FINDING OUT WHAT'S IN A 'NET FREE-AT-COMMUNITY-FRONTIER PRICE'

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This article has been prepared in the context of a Research Project.[1]

Abstract

In the European Union (EU), antidumping duties are calculated in most cases based on the 'net free-at-Community-frontier price' of the goods. In this paper the relevance of customs valuation rules in determining such 'net free-at-Community-frontier price' is analysed, building on two rulings of the European Court of Justice (ECJ) and a ruling from an English Court.

Introduction

Valuation is relevant in the context of Antidumping Duties (ADD) at two different stages:

First, in order to ascertain whether dumping exists, we need to establish the 'export price' of the goods (that is, the price actually paid or payable for the product when sold for export from the exporting country to the Community) and their 'normal value' (a value usually based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country).[2] Inasmuch as the normal value is higher than the export value, a margin of dumping will be determined to exist. When this dumping causes damage to the European industry, ADD will be established.

Second, once ADD have been established, we need to determine the amount to be paid as a result on each import covered by the ADD Regulation. In this regard, each ADD Regulation can provide a different means to calculate the ADD due. Most of the time, though, ADD are calculated by reference to the 'net free-at-Community-frontier price' of the goods.

Neither 'export price', nor 'normal value', nor 'net free-at-Community-frontier price' are values referred to in the Customs Valuation Code[3] (CVC). Therefore, in principle at least, one could expect that customs valuation rules should have no relevance for ADD purposes. This impression is further reinforced by the CVC itself, since at the General Introductory Commentary it states that the Members recognise that 'valuation procedures should not be used to combat dumping'.[4] Admittedly, the aim of this provision is not to preclude the relevance of customs valuation rules in the field of ADD, but rather to avoid that antidumping considerations might have an impact on customs valuation, which could interfere with the objectives of neutrality and uniformity which are so dear to the CVC. Nevertheless, it also reflects a well established specificity of valuation rules in the context of ADD.

The European Court of Justice (ECJ) rulings

When the Courts have to ascertain the 'net free-at-Community-frontier price' of the goods they find themselves in a very uncomfortable position because there is no legal concept for it and there is not even any further indication about its detailed content. The situation is especially troublesome when the goods have not been imported as a result of a sale and, therefore, there is no 'price' at all, or when the 'price' provided by the importer is not acceptable for any reason, as when it is a related party transaction and the 'price' is not at arm's length. But difficulties are not limited to those extreme cases since there are many

situations where the inclusion of an element in the price can be dubious and the ADD rules provide no guidance to decide whether it is correct to make such inclusion or not.

Facing these difficulties, the ECJ stated in *Nakajima All Precision Co. Ltd v. Council of the European Communities* (case C-69/89, 5 July 1991) that 'anti-dumping duties are imposed on the net free-at-Community-frontier price before duty, that is to say, on the Customs duty (c.i.f. price) of the imports'.[5] With this laconic reference, the ECJ announces that it will rely on customs valuation rules in order to fill this legal gap. The use of customs valuation rules to determine the net free-at-Community-frontier price for ADD purposes is confirmed by the ECJ in *Indústria e Comércio Têxtil* (case C-93/96, 29 May 1997). The Court establishes that 'the free-at-Community-frontier price, to which the anti-dumping duty is applied, corresponds to the customs value of the imported goods, as defined by Article 3(1) of Council Regulation (EEC) No. 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), namely the transaction value, that is to say, the price actually paid or payable for the goods when sold for export to the customs territory of the Community'.[6]

Reliance on customs valuation rules to obtain further guidance in determining the net free-at-Community-frontier price seems to make sense. Customs valuation provisions contain a detailed set of rules that deal with many elements whose inclusion in the price might otherwise cause some doubts. On the other hand, regulations establishing ADD systematically provide that 'unless otherwise specified, the provisions in force concerning customs duties shall apply'. Therefore, ADD Regulations direct us to the Customs Code[7] to complete its provisions, setting a legal basis to apply customs valuation rules to fill the gaps in the expression 'net free-at-Community-frontier price'.

