pay the price of the goods but also to pay the royalties to the seller (direct payment) or to a third party (indirect payment).

The crucial question then becomes: how do we determine that the royalties are a condition of sale of the purchased goods?

A key consideration for determining whether the buyer must pay the royalty or licence fee as a condition of sale is whether the buyer cannot purchase the imported goods without paying the royalty or licence fee.

It should be considered that an obligation of payment of a royalty (i.e., the legal obligation to pay to the copyright holder) does not automatically imply that it is a condition of sale[46].

The WCO Technical Committee, in Commentary 25.1, concludes that this should be reviewed in a case-by-case basis, after thorough review of the sales and licensing contracts.

Moreover, as the doctrine advocates, the conditioning to the payment of royalties does not necessary to appear as an explicit statement in the contractual documentation (on the sales contract). An implicit condition arising from the operation´s circumstances may be sufficient.

Various scenarios emerge based on these considerations.

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[42] Sherman, S.L." *Customs Valuation, Commentary on the GATT Customs Valuation Code 123*" Ed. ICC Publishing Co, 1980.
[43] Lux, M., "*The Customs treatment of royalties and licence fees with regard to imported goods*" Ed. Global trade and Customs Journal, 2012.
[44] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, ed, 2014.
[45] However, we would analyze those ones which are more relevant to better understand this concept.
[46] For instance, as the Technical Committee concludes on the Advisory Opinion 4.2.

4.2.2.1 The royalties are paid to the manufacturer/seller:

The case of a direct payment of the royalty to the seller, in principle, would be the concept of condition of a sale.

However, we should also note that parties sometimes decide to enter separate contracts regarding the sales of goods and licence fees. This arrangement on separate contract does not affect the categorization of royalty payment as a condition of sale.

The WCO Technical committee has observed the following in this sense:

> *"The mere fact that parties decided to lay down their agreement for the payment of royalties or license fees* <u>*in a separate contract does not affect the fundamental aspects of the commercial terms between the buyer and the seller regarding the imported goods*</u>*. If the seller will not sell the goods for export to the buyer unless royalties or licence fees are paid, or if the buyer cannot purchase or import the goods that are the subject matter of valuation, on a legal and definitive basis, unless royalties and license fees are paid, then the obligation to make payment is a condition of the sale of the goods in question*[47]".

Thus, we must prioritize economic reality over the formal appearance[48].

To ascertain when a direct payment is considered a condition of sale, reference should be made to examples issued by the WCO Technical Committee.

Advisory Opinion 4.10 analyses the case of an importer that must pay a seller (the trademark holder) for the right to resell the imported garments containing trademarked material (containing comic strip characters).

In that case, the WCO Technical Committee concludes that the licence fee paid for the right to resell such imported garments is a condition of the sale and relates to the imported goods. Without permission to use the comic strip characters and the trademark, the imported goods cannot be bought and resold. Therefore, this payment should be added to the paid or payable price.

However, not every scenario where a royalty payment is made to the seller automatically implies that it is a condition of sale.

For instance, Advisory Opinion 4. 5., where an importer is required to pay a licence fee to a trademark holder for the right to manufacture and sell six types of cosmetics under that trademark, regardless of whether ingredients from the trademark holder or local supplies are used.

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[47] WCO, Technical Committee, Information Document (10/12/1996). https://carena.com.ar/wp-content/uploads/2015/07/GTCJ_9-9_Julio-Carlos-Lascano.pdf (Accessed 01/03/2023)
[48] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, ed, 2014.

The WCO Technical Committee concluded since the royalty is payable to the seller/licensor irrespective of the source of ingredients used by the importer, it does not constitute a condition of the sale of goods.

4.2.2.2 Royalties paid to a different party than the manufacturer/seller:

This is a complex scenario to consider that the sale can be deemed conditional upon the payment of the royalties[49].

In transactions involving unrelated parties, the Technical Committee, as per Commentary 25.1, believes:

> *"5. Where a royalty or licence fee is paid to **a third party, it is considered unlikely** that the fee would be included in the price actually paid or payable under Article 1*[50] *".*

Exceptions exist, however, if the seller or someone related to the seller mandates the buyer to make the payment[51].

If the royalty or licence fee is paid to a third party related to the seller of the imported goods, it is more likely that the fee is paid as a condition of sale than if it were paid to an unrelated party[52].

Given this context, each of the following situations requires thorough analysis to determine its status as a condition of sale.

4.2.2.3 Related parties:

4.2.2.3.1 When the seller or a third party requires the importer to pay the licence fees:

It is evident that when the seller, or a related third party mandates the importer the payment of license fees, this requirement constitutes a condition of sale.

Even if the license fees are not explicitly mentioned in the contract signed between the manufacturer and the importer, an implicit condition obligates the payment of these fees. This implicit condition often arises from the existing relationships among the various parties involved.

To identify instances where such indirect payment is deemed as a condition of sale (due to an implicit condition), references should be made to the examples issued by the Technical Committee.

- A clear case would be Advisory Opinion 4.11, where the importer, manufacturer and licensor are all related parties. The parent company (owning the license) obliges the importer to pay royalties as a condition of purchasing the goods. The

[49] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, 2014.
[50] Commentary 25.1 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).
[51] Lux, M. "*The Customs treatment of royalties and licence fees with regard to imported goods*" Ed. Global trade and Customs Journal, 2012.
[52] Article 15.4 of the WTO Regulations defines the concept of related parties.

importer cannot use the trademark without fulfilling this royalty payment obligation.

- While some Customs Authorities are willing to accept that the transactions between related parties automatically imply a condition of sale of the importation, Advisory Opinion 4.13 clarifies that it is not always the case.

  Here, the importer must pay a trademark fee to the licensor (related party) for the use of the trademark, which is produced by an external manufacturer.

  Although the importer is required to pay a royalty to obtain the right to use the trademark, this result from a separate agreement unrelated to the sale for export of the goods to the country of importation. The imported goods are purchased from various suppliers under distinct contracts, and the royalty payment is not a condition of the sale of these sales of goods.

  Thus, the buyer does not have to pay the royalty to purchase the goods.

Therefore, despite the parties involved are related does not automatically imply an implicit condition to be obliged to pay the licence fees.

4.2.2.3.2 Licensor's control over the manufacturer:

Not every transaction between related parties implies an implicit condition from the seller to pay the licence fees.

One of the factors that the Technical Committee has emphasized in Commentary 25.1, to be considered in determining whether licence fee payment is a condition of sale is if the royalty or licence agreement allows the licensor to oversee the manufacturer´s production or sales in a manner exceeding quality control.

> "*5. The royalty or licence agreement contains terms that permit the licensor **to manage the production or sale between the manufacturer and importer** (sale for export to the country of importation) that go beyond quality control*[53] ."

As we will see, the EU, in its Compendium of Customs Valuation[54], recognized that when the royalties are paid to a third party that directly or indirectly has control over the manufacturer, it is presumed that both parties are related in the sense of Article 15.4 of WTO Regulations[55].

However, when can we ascertain that the licensor controls the manufacturer?

To clarify this concept, the WCO published the Advisory Opinion 4.15 (Adopted on the WCO 36th Session, 19 April 2013). This Opinion details a scenario where related-party licensor and importer have signed agreements concerning goods 'manufacture and

[53] Commentary 25.1 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).
[54] Version TAXUD/800/2002-EN, Conclusion 24: Royalties and licence fees.
[55] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, 2014.

importation, including terms allowing the licensor to terminate the license agreement for payment defaults.

In parallel, the importer has signed a contract-manufacturer agreement with a third party. The contract does not state anything about the royalty payments.

However, the licensor has signed a supply agreement with the manufacturer; agreeing that the manufacturer must follow the specifications of quality and design provided by the licensor and stating that the manufacturer is only able to sell products with its trademark solely to designated parties by the licensor.

The WCO Technical Committee understand that the royalty payment is a condition of sale, based on the following reasons:

a.) The licensor dictates transaction terms between the manufacturer and importer, controlling trademark use.

b.) Non-payment triggers, the annulment of the license agreement.

c.) If the importer does not pay, it should not be able to purchase the goods.

The Technical Committee focuses on the control factor. However, this is in respect of intellectual property for the production rights and not for selling or distribution rights[56].

4.2.2.3.3 Unrelated parties:

In principle, it is unlikely for royalty payment to constitute a condition of sale when no formal agreement exists between the seller and the importer regarding licence fee payments. The absence of such provisions in a sales documentation, it makes necessary to consider other factors to determine whether the royalty or licence fee payment is made as a condition of sale.

However, a contract explicitly or implicit mandating royalty payments, it would lead to "*a factor evidencing that the sale is somehow conditional upon their payment; naturally, this is a rebuttable presumption*[57]".

The payment of a royalty should not be automatically considered as a condition of sale, as highlighted by the WCO Technical Committee in Advisory Opinion 4.3. This opinion elaborates on a scenario, where an importer acquires the right to use a patented process for manufacturing certain products (agreeing to a royalty based on the number of articles produced using that process). On a separate contract, the importer acquires a machine from a foreign manufacturer, designed primarily to execute the patented process.

[56] Canistra, D. "*The Dutiability of Royalty Payments: The Impact of the World Customs Organization's Advisory Opinion 4.15*" Ed. Global Trade and Customs Journal, 2014.
[57] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, 2014.

Although the payment being exclusively for use of the machine and the patented process, which is embodied in the imported machine. The royalty payment is not a condition of sale[58].

Commentary 25.1 emphasizes that the determination of whether the licence fee payment is a condition of sale should be reviewed on a case-by-case basis.

Advisory Opinion 4.7. addresses a scenario where licence fees should be added to the customs value.

This Opinion is related to a situation where the importer must pay a royalty to a seller, who has been granted worldwide reproduction, marketing, and distribution rights by a rights holder, for the marketing and distribution rights within the country of importation.

The WCO Technical Committee determines that the royalty payment constitutes a condition of sale because the importer´s obligation to pay is stipulated within the distribution and sales agreement with the manufacturer. To protect his commercial interests, the manufacturer would not have sold the records to the importer if the importer had not agreed to those terms[59]. The Committee notes:

> "*The payment is related to the goods being valued as it is made for the right to market and distribute the particular imported goods and the amount of the royalty will vary according to the actual selling price of a particular record*[60]*"*.

4.2.3 CONCLUSIONS – requirements for adding royalty payments to the customs value.

The WTO Regulations and the WCO Technical Committee have defined the concept of royalties and license fees broadly, without placing exhaustive limits on the concept.

Although this is not thoroughly defined, both entities advocate for a constrained interpretation, offering a comprehensive list of elements that must be considered when determining if royalties should be added to the customs value[61].

Based on WTO Regulations and the WCO Technical Committee, the royalty payments of intangibles should be added to the customs value, if two conditions are met[62]:

a.) *The royalties must be related to the imported goods.*

This is a complex scenario especially in cases where it is unclear that the royalties (or intangible) are "*embodied*" in the imported goods.

[58] Advisory Opinion 4.3. (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).
[59] Advisory Opinion 4.7 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).
[60] Ibid.
[61] Schippers, M.J. *"Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.
[62] We do not include in our analysis the third condition (that the royalty payments have not already been included in the purchase price), because we consider it relevant.

To confirm this requirement, the contractual provisions resulting from the licence agreements should be reviewed[63] (as could be appreciated in the different examples previously described).

b.) *The royalty payments must be a condition of sale.*

A "*condition of sale*" determines whether the buyer cannot purchase the imported goods without paying the royalty or licence fee[64]. Or the goods would not have been sold at all or, at the same price, without such payment.

In principle, the payment of royalties would be a condition of sale, when a payment is expressively disclosed in the sales contract. However, it would also be considered a condition of sale, if, based on the economic reality, the goods would not be purchased without the payment to unrelated parties.

Commentary 25.1 concludes that this determination should be made on a case-by-case basis after analysing the sales and licensing contracts.

Cannistra and Rodríguez Cuadros provide two approaches to distinguish when a royalty payment can be considered a condition of sale[65]:

a.) ***Contractual*** approach: the royalty is a condition of sale if the sales agreement requires a payment in respect of the royalties.

b.) ***Control*** approach: the royalty payment would be a condition of sale if the licensor can influence and control the transaction beyond rather than include it in the sales contract.

Thus, the economic reality should be analysed to establish whether the importer could purchase products without paying the licence fees[66].

4.3 Treatment of the royalties provided free of charge.

The inclusion of intangibles in the customs value, as outlined in Article 8 of WTO Regulations; is a complex topic, especially when such intangibles are provided free of charge to the manufacturer for the production of the imported product.

It will be case than the importer has agreed to payment of a royalty fee for know-how, which is provided free of charge to the manufacturer because it is necessary to produce the imported product.

So, in principle, the intangible could fall under the scope of (iv) assist category and also, as a royalty payment. This situation is relevant since the inclusion of royalties is subject

[63] Rijo, J. "*Derecho Aduanero de la Unión Europea: Notas del marco normativo, doctrinario jurisprudencial*", Ed. Libros de la Fundación Aduanera, 2019.
[64] Lux, M., "*The Customs treatment of royalties and licence fees with regard to imported goods*" Ed. Global trade and Customs Journal, 2012.
[65] D. Canistra "*The Dutiability of Royalty Payments: The Impact of the World Customs Organization's Advisory Opinion 4.15*" Ed. Global Trade and Customs Journal, 2014.
[66] Lascano, J. "*The condition of sale for the purposes of the Royalty- Based adjustments under article 8 of the GATT Valuation Agreement*". Ed. Global Trade and Customs journal, 2014.

to specific requirements[67], whereas the (iv) category of assist is limited to some instances (that it is needed for the production process and not undertaken in the country of importation).

Determining whether the same intangible should be classified as royalty or assist -and which categorization takes precedence- it is not straightforward. The WTO Regulations do not provide any guidance; we place focus on the conclusions of the WCO Technical Committee:

a.) Advisory Opinions 4.8.

The Technical Committee examines whether royalties paid could be dutiable under Article 8(1) (c) WTO Regulations (as a royalty) or considered as an assist.

In case that the importer pays a third party (the licence holder) for the right to use a trademark[68]. Specifically, the licensor provides art and design work relating to the trademark.

The importer agrees with the manufacturer to purchase shoes bearing the trademark affixed to the shoes by the manufacturer, supplying the manufacturer with the art and design work provided by the licensor.

In this specific case, the Technical Committee concludes that those payments are dutiable under the terms of Article 8 (1) (c) WTO Regulations. Regarding the possibility of considering them as an assist, it concludes:

> *"Whether the supply of the art and design work/labels relating to a trademark would qualify as dutiable under Article 8.1(b) is a separate consideration.[69]"*

We can conclude that the WCO Technical Committee advocates that it should be ascertained if this intangible can qualify as royalty rather than assist.

b.) Advisory Opinion 4.13:

The Advisory Opinion analyses the case of an importer (related to the licensor) who holds a trademark right. Under the terms of a contract between the importer and the licensor, the licensor transfers the right to use the trademark to the importer for a royalty payment.

The importer furnishes the manufacturer with labels bearing the trademark which are affixed to the sports bags before the importation.

As in Advisory Opinion 4.8., the Technical Committee reviews and analyses one statement of facts, in which the payments could be either considered as royalties or also, as assist.

As in the previous Advisory Opinion, the WCO concluded that these are dutiable because it is considered a royalty payment.

