**Case C-775/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

22 October 2019

**Referring court:**

Finanzgericht Baden-Württemberg (Finance Court of Baden-Württemberg, Germany)

**Date of the decision to refer:**

22 July 2019

**Applicant:**

5th AVENUE Products Trading GmbH

**Defendant:**

Hauptzollamt Singen (Singen Principal Customs Office)

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**Subject matter of the main proceedings**

Import duties, customs valuation

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

**Questions referred**

1. Are payments which the purchaser of a product makes in addition to the purchase price, depending on his sales revenues, once a year for four years, in order to be able to sell the product

– in a particular territory,

– for the very first time,

– exclusively and

– permanently,

royalties and licence fees within the meaning of Article 32(1)(c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (CC) which are to be added to the price actually paid or payable for the imported goods under Article 32(5)(b) CC in conjunction with Article 157(2) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code (CCIR)?

2. Are such payments, where appropriate, to be added to the price paid or payable for the imported goods only on a proportional basis and, if so, on the basis of which criterion?

**Cited legislation and case-law of the European Union**

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the CC'), Article 32(1)(c), Article 32(2) and Article 32(5)(b)

Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) ('the CCIR'), specifically Article 157(1) and (2), Article 158, Article 160 and Article 161

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 (OJ 2015 L 343, p. 558) ('Implementing Regulation 2015/2447'), first sentence of Article 136(1) and Article 136(4)(a)

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (GATT Customs Valuation Code 1994) (OJ 1994, L 336, p. 119), Article 8(3) and notes thereto

Judgment of the Court of Justice of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195

**Brief summary of the facts and procedure**

1 The parties to the main proceedings are in dispute as to whether payments made by the applicant to its suppliers for a (sole) right of distribution are to be added to the price actually paid for the imported goods.

2 The object of the applicant's undertaking is (wholesale) trade *inter alia* in Havana cigars. The applicant obtains Cuban cigars from Habanos S.A., the Cuban state-owned export company for cigars.

3 On 31 January 2012 the applicant and Habanos S.A. concluded an English-language agreement described as an 'Exclusive Distribution Agreement' ('the EDA'), according to which the applicant has the sole right of distribution for Habanos S.A. cigars for the German and Austrian market.

4 In return for the granting of the sole right of distribution in Austria, the applicant undertook to make four annual payments, described as 'compensation', to Habanos S.A. of 25% of its revenues achieved from the sales to Austria.

5 As agreed, the 'compensation' was invoiced annually to the applicant and also paid by the latter. The payments ended upon expiry of the contractually agreed term (27 February 2016). The applicant did not have to pay any corresponding 'compensation' for the sole right of distribution in Germany.

6 The cigars were not purchased through conclusion of a written purchase agreement, but in each case through ordering and order acceptance. The applicant received a price list on the basis of which the respective orders were made. The purchase prices were in this case independent of the country in which the cigars were resold by the applicant. If an order was placed by the applicant, Habanos S.A. issued an invoice and delivered the goods ordered.

7 The applicant basically cleared the imports of the Cuban cigars via the type D customs warehouse for which it holds authorisation. The warehouse is located in the applicant's domicile in Waldshut-Tiengen, Germany. The release for free circulation took place upon removal from the customs warehouse through the simplified discharge of the procedure, also covered in the authorisation, under Article 278(3) CCIR, that is to say through entry in the records and without further presentation. When cigars from the supplier Habanos S.A. were admitted into its type D customs warehouse, the applicant declared the purchase prices actually paid plus surcharges (freight, insurance, etc.), but without consideration of the payments described as 'compensation' as a basis for determining the customs value. This is because, at the time of admission into the warehouse, it was not yet established which of the cigars were being sold to Germany and which were being sold to Austria.

8 Following a customs inspection of the applicant's premises, the inspector expressed the opinion that the fee described as 'compensation' was a separate purchase price component which was to be taken into consideration in the customs valuation under Article 29(3)(a) CC.