In any case, the ECJ paragraph reproduced above deserves some criticism. It first asserts that 'the free-at-Community-frontier price…corresponds to the customs value of the imported goods'; then it identifies 'customs value' with the transaction value (namely the transaction value); and finally, it identifies transaction value with the price actually paid or payable for the goods when sold for export (that is to say, the price…). The ECJ incurs here an oversimplification. Transaction value is not just the price actually paid or payable for the goods when sold for export, since some adjustments must be made on such price to arrive at transaction value. And transaction value is just one of the methods for customs valuation and therefore it is incorrect to make both concepts equivalent.

Herrera Ydáñez had already warned about the error that is made when identifying the expressions 'transaction value' and 'price paid or payable', when he stated that, 'It must be noted that the expressions "price paid or payable" and "transaction value" are not always coincidental, as it has sometimes been assumed. The confusion could have its root in the fact that Article 1 of the Agreement – on Implementation of Article VII of the GATT – establishes that "transaction value is the price actually paid or payable"; but the definition does not end there, since next, the Article further provides that "adjusted in accordance with the provisions of Article 8" '.[8]

The lack of technical accuracy on the part of the ECJ causes some trouble when trying to ascertain the impact of its reasoning in future cases. It could be argued that the ECJ is limiting the scope of relevant customs valuation provisions for ADD to those that refer to the 'price actually paid or payable for the goods when sold for export', as they have been construed by the authors and the ECJ itself. That is to say, as far as both ADD Regulations and customs valuation rules refer to a 'price', the legal concept for it should be equivalent. Another option would be to extend the scope of relevant customs valuation provisions to those that establish transaction value, and thus the provisions dealing with adjustments to the price should also be taken into account. And yet another option would be to recognise relevance to all customs valuation provisions when determining the 'net free-at-Community-frontier price' for ADD purposes.

In the *Indústria e Comércio Têxtil* case, the issue discussed was the impact of financing arrangements on the price. The ECJ applies the rules on customs valuation according to which charges for interest under

a financing arrangement entered into by the buyer and relating to the purchase of imported goods are not to be included in the customs value, provided that the charges are distinguished from the price actually paid or payable for the goods, that the financing arrangement has been made in writing and that, where required, the buyer can demonstrate not only that such goods are actually sold at the price declared as the price actually paid or payable, but also that the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

The discussion in the *Indústria e Comércio Têxtil* case refers to the elements that are part of the 'price' (that is, whether or not interests resulting from a financing arrangement are part of the price); it does not extend to adjustments to the price or to the use of different customs valuation methods. Therefore, this case makes clear that the provisions of customs valuation regarding to the price are relevant to construe the concept of price when applying ADD (if they are to be calculated based on the 'net free-at-Community-frontier price'). But, as we have signalled before, it remains to be seen if the customs valuation provisions dealing with adjustments to the price (Articles 32 and 33, Customs Code) and with alternative customs valuation methods (Articles 30 and 31, Customs Code) are also relevant – and to what extent and under which limitations – in the context of ADD.

The *Watchorn* case

The London Tribunal Centre had to address this issue in the *Watchorn* case.[9] Watchorn made imports of Russian ammonium nitrate which, at the time of entry, was subject to ADD. The ADD was calculated as the difference between ECU 102.9 per tonne net of product and the net c.i.f. price, Community frontier before customs clearance.[10] Note that, this being the calculation formula, the higher the net c.i.f. price, Community frontier, the lesser the amount of ADD. By doing so, the ADD Regulation in this case tried to encourage exporters to fix a minimum price equal to ECU 102.9 per tonne. So the importer wanted to uphold a net c.i.f. price as high as possible (at least ECU 102.9 per tonne, to avoid ADD being levied), whereas the Administration tried to argue that this value should be lower.