[67] That the royalty payments are a condition of sale and also that the royalty are related to the goods to be imported.
[68] Advisory Opinion 4.8 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/03/2023).
[69] Advisory Opinion 4.8 (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/03/2023).

However, without analysing if it could be considered as an assist ("*Whether the supply of labels evidencing a trademark would qualify as dutiable under the provisions of Article 8.1 (b) is a separate consideration*[70]").

We can conclude that the WCO Technical Committee advocates that it should be ascertained if this intangible can qualify as royalty rather than assist.

c.) Case Study 8.1:

The Committee considers whether the customs value for imported garments should include the royalty (licence fee) for using paper patterns provided free to the manufacturer. The conclusion is that the customs value adjustment should be based on the tangible paper patterns provided as assists, indicating a shift in the Committee's stance towards prioritizing assists over royalties in such contexts.

d.) Case study 8.2.:

The case study is one of the cases which further clarifies the criterion from the Technical Committee about the royalties provided free of charge to the manufacturer.

This case is related to the licence fee that must be paid for the right to use the music video clips and master tape paid to a third party and provided (free of charge) to the manufacturer, in order, they produce the video laser discs (which contains the music video clips).

The Technical Committee concludes that the customs value should be adjusted, including the rights of the video laser discs (royalties). That adjustment is based on Article 8.1 (b) (iv).

As in Case Study 8.1., the WCO Technical Committee advocates that falling under the qualification of assist prevails over the qualification as a royalty.

4.3.1 CONCLUSIONS - Treatment of the royalties provided free of charge by the importer.

The distinction between classifying intangibles as royalties or assists is ambiguous, with potential overlap between the concepts.

The WCO Technical Committee understands that intangibles can indistinctly qualify under both categories, leaving no definitive criterion for prioritizing one classification over the other. This ambiguity introduces uncertainty for both operators and Customs Authorities, especially since considering a royalty payment as an assist eliminates the need to verify if it meets the three criteria outlined in Article 8.1(c) of the GATT for inclusion in the customs value.

[70] Advisory Opinion 4.13.: (https://www.wcotradetools.org/en/valuation/tccv-texts) (Accessed 05/04/2023).

5 EU implementation of the intangibles

In the case of the EU, as we will analyse, the legislative approach to handling intangibles closely mirrors the principles outlined in the WTO Regulations. This parallel ensures consistency in the valuation and treatment of intangible assets across international trade practices, reflecting a global standard within the EU framework.

The rules are both included in the Article 71 of the UCC:

1. After determining the customs value under Article 70, the price actually paid or payable for the imported goods shall be supplemented by:

> "(*b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*
>
> *(i) materials, components, parts and similar items incorporated into the imported goods;*
>
> *(ii) tools, dies, moulds and similar items used in the production of the imported goods;*
>
> *(iii) materials consumed in the production of the imported goods; and*
>
> *(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods;*
>
> *(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable*[71]".

It is evident that the WTO Regulations as been transposed into the EU´s UCC using terms identical to those originally set forth by the WTO. This direct transposition is mandated by the obligation by the obligations of WTO member countries to conform to WTO Regulations.

We will focus on the development of the UCC regulations; ensuring the UCC faithfully mirrors the terms and provisions of the WTO Regulations.

[71] Article 71 UCC (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02013R0952-20200101&from=EN.) (Accessed 12/12/2022).

Article 71 UCC is developed by Articles 135 and 136[72] of the UCC IA[73], which provide detailed guidance on the application of article 71 UCC.

5.1 Assists (Article 71.1. b) UCC)

Articles 135.4 and 135.5 of the UCC IA, develop the assists concept[74]:

> "***Article 135***[75]
> *Goods and services used for the production of the imported goods.*
>
> *(Article 71(1)(b) of the Code) (…)*
>
> *4. The value of the services referred to in Article 71(1)(b) of the Code, shall include the costs of **unsuccessful development activities** insofar as those were incurred in respect of projects or orders relating to the imported goods.*
>
> *5. For the purposes of Article 71(1)(b)(iv) of the Code, **the costs of research and preliminary design sketches** shall not be included in the customs value"*[76] (we have included the underlined).

The clarification on how to proceed with the unsuccessful development activities and the costs associated with research on preliminary sketches, is not defined in Article 8.1. b) (i) of the WTO Regulations, nor on the interpretative notes, nor in any of the documents issued by the Technical Committee.

As explained (in previous section 4.1), Article 8.1. b) of the WTO Regulations includes a list of "*numerus clausus*" concepts that should be added to the customs value.

So, this raises the question: are the EU regulations still in line with the WTO Regulations?

Upon an in-depth review of the content of Article 8.1.(b) WTO Regulations, it becomes clear that it does not cover the research costs. So, in principle, research costs should not be included; however, the development activities should be added to the customs value.

The reason for this distinction between the development activities and the research costs lies in a key aspect of Article 8.1 b) (i) WTO Regulations, which requires the service provided to be necessary for producing the imported goods (as already concluded in the previous chapter 4).

We would like to draw attention to the explanations by Diaz Gavierez in respect of what is necessary for the production, he mention that a service is dutiable only when the

[72] In this part, we would focus on the mere reviewal of the EU Regulations (without analysing any interpretative notes) and comparing it with the GATT regulations (without checking the Technical Committee publications).
[73] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (Hereinafter, UCC IA)
[74] In this sense, we would like to clarify that for the sake of not overextending this study, we would only focus on those points, which we see some controversy (in terms that they differ with the wording of the GATT).
[75] We have not analyzed those parts which analyzes how it should be valued the assist to be added to customs value, as we consider it out of the scope of this research.
[76] Article 135 UCC IA (http://publications.europa.eu/resource/cellar/a4ad784f-96b9-11eb-b85c-01aa75ed71a1.0006.02/DOC_1) (Accessed 01/01/2023).

manufacturer could not have produced the good without it. The possibility that other manufacturers could have produced the imported product without the service from the buyer is irrelevant. When the buyer supplies the service, but the manufacturer can produce the goods without it, this cost is not dutiable because such service is not necessary to produce the imported goods[77].To avoid any misunderstandings and keep within the terms of the WTO Regulations' terms, the EU included a clarification that, we understand is in line with the spirit of the Customs Valuation Code (GATT).

As we can see, after a thorough review of the EU legal regulations, we can conclude that only intangibles necessary for the production of the goods (which can be classified within the iv category) can be added to the customs value, in the same terms that in the WTO Regulations.

Therefore, we can conclude that the EU Regulations have been transposed following the spirit of the WTO Regulations.

5.2 Royalties (Article 71.1. c) UCC)

Under the UCC, the EU regulations do not explicitly define the notion of "*royalties*". However, a general definition of "*royalties and licence fees*" can be found in Article 12(2) of the OECD Model Tax Convention on Income and on Capital stating[78]:

> *"2. The term "royalties" as used in this Article, means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including computer software, cinematograph films, and films or tapes used for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience[79]".*

Once, we have defined the concept of royalty, we would like to draw the attention according to Article 71 of the UCC and Article 136 of the UCC IA, three criteria must be met for a royalty to be added to the customs value:

1. *The royalties should be related to the imported goods.*

The royalties must be related to the imported goods, which is a principle also underscored into the WTO Regulations.

This relationship would be fulfilled if the product could not be conceived without the intangible that it is part of the goods.

[77] Díaz Gavier, P. "*On Article 8.1(b) (iv) of the Customs Valuation Agreement: When Is the Value of Certain Services Supplied by the Buyer Relevant for Customs Value (i.e., Engineering, Development, Artwork, Design Work, and Plans and Sketches)?*" Ed. Global Trade and Customs Journal, 2014.
[78] Commentary 13 of the Customs Valuation Compendium (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 01/02/2023).
[79] Commentary 13 of the Customs Valuation Compendium (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 01/02/2023).

Specifically, Article 136.1 UCC IA presumes a connection when the rights transferred under the licence or royalties´ agreement are "*embodied*" in the imported goods[80]. Additionally, Article 136.2, UCC IA suggests a relationship when the royalty´s pricing method depends on the imported goods.

2. *The intangible price is not already included in the purchase price of the imported goods.*

This exclusion is to avoid a double taxation.

3. *The royalties constitute a condition of the sale of imported goods.*

The royalty payments must be a condition for the sale of the imported goods, another requirement set forth in the WTO Regulations.

This requirement is complicated because the same content is not always attributed to that concept. This is because, within the UCC, there is no comprehensive definition of what is considered a condition of sale, as it also happens with the WTO Regulations. As a result, we will focus our analysis on where the royalty fees payment is a condition of sale (without analysing if the royalties are related to the imported goods).

Article 136.4 UCC IA, however, outlines some examples of cases in which is considered that a condition of sale takes place:

> *"(a) the seller or a person related to the seller requires the buyer to make the payment.*
>
> *(b) the payment by the buyer is made to satisfy an obligation of the seller in accordance with contractual obligations.*
>
> *(c) the goods cannot be sold to, or purchased by, the buyer without payment of the royalties or license fees to a licensor[81]".*

Finally, Article 136.5 UCC IA: includes clarification that the "*The country in which the recipient of the royalties or licence fees payment is established is not a material consideration[82]*".

The idea of the Commission is that the persons to whom royalties or licence fees are paid are not relevant (in terms of the place of residence of such persons)[83].

Article 8.1 (c) of the WTO Regulations WTO Regulations is transposed into European law through Article 71.1. c) UCC and that these regulations have been transposed following the spirit of the WTO Regulations.

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[80] The presumption that the royalties are related to the goods imported, if they are embodied in the goods was already set forth by the WCO Technical Committee on the Advisory Opinion 4.3.

[81] Article 136.4 UCC IA: http://publications.europa.eu/resource/cellar/a4ad784f-96b9-11eb-b85c-01aa75ed71a1.0006.02/DOC_1) (Accessed 02/01/2023).

[82] Ibid.

[83] Commentary 13 of the Customs Valuation Compendium (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 01/02/2023).

Therefore, we can conclude that both legislations are aligned.

However, complexities emerge with Article 136 UCC IA. The EU Commission has provided some examples of what it is considered a condition of sale.

Therefore, we wonder, if these examples are in line with the spirit of the GATT Regulations? Topic that we will analyse this in detail in chapter 6.1.

5.3 Treatment of the royalties provided free of charge.

In the case of the intangibles, it is clearly difficult to identify which royalties provided free of charge can be understood, referring to Article 71.1. b) (iv) UCC, rather than to the following letter c)[84]. The EU Regulations do not set forth anything nor distinguish them and if they should be given priority one over the other.

This topic requires a detailed analysis, comparing ECJ decisions and the EU interpretative conclusions (to be carried out in next chapter 7.3).

[84] Fabio, M. "*Customs Law of the European Union*", Ed. Wolters Kluwer, 2020.

6 Comparison between the Valuation Agreement and the EU implementation

As stated previously, the EU (as a member of the WTO) has transposed into the internal regulations the principles of the WTO of the inclusion of the intangibles into the customs value.

As we have already concluded in the different parts of the previous chapter 5, the UCC (and articles 135 and 136 UCC IA) align with the WTO principles. However, questions about 136.4 UCC IA´s alignment persist, necessitating further review.

6.1 Analysis of Article 136.4 UCC IA

Article 136.4 UCC IA provides some examples of cases that are considered to constitute a condition of sale. In these cases, royalties or licence fees would be considered to be paid as a condition of sale of the imported goods when: "*(c)* the goods **cannot be sold to, or purchased by**, the buyer without payment of the royalties or license fees to a licensor[85]".

However, Article 71.1. c) UCC sets forth that it will be added to the customs value:

> *c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly,* ***as a condition of sale of the goods being valued****, to the extent that such royalties and fees are not included in the price actually paid or payable*[86]"

It is evident that Article 136.4 UCC IA introduces a new provision, in this case, the condition of purchase, which is not aligned with the UCC.

This is relevant as the presumption is that the royalties would be a condition of the sale of the imported goods, if the goods cannot be sold to/or purchased by the buyer without the payment of the royalties or licence fees to a licensor.

This new regulation attempts to simplify the determination on when the royalties are a condition of sale. However, it introduces a new an absolutely indeterminate provision, leading to the conclusion that the dutiability of licence fees paid by the importer, in any case where the sale of goods is in some way conditioned by the existence of a licence agreement[87], is questionable.

We understand that there is a risk that Customs authorities might interpret this Article broadly, which could lead to the situations mentioned by De Rybel. For example, in the case where a seller sells goods embodying a trademark owned by a third party, with no linkage between the importer and licensor, it could lead to the following treatment:

[85] Article 136.4 UCC IA: http://publications.europa.eu/resource/cellar/a4ad784f-96b9-11eb-b85c-01aa75ed71a1.0006.02/DOC_1) (Accessed 02/01/2023).
[86] Article 136.4 UCC IA: http://publications.europa.eu/resource/cellar/a4ad784f-96b9-11eb-b85c-01aa75ed71a1.0006.02/DOC_1) (Accessed 02/01/2023).
[87] Fabio, M. "*Customs Law of the European Union*", Ed. Wolters Kluwer, 2020.

a) Under the WTO Regulations, we will conclude that the royalty payment does not constitute at all a condition of sale [88].

b) However, applying an extensive application of the wording of Article 136.4 c) UCC IA, could lead to the case where the goods would not be able to be sold to the importer (Even if it is no linkage between the licensor and the manufacturer) because the licensor would have the contractual obligation to interfere in that transaction (through legal means to avoid the sale of a product subject to a trademark) [89].

Nevertheless, Fabio understands that whether the contractual agreements between the parties do not expressly emerge that the goods cannot be sold by the purchaser and distributed without the payment of the parties' rights, thus supporting the inefficacy of this letter.

We agree with that perspective because (as De Rybel´s examples indicate); we run the risk that, based on copyright regulations (even if it is not expressively outlined in the agreement between the different parties), if the importer does not pay the royalty, he would not be able to purchase the goods. Therefore, the payment of the royalties would be a condition of purchase and thus, the royalties should be added to the customs value.

Willems also agrees with our conclusions and understands that this "*clause can be qualified as catch-all*[90]".

In conclusion, this clause does not align with the WTO Regulations and, we understand that it is a high risk that the EU is trying to enlarge the concept of the condition of sale to include as many cases as possible within the scope.

Thus, in the following chapters, will analyse whether the ECJ or any EU interpretative conclusion has clarified the wording of Article 136.4 UCC IA, as it appears this clause allows broad interpretations.

[88] De Rybel, B, "*Dutiability of Royalty payments and licence fees: Extending the concept of "condition of sale" in the EU*", Postmaster Thesis, Erasmus University Rotterdam, 2011.
[89] Ibid.
[90] Willems, A. "*Changes in the Treatment of Trademark Royalties in EU Customs Law: The Example of the 3D Printing*", Ed. Global Trade and Customs Journal, 2015.

7 In how far is the ECJ still within the boundaries of the WTO legislation?

The primary issue with customs valuation lies in that the WTO Regulations´ rules are not very extensive, leaving much part of it to the interpretation and implementation by its member countries.

This ambiguity has led to confusion among traders as there is no consistency by the different countries who are members of the WTO.

Consequently, one might question whether the EU's interpretation of the WTO Regulations aligns with the aforementioned challenges.

As we have already discussed, the ECJ recently issued three decisions which have created controversy as it appears they are diverging from the WTO Regulations.

The decisions are the following:

- Case C-509/19 (BMW Bayerische Motorenwerke AG).
- Case C-775/19 (5th Avenue Products Trading Gmbh).
- Case C-76/19 (Curtis Balkan).