9 The defendant Principal Customs Office endorsed the inspector's opinion and issued several import duty notifications, including the notification of 28 August 2015 which is solely at issue here and by means of which it imposed import duties by way of post-clearance recovery. The applicant raised an objection to that

notification on 23 September 2015, but that objection was only partly allowed by the Principal Customs Office. The Principal Customs Office rejected the remainder of the objection as unfounded.

10 With its action brought on 6 December 2017, the applicant opposes the — in its view incorrect — addition of the payments described as 'compensation' to the customs value of the goods being valued.

**Brief summary of the basis for the reference**

11 In the opinion of the referring court, the present case concerns the question of whether only the purchase price paid by the applicant for the goods imported from a third country (cigars from the supplier Habanos S.A.) is to be taken as a basis as transaction value, in which case the action would have to be upheld, or whether the payments described as 'compensation' made by the applicant depending on the amount of its revenues concerning deliveries to Austria are also to be added to the customs value, in which case the action would have to be dismissed.

***First question referred***

12 The referring court assumes that the payment ('compensation') to be assessed is not a separate part of the purchase price under Article 29(3)(a) CC.

13 As the 'compensation' is to be paid for the use of rights relating to the use or resale of the imported goods, under the third indent of Article 157(1) CCIR this is instead a royalty or licence fee within the meaning of Article 32(1)(c) CC. Such royalties or licence fees are to be added to the purchase price actually paid or payable for the imported goods under Article 32(1)(c) and Article 32(5)(b) CC in conjunction with Article 157(2) CCIR where three cumulative conditions are satisfied, namely that, first, the royalties or licence fees have not been included in the price actually paid or payable, second, they are related to the goods being valued and, third, the buyer is required to pay those royalties or licence fees as a condition of sale of the goods being valued (see judgment of the Court of Justice of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195 relating to trade marks).

14 With regard to the first condition, the referring court is of the opinion that it is apparent from the provisions of the licence agreement in question, that is to say the EDA, that the royalties or licence fees for the exclusive right to distribute the cigars in Austria were not included in the purchase price of the goods being valued.

15 As regards the third condition, the referring court is of the opinion that the payment of the 'compensation' at issue also constitutes a condition of sale within the meaning of the second indent of Article 157(2) CCIR. The fact that the obligation expired after four years does not mean that the applicant would also have been granted the (exclusive) right to distribution in Austria without payment

of the royalty or licence fee. It is also irrelevant that the 'compensation' was not agreed in the respective purchase transactions, but in the EDA, since the existence of a framework licence agreement is sufficient if — as with the EDA to be assessed — it is apparent therefrom that all future single purchase agreements are to be dependent on the payment of a royalty or licence fee. It is therefore to be assumed that Habanos S.A. would not have supplied the goods intended for distribution in Austria, or at least not under the contractual terms agreed, without the payment of the fee that is the subject matter of the proceedings.

16 However, the referring court has doubts with regard to the satisfaction of the second condition, that is to say whether the payment is related to the goods being valued within the meaning of the first indent of Article 157(2) CCIR. Whether a royalty or licence fee is related to the imported goods, that is to say whether goods-related services are compensated therewith, is to be assessed in the light of all the circumstances of the individual case, particularly in consideration of the licence fee agreement. The method of calculation is not decisive. If — as in the present case — account is taken of the proceeds from the resale of the imported goods for the calculation of the amount of the royalty or licence fee, this admittedly does not justify, under Article 161(1) CCIR, the assumption that the royalty or licence fee compensates goods-related services. On the other hand, as is apparent from Article 161(2) CCIR, such a method of calculation also does not rule out that the royalty or licence fee is related to the imported goods.

17 In this respect, the referring court assumes that the applicant had to pay the 'compensation' that is the subject matter of the proceedings both in order to be able to sell the imported goods on the Austrian market for the very first time (distribution right) and to have the exclusive right to distribute the cigars in Austria (territorial protection).

18 In so far as the applicant had to pay the 'compensation' in order to be able to resell and distribute the imported cigars (for the first time) in Austria, the referring court is of the opinion that the royalty or licence fee paid is fundamentally related to the imported goods within the meaning of the first indent of Article 157(2) CCIR, because the right of distribution or resale is part of the procurement of the power of disposal when the imported goods are acquired.