The Administration wanted to have the net c.i.f. price calculated based on the price in a subsequent sale in the Community and allowing for a deduction of the costs and profits incurred after importation, and based that method of calculation on Article 2.10 of Regulation (EC) 384/96 (the antidumping Basic Regulation), that provides such method of calculation for those cases in which there is no export price or it is unreliable.[11] Note, however, that we are not looking for an 'export price', nor a substitute for it, for that matter – we are looking for a net c.i.f. price. As we have explained before, 'export price' is relevant to determine if there is dumping and to what extent (by comparison with the normal value), and hence, whether an ADD Regulation should be adopted. But once ADD are established, we have to calculate the amount to be levied based on the criteria set by the relevant ADD Regulation, in this case, based on the net c.i.f. price. As the Court observes, 'Regulation 384/96 has a separate and different function from Regulation 2022/95. The former is concerned with prescribing the procedure to be adopted by the EC institutions in establishing an export price for the purpose of adopting a Regulation that imposes ADD. Regulation 384/96 says nothing about the procedure to be followed by national customs authorities in applying such a regulation once adopted. In particular, it says nothing about the determination of c.i.f. prices for the purpose of such a regulation' (at paragraph 13). The Court rules that there is no provision directing the authorities to rely on the valuation methods of Article 2 Regulation 384/96 when determining a net c.i.f. price, and also rejects that they can be applicable by analogy.

Nevertheless, the Court sees that additional valuation rules are needed, if only because 'it is unthinkable that the regulatory framework should fail to cover the situation where no net c.i.f. price exists, either because consignor and consignee are the same person or because the declared c.i.f. price is a sham' (at paragraph 16). That makes the Court turn its eyes to the Customs Code (CC), which contains the set of general rules for the application of the Common Customs Tariff. The Court also observes that, as it

is the case in each ADD Regulation, Regulation 2022/95 provided that 'unless otherwise specified, the provisions in force concerning Customs duties shall apply'. Another argument to resort to the valuation methods established in the CC are the ECJ rulings *Nakajima* and *Indústria e Comércio Têxtil*, to which we have referred above.

The Customs authority resisted this finding. Quite tellingly, they argued that 'Article 29 – CC, which regulates transaction value – in conjunction with the required adjustments referred to in Articles 32 and 33 – is designed to ensure that the transaction value is kept up to an amount, appropriate for ad valorem duty purposes'. Here the rationale of the ECJ's *Chatain* case strongly resonates.[12] According to this view, in applying customs valuation rules, customs authorities must fight under-valuation, but customs valuation rules are not intended to fight over-valuation. In our view, setting aside the merits of such a position under the previous international valuation standard, the Brussels Definition of Value, this interpretation is completely incompatible with the GATT Valuation Code, which intends to establish 'a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values' (General Introductory Commentary); Article 7 further provides that 'No customs value shall be determined under the provisions of this Article on the basis of: …(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values; … (f) minimum customs values; or (g) arbitrary or fictitious values'. Over-valuation results in an arbitrary or fictitious value, which is precluded by the GATT Code; it is also contrary to uniformity. The GATT Code provides many arguments to reach the conclusion that over-valuation, even when it is made on the part of the importer, is not an acceptable valuation.

In this regard, when Articles 2 and 3 regulate transaction value of identical/similar goods, they provide that 'If, in applying this Article, more than one transaction value of identical/similar goods is found, *the lowest such value shall be used* to determine the customs value of the imported goods'. In Annex 1 to the Valuation Code, the Interpretative Notes to Articles 2 and 3 provide (at 5) that 'A condition for adjustment because of different commercial levels or different quantities is that such adjustment, *whether it leads to an increase or a decrease in the value*, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments'.