As we have concluded, the EU regulations adhere the spirit of the WTO Regulations.

Thus, it raises the question: on what basis did the Court render its decisions?

7.1 ASSISTS: The BMW Bayerische Motorenwerke AG case.

It analysed the inclusion of the intangibles, assists provided free of charge by the importer, to the customs value.

On September 10th, 2020, the ECJ issued the Case C–509/19 (BMW Bayerische Motorenwerke AG[91]).

7.1.1.1 BMW Facts

BMW produces vehicles containing control units. The control units are produced by different manufacturers and imported into the EU by BMW. At the same time, BMW provides the manufacturers with a software free of charge.

Based on the statement of facts of the ECJ case, this software is developed by BMW (or arranged for the development) by commissioned undertakings in the EU and 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[92].

[91] Hereinafter, the BMW case.
[92] ECJ BMW Case C–509/19: (CURIA - Documentos (europa.eu)) (Accessed 11/03/2023).

This software is made available to the manufacturers for them to perform a functionality test before the delivery of the control units. The software can also be used to ascertain whether any errors that have arisen upon the delivery were caused during the transport of the control units or during the implementation of the software.

During a customs inspection carried out by the Principal Customs Office, they concluded that the software should be added to the customs value. In this scenario, the Finance Court referred the case to the ECJ, asking if the software (developed in the EU) should be added to the customs value based on Article 71(1)(b) of the UCC.

7.1.1.2 ECJ decision into the BMW case

In that case, the ECJ considers that even if the software is not explicitly listed among the categories of assists, the intangible assets may still be covered by both Article 71 (1) (b) (i) and by Article 71 (1) (b) (iv) of the UCC.

Regarding Article 71 (1) (b) (i) UCC, it is especially relevant that the ECJ noted:

> *"It is therefore irrelevant, for the purposes of determining the customs value of the imported goods, that the product to which the value should be added is an intangible asset, such as software. It follows from the wording of that provision, which expressly refers to "goods" or "services", **that its scope is not limited to tangible assets**[93]".*

The ECJ clarified that (i) category of Article 71 (1) (b) UCC cannot be interpreted as excluding intangible assets.

To determine whether the software provided by BMW, which is not necessary for the production process, should fall under the category (i) rather than in Article 71 (1) (b) (iv) UCC, the ECJ referred to Conclusion 26 of the Customs Valuation Compendium[94]:

> *"conclusion No 26 of the Compendium of Customs Valuation Texts issued by the Customs Code Committee, referred to in Article 285 of that code, distinguishes between, first, **the intellectual services necessary for the manufacture of the goods**, which fall within the scope of Article 71(1)(b)(iv) of the Customs Code, and, secondly**, the intangible components incorporated into the imported goods to make them function and which are not necessary for their production**. According to the Customs Code Committee, those components are, however an integral part of the end products, since they are connected to, or incorporated in, them and make it possible for them to function or improve the way in which they function. In addition, they add new functionality to those end products and thus contribute significantly to the value of the imported goods. They therefore fall, according to the Customs Code Committee, within Article 71(1)(b)(i) of that code[95].*

[93]Ibid.
[94] Issued by the Expert Valuation Group, which are included in the Customs Valuation Compendium.
[95] Ibid.

Based on this Conclusion, the ECJ provides guidance on adding the economic value of the intangibles to the customs value, based on Article 71 (1) (b) (i) or by Article 71 (1) (b) (iv) of the UCC.

Thus, the ECJ held that Article 71(1)(b) of UCC must be interpreted to allow, for the purposes of determining the customs value of imported goods, that the economic value, of software undertaken in the EU (not necessary for the production process) and provided free of charge by the buyer to the seller established in a third country, should be added to the customs value.

7.1.1.3 Impact of the BMW Case on the EU Regulations

In the BMW case, the ECJ concluded that the software developed in the EU, not necessary for the production process, should be added to the customs value in accordance to Article 71 (1) (b) UCC.

The BMW decision is unsurprising because, this decision align with ECJ´s prior judgment. Notably the Compaq Case[96] (which was referenced already in the BMW case deliberation)[97] .

Upon a preliminary analysis of the statement of facts of the BMW Case, it becomes evident that:

- This situation cannot constitute a dutiable assist under Article 71(1)(b) (iv) UCC, as the software undertaken in the EU should not be added to the customs value.

- At the same time, that software cannot be classified as an assist under the (iv) category (set forth in Article 71(1)(b) (iv) UCC), because it was not necessary during the production process.

Consequently, on what legal ground does the ECJ determine that software (unnecessary for production, developed in the EU, and provided free of charge) should be added to the customs value?

The ECJ concludes that this software should be added to the customs value as it falls under Article 71 (1) (b) (i) UCC, which stipulates:

> *"The value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:*

[96] We will analyse on detail that judgment on chapter 8.1.2.3.
[97] In this sense, the ECJ refers to the Compaq case in the following terms:
"*the Court has already had occasion to reject the argument* ***that software does not fall within any of the categories which may be the subject of an adjustment to the customs value****, by holding that, in order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable (see, to that effect, judgment of 16 November 2006, Compaq Computer International Corporation, C–306/04, EU:C:2006:716, paragraphs 23, 24 and 37)*".
(62019CJ0509 (europa.eu)) (Accessed 01/02/2023).

> *(i) materials, components, parts and similar items incorporated into the imported goods[98]"*

The ECJ asserts that (i) category of Article 71 (1) (b) UCC cannot be interpreted as excluding intangible assets. consequently, the ECJ considers that intangible assets may fall under both Article 71(1)(b)(i) and Article 71(1)(b)(iv) of the UCC.[99]

To ascertain the appropriate classification, the ECJ references Conclusion 26 of the Customs Valuation Compendium.

As we previously analysed in chapter 4.1. of this paper, according to the WTO Regulations, only services (provided free of charge) necessary for production would be dutiable.

Diaz Gavier similarly concludes saying that the value of a service is not dutiable under Article 8 WTO Regulations unless the service is necessary for the production of the importer good and therefore, falls within Article 8.1. (b) (iv) GATT[100]. Thus, the ECJ´s interpretation seems to diverge from the interpretation of the WCO.

Thus, we understand that ECJ is enlarging the scope of Article 71(1)(b) (i) UCC, adding the option to include the services provided free of charge. Consequently, the intangibles (not necessary for the production process) must be added to the customs value.

Although the ECJ is enlarging the scope of (i) category of assist, and that interpretation contradicts the spirit of the WTO Regulations, we endorse this approach (although, it is due to an extensive interpretation of the wording of that Article), because is a literal interpretation of the article's wording, and it technically aligns with the UCC's language and ensures that the customs value mirrors the economic reality of the transaction.

7.1.2 Previous treatment of the intangibles was provided free of charge.

The ECJ on the treatment of intangibles (especially focused on the analysis of software provided free of charge) for customs valuation purposes, although complex, points towards the inclusion of the intangibles into the final price[101].

Key ECJ decisions pertinent to this issue include:

7.1.2.1 Van Houten Case

The ECJ case, C-65/85 (Van Houten). Van Houten declared during the importation of Cocoa Beans, in addition to the net invoice price, additional costs incurred from weighing the product.

[98] Article 71 UCC (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02013R0952-20200101&from=EN.) (Accessed 01/03/2022).
[99] Ibid.
[100] Diaz Gavier, P. "*On article 8.1 (b) of the Customs Valuation Agreement: When is the Value of Certain Services Supplied by the Buyer Relevant for the Customs Value (i.e., Engineering, Development, Artwork, Design Work, and Plans and Sketches)?*", Ed. Global Trade and Customs Journal, 2014.
[101] Cernat, L. "*Thinking in a Box: A 'Mode 5' Approach to Service Trade*". Ed. Kluwer Law International BV, 2014.

According to the contract of sale, the sale was concluded under "*CIF Hamburg Net Delivered weights*". It means that the purchase price was to be determined by weight upon delivery and the cost of determining this weight was to be borne by the buyer.

The German Customs incorporated the weighing value in the customs value. Van Houten appealed arguing that the weighing costs were wrongly added to the customs value.

The ECJ was asked if it should be added to the transaction value the costs associated of establishing the weight of goods upon arrival if that cost is to be borne by the buyer.

This Case is significant for our study as it highlights the conditions under which an assist should be included in the customs value. In this sense, the ECJ noted:

> *"11. According to the Commission,* ***the transaction value is adjusted in appropriate cases, pursuant to Article 8 of the regulation, but the additions which must be made to the price actually paid pursuant to that article*** *do not include the weighing costs. Thus the only relevant consideration is whether those costs form part of the 'price actually paid or payable', as defined in Article 3 (3) of the regulation. Article 3 (3) (a) specifies the payments which are to be included in that price and Article 3 (3) defines those which are not to be included.*
>
> *12. According to the Commission, the transaction value is adjusted in appropriate cases, pursuant to Article 8 of the regulation, but the additions which must be made to the price actually paid pursuant to that article do not include the weighing costs. Thus the only relevant consideration is whether those costs form part of the 'price actually paid or payable', as defined in Article 3 (3) of the regulation. Article 3 (3) (a) specifies the payments which are to be included in that price and Article 3 (3) defines those which are not to be included*[102]*".*

Drawing from the ECJ´s deliberation in that case, and considering the current Article 71.3 UCC[103], we can conclude that the four categories of assist must be stringently interpreted[104].

7.1.2.2 BayWa AG Case

The ECJ case, C-116/89 (BayWa AG). BayWa buys basic seed from EU breeders and subsequently selling it to non-EU propagation undertakings that produce harvest seed. That harvest seed is then imported back into the EU by BayWa.

The arrangements between BayWa and the propagation undertakings were governed by separate contracts, which stipulated that BayWa was responsible to import the harvest seed into the EU and must pay a license fee to the EU breeders, in the year following the harvest.

Under its contracts with the EU breeders, BayWa must pay licence fees calculated according to the quantity of harvest seed produced in the non-member country. In this

[102] ECJ Van Houten case, C-65/85: (EUR-Lex - 61985J0065 - EN (europa.eu)) Accessed on 01/05/2023.
[103] Article 71.3 UCC: "*No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.*"
[104] Hesselink, T. "*EU Customs Valuation: wake-up call for MNE*". Ed. Global Trade and Customs Journal, 2012.

scenario, the ECJ was asked if the licence fees paid to the EU breeders should be added to the customs value, or if including the license fees contravenes the principle that intellectual services provided within the EU are exempt from customs duties.

In this case, we would like to draw attention to its Opinion of Advocate General[105], delivered on May 2nd, 1990, who suggested that these payments should be classified as royalty payments. Thus, it concluded:

> *"In the case of a sale of harvest seed produced from basic seed supplied by the buyer, licence fees which the buyer has to pay in respect of the harvest seed to the breeder of the basic seed are not to be added to the price paid or payable, for the purpose of determining the customs value**, if the buyer's obligation to pay the licence fees arises out of a transaction unrelated to the sale in question**[106]"*

The Advocate General understood that the requirements for royalty to be added to the customs value were not met.

Contrarily, the ECJ referring to Article 32 (b) CCC[107] (current Article 71 (1) (b) UCC[108]), concluded that the value of materials incorporated in the imported goods, supplied directly or indirectly by the importer free of charge, for use in connection with the production of the imported goods, must be included in the customs value[109].

The ECJ reasoned that the customs value of the imported harvest seed comprises the value of the basic seed and the cost of propagation incurred in non-EU countries. Regarding the licence fees, the ECJ considers:

> *"It is clear that the licence fees are intended to constitute consideration for the breeders' services and to provide the breeders with a fair share of the profits resulting from the breeding of the basic seed[110]"*

Due to this fact, the ECJ advocates that "*The licence fees must therefore be attributed to the purchase of the basic seed, and form part of the price payable for that seed. Since the basic seed is then incorporated in the imported goods, **those fees must be added, pursuant to Article 8(l)(b)(i)[111], to the price actually paid or payable for the imported seed**[112]*".

[105] Opinion of Mr. Advocate General Lenz delivered on 2 May 1990. – Case Baywa AG v Hauptzollamt Weiden (Case C-116/89).
[106] Opinion of Mr. Advocate General, C-116/89 EUR-Lex - 61989C0116 - EN (europa.eu).) (Accessed 03/04/2023).
[107] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (hereinafter, CCC).
[108]On purpose, we will be referring along the whole paper to the Article currently in force (even it was not the applicable one at the time that the ECJ issued itsdecision).
We are following that approach on the whole document.
[109] ECJ BayWa Case C-116/89: (EUR-Lex - 61989J0116 - EN (europa.eu) (Accessed 03/04/2023).
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0116&from=en.
[110] Opinion of Mr. Advocate General, C-116/89 (EUR-Lex - 61989C0116 - EN (europa.eu)) (Accessed 03/04/2023).
[111] That Article 8(l)(b)(i) of the customs valuation provides that the value, apportioned as appropriate, of 'materials, components, parts and similar items incorporated in the imported goods.
Currently replaced by Article 71 (1) (b) UCC.
[112] Opinion of Mr. Advocate General, C-116/89 (EUR-Lex - 61989C0116 - EN (europa.eu)) (Accessed 03/04/2023).

Based on the above, the ECJ concluded that the license fees that BayWa pays to the German breeders for the propagation of that seed should be added to the Customs Value as an assist, in accordance with the current Article 71 (1) (b) (i) UCC.

Furthermore, As Lux concludes why ECJ did not follow the Opinions of the Advocate General:

> "*This result has also been justified with the argument that the foreign sellers would not have received the harvest seed at the agreed price if the buyer– instead of the seller– had not paid the license fee to the breeder* [113]".

So, we see that the ECJ always concludes consistently, because their opinion is that the customs value should reflect the economic reality of transactions. This principle serves as a robust foundation for determining which elements ought to be incorporated into the customs value.

The ECJ's decision provide clear guidance on the inclusion of intangibles provided free of charge and produced within the EU (such as breeder's services) in category (i) of assist.

This is a significant departure from the stipulations of Article 8 of the WTO Regulations, which limit dutiable services to those undertaken outside the country of importation (in this case, the EU) and necessary for the production of the imported goods, as specified in Article 8.1.(b)(iv) of the WTO Regulations.

So, we consider that the ECJ is extending the scope of items falling under (i) of assist. However, we agree on the approach of the ECJ, insofar as it is trying that the customs value would reflect the economic reality of the underlying transaction.

In this case, insofar that the outcome of this ECJ decision is the starting point of the BMW Case, we will further explore its implications and relevance in chapter 8.1.4 of our study.

7.1.2.3 Compaq case

The ECJ case, C-306/04 (Compaq Computer International Corporation). Compaq Europe is a subsidiary of Compaq US which sells Compaq data processing equipment in Europe and has a distribution centre in the Netherlands.

Under an agreement between Compaq US and Microsoft, Compaq is allowed to pre-install Windows operating systems on its computers for a payment of USD 31 per computer.

Compaq US purchased laptop computers from Taiwanese computer manufacturers. As part of this sale, it was agreed that the operating systems would already be installed on the hard drives of the computers when they were delivered. Therefore, Compaq US made these operating systems available free of charge to the manufacturers, who then installed on the computers.

[113] Lux, M. "The Customs Treatment of Royalties and Licence fees with Regard to Imported Goods". Global Trade and Customs Journal, 2012.