19 In so far as the applicant had to pay the 'compensation' in order to be able to exclusively sell the Havana cigars in Austria (territorial protection), that is to say for Habanos S.A. not to supply any other buyers, the relationship between the payments and the goods is, in contrast, questionable.

20 The referring court is inclined to assume that payments made by the purchaser in addition to the purchase price of the imported goods solely in order to be able to exclusively sell the goods in a particular territory are not to be taken into consideration as a royalty or licence fee within the meaning of Article 32(5)(b) CC in conjunction with Article 157(2) CCIR when determining the customs value. This is because, while the right to be able to resell and distribute the goods

concerns the power of disposal in respect of the goods and is therefore embodied therein (also see, in this respect, the first sentence of Article 136(1) of Implementing Regulation 2015/2447), a sole right of distribution is an additional right going beyond the entitlement to procurement of the power of disposal in respect of the goods. Accordingly, the royalty or licence fee for a sole right of distribution is also not paid as consideration for the imported goods, but so that other persons in the contractual territory are not supplied by the seller.

21 The above question in dispute can only remain open if — contrary to the view taken by the referring court — it is considered that payments to be made by the purchaser in addition to the purchase price of the goods (solely) for the granting of territorial protection are to be added to the price actually paid or payable for the imported goods as a royalty or licence fee under Article 32(5)(b) CC in conjunction with Article 157(2) CCIR.

22 With regard to the statements of the Court of Justice in the judgment of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, the referring court assumes, last, that it is irrelevant for the assessment of the relationship between the goods and the 'compensation' that is the subject matter of the proceedings that, in the present case, it was not yet established when the cigars that are the subject matter of the proceedings were sold for export whether they were being resold to customers of the applicant in Germany — in which case the applicant already had the distribution right regardless of the payment of the 'compensation' — or in Austria.

***Second question referred***

23 If payments to be made solely for the granting of territorial protection should not have to be added to the price actually paid or payable for the imported goods under Article 32(5)(b) CC in conjunction with Article 157(2) CCIR, in the case of payments which — as in the present case — are made in order for the purchaser of the goods both to be able to supply a particular territory for the very first time and to be exclusively granted this distribution right, this raises the further question of whether these royalties or licence fees are to be added overall to the purchase price of the imported goods, or whether they are then to be divided into a component that is to be added to the purchase price and a component that is irrelevant for customs valuation purposes.

24 In the scope of Article 158(3) CCIR, the Court of Justice ruled that an addition under Article 32(1)(c) CC can be made even if royalties or licence fees are related partly to the imported goods and partly to services supplied after their importation. The adjustment then needed to be made on the basis of objective and quantifiable data capable of estimating the amount of the royalties or licence fees related to those goods (judgment of 9 March 2017, *GE Healthcare*, C-173/15, EU:C:2017:195, paragraph 52).

25 The first question which arises is whether these principles can be applied to the present case of the granting of a first-time distribution right connected with territorial protection and therefore the payment made by the applicant, in so far as this is for the first-time granting of the distribution right for Austria, is to be partly added to the price of the imported goods under Article 32(5)(b) CC in conjunction with Article 157(2) CCIR (see Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 [OJ 1994, L 336, p. 119], Article 8(3)).

26 Should this be answered in the affirmative, this raises the further question of whether and, where appropriate, on the basis of which criterion the division of the royalty or licence fee has to take place if — as with the 'compensation' to be assessed — there are no objective and quantifiable data within the meaning of Article 32(2) CC and Article 158(3) CCIR which would make it possible to divide the amount of the royalties or licence fees into a component to be added to the price actually paid or payable for the imported goods and a component that is irrelevant for customs valuation purposes (also see, in this regard, Notes to Article 8(3) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 in Annex I to that agreement, Annex 23 to the CCIR regarding Article 32(2) CC and Comment No 3 of the Customs Code Committee [customs value], point 7 and points 11 *et seq.*).