When setting the criteria under which the price in a related party transaction is an acceptable basis for transaction value, Article 1.2 of the GATT Code provides that 'In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted *provided that the relationship did not influence the price*'. Here the Code makes no difference as to the effect of the relationship; transaction value is not applicable whenever the relationship has had an influence on the price, no matter if that influence results in a lower price or if it results in a higher price.[13]

Once it has soundly established that the CC provisions on valuation apply, the Court states nevertheless that 'at all events, recourse to Articles 30 to 33 for ADD valuation purposes, calls for a purposive and adaptative construction of those provisions' (at paragraph 23). For reasons that we will explain below, we completely agree with this finding of the Court. And then it goes on to state that 'the procedures and safeguards cannot, however, be disregarded. The importer is entitled to a measure of legal certainty. He must be accorded his right to choose the order of application of the methods prescribed in Article 30.2 CC', that is, to apply computed value over deductive value. The Court also finds that the customs authorities should have observed the provision in Article 181a CCIP that establishes the procedure and guarantees that apply when the authorities decide to resort to a valuation method other than transaction value when they are not satisfied that the declared value represents the total amount paid or payable. On these grounds the Court decides that failure to comply with the prescribed procedure, set in Article 181a CCIP, invalidates the post clearance demand.

Here we have a very interesting element for our discussion. If, as the ECJ has decided, customs valuation rules are relevant for the determination of a 'net free-at-Community-frontier price', then – the London Tribunal Centre feels – we should all go down the road to conclude that the provisions established

in connection with the customs value determination should also apply in the context of the value determination for ADD purposes and, in particular, those provisions on procedures and guarantees for the taxpayer, such as that found in Article 181a CCIP.

Some reflections

We tend to agree with the findings of the London Tribunal Centre in the *Watchorn* case. In our view, all customs valuation provisions (and not just those referring to the price) should be taken into account when determining the 'net free-at-Community-frontier price'. But, whereas customs valuation provisions and interpretation criteria regarding the 'price actually paid or payable for the goods when sold for export to the customs territory of the Community' can be applied without restrictions to determine the 'net free-at-Community-frontier price', the same cannot be said about the rules providing adjustments to the price and the rules providing alternative valuation methods.

On the one hand, we think that ADD Regulations that direct the authorities to calculate ADD based on the 'net free-at-Community-frontier price', lacking further rules to ascertain such price, must be supplemented by additional valuation rules. And those valuation rules can be no other than those provided for in the Customs Code, that is, customs valuation rules. But as the London Tribunal Centre concedes, 'recourse to Articles 30 to 33 for ADD valuation purposes, calls for a purposive and adaptative construction of those provisions'. And the devil is in the details.

As an example of such 'adaptative construction' needed, we feel that so-called 'assists' provide a good case of an adjustment under customs valuation rules that, in our view, would make no sense in the context of determining the amount of ADD. The concept of 'assist' is laid down in Article 32 of the Customs Code, which provides that:

> In determining the customs value under Article 29, 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,
>
> (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

An example will help us illustrate this idea. Imagine that a European importer supplies the foreign manufacturer, free of charge, with European made chips which are then incorporated into electronic devices which are subsequently imported into the Community. According to customs valuation rules, the transaction value of the electronic devices shall be the price actually paid or payable to the manufacturer of the electronic devices plus the value of the chips (the chips are an 'assist' under Article 32.1.(b).(i) of the Customs Code and, thus, an upward adjustment to the price has to be made). It is counter-intuitive, but the fact is that an element of the goods which was manufactured in Europe (the chips) will increase the value of imported goods (the electronic devices), and therefore will be deemed as imported for customs duty purposes. It is interesting to note, however, that in this case the importer may apply for the outward processing procedure. This procedure would result in a deduction in customs duties equal to the duties that would be levied for the temporarily exported merchandise (the chips), if they were imported

from the country where the goods (the electronic devices) were originating. So the net result for customs duties, when the importer applies for the outward processing procedure, is that duties will be assessed on the total value of the electronic devices (including an addition for the value of the chips) and a deduction equal to the duties applicable to the chips will be granted. (Notice that electronic devices and chips could be subject to different tariffs, so the result would not be the same if we merely assessed duties on the price of the electronic devices without any addition for the value of the chips.)