Compaq US then sold to Compaq EU the laptop computers, which were dispatched free on board from Taiwan to the Netherlands. Compaq EU declared the computers for free circulation without including the value of the operating systems.

In this scenario, the ECJ faced the challenge of deciding whether the value of pre-installed operating system should be included in the customs value of the imported laptops. This issue arose despite the operation system not falling under any of the categories of Article 32(1)(b) CC[114] , but determination hinged on the economic reality that the pre-installed software effectively increased the value of the goods.

The Court argued that Compaq US provided the operating systems to Taiwanese manufacturers free of charge. As these systems had a unitary economic value that was not included either in the value of the transaction between the Taiwanese manufacturers and Compaq US or in that of the transaction between Compaq US and Compaq EU. Consequently, the Court found that an adjustment to the transaction value was necessary.

Nevertheless, the ECJ does not state if the reason that dutiable nature of the software stemmed from its classification under Article 32(1)(b)(i) CC[115] (incorporated materials) or under Article 32(1)(b)(iv)[116] CC (engineering, development work) or a Royalty (Article 32 (1) c CC[117]).

For a more nuanced understanding, the Opinion of the Advocate General Stix-Hackl[118], proves invaluable:

a.) *"intellectual assists supplied for the purposes of manufacturing the product, such as, for example, a patent, a design or a model. Such assists may, if the other factual conditions are satisfied, come within subparagraph (iv) of Article 32(1)(b) of the Customs Code (…)*[119]

b.) *"These must be distinguished, on the other hand, from intangible components which are installed in the imported goods in order for them to work, for example the wash programme in a washing machine or the software in an on-board computer in a car. Unlike, for example, a patent, a model or a design, an intangible component is not directly necessary for the production of the imported product. Despite its incorporeality, however, an intangible assist is still a constituent part of the end product, since it is integrated into it, (22) enhances its capabilities or even adds a new functionality and thereby contributes not insignificantly to the value of the imported product. This category of intangible components embodied in an imported product in my view includes the software considered in Brown Boveri, for example*[120]*"*.

The Advocate´s General Opinion in the Compaq case highlights a significant point: intangibles assets (such as pre-installed operating systems) even when they are provided

[114] Current Article 71.1 (b) UCC).
[115] Currently, it is regulated by Article 71.1 (b) (i) UCC.
[116] Current Article 71.1 (b) (iv) UCC.
[117] Currently, the royalties are regulated into the Article 71.1 (c) UCC.
[118] Opinion of Advocate General Stix-Hackl delivered on 26 January 2006, Case C-306/04 (Compaq Computer International Corporation vInspecteur der belastingdienst – Douanedistrict Arnhem).
[119] Opinion of Advocate General Stix-Hackl C-306/04 (CURIA - Documentos (europa.eu)) (Accessed 11/03/2023).
[120] Opinion of Advocate General Stix-Hackl C-306/04 (CURIA - Documentos (europa.eu)) (Accessed 11/03/2023).

free of charge, can be considered as materials, components, parts, and similar items incorporated in the imported goods in accordance with the current Article 71 (1)(b)(i) UCC. This interpretation opens up a pathway for including the value of such intangible assists in the customs value of imported goods.

The Compaq case´s conclusion is in line with the precedent case, the BayWa AG Case, where the ECJ advocated that the intangible asset could fall under one category or another one of assist, depending on the specifics of the case, based on the wording of Article 71 (1) (b) UCC. This flexible approach envisages the evolving nature of goods and the significance of intangible components in their valuation, so as, they reflect its economic reality.

This case is especially relevant because it is used by the ECJ on the BWM Case, where the court concluded that the software, even it was not necessary for the production process and was undertaken within the EU, should fall under the (i) category of assist[121].

This classification underlines the ECJ broad interpretation of what constitutes an assist, extending beyond physical inputs so as to include intangible elements that add value to the finished product.

The outcome of the ECJ decision and the conclusions from Advocate General in the Compaq Case, serve as a foundational element of the BMW Case, demonstrating the importance of adding the intangible assists to the customs valuation.

As we have seen, this precedent emphasizes the necessity of adapting customs practices to the realities of modern trade, where intangible assets increasingly contribute to the value of physical goods.

[121] As the ECJ mentions on the BMW case:
"*17 In that regard, the Court has already had occasion to reject the argument that software does not fall within any of the categories which may be the subject of an adjustment to the customs value, by holding that, in order to determine the customs value of imports of computers equipped by the seller with software for one or more operating systems made available by the buyer to the seller free of charge, the value of the software must be added to the transaction value of the computers if the value of the software has not been included in the price actually paid or payable (see, to that effect, judgment of 16 November 2006, Compaq Computer International Corporation, C–306/04, EU:C:2006:716, paragraphs 23, 24 and 37)*".

7.1.3 Expert Valuation Group: Customs valuation compendium

Regarding the conclusions of the Expert Valuation Group (hereinafter, EVG), which are included in the Customs Valuation Compendium[122], although they are not legally binding, the ECJ considers them to nevertheless be an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such may be regarded as a valid aid to the interpretation of the UCC[123].

We would like to draw attention to the following conclusions that analyse whether the intangibles provided free of charge should be added to the customs value:

7.1.3.1 Conclusion number 26: Software and related technology: treatment under Article 71 (1) (b) UCC.

The Expert Valuation Group (EVG) analyses the treatment of software provided free of charge to the producer, for use in connection with the production and sale of the imported goods.

The EVG is very clear considering that the software, installed in imported goods to enable their operability or enhance their functionality, although intangible should fall within the scope of Article 71 (1) (b) (i) UCC, even if it is not necessary for the production of the imported goods. This is relevant because EVG concludes:

> *"These intangible components are, however, an integral part of the final goods,* ***since they are connected to or part of them, make their operability possible or improve them****. Furthermore, they add a new functional character and thereby* ***contribute significantly to the value of the imported goods****. Such intangible assists fall under Article 71(1)(b)(i) UCC*[124]*.*

Conversely, EVG also makes a distinction for intangible assists (such as software/technologies) made available by the buyer to produce the imported goods:

a.) Which are necessary for the production[125]. In other words, it is necessary part of the production process of the goods. Such intangible assists fall under Article 71(1)(b)(iv) UCC[126].

b.) And those intangibles, which are not necessary for the production but contribute to increase the value of the imported goods. Such intangible assists fall under Article 71(1)(b)(i) UCC.

[122] Our next comments are based on the wording of the updated version of 2022 (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en).
[123] Judgment of 9 March 2017, *GE Healthcare*, C–173/15).
[124] Conclusion number 26, (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 10/03/2023).
[125] Based on the Opinion of the Advocate General Stix-Hackl on the Compaq case, which were already analysed on the previous chapter 8.1.2.3.
[126] EU 2022 Compendium of Customs Valuation.

It appears the conclusion is like the ECJ decision in the BMW case. It is evident that there is an extra limitation of the spirit of the WTO Regulations, which stipulates that the intangibles would only be dutiable if they fall under the (iv) category of assist.

Therefore, it can be concluded that the EVG is increasing the scope of the first category of assist set forth in Article 71 (1) (b) (i) UCC. However, it is evident that EVG is aligns with the precedent set in the BayWa case, insofar that the EU is trying that the customs value accurately reflects the economic reality of the products being imported.

As we have already concluded in the BMW case, even though the ECJ is enlarging the scope of (i) category of assist, in a manner that may seem to contradict the spirit of WTO regulations, we endorse this approach, as it ensures that the customs value truly reflects the economic reality of the transaction.

7.1.3.2 Conclusion number 28: Production inputs under points (ii) and (iv) of Article 71 (1) (b) UCC

EVG analyses the application of Article 71 (1) (b) UCC in relation to the supply of designs and related data for textile production purposes.

In this Conclusion, the discussion is around the use of cutting-position images (the outputs of Computer-Aided Design -CAD- programs) for manufacturing textiles in third countries. The images, supplied free of charge by the buyer to the manufacturer in the third country, are sent by electronic means (e-mail) and are essential for both the production and sale of the imported goods. The question analysed is whether the value of these designs should be considered in the customs value of the goods.

The CAD programs are used to produce cutting-position images in the EU, which are then forwarded to manufacturers in third countries.

The EVG deliberates whether these CAD designs to be seen as:

a) "*means of production*" assists under Article 71(1)(b)(ii) of the UCC;

b) or "*intellectual assists*" and designs under Article 71(1)(b)(iv) of the UCC.

Regarding the distinction between the (ii) and (iv) category of Article 71 (1) (b) UCC, at first glance, there appears to be no overlap between the two categories.

However, the EVG considers these inputs essential to the production of the goods as they include detailed instructions for creating cutting-position images (integral to the clothing manufacturing process). Due to that fact, the EVG reaches its conclusion as follows:

> *"In the case in question, the file with the cutting-position image is opened and the image is printed on a paper plane using a plotter. The manufacturer of the imported goods does not need to provide any further intellectual input. The images sent electronically can be used directly for the production of the imported goods.*

> *In this case, the* ***image is used for cutting the pieces of cloth. These images (patterns) could therefore be considered as assists under Article 71(1)(b)(ii) of the Code***[127]*".*

In Conclusion number 28, the EVG understands that CAD design, which provides a cutting-position image, should be considered dutiable, because it qualifies as an assist under Article 71(1)(b)(ii) UCC, rather than falling under (iv) category of Article 71(1)(b) UCC.

This view significantly diverges from the conclusions drawn by WCO Technical Committee (on the previously analysed, Commentary 18.1 "*Relationship between Articles 8.1 (b) (ii) and 8.1 (b) (iv)*").

Consequently, we consider that Conclusion number 28 misaligns with the WTO Regulations or with the ECJ decisions.

Despite our previous conclusions, it is important to highlight that the EVG´s position is based on:

> *"The assists described under Article 71(1)(b) of the Code are distinctive categories of assists.* ***In general, the four categories of assists are relatively well described and capable of being distinguished****, one from the other. However, while the 1st, 2nd and 3rd* ***categories of assists are relatively well defined, the 4th category of assist is relatively undefined and vague****.*
>
> *The problem* ***with this 4th category is that there is no link with any production process in relation to the finished goods****. The only condition to be met is that such an assist is "necessary for the production of the imported goods."*
>
> *Therefore, while this assist is described in terms of designs, drawings, plans, or artwork, etc., there are no requirements or conditions as to how it is applied or used.* ***However, the use of artwork, designs, engineering, etc. normally requires intermediate technologies and various means of copying, or transformation****, in order to contribute to the production of goods*[128]*".*

This distinction hinges on whether the intangible is "*used in the production*" or is "*necessary for the production*" to differentiate its categorization.

Article 71 (1) (b) UCC is defined as "*numerus clausus*", which means only those concepts explicitly included in the wording of the text can be considered as an assist, and thus, added to the customs value.

Despite this, the EVG concluded that a CAD design providing cutting-position image for textiles, which is provided by electronic means to the manufacturer (they are provided by e-mail, without physical support), should be regarded as a contribution falling under the

[127] Conclusion number 28, (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 10/03/2023).
[128] Conclusion number 28, (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 10/03/2023).

second category ("*tools, dies, molds and similar items*"). Although that, the fourth category explicitly includes "*artistic and design work, plans and sketches*"[129].

The Van Houten case confirms the four categories of assist must be interpreted rigorously. So, an analyse Article 71 (1) (b) (ii) UCC is necessary to ascertain the correctness of the EVG´s approach:

> "(*b) the value, apportioned as appropriate, of the following* ***goods and services*** *where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable: (...)*
>
> *(ii) tools, dies, moulds* ***and similar items*** *used in the production of the imported goods*[130]*";*

We analyse the meaning of the word "*similar* by referring to the Cambridge Dictionary, which defines it as "*looking or being almost, but not exactly, the same*[131]. Consequently, the CAD design provide cutting-position image for textiles, even though used to produce imported goods, cannot be assimilated to tool, dies and moulds (objects thar are effectively used during the production process).

Thus, we agree with Ibañez that in this case, they should be classified within the (iv) assist category.

We reiterate that the EVG concluded that intangibles (in this case, CAD design to provide cutting-position image for textiles) should fall under the (ii) category of assist instead of the (iv) category of assist.

However, the BMW Case recently advocated that "*intangible assets may be covered by both Article 71(1)(b)(i) and Article 71(1)(b)(iv) of the Customs Code*[132]". Thus, we understand that the ECJ advocates that the intangibles could not be classified at all within the (ii) category of assists.

We acknowledge that, through the BayWa case, the ECJ confirmed, that the customs value should reflect the economic reality of the imported products, and we agree with this approach. However, there should be certain limits.

Nonetheless, it seems that the EVG is attempting to artificially narrow the scope of the (iv) category of assist in this case.

> ***"In general, the four categories of assists are relatively well described and capable of being distinguished****, one from the other. However, while the 1st, 2nd and 3rd* ***categories of assists are relatively well defined, the 4th category of assist is relatively undefined and vague****.*

[129] Ibáñez Massilla, S. "*GPS Aduanas*" Ed. Tirant lo Blanc, 2022.
[130] Article 71 UCC (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02013R0952-20200101&from=EN.) (Accessed 07/05/2022).
[131] Cambridge Dictionary (SIMILAR | English meaning - Cambridge Dictionary) (Accessed 09/04/2023).
[132] ECJ BMW Case C–509/19: (CURIA - Documentos (europa.eu)) (Accessed 11/03/2023).

> *The problem* ***with this 4th category is that there is no link with any production process in relation to the finished goods****. The only condition to be met is that such an assist is "necessary for the production of the imported goods."*

We strongly disagree with this approach trying to limit the scope of (iv) category of assist, particularly following the clarify provided by the BMW case.

It appears that the EVG intends to narrow the application of Article 71 (1) (b) (iv) UCC, (excluding from taxation the intangibles produced in the EU), by broadening the scope of application of the other categories detailed in Article 71 (1) (b) UCC.

We reiterate that, according to Article 8 WTO Regulations, only services that are necessary to produce the importer good and not undertaken within the EU (country of importation) should be subject to duty. As previously analysed, the four categories of assist must be interpreted strictly.

Hence, we would like to reiterate that this Conclusion does not align with the spirit of the WTO Regulations.

Our disagreement with the EVG is grounded in their extensive and artificial interpretation of the concept of assist when it is related to intangibles provided free of charge.

In conclusion, this type of assist should, as the UCC indicates, fall under the (iv) category.

We also believe that the underlying purpose of this interpretation is to unjustly increase the duty scope, an action that does not accurately reflect the economic reality which the customs value should represent. This approach, we assert, is not correct.

To finalize this analysis, we draw the attention that there is an ongoing customs valuation case under review by the ECJ (case Case C-307/23, G GmbH)[133], which will determine whether certain label designs (provided free of charge by the buyer) should be qualified as an assist.

It confirms that it is not an easy topic, but it offers the ECJ an opportunity to clarify the definition and scope of intangible assists provided free of charge, addressing many of the questions and uncertainties discussed in this chapter.

7.1.4 CONCLUSION- Impact of the BMW of the intangibles provided not necessary for the production process.

The BMW case and Conclusion number 26 from the EVG indicate that the EU has enlarged the scope of the (i) category of assist. This expansion encompasses the provision of goods and services added to the imported product, even when they are not essential to the production process.

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[133] Case C-307/23, G GmbH: Request for a preliminary ruling from the Bundesfinanzhof (Germany) lodged on 17 May 2023 — G GmbH v Hauptzollamt H (https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:62023CN0307) (Accessed 23/09/2023).

However, that approach is not new, with the ECJ having previously advocated in similar stance in the BayWa and the Compaq cases[134] .

Despite this interpretation appears to contradict the spirit of the WTO regulations, we support this approach. Although it results from an extensive interpretation of the Article´s wording, it ensures that the customs value reflects the economic reality of the underlying transaction.

Regarding Conclusion number 28, we disagree with the EVG. We understand that they are attempting an extensive, artificial interpretation of the assist´s concept wording. This interpretation is not technically in harmony with the UCC's wording, as this type of assist should categorize under the (iv) category.

We would like to highlight that the ECJ´s decision in the BMW case already suggests that the intangibles could only fall under the (i) and (iv) assist categories.

Our understanding is that the sole purpose of this interpretation is to broaden the range of dutiable intangibles, risking a customs value that does not reflects the economic reality. Thus, we consider that approach is not correct.

We expect that the ECJ will clarify this concept through the Case C-307/23, G GmbH)[135], and will limit this exaggerated interpretation.

7.2 ROYALTIES

The ECJ has issued two decisions analysing the concept of the condition of sale.

To avoid extending the scope of this document, we will only focus on analysing the notion of the condition of sale, without analysing in detail the evolution of the requirement that the royalty is related to the imported goods.

7.2.1 The 5th Avenue Products Trading GmbH case

The ECJ analyses the notion of the condition of sale.

On September 19th November 2020, the ECJ issued Case C-775/19, (5th Avenue Products Trading GmbH[136]).

7.2.1.1 The 5th Avenue Facts

5th Avenue is a company established in Germany, engaged in the trade and manufacture activity of tobacco products. It entered an agreement with Habanos for exclusive

[134] The ECJ Compaq case does not expressively mention that the intangibles could fall under the (i) category of assist, because the intangibles supplied were undertaken outside of the EU; so, in any case, they would be dutiable. However, the Advocate General´s conclusions expressively included that option and explained in which cases the assist should fall under (i) category and in which ones, they shall fall under the (iv) category.

[135] Case C-307/23, G GmbH: Request for a preliminary ruling from the Bundesfinanzhof (Germany) lodged on 17 May 2023 — G GmbH v Hauptzollamt H (https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:62023CN0307) (Accessed 23/09/2023).

[136] Hereinafter, the 5th avenue case.

distribution rights. 5th Avenue has granted exclusive right to import, sell, and distribute cigars produced by Habanos in Germany and Austria.

5th Avenue ordered cigars utilized a customs warehouse located in its headquarters in Germany for the importation of the goods. 5th Avenue declared into the import declaration (release for free circulation) the purchase price (paid). freight and insurance. However, the consideration of the compensation due under the exclusive distribution agreement (EDA) for the part of the goods sold in Austria was not included in determining the customs value.

At that time the purchase order was placed, it was not known how many of the goods would be sold in Austria and in Germany.

The German Customs authorities advocated that the payment of the compensation under the EDA represented a separate component of the purchase price for the imported goods and should thus, be considered in the customs valuation of the goods.

The Finance Court referred the case to the ECJ, asking whether the payments for the exclusive distribution rights should be added to the customs value as a royalty.

7.2.1.2 ECJ decision into the 5thAvenue case

The ECJ starts defining the concept of royalties, limiting to the use of intellectual property rights:

> *"As the European Commission rightly observed in its written observations, it should be noted that the concepts of 'royalties' and 'licence fees' which appear in those provisions relate solely to payments made by a buyer to a seller for the use of intellectual property rights.*
>
> *As is apparent from the actual wording of Article 157(1) of the Implementing Regulation, those concepts refer to payments for the use of rights relating to the manufacture of goods, such as, in particular, 'patents, designs, models and manufacturing know-how', the sale for exportation of goods, such as, in particular, 'trade marks, registered designs', and the use or resale of those goods, such as, in particular, 'copyright, manufacturing processes inseparably embodied in those goods' (see, to that effect, judgment of 9 March 2017, GE Healthcare, C 173/15, EU: C:2017:195, paragraph 33)[137]"*

Given that the exclusive distribution right falls outside the scope of that definition, the ECJ determined that payments related to an exclusive distribution right cannot be considered as a royalty fee.

As a result, the ECJ reformulates the referred question, and it asks:

> *"Accordingly, it must be held that the first question put by the referring court asks whether Article 29(1) and (3)(a) of the Customs Code must be interpreted as meaning that a payment made for a limited period of time by the buyer of imported goods to the seller of those goods, in return for the granting by the seller of an*

[137] ECJ 5th Avenue Case, C-775/19 (62019CJ0775 (europa.eu)) (Accessed 11/03/2023).

exclusive right to distribute those goods in a given territory, calculated on the basis of the turnover achieved in that territory, must be included in the customs value of those goods".

It should be noted that the '*price actually paid or payable*' within the meaning of Article 29(1) of the Customs Code (now Article 70 of the UCC) corresponds to the total payment made or to be made by the buyer to the seller for the imported goods. This encompasses all payments made between them as a '*condition of sale*' for those goods.

The customs regulation (both WTO Regulations and EU) does not explicitly define the notion of a condition of sale.

The ECJ noted that the expression "*condition of the sale*" holds the same meaning in Article 70.2 UCC (which defines the transaction value) as it does in Article 71.1 (c) UCC (regulating the addition to the customs value of the royalties or licence fees).

According to the ECJ, a payment qualifies as a '*condition of sale*' for the goods being valued when, within the contractual relationship between the seller, or a person related to the seller, and the buyer, that payment is so important to the seller that, without such payment, the seller would not have concluded the sales contract.

Additionally, the ECJ also clarified that the payment would be considered as a condition of sale, by the fact that the payment is for a limited period of time only (during which, the royalty should be added to the customs value).
Based on this reasoning, the ECJ concludes that the distribution rights should be added to the customs value, because they constitute a condition of sale:

> *"It is apparent from the information available to the Court that, according to the assessment made by the referring court, this is precisely the case, since that court has already come to the conclusion in the order for reference that the seller of the goods, given that it is also the recipient of the payment at issue, would not have supplied those goods for exclusive distribution in Austria without that payment, so that that payment must be regarded as forming part of the conditions of sale of those goods[138]"*

7.2.1.3 Impact of the 5th Avenue case

The key of this judgment lies in the interpretation of the concept of condition of sale, which is applied in the same terms to define the transaction value (currently addressed in Article 70.2 of the UCC), as in terms of the addition of the Royalties (Article 71.1 (c) UCC).

Article 7 of the WTO Regulations restricts the scope of the transaction value to the "*price actually paid or payable for the goods when sold for export to the country of importation[139]*" was used, and the interpretative note to Article 1 of the agreement generically indicates that this price refers to "*imported goods*".

[138] ECJ 5th Avenue Case, C-775/19 (62019CJ0775 (europa.eu)) (Accessed 11/03/2023).
[139] Artcile 7 WTO Regulations Valorizaciones | WCO Trade Tools (Accessed 01/03/2023).

However, UCC introduced an unfortunate nuanced definition of the price paid or to be paid as a "*condition of sale of the imported goods*" (Article 70, paragraph 2, UCC), assigning the exact legal meaning to the term *"condition of sale*"[140].

The EU Regulations diverge with the WTO Regulations, as evident in the above case. This divergence clarifies the concept of the condition of sale, and delineates when, the intangibles should be added to the customs value.

It is also relevant, to recognize a condition of sale despite the payment is made during a limited period of time.

We will analyse the notion of the condition of sale outlined in the above case and also the Curtis Balkan case (stated below).

7.2.2 The Curtis Balkan case.

The ECJ analyses specific aspects of adding the royalties into the customs value, focusing on determining the condition of sale and ensuring that the royalty is related to the imported goods.

ECJ issued Case C-76/19, (Curtis Balkan" EOOD [141]).

7.2.2.1 The Curtis Balkan Facts

Curtis Balkan, a company established in Bulgaria and owned by Curtis US, operated under two contracts:

- Contract about the right to patent use (hereinafter, the patent use agreement).
- A contract relating to the supply of management services.

Under the patent use agreement, Curtis US sets a standard price to Curtis Balkan kits. which includes the manufacturing of fuel supply indicators and high-frequency speed regulators based on patented technology. Curtis Balkan is authorised to produce and sell engine speed regulators and components for electric vehicles, in return for a fee paid for the right to use the patent.

Curtis US receives royalties for 10% of the net sale price of the goods covered by the contract and sold by Curtis Balkan.

Based on the contract for the supply of services, Curtis US undertakes, inter alia, to carry out the operational activity for Curtis Balkan. The service includes management, marketing, advertising, preparing budgets, financial reports, information systems and human resources.

The Bulgarian customs authorities discovered that the '*parts and components*' imported by Curtis Balkan for the manufacture of products for which Curtis Balkan pays royalties

[140] Bellante, P. "*Note to the court of Justice judgment in Case C-775/19, 5th Avenue Products Trading: the Condition of the sale and the transaction value under EU Customs Valuation Law*". Ed. Global Trade and Customs Journal, 2021.
[141] Hereinafter, the Curtis Balkan case.

to Curtis US[142]. However, the customs declarations of the imported goods did not include the royalty payments.

During such inspection, it was concluded that, apparently, Curtis US controls the entire production line, from the negotiation and centralized purchase of the components required for production up to the sale of the finished products. The components incorporated in the products are manufactured per specifications imposed by Curtis USA and designed specifically for those products. In addition, the selection of another supplier must be approved by Curtis US[143].

The external vendors, of the imported components confirmed to have had no relation with Curtis US, had not conditioned the sale on the payment of royalties, and Curtis US was not able to direct or limit the activities of those vendors.

The Bulgarian Supreme Administrative Court referred the case to the ECJ, asking if the royalties' payments are related to the imported products and if the payments are a condition of sale. To ascertain if the payment of the royalties should be added to the customs value.

7.2.2.2 ECJ decision into the Curtis Balkan case

The ECJ analysed the requirements laid out in Article 32 (1) (c) Customs Code (which since 2016 has been replaced by Article 71.1 (c) UCC).

Our focus here is solely on the ECJ´s conclusions relating to

- The payments of royalties are related to the imported goods.

  This aspect is relevant since the royalty is paid for a good obtained in the EU, as the imported product is a component of it.

- The conclusions regarding whether to the payments are a condition of the sale.

The ECJ understands that the method of calculating the amount of the royalty or licence fee may be an indication that the royalties relate to the imported goods but is not a decisive factor.

In addition, the ECJ considers that the mere fact that the payments are partially related to the goods being imported does not exclude the payments could be considered as dutiable. They should be added to the customs value (with a necessary an adjustment for partial inclusion).

The ECJ concludes that where the final product is licensed, the royalty or licence rights relate only to the imported of the semi-finished goods that are incorporated into the final product, especially if there is a sufficiently close connection between the royalties or licence rights and the imported semi-finished goods.

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[142] ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 10/03/2023).
[143] However, for any order of a value not exceeding USD 100 000 (approximately EUR 85 000), Curtis USA does not need to be notified or give its approval.

Such connection exists where the know-how supplied under the licence agreement is necessary to manufacture of the imported semi-finished products[144]. In this case, the ECJ concludes that the royalty payment would be related to the imported goods if:

a) The imported product is specifically designed for integration into the licensed final product, without no other use being envisaged for the intermediate products. In that case, a connection exists, indicating that the royalties are related to the imported goods.

b) On a separate note, if the know-how is only necessary for completing the licensed final products, a close connection does not exist, leading to the conclusion that the royalties are not related to the imported goods.

The ECJ considers that the referring Court must test whether a close connection in the aforementioned scenarios.

Regarding whether the royalty constitutes a condition of sale, the ECJ reference its doctrine from the GE Healthcare case concerning the notion of the condition of sale. It emphasized that a condition of sale of the goods is fulfilled when, by virtue of the contractual relationship established between the seller, or a person connected to him, and the buyer, the payment of the royalty is of such importance for the seller that, if it were not made, the sale would not occur.

To determine if a condition of sale exists, especially when the seller of the goods is different from the licensor, it essential to assess whether the seller can ensure that the importation of the goods is conditional upon the payment of the royalty.

This link is determined based on one person's direct or indirect control over the other. In order to determine if that control exists, the ECJ refers to Commentary n 11 (currently deleted)[145] "*Even if the actual sales contract between the buyer and the seller does not explicitly require the buyer to make the royalty payments, the payment could be* ***an implicit condition of sale****, if the buyer was not able to buy the goods from the seller* ***and the seller would not be prepared to sell the goods to the buyer without the buyer paying the royalty*** *fee to the licence holder*".

Based on the guidance of that Commentary, the ECJ clarified the notion of condition of sale "*the decisive question being merely whether, in the light of all the relevant factors, had that payment not been made, the conclusion of the sales contracts in the form selected and, consequently, the supply of the goods would have taken place or not*[146]."

The ECJ considers that the referring Court must assess whether Curtis US has sufficient control over the manufacturers.

7.2.2.3 Impact of the Curtis Balkan case

[144] Schippers, M.J. "*Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.
[145] It is no longer in force.
[146] ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 10/03/2023)

As stated above, there is no provision in the customs regulations (including both the UCC and the WTO Regulations) that contains a definition of the condition of sale. Therefore, the EU and the ECJ play a decisive role in the definition of such notion.

We would like to state that the Curtis Balkan case is especially relevant for this research thesis, because it analyses the requirements to be fulfilled in order that a royalty payment should be added to the customs value:

1. *The royalty payments are related to the imported goods:*

The definition of the condition of sale, set forth by the EC on the Curtis Balkan case, as the critical aspect of this decision. For instance, Schippers ´conclusions highlighted that the most important part of the Curtis Balkan case is the analysis if the payment of royalties is related to the imported goods[147].

This is relevant since Curtis Balkan imports semi-finished products used to produce the final product, paying the royalty fee for the know-how used to produce a finished product. Product being produced after the importation of the semi-finished product.

The ECJ concludes that the royalty or licence rights are related to the imported goods (incorporated into the final product) if there exists a sufficiently connection between the royalties and those goods[148] (semi-finished products used on the production of the final product).

It is evident that the EU willingness to deem royalties to be related to the imported goods, if those payments are connected to services used after the importation of the semi-finished product. There lies a potential risk in the EC´s judgment, insofar that it is increasing the situations that the royalties would be considered as related to the imported goods.

Schippers criticizes the ECJ´s approach because it is inconsistent with the principle that the customs value should be determined in accordance with a fair, uniform and neutral system excluding the use of arbitrarily determined or fictitious customs values[149].

The statement of facts of the Curtis Balkan case parallels Advisory Opinion 4.17 of the WCO Technical Committee (previously analysed), which concluded that in case of importation of semi-finished products which would be used into a production process, the payment of royalties is not related to the imported goods.

Thus, it could be concluded that in this sense, the ECJ´s decision diverge with the WTO Regulations.

The most relevant part of the Curtis Balkan is the analysis of whether the royalty payments are related to the imported goods. However, for the shake of no overextending this analysis, we will focus only on the notion of the condition of sale outlined by the ECJ in the Curtis Balkan case and in the 5th Avenue case.

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[147] Schippers, M.J. *"Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.
[148]ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 06/05/2023)
[149] Ibid.