Now imagine that these electronic devices are subject to ADD, calculated as a percentage of their 'net free-at-Community-frontier price'. If we apply customs valuation rules, including rules on adjustments, to determine the 'net free-at-Community-frontier price', then the basis to calculate the ADD would be the price paid for the electronic devices plus the value of the chips (the 'assists'). However, in determining ADD the importer could not rely on any deduction arising from the fact that the chips were made in Europe, even in the context of the outward processing procedure. This is because Article 590.1 of the Implementing Provisions to the Customs Code (IPCC) provides that 'for the calculation of the amount to be deducted, no account shall be taken of anti-dumping duties and countervailing duties'. Therefore, the importer would be paying ADD on the total value of the electronic devices (including the chips), and the fact that these chips were made in Europe would not affect the amount of ADD to be paid.

What we would have then is that the circumstance that the chips were made in Europe is relevant for the calculation of customs duties, but irrelevant for the calculation of ADD. This does not make sense when we take into account that the purpose of ADD is to protect the Community industry against foreign producers that sell for export to the Community at a price lower than the normal price in their domestic market. It is hard to see how a foreign manufacturer can harm Community producers inasmuch as it is using Community-made inputs. It can harm Community producers underpricing its own manufacturing and foreign-source inputs, but by not charging for the assists that the importer provided free of charge, the exporter can not harm Community producers. Quite to the contrary, Community producers of the 'assists' would be harmed if the fact that an input is made in the Community were irrelevant for the calculation of ADD. If that were the case, the importer would have no incentive to use 'assists' made in the Community. If we apply ADD on the price paid to the seller *and* on the value of the assist, we are applying ADD against a Community input. We would be using ADD to protect Community manufacturers – of electronic devices – against Community manufacturers – of chips – which is absurd.

In our view, an 'assist' made in the Community should not be added to the price for ADD valuation purposes, and so this could well be a case of 'adaptative construction' of customs valuation provisions (the same could be said about royalty payments made to a European company when such royalty payments determine an addition to the price according to Article 32.1.(c) CC). Of course, we have chosen an element we feel quite certain about how it should be dealt with. But, as we have said before, the devil is in the details. Imagine the 'assist' provided by the importer – the chip – was not made in the Community but in Japan. Imagine that antidumping duties are provided for the electronic devices manufactured in China and Vietnam. Should, in this case, the value of the 'assist' be added to the price when determining the 'net free-at-Community-frontier price'? Here we feel rather inclined to decide on the affirmative (and therefore, that ADD should also be levied on the value of the assist). The importer in this case could not rely on the outward processing procedure in respect of the assist, and therefore no deduction would be made for customs duty purposes. It thus seems that there is no need to apply any compensation for ADD either. And we would not be indirectly applying ADD against a Community input; we are now assuming it is a Japanese input. Some practical reasons also favour this decision. Community authorities have supervisory powers over Community manufacturers, but they lack any authority over both Japanese and Chinese manufacturers. How could the Community authorities fight a collusion of Japanese and Chinese manufacturers regarding the relative value of their products?

To make things more complicated, we think that the solution should be different when ADD are calculated based on the difference between the 'net free-at-Community-frontier price' and a minimum target price,

as in the *Watchorn* case. If that were the method of calculation of the amount of ADD to be paid, we think that in determining the 'net free-at-Community-frontier price' both assists and royalty payments should be computed, thus reducing the amount of ADD to be paid. The reason for this different outcome is that the price commanded by the exporter does not include all the costs incurred to produce and sell the goods. The importer in this case will not be able to sell in the Community at the price paid to the exporter plus a mark-up for profit, because the importer will also need to recover the cost of the assists and of the royalty payments. Therefore, the harm to Community producers would not be measured adequately by the difference between the price commanded by the exporter and the target price, but rather by the difference between the total cost of having the imported goods (that is, the price paid by the importer plus other costs such as assists and royalty payments) and the target price.

As a general rule that could be helpful in construing customs valuation rules in the context of ADD, it is important to bear in mind that through ADD we are trying to create a protection against the commercially harmful behaviour of foreign producers. The amount of ADD should reflect the extent to which that behaviour is damaging domestic producers. Inasmuch as it is established that inputs made in the Community are involved, it seems reasonable that no ADD should be levied on that portion of the value of the goods imported, whatever the method to determine the base of the ADD.