2. *Definition of the condition of sale:*

This decision is vital for defining the concept of the condition of sale. The ECJ concluded that the determination of the concurrence of the requirements to understand that a condition of sale exists is a factual question that must be analysed on a case-by-case basis (analysing all the circumstances present in the case), and such condition cannot be presumed from the existence of a network of intra-group contracts and contracts with independent entities[150].

The ECJ follows the notion of the condition of sale started in the GE Healthcare case, through which it is understood that the condition of sale of the goods is fulfilled when, by virtue of the contractual relationship established between the seller, or a person connected to him, and the buyer, the payment of the royalty is of such importance for the seller that, if it were not made, the latter would not make the sale[151].

In the GE Healthcare case, the royalties were presumed to automatically constitute a condition of sale, insofar that all the entities involved with related parties:

> *"Having regard to the foregoing, the answer to the third question is that Article 32(1)(c) of the Customs Code and Article 160 of Regulation No 2454/93* ***must be interpreted as meaning that royalties or licence fees are a 'condition of sale' of the goods being valued where, within a single group of undertakings, those royalties or licence fees are required to be paid by an undertaking related to both the seller and the buyer and were paid to that same undertaking***[152]"

In contrast in the Curtis Balkan Case, the ECJ clarifies that the condition of sale would not automatically be presumed if the licensor is related to the different parties[153]. The ECJ nuanced this view, due to this fact, the ECJ advocates that it should analyse if the payment, in this case has not been made, would imply the conclusion of the sales contract and, consequently, the supply of the goods would have taken place or not[154].

This new ECJ´s approach aligns with the WCO Technical Committee´s Advisory Opinion 4.13, through which the Technical Committee understood that even though the parties are related, it does not imply automatically that the royalty payments are a condition of sale.

We would also like to draw the attention that the US Court of International Trade recently issued the Trimil Vs US (December 17, 2019) in similar terms[155]. It is noted that this criterion is applied by the different Customs Authorities.

To determine the existence of the condition of sale, especially when the seller of the goods is different from the licensor, it should be assessed whether the importation of the goods

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[150] Calderón, J.M. "*Comentario a la Sentencia del Tribunal de Justicia de la UE, de 9 de Julio de 2020 (Sala Séptima), Asunto C-76/19*", Ed. Revista Técnica Tributaria N. º 131, 2020.
[151] This approach is also followed by the 5th Avenue Case.
[152] GE Healthcare case C-173/15 (CURIA - Documentos (europa.eu)) (Accessed 15/03/2023).
[153] Calderón, J.M. "*Comentario a la Sentencia del Tribunal de Justicia de la UE, de 9 de Julio de 2020 (Sala Séptima), Asunto C-76/19*", Ed. Revista Técnica Tributaria N. º 131, 2020.
[154] EY – Tax Alert - (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 (ey.com)) (Accessed 05/04/2023).
[155] Calderón, J.M. "*Comentario a la Sentencia del Tribunal de Justicia de la UE, de 9 de Julio de 2020 (Sala Séptima), Asunto C-76/19*", Ed. Revista Técnica Tributaria N. º 131, 2020.

is conditional upon the payment of the royalty. Such a connection is determined based on direct or indirect control of one person over the other, based on factual or legal elements, which allow limitations and guidance to be imposed.

The ECJ instructs the referring court to verify if the licensor effectively controls the supplier, referencing Commentary No. 11 (currently deleted) of the EVG.

Despite that Commentary was on the 2022 version, is considered relevant for its similarity to Commentary 25.1 of the GATT Regulation[156]. That Commentary outlined the importance of the control factor (set forth on the WCO Advisory Opinion 4.15) by the licensor over the manufacturer: *the decisive question being merely whether, in the light of all the relevant factors, had that payment not been made, the conclusion of the sales contracts in the form selected and, consequently, the supply of the goods would have taken place or not*[157]."

In the Curtis Balkan case, given the supplier´s declaration that they do not have a relation with Curtis US and the different set of facts described in this case[158]we can conclude that the royalty was not a condition of sale. Thus, it should not be added to the customs value.

7.2.3 Treatment of the condition of sale before those Cases

The requirement that the payment of royalties constitutes a condition of the sale is one of the most problematic requirements, because, as the doctrine itself states, it is not always attributed to the same content.

As stated, both cases follow the criterium already set forth in the GE Healthcare case.

7.2.3.1 BayWa Case (General Advocate´s Opinions)

The General Advocate understood that the harvest seed provided free of charge should be understood as a royalty. He then delved into whether such royalty payments ought to be dutiable:

> *"38. Inclusion under Article 3(3)(a) could not be envisaged unless the licence fee were a condition of the sale between the plaintiff and the propagators and unless the buyer (the plaintiff) were to pay it to a third party to satisfy an obligation of the seller (the propagation undertakings). As has been seen from the examination of the contract terms, the obligation to pay the licence fees lies not on the propagators but on the plaintiff as licensee. Furthermore, the licence fee is not mentioned in the contract of sale — far less is it a condition thereof — so that inclusion of the fee in the customs value is out of the question.*
> *(…)*
> *'When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 1(2) shall not be considered as met unless the seller or a person related to him requires the buyer to make that payment.'*

[156] Lascano, J. "*Ajustes del valor en aduana por el pago de regalías, precedentes internacionales*", V Foro Internacional sobre Valoración Aduanera, 2021.
[157] ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 10/03/2023)
[158] Among others, that Curtis US was not able to determine the prices, Curtis Balkan was able to purchase the semi-finished products directly, the manufacturers were not obliged to only supply to Curtis Balkan, etc.

> *45. Since the propagators have not the slightest influence on the licence fee payments, there can be no doubt that the value of those payments is not to be included in the customs valuation[159]".*

The General Advocate aligns the GATT´s approach (prior to Commentary 25.1 and Advisory Opinion 4.15 were released), understanding that only in very limited cases, royalty payments could be a condition of sale.

7.2.3.2 GE Healthcare Case

The ECJ case, C-173/15 (GE Healthcare Gmbh), is pertinent to be analysed as the ECJ refers to it in the Curtis Balkan case.

GE Germany entered a contract with M (Monogram Licensing International Inc), a company of the GE Healthcare group, grating GE Germany.

- A non-exclusive licence, for consideration, to use the GE Group's trademark, with strict compliance on quality standards, for products manufactured, sold and for services provided by GE Germany.

- A non-exclusive licence, free of charge, allowing the use of the GE brand for reselling the goods to other GE group subsidiaries.

M reserved extensive monitoring powers and, in the event of non-compliance, the contract would be annulled.

The fee was set at a percentage of GE Germany's annual turnover.

The Customs Authorities found that GE Germany did not add to the customs value the royalty paid to M for the imports of goods purchased from other GE Group companies.

The ECJ had to decide if the royalties (not known at the time of importation) should be added to the customs value and if those payments could be considered as a condition of sale[160]. Additionally, if the royalties partially referred the imported goods, they should be adjusted, and only the proportion related to the imported goods should be added.

This judgment, the ECJ defined the concept of the condition of sale (not defined either in the EU customs regulations or in the GATT).

Considering the nature of a condition under the earlier law, the Court has had regard to the conclusions of the Customs Code Committee, which stated that[161]:

> *"The question to be answered in this context is whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee.* ***The condition may be explicit or implicit.*** *In the majority of cases it will be specified*

[159] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CC0116&from=es.
[160] In this case, we will focus on the condition of sale, and we are not going to analyze the criteria followed by the ECJ, in order to understand that those royalties are related to the imported goods.
[161] Lyons, T." *Eu Customs Law*". Ed. O for University Press Academic UK, 2018.

in the licence agreement whether the sale of the imported goods is conditional upon payment of a royalty or licence fee. It is not, however, essential that it should be so stipulated[162]*"*.

This judgment is particularly relevant since it clarifies the notion of "condition of sale", adhering to the conclusions of Advocate General[163], which advocated for an objective interpretation of the condition of sale.

The factual background of this case mirrors the scenario described in WCO´s Advisory Opinion 4.11[164], and based the conclusion on the basis of Commentary 25.1. Consequently, the ECJ ruled that "*royalties or licence fees are a 'condition of sale' of the goods being valued where,* ***within a single group of undertakings, those royalties or licence fees are required to be paid by an undertaking related to both the seller and the buyer and were paid to that same undertaking***" .

The ECJ consideration means that the condition of sale test, within a single group of undertakings, is automatically fulfilled (deemed condition of sale).

However, that approach was nuanced by the Curtis Balkan case, which positioned that belonging to a group of companies does not be automatically fulfilled this condition. Instead, it must be assessed if effectively the sale would take place without payment of the royalty fee.

7.2.4 Expert Valuation Group: Customs valuation compendium

The conclusions of the Customs Code Committee, included in the Customs Valuation Compendium[165], while not legally binding, are nevertheless considered by the ECJ as a crucial tool for ensuring the uniform application of the Customs Code by the customs authorities of the Member States. As such may be regarded as a valid aid to the interpretation of the UCC[166].

Our focus is on the commentaries that analyse the concept of the condition of sale, particularly in relation of adding the royalties to the customs value.

7.2.4.1 Commentary No 3: Incidence of royalties and licence fees in the customs value

This commentary helps us to define the concept of royalties, as it also refers to definition of royalty found in article 12 of the OECD Model Double Taxation Convention on Income and on Capital (1977) Convention.

Such reference is crucial, as it defines the concept of the condition of sale. Specifically, when goods are purchased from one person and a royalty or licence fee is paid to another person, the payment can still be considered as a condition of sale of the goods. This is

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[162] GE Healthcare case C-173/15 (CURIA - Documentos (europa.eu)) (Accessed 15/03/2023)
[163] Opinion of the Advocate general Mengozzi, delivered on July 28th, 2016.
[164] In that case, the WCO analyses if it should be added to the customs value, the royalty that the importer is required to pay to a related party the trademark holder), who is also related to a seller (manufacturer), for the right to use the trademark which is affixed to the imported goods.).
[165] Commentary number 3 (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 02/02/2023).
[166] Judgment of 9 March 2017, *GE Healthcare*, C–173/15, EU:C:2017:195, paragraph 45).

particularly relevant in scenarios when the seller, or a person related to him, is requiring the buyer to make that payment. For example, in a multinational group, if goods are bought from one member of the group and the royalty is required to be paid to another member of the same group, this constitutes a condition of sale. Likewise, this principle would apply when the seller is a licensee of the royalty recipient, and the latter has influence over the sale conditions[167].

7.2.4.2 Commentary number 13: Guidance on Articles 128 and 136 UCC IA.

That commentary examines the following issues:

a) The concept of the last sale for export, which determined the customs value, and.

b) The scope of Article 136 UCC IA, in determining in which cases the royalties should be added to the customs value.

Our analyses would be limited on the aspect concerning royalties.

Article 136.4 UCC IA extra limited the scope set forth in Article 71 UCC. However, the EU Commission acknowledge this extra limitation of Article 136.4 UCC IA and sought to mitigate it, through Commentary 13 of the Customs Valuation Compendium:

> *"Article 136 (4)(c) UCC IA, which refers to the payment of royalties to the licensor. This is **not a major clarification**, it simply makes explicit the fact that royalties are, by definition, paid to the owner (licensor) of the licenced rights and are usually paid by the buyer of the goods.[168]".*

The EU Commission understands that letter c) of Article 136. 4 UCC IA simply makes explicit the fact that royalties by definition, is paid to the owner (licensor) of the licenced rights and by the buyer of the goods.

It is significant that the EU Commission has attempted to address the overextending of the functions of an implementing regulation (UCC IA) over the UCC, through an interpretative tool (like the Customs Valuation Compendium), which, paradoxically, has only contributed to further legal uncertainty.

> *4. The rule indicates that condition of sale provisions are based on commitments entered into by, and binding on, the buyer or the seller. This indicates that the "condition of sale" criterion refers **not only to conditions imposed by or on the seller, but also on the buyer**, and this is a useful clarification[169]"*

The EU Commission (through the EVG) does on to elaborate on what constitutes a royalty and specifies the conditions under which such payment ought to be incorporated into the customs valuation of the imported goods.

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[167] Commentary number 13 (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 10/04/2023).
[168] Commentary number 13 (https://taxation-customs.ec.europa.eu/document/download/9a13b89e-9e5e-482e-be0b-f593d96bc815_en) (Accessed 10/04/2023).
[169] Ibid.

Finally, the EVG explains the conception of sale based on several practical examples.

As Ibañez mentions, the Commission opts for the *"objective"* conception of the condition of sale (interpreting it as a fundamental assumption without which the sale of the imported goods could not occur – a necessary prerequisite for the transaction), and not for the *"subjective"* conception (where the condition was imposed at the seller´s initiative)[170].

However, there is a perception that through its Commentary, aligned article 136.4 UCC IA, the EU Commission is trying to extend the concept of the condition of sale. This expansion seems to transform it into a condition of purchase rather than a condition of sale.

7.2.5 CONCLUSION – Impact of the 5th Avenue and the Curtis Balkan Cases of the notion that the royalty payments are a condition of sale.

Echoing Lyons, we agree that with the enactment of the UCC, and the removal of the previously applicable definition, the EU appears to be adopting a policy of broadening the scope for adding the royalties to the customs value[171] and, also facilitated by the UCC IA (implementing Regulation).

This is issue is particularly relevant with Article 136.4 UCC IA, which narrows the scope established in Article 71 UCC. Yet, through Commentary nº 13, aligned article 136.4 UCC IA, the EU Commission is trying to extend the concept of the condition of sale to that extent that it essentially becomes a condition of purchase.

However, the ECJ (through the Curtis Balkan case) is more inclined to adopt a verification of the influence approach.

The Curtis Balkan case mandates an assessment to determine if the of the royalty payment would prevent the competition of the sales contract and, thereby, the delivery and importation of the goods. It is evident that the ECJ, through the Curtis Balkan case, nuanced his view in respect of the GE Healthcare case.

Based on the above, we can conclude that the ECJ is aligned with the WCO´s subjective condition of sale (outlined by the WCO Technical Committee in Commentary 25.1 and, on the Advisory Opinion 4.15).

This raises a question: should the ECJ be required regarding the validity of article 136.4 UCC IA might it be deemed invalid?

7.3 ROYALTIES PROVIDED FREE OF CHARGE

Understanding the categorization and implications of intangibles provided free of charge, presents challenges. Specially, determining whether royalties provided free of charge should be classified according to Article 71.1. b) (iv) UCC, rather than to the following letter c)[172], is crucial in this context.

[170] Ibáñez Massilla, S. "*GPS Aduanas*" Ed. Tirant lo Blanc, 2022.
[171] Lyons, T." *EU Customs Law*". Ed. Oxford University Press Academic UK, 2018.
[172] Fabio, M. "*Customs Law of the European Union*", Ed. Wolters Kluwer, 2020.

When intangibles are provided free of charge and they could be interpreted as assist or royalties, EU Regulations lack clear guidance on whether these terms could be interpreted interchangeably, or which concept would take precedence.

Thus, an analyse of the ECJ judgments is necessary to clarify the scope of these concepts and their hierarchical relationship.

7.3.1 The Curtis Balkan case

This case has been explained in chapter 7.2.2. Curtis Balkan paid royalty fees for acquiring know-how which is used during the production of goods. The case description suggests that Curtis Balkan provided this know-how for the production of imported products.