Conclusions

In determining a 'net free-at-Community-frontier price' customs valuation rules apply in as far as such expression might not provide enough directions in order to decide whether an element of cost should be taken into account or not. Once we decide that customs valuation rules apply, it should follow that, when that is the case, procedures and guarantees established for customs valuation in respect of customs duties should also apply in the context of valuation for ADD purposes.

However, the applicability of customs valuation rules for ADD purposes produces results which are far from fully satisfactory, since their purpose and design follow a different underlying logic than that of ADD. A case in point has been presented, regarding 'assists' made in the Community, where the automatic application of customs valuation rules would produce undesirable results. If customs valuation rules cannot be applied automatically, and instead an in-depth analysis in light of the purposes and underlying logic of ADD is required in each case, what we get is an important degree of legal uncertainty for all the subjects affected (importers, authorities and judges). It is for the EU Commission to elaborate a legal framework that sets clear rules that ensure uniformity and fairness on this issue.

Endnotes

1 Research Project GV 2007-068.

2 The legal concepts of 'export price' and 'normal value' are laid down in article 2 of Council Regulation (EC) No. 384/96, on protection against dumped imports from countries not members of the European Community.

3 Agreement on Implementation of Article VII of the General Agreement on Tariffs And Trade 1994 (Customs Valuation Code, 'CVC').

4 GATT 1994, CVC.

5 ECJ judgment of 7 May 1991, Case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, ECR 1991 I – 2069, at paragraph 105.

6 ECJ judgment of 29 May 1997, Case C-93/96, *Indústria e Comércio Têxtil,* at paragraph 14.

7 Council Regulation (EEC) No. 2913/1992 of 12 October 1992, establishing the Community Customs Code (referred to as 'Customs Code' or 'CC').

8 Herrera Ydáñez, R 1988, *Valoración de mercancías a efectos aduaneros*, Escuela de la Hacienda Pública-Ministerio de Economía y Hacienda, Madrid, p. 57 (the translation into English in the text is ours). The same idea is expressed in Ibàñez Marsilla, S 2002, *La valoración de las importaciones. Régimen tributario y experiencia internacional*, McGraw-Hill, Madrid, pp. 81-82. In the EU the concept of transaction value is laid down in Article 29 of the Customs Code.

9 Robin Watchorn & Rosemary Watchorn, T/A Robin Watchorn Marketing and The Commissioners of Customs and Excise, London Tribunal Centre, 31 January 2000; 1, 2 and 3 February 2000. This ruling can be obtained at: http://www.financeandtaxtribunals.gov.uk/Documents/decisions/custduties/C00117.pdf.

10 Council Regulation (EC) No. 2022/95 of 21 June 2005.

11 Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

12 ECJ judgment of 24 April 1980, Case 65/79, *Procureur de la République v. Rene Chatain ECR 1980*. For a more in-depth analysis of this ECJ ruling, see Ibàñez Marsilla, S 2002,'La trascendencia de la valoración aduanera en el Impuesto sobre Sociedades. Especial referencia al transfer pricing', *Revista Española de Derecho Financiero*, no. 113, pp. 47-98, especially at pp. 53-63.

13 This seems also the opinion of the US Customs (see 19 CFR 152.103 (1) (2) (ii)), a fact which is relevant when put in relation with the 'uniformity' goal of the GATT Code (especially when there are no good arguments for the case against). Leonard Lehman stresses, in this regard, that customs valuation is not just relevant for duty purposes, but 'for the accurate reporting of the actual value of import trade' (1981, 'New valuation concepts under the trade Agreements Act of 1979', *New York Law School Law Review*, vol. 26, p. 513). However, for us the strongest argument in favour of this view results from a finalist interpretation of the GATT Code as a tool of mutual assurance against a protectionist backlash. In this light, overvaluation is simply unacceptable.

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