It is not clear if Curtis Balkan is providing an assist to the manufacturer. In this sense, the ECJ explicitly states:

> *"Thus, as regards royalties and licence fees, Article 32(1)(c) of the Customs Code, the conditions for the application of which are set out in Articles 157 to 162 of Regulation No 2454/93,* ***constitutes the only legal basis for adjusting the customs value by adding royalties or licence fees***[173]*".*

The ECJ´s posits that intangible provided free of charge, when deemed an assist, is dutiable solely under the terms of Article 71(1)(b) UCC. Similarly for royalties, albeit under Article 71(1)(c) UCC.

In contrast, the WCO Technical Committee understands that intangibles can indistinctly qualify under both categories, leaving no definitive criterion for prioritizing one classification over the other.

Then, Clarification is needed on when an intangible can be considered an assist and when it should be viewed as a royalty.

The main ECJ judgments related to this topic would be the following ones:

7.3.2 Treatment of the royalties provided free of charge before that Case.

7.3.2.1 BayWa AG Case

As previously discussed in chapter 7.2.2. It is interesting because it helps to understand even though a payment could be understood by the parties as a royalty fee, it would be considered from a customs perspective as an assist[174].

However, it is not clear if in this case the ECJ was aligned with the WCO Technical Committee approach.

[173] ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 10/03/2023)
[173] Ibid.
[174] Schippers, M.J. *"Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.

7.3.2.2 Compaq case

This case has been explained in the previous chapter 7.1.2.3.

Rijo criticized that case, arguing that artificially the ECJ advocates that the software installed in the computer is classified as an assist rather than a royalty. This is because if we classified as royalties, the payment of such fees must be a condition of sale of the imported goods to be added to the customs value.[175].

The ECJ confirms that software can be treated both as a dutiable assist and as a royalty fee. However, it does not clarify whether Article 71(1)(b) UCC takes precedence over section (c), particularly since the software was developed outside the EU; thus, raising the question of its dutiability regardless. This suggests that the ECJ was adopting the approach of the WCO Technical Committee.

Fabio´s analysis, based on the reflections issued by the Advocate General (in the Compaq case) helps differentiating between both concepts:

> *"With the clarification offered by the Advocate General, the discrimen between products and services referred to in Article 32, n. 1, letter b), sub. iv) CCC (Article 71(1)(b)(iv) UCC), and the fees and licence fees referred to in subparagraph c), it seems to be detected at the time from which the claim of the intellectual property right (hereinafter in this chapter 'IPR') owner begins. In particular, it becomes relevant if the payment is attributable to the right to use an intellectual contribution before or after work.*
>
> *If, in fact, the intellectual elements are made available before the realization of the licensed product, these will be more easily traceable to the products and services referred to in Article 32, n. 1, letter b), sub iv). If, on the other hand, the consideration agreed between the licensor and the licensee intends to compensate only for the use of the product after the license, the intellectual element subject to assessment must reasonably be included among the considerations and rights described in Article 32, n. 1, letter c)* [176].

While the Opinion of Advocate General in the Compaq Case was mainly focused on differentiating the type of assist applicable (as interfered from the BMW case), Fabio´s reflections are useful to understand that the royalties and assist are not the same and have their own scope (as we will see clearly explained in other examples of this chapter).

7.3.3 Expert Valuation Group: Customs valuation compendium

The conclusions of the Customs Code Committee relate to the royalties provided free of charge. In this sense, we would like to draw attention to the following conclusions:

7.3.3.1 Commentary number 13: Guidance on Articles 128 and 136 UCC IA.

[175] Rijo, J. "*Derecho Aduanero de la Unión Europea: Notas del marco normativo, doctrinario jurisprudencial*", Ed. Libros de la Fundación Aduanera, 2019.
[176] Fabio, M. "*Customs Law of the European Union*", Ed. Wolters Kluwer, 2020.

This Commentary, related to royalty payments, was elaborated upon previous chapter 7.2.4.2.

Attention is drawn to the practical example (case 3) where the EVG analyses the design and manufacturing know-how. This expertise, for which the importer compensated the licensor through the payment of royalties, was provided free of charge to the manufacturer of the importer product.

The essence this comment is generic and only indicates to the fact that these intangibles provided free of charge should be understood as an assist.

This observation leads us to conclude that there is a high risk that any intangible provided to the supplier (even if it can be considered as a royalty) will have to be added to the customs value.

The EVG concludes that both notions can be applied, which opens the door indistinctly for such contributions being considered as an assist or a royalty. Although in the other hand, they fail to satisfy the criteria for classification as a royalty to be added to the customs value. Being added to the customs value as an assist.

We conclude that the EVG is following a similar criterion of the WCO Technical Committee on Case Study 8.2.

7.3.3.2 Conclusion number 30: Application of Article 71 (1) (b) and Article 71 (1) (c) UCC

The EVG analyses situations when a royalty, or a part thereof, is paid to a licensor for the manufacturing know-how. This licensor provides this manufacturing know-how to the production companies free of charge for the manufacture of the imported product.

The EVG suggests that the application of assist and royalty fees could be delineated as follows:

> *"28. Article 71(1)(b) of the Union Customs Code is relevant **if manufacturing knowhow needed for the manufacture of the imported goods is provided under a licensing agreement** and is made available free of charge to the manufacturer of the imported goods by the licensee or indirectly by the licensor.*
>
> *29. Consequently, Article 71(1)(c) of the Union Customs Code **would only need to be checked for parts of the royalty that do not concern a production factor** (e.g. royalties for using trade mark rights, distribution know-how, utilisation knowhow, maintenance and repair know-how, etc.)*[177].

Schippers highlights that Article 71 (1) (b) UCC does not have priority over Article 71 (1) (c) UCC because "***they have each own scope and own set of conclusions to meet for inclusion or exclusion purposes***". It seems that the EVG reached this conclusion as well[178].

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[177] Conclusion number 30 (https://taxation-customs.ec.europa.eu/system/files/2022-07/2022%20EU%20Valuation%20Compendium%20EN.pdf) (Accessed 08/04/2023)

[178] Schippers, M.J. "*Software and Customs Valuation*", Ed. Global Trade and Customs Journal, 2021.

It is evident that the EU does not align with the opinion of the WCO Technical Committee, which advocates that the intangibles can be qualified under both concepts without distinction.

At the same time, it should be noted that the EVG agrees with the criterion set out by the ECJ in the Curtis Balkan case. However, the ECJ, in the Curtis Balkan case, qualified the intangibles as royalties (rather than assist as indicated in Commentary 30), because, based on Article 157 (in force at the time of the facts of the Case) those intangibles were classified royalties[179].

This interpretation leads to misunderstanding. However, based on Commentary 30, we content that if the Curtis Balkan case were assessed under the current regulations (UCC rather than the Regulations in force for the Case), this know-how would be qualified as an assist.

7.3.3.3 CONCLUSION- Impact of the Curtis Balkan case on the royalties necessary for the production process provided free of charge

Understanding the categorization and implications of intangibles provided free of charge is highly complex and potentially confusing issue. As studied, the ECJ and EVG´s criterion divers from the one of the WCO Technical Committee.

In the case of the EU, from the insights offered in Commentary 30, it discernible that:

a.) Intangibles provided under a licensing agreement and made available free of charge to the manufacturer by the licensee or indirectly by the licensor, which constitute essential manufacturing know-how for the production of the imported goods, are classified as an assist.

b.) Alternatively, intangibles provided free of charge, which do not concern a production factor (e.g. royalties for using trademark rights, distribution know-how, utilization knowhow, maintenance, and repair know-how, etc.), are treated as a royalty.

Nevertheless, the WCO Technical advocates that the intangibles can be classified under both concepts indistinctly, without a preference for one over the other.

Therefore, the ECJ and EVG´s conflicts with the WTO Regulations. However, the aligned EU´s approach offers a clearer and more secure framework for the stakeholders.

[179]Schippers, M.J. *"Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.

8 Can the ECJ reinterpret the formal valuation rules to align with the current commercial environment?

Globally, customs valuation rules have evolved from objective market value basis to the current transaction value system.

The goal is to increasingly enhance the revenue-collecting capacity of the customs duties. The shift towards customs valuation resembles the product's real value. Consequently, the ECJ is extending the concepts of the condition of sale and the first category of assists, to ensure that the customs value reflects the economic reality.

What is the impact of the policy on the customs valuation of the intangibles following the recent ECJ decisions? Can ECJ enforce the change? Is this consistent with the WTO Regulations?

8.1 Impact on the case of assist.

Article 8.4 of the WTO Regulations states that the four assists' categories must be interpreted strictly[180]. The ECJ already confirmed this approach in the Van Houten International case[181] rejecting the incorporation in the customs value of weight costs borne by the buyer of a consignment of imported cocoa beans.

This issue appeared to be straightforward until the BayWa case (as discussed in chapter 7.1.2.2.), where the ECJ ruled that the royalty should be added to the customs value. However, the ECJ based its decision on Article 8.1(b) of GATT regulations (assist) rather than Article 8.1. (c) GATT[182](royalties).

The ECJ's criterion is that the customs value must reflect the real economic value of an imported good[183], thus, taking considering all elements that have economic value[184].

In the BMW case, the ECJ concluded that the software (undertaken into the EU) should be added to the customs value and classified as an assist under the first category of the Article 71 (1) (b) UCC). Therefore, the ECJ is also considering that the intangibles (provided free of charge by the importer) as dutiable, even if they were not necessary for the production process.

However, the GATT Regulations state that the supplies of intangibles (free of charge) could only be classified under the (iv) category.

In the BMW case, the ECJ argues that the (i) category of assists covers both the supplies of goods and services, thereby the ECJ is enlarging the scope of (i) category of assist.

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[180] Hesselink, T. "*EU Customs Valuation: wake-up call for MNE*". Ed. Global Trade and Customs Journal, 2012.
[181] C-65/85 - Hauptzollamt Hamburg-Ericus v Van Houten.
[182] Lascano, J. "*Ajustes del valor en aduana por el pago de regalías, precedentes internacionales*", V Foro Internacional sobre Valoración Aduanera, 2020.
[183] The Compaq case, Case C-306/04, (62019CJ0509 (europa.eu)) (Accessed 19.03.2023)
[184] The Compaq case, Case C-306/04, (62019CJ0509 (europa.eu)) (Accessed 19.03.2023)

To support the approach, the ECJ based its decision on Conclusion number 26 of the EVG[185]. Thus, this criterion is not new, and the ECJ had already reached similar conclusions in the BayWa and Compaq cases[186] .

The key question is whether the extension of the assist´s concept aligns with the GATT regulations.

As Diaz Gavier posits, under the terms of the WTO Regulations, the value of a service is not dutiable under Article 8 WTO Regulations unless the service is necessary for the production of the importer good and thus, classified within Article 8.1. (b) (iv) GATT.

It is evident that the BMW case contradicts the WTO Regulations. Raising questions, if the ECJ is entitled to make such interpretation?

The main problem with customs valuation is that the WTO Regulations' rules are not very extensive, leading to diverse interpretations and implementations by each country. This creates uncertainty for the traders, leading to different approaches among countries.

In the case of assist, the ECJ diverges from the WCO Technical Committee Advisory Opinions. However, these WCO Advisory Opinions do not have the force of law unless they are incorporated into the national legislation[187].

The ECJ contradicts the spirit of the WCO Customs Valuation Code (specifically the guidance issued by the WCO Technical Committee). Yet, since the Advisory Opinions do not have the force of law, there is no consequence for the EU. Hence, the WTO members do not interpret the Customs Valuation principles uniformly.

Despite this lack of uniformity, it can be concluded that the ECJ is not obliged to follow the WCO´s Criterion.

8.2 Impact on the case of royalties

As previously mentioned in this paper, neither the WTO Regulations nor the EU legislation have explicitly defined the notion of the condition of sale. The ECJ, through the 5th Case and the Curtis Balkan Case, has delineated this concept (following the criteria already outlined in the GE Healthcare case).

The ECJ, particularly through the Curtis Balkan case, advocates to interpret that a royalty payment could be understood as a condition of sale, if the influence approach is verified[188].

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[185] We would like to remark that the EVG based its conclusions on the Opinion of Advocate General Stix-Hackl on the ECJ Compaq case).
[186] The ECJ Compaq case does not expressively mention that the intangibles could fall under the (i) category of assist, because the intangibles supplied were undertaken outside of the EU; so, in any case, they would be dutiable.
However, the Advocate General´s conclusions expressively included that option and explained in which cases the assist should fall under (i) category and in which ones, they shall fall under the (iv) category.
[187] Are the TCCV instruments binding on WTO Members? World Customs Organization (wcoomd.org) (Accessed 10/03/2023).
[188] This involves an analysis of whether one party exercises direct or indirect control over the other, based on factual or legal elements, thereby allowing for the imposition of limitations and guidance.

The Curtis Balkan case, highlights that the influence approach verification should lead us to analyse if the failure to make a royalty payment would lead to the termination of the sales contract and, consequently, affect the supply of the goods.

In contrast to the GE Healthcare case, where it was considered that the condition of sale within a single group of companies is automatically met, the ECJ in the Curtis Balkan case adopted a more nuanced view. Now the ECJ understands that the condition of sale should not automatically be presumed if the licensor is related to the different parties, aligning with the approach set forth by the WCO Technical Committee in Advisory Opinion 4.13.

To determine the existence of the condition of sale, particularly when the seller of the goods differs from the licensor, it should be verified if the sale of the goods is contingent upon the payment of the royalty. This condition will be fulfilled if exists a direct or indirect control of one person over the other, based on factual or legal elements, which allow limitations and guidance to be imposed.

The ECJ addresses the referring court to verify whether the licensor effectively controls the supplier, under the terms of Commentary No. 11 of the EVG. This Commentary is especially relevant because it emphasizes the control factor by the licensor over the manufacturers[189]:

> *the decisive question being merely whether, in the light of all the relevant factors, had that payment not been made, the conclusion of the sales contracts in the form selected and, consequently, the supply of the goods would have taken place or not*[190]."

We can conclude that the ECJ aims to ensure the EU´s interpretation of the notion of the condition of sale in the EU is consistent with the WTO.

Finally, we would remind, that this decision is not a change and criterion, but rather elucidates and nuanced the principles set forth in the GE Healthcare case.

8.3 Impact on the case of the royalties provided free of charge

Qualify intangibles as either royalties or assist presents a highly complex and potentially perplexing issue.

The ECJ, in the Curtis Balkan case, advocates that if an intangible is deemed as an assist, it only would be dutiable under the terms of Article 71 (1) (b) UCC, applying the same terms as for the royalties (falling under Article 71 (1) (c) UCC.

The approach in the Curtis Balkan is consistent with the EVG´s Conclusion Number 30. Based on this case and Commentary 30, it is understood that:

a.) Intangibles provided under a licensing agreement and made available free of charge to the manufacturer by the licensee or indirectly by the licensor, which

[189] As set forth on the WCO Advisory Opinion 4.15.
[190]ECJ Curtis Balkan Case, C-76/19 (CURIA - Documentos (europa.eu)) (Accessed 11/03/2023).

constitute essential manufacturing know-how for the production of the imported goods, are classified as an assist.

b.) Alternatively, intangibles provided free of charge, which do not concern a production factor (e.g. royalties for using trademark rights, distribution know-how, utilization knowhow, maintenance, and repair know-how, etc.), are treated as a royalty.

Therefore, we now have more clarity regarding which concepts should be added to the customs value.

However, this criterion set forth by the ECJ on the Curtis Balkan was already outlined in the Commentary number 3 of the Compendium of Customs Valuation (valid until the 2018´s edition) which established:

> *" 20. The provisions of Article 32(1)(a) to (e) of the Code, which concern additions to the price actually paid or payable for the imported goods, each have their own scope. Thus, payments which fall within the definition of royalties and licence fees are to be* ***examined solely*** *in the light of Article 32(1)(c) of the Code*[191]*".*

Nonetheless, we must ascertain if that criterion aligns with the GATT regulations. In this sense, the WCO Technical advocates that the intangibles can be qualified under both concepts.

Therefore, the ECJ's criterion appears to contradict the advisory opinions of the WCO Technical Committee.

We refer to our previous conclusions on chapter 8.2.

However, these WCO Advisory Opinions do not have the force of law unless they are incorporated into the national legislation[192].

The ECJ contradicts the spirit of the WCO Customs Valuation Code (specifically the guidance issued by the WCO Technical Committee). Yet, since the Advisory Opinions do not have the force of law, there is no consequence for the EU. Hence, the WTO members do not interpret the Customs Valuation principles uniformly.

Despite this lack of uniformity, it can be concluded that the ECJ is not obliged to follow the WCO´s Criterion.

[191] Commentary number 3 - TAXUD/800/2002-ES(compendium (uv.es) (Accessed 01/02/2023).

[192] Are the TCCV instruments binding on WTO Members? World Customs Organization (wcoomd.org) (Accessed 10/03/2023).

9 Conclusions and recommendations

Our conclusions are divided into distinct groups:

a.) In the first group, we analyze the impact of the ECJ´s BMW case on the inclusion of the customs value of intangibles provided free of charge by the importer.

b.) Secondly, we discuss the concept of the 'condition of sale' for adding the royalties into the customs value.

c.) Finally, based on the previous points, we examine the influence of royalties, when provided free of charge by the importer to the manufacturer.

From these conclusions, we will be able to address the research question on chapter 10.

9.1 In the case of assist.

Through the ECJ´s BMW case and EVG´s Conclusion number 26, the EU has enlarged the scope of the (i) category of assist. However, this interpretation is not new, and the ECJ had already expressed a similar opinion in the previous BayWa and Compaq cases[193].

We understand that this broader interpretation contradicts the spirit of the WTO regulations. Nonetheless, we agree with the ECJ's conclusion, as it aligns with the wording of the UCC and allows the customs value to reflect the economic reality of the transaction more accurately.

We wonder, what is the purpose of the EU?

The European Union's aim is that the customs value should increasingly resemble the real value of imported products. thus, EU is expanding the concept of the (i) category of assist.

Through the BMW case, the ECJ is placing the intangible goods, produced in the EU which are not necessary for the production process, at a disadvantage compared to if the importer had provided a tangible good.

We would like to highlight that the request for a preliminary ruling of the BMW Case, it was declared that: "*assists originating in the European Union are treated equally*[194]"

However, a tangible good used during the production process and provided free of charge can benefit from the outward processing regime, which covers the export and thus avoids taxation upon the goods return into the EU's customs territory.

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[193] The ECJ Compaq case does not expressively mention that the intangibles could fall under the (i) category of assist, because the intangibles supplied were undertaken outside of the EU; so, in any case, they would be dutiable. However, the Advocate General´s conclusions expressively included that option and explained in which cases the assist should fall under (i) category and in which ones, they shall fall under the (iv) category.

[194] Request for a preliminary ruling of the BMW Case: showPdf.jsf;jsessionid=95305C3D4198B646FD8ED052DEBC305F (europa.eu) (Accessed 09/04/2023).

To the contrary, for intangibles provided free of charge that are not necessary for producing the imported product, EU customs legislation does not offer any relief that can be claimed within the EU.

The BMW case states that if the importer provides free-of-charge software produced within the EU that is not required for the production process then this software falls under Article 71 (1) (b) (i) UCC, and so, it will be dutiable.

However, if the imported goods include software necessary for production, which falls under category (iv), and the intangible has been produced within the EU. This intangible should not be considered for determining the customs value.

The idea to leave the value of the Union goods untaxed upon their return into the EU Customs territory -whether for the application of the outward processing for tangibles products or, the exception of intangibles mentioned in article 71 (1) (b) (iv) UCC- is to establish equitable conditions in tariff application compared to other supplies[195].

Likewise, the exclusion by the legislator of the need to add to the customs value the cost of engineering, development, artistic work, and design work, including plans and sketches necessary for producing the imported goods provided free of charge by the importer if developed within the EU, was intended to prevent potential double taxation, as these would already be subject to direct taxes within the EU.

However, all intangibles developed within the EU that are not required for the production process are now in a more disadvantageous situation. Because it risks that those R&D activities could be undertaken outside of the EU, in a country with lower direct tax rates.

This means that the outward processing cannot be applied to intangibles provided from the EU territory (as it only applies to movements of goods). Therefore, we recommend establishing additional types of customs duties reliefs for the use of cross-border intangibles (undertaken into the EU) as currently provided in Article 71 (1) (b) (iv) of the UCC.

If the EU does not proceed in this way, there is a risk that Customs Authorities might artificially classify all free-of-charge assists as falling under the (i) category, even when they are solely for the production process. Our concern is evidenced by the EVG attempting such a reclassification through Commentary number 28.

So, we also suggest that EVG's Conclusion number 28 should be dismissed, as the EVG appears to be attempting to unnecessarily narrow the scope of products under Article 71 (1) (b) (iv) of the UCC.

Nonetheless, we are pending on the ECJ decisions on the preliminary ruling of the Case C-307/23 from the Bundesfinanzhof (Germany) lodged on 17 May 2023 — G GmbH v Hauptzollamt H.

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[195] Schippers, M.J. *"Douanewaarde in een globaliserende wereld, Customs Valuation in a Globalized World*" Ed Erasmus University Rotterdam, 2021.

Finally, we also consider that the text of the WTO should be updated, as it is currently subject to misinterpretation by the member states. The legislation was drafted when international supply chains were less complex, and the impact on service provision was not as significant. Otherwise, it would be challenging to ensure the uniform application of WTO regulations by the customs authorities of each member state.

However, this recommendation is more complex to implement, due to the difficulty in achieving consensus among WTO members.

9.2 In the case of the royalties.

Neither the WTO Regulations nor the EU legislation have clearly defined the notion of condition of sale. The ECJ has defined this concept, through the 5th Case and the Curtis Balkan Case, following the criteria set forth already in the GE Healthcare case.

Therefore, we should analyse the impact of this notion of the condition of sale under the grounds of EU Regulations and the WTO Regulations.

Article 8.1 (c) of the WTO Regulations has been incorporated into European law through Article 71.1. c) UCC with these regulations being transposed following the spirit of the WTO Regulations.

Lyons concluded that with the implementation of the UCC and the removal of the previously applicable definition in the UCC IA, the EU has broadened the extent to which royalties are added to the customs value, [196] criterion also upheld in the UCC IA (implementing Regulation).

This is relevant because of Article 136.4 UCC IA, which limits the scope set forth in Article 71 UCC and contradicts the spirit of the WTO Regulations.

Through Article 136.4 UCC IA (and EVG Commentary number 13), the EU Commission has attempted to extend the concept of the condition of sale to such an extent that it becomes a condition of purchase. Especially, this "*clause can be qualified as catch-all"*[197] which leads to the risk of an extensive interpretation of that article, implying that a royalty payment is always due. Automatically applied as a condition of sale (in this sense, a condition of purchase), and therefore, should be added to the customs value.

However, it appears that the ECJ's position in the Curtis Balkan case does not consider this point, as it focuses on the objective condition of the condition of sale (whereby, in the absence of the payment of the royalty, the sale would not have taken place).

The ECJ position which we consider is in line with the criterion set forth by the WCO Technical Committee on the Commentary 25.1 and the Advisory Opinion 4.15. This position is what Ibañez calls as the subjective condition of sale.

Based on the above, we can conclude that the ECJ criterion differs from the one set forth on Article 136.4 UCC IA and the EVG´s Commentary number 13.

[196] Lyons, T." *EU Customs Law*". Ed. Oxford University Press Academic UK, 2018.
[197] Willems, A. "*Changes in the Treatment of Trademark Royalties in EU Customs Law: The Example of the 3D Printing*", Ed. Global Trade and Customs Journal, 2015.

Thus, we see a misalignment between the ECJ and the EU Commission regarding the extent to which a royalty payment will be a condition of sale.

As concluded in chapter 6.1, we understand that Article 136.4 UCC IA is contrary to the UCC (and to the GATT as well). Therefore, we recommend requesting a preliminary ruling before the ECJ asking about the validity of the condition of purchase outlined in that Article, as it is very likely that the ECJ would declare it invalid. At the same time, we recommend modification to the EVG Commentary number 13 to align it with the Curtis Balkan criterion.

The ECJ in the Curtis Balkan case referred to the deleted EVG Commentary 11, which aligns with the criteria set out in Commentary 25.1 of the GATT Regulation.

Therefore, we can conclude that the ECJ is in accordance the WTO Regulations and also, the WCO Technical Committee.

Even though the ECJ is following the WTO Regulations, as previously concluded, we also believe that it is pertinent that the text of the WTO should be updated. It is currently misinterpreted by the member states, having been drafted at a time when international supply chains were simpler and the impact on the provision of services was not as substantial. We would not be able to ensure the uniform application of WTO Regulations by the customs authorities of the Member States

However, we consider this option to be more complex due to the difficulties in achieving consensus among WTO members.

9.3 In the case of the royalties provided free of charge

The ECJ, through the Curtis Balkan case, advocates that if an intangible is considered as an assist, is dutiable under the terms of Article 71 (1) (b) UCC, and similarly for the royalties (but in this case, by Article 71 (1) (c) UCC). This decision, along with the EVG Commentary number 30 , clearly guides on classifying free of charge intangibles as either as royalties or as an assist.

This criterion does not align with the approach of the WCO Technical Committee regarding which qualification prevails over the other. The lack of clarity leads to confusion among operators and Customs Authorities.

Determining if the know-how qualifies as a royalty or an assist is especially relevant. Since to consider that a royalty should be added to the customs value, requires that it fulfils three conditions. Otherwise, it will be massively considered an assist by the Customs Authorities.

Nevertheless, in the case of the EU, we would like to draw attention to the following points:

- Due to the BMW Case, the cases of intangibles falling under the first condition of assist has been enlarged. It would be added to the customs value (Even that the intangible is undertaken in the EU).

- Commentary number 28 of the EVG, aim is to substantially reduce the scope of the products under Article 71 (1) (b) (iv) UCC (excludes taxation of the intangibles produced in the EU);

Consequently, there is a risk that most intangibles could be classified as assists and added to the customs value. Under WTO rules, an assist would not be dutiable if produced within the EU.

Therefore, in reference to the conclusions in section 9.1, we recommend the inclusion of a special rule. This rule should stipulate that intangibles not essential for the production process and carried out within the EU should not be added to the customs value, and that Commentary number 28 be deleted.

Finally, we would also refer to the previous conclusions and recommend that the WTO regulations would be updated but, in this case, following the EU´s criterion.

10 Answer to the research question.

Based on the comprehensive analysis and conclusions previously discussed in this paper, we can address the research question previously formulated.

> *"To what extent are the recent EU decisions on when intangibles should be added to the transaction value aligned with WTO customs valuation rules?"*

To answer this research question, the following sub-questions should be formulated and answered:

10.1 Comparison between the WTO Valuation Agreement and the EU´s implementation of it regarding this issue?

As we have analysed in detail in previous chapters, the WTO regulation, and the EU´s implementation align. In particular, the UCC is written in very similar terms to the ones included on the WTO regulations[198].

Only we have our doubts regarding the examples of the condition of sale set out in Article 136.4 IA UCC, which allows for an expansive interpretation of that notion, to the extent that the payment of a royalty could even become a condition of purchase.

Nonetheless, we believe that the IA UCC is not consistent with the UCC. Therefore, we recommend (as already explained further in previous chapter 9) seeking a preliminary ruling from the ECJ to inquire about the validity of such a provision.

10.2 To what extent does the ECJ still within the legislation´s boundaries?

Regarding this point, and before analysing it, it is crucial to acknowledge that the main challenge with customs valuation stems from the fact that the rules set by the WTO Regulations are not exhaustive, leading to disparate interpretations and applications by individual countries.

Thus, in this paper, we are interpreting the concepts and spirit of the Customs Valuation Code through the lens of the advisory opinions issued by the WCO Technical Committee.

While the provisions of the ECJ are generally in line with the WTO Regulations, it should be noted that, in certain aspects, the ECJ´s interpretations diverge from those of the WCO Technical Committee (as discussed on previous chapters).

That is why we find that in several cases it could be considered that the ECJ contradicts the concept of valuation as established by the WCO Technical Committee. From this perspective, we can deduce that the CJEU's decisions adhere to the legislative framework (encompassing both EU and WCO guidelines) and contribute to elucidating the concepts contained therein, as exemplified by the BMW case.

It is worth to mention that, even ECJ´s decisions contradict the WCO Technical Committee's interpretation on customs valuation, given that the Advisory Opinions do

[198] In this first sub question, we don't take into account the interpretation of the WCO Technical Committee nor, the ECJ´s decisions.

not have the force of the law, we can conclude that the judge is still within the boundaries of the legislative framework.

Examining the ECJ´s recent contributions on customs valuation of intangibles, we would like to draw attention on the following points:

- First of all, the ECJ through those decisions has not changed its criterion but rather elucidated and nuanced the principles already set forth in previous cases (among others GE Healthcare, BayWa case and the Compaq Case

- The EU position is inclined towards to ensure that the customs valuation reflects the economic reality of the transaction (especially in the case of the assists provided free of charge and the royalties paid).

- Even though, it could be argued that the ECJ has adopted an extensive interpretation of certain concepts (like the concept of intangible assist, as defined in the BMW case). It has simultaneously restricted the broader interpretations espoused by the EU Commission through the Compendium of Customs Valuation because in those cases, the customs value would not reflect the economic reality.

- Finally, it should also be noted that concerning the of royalties provided free of charge by the importer, we understand that the EU's interpretation of is more precise in dispelling the interpretive ambiguity fostered by the WCO Technical Committee.

Thus, we can conclude that the ECJ has still within the boundaries of the legislation, and it has played a pivotal role on clarifying certain topics, that were very unclear and led to confusion among traders.

10.3 Does the judge need to re-interpret the formal valuation rules to accommodate them to the present-day commercial environment?

Regarding this point, with a focus solely on EU regulation, we have observed that the ECJ decisions analysed are consistent with the criterion set forth in previous judgments (as analysed in previous chapter 8). The underlying principle across various ECJ decisions is that customs valuation should mirror the economic reality of the underlying transaction.

On the other hand, these decisions serve to delimit the concept more precisely, narrowing the confusion of concepts as implemented by the EU Commission through the EVG and the IA UCC (As noted in the conclusions above).

Therefore, rather than witnessing a reinterpretation of the EU concepts to adjust them to the current scenario, we observe a continuation and clarification of the ECJ´s previously established positions.

In conclusion, and building on the above, to answer the research question, we understand that although some ECJ decisions might suggest a departure from the principles of the valuation code (as interpreted by the WCO Technical Committee's advisory opinions),

given that the Advisory Opinions do not have the force of the law, we can assert that the judge remains within the boundaries of the GATT regulations. It is helping to understand the concepts, ensuring that the customs valuation reflects the economic reality.

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