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GUIDANCE

**CUSTOMS VALUATION
IMPLEMENTING ACT
ARTICLES 128 AND 136 UCC IA
ARTICLE 347 UCC IA**

Approved in the 8th CEG-VAL, 17 July 2020

Disclaimer

It is stressed that this document does not constitute a legally binding act and is of an explanatory nature. Its purpose is to ensure a common understanding for both customs authorities and economic operators and to provide a tool to facilitate the correct and harmonised application by MS.

Guidance is an active tool and is therefore likely to be further developed in the light of practice and experience.

Legal provisions of customs legislation take precedence over the contents of this document and should always be consulted. The authentic texts of the EU legal instruments are those published in the Official Journal of the European Union.

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Legal References

UCC	Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10 October 2013, p. 1 – 101)
UCC DA	Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29 December 2015, p. 1 – 557)
UCC IA	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 L 343, 29 December 2015, p. 558 – 893)
UCC TDA	Delegated Regulation (EU) 2016/341 of 17 December 2015, establishing transitional rules for certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council, laying down the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446 (OJ L 69, 15 March .2016, p. 1–313)

Section 1 - Introduction

1. This guidance is set out in terms of the structure and order of the relevant UCC IA provisions, and focuses on new elements of customs valuation rules. It revises and replaces previous guidance on those elements.
2. A full integration within the Compendium of Customs Valuation Texts¹ will take place during 2021.

Section 2 – Transaction Value

2.1 Sale for export

Article 70(1) UCC

The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.

Article 128(1) UCC IA

The transaction value of the goods sold for export to the customs territory of the Union shall be determined at the time of acceptance of the customs declaration on the basis of the sale occurring immediately before the goods were brought into that customs territory.

1. Article 128(1) UCC IA establishes the principle that the relevant sale, for the application of the transaction value method, is the *sale occurring immediately* before the introduction of the goods into the EU customs territory, on condition that such sale actually constitutes a “sale for export” to the customs territory of the Union.
2. The relevant moment for determining the transaction value of the goods being valued is therefore when goods are brought into the customs territory of the Union (see the provisions of Title IV UCC). The relevant sale for goods brought into the Union is the sale when crossing the border, i.e., the ultimate sale taking place, in performance of the contract of sale, at that time.

¹ Compendium of Customs Valuation Texts, available at:
https://ec.europa.eu/taxation_customs/sites/taxation/files/customs_valuation_compendium_2018_en.pdf

3. Usually the seller is located in a country of exportation and the buyer is located in the Union. However, it should be underlined that the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the WTO Valuation Agreement) does not contain provisions relating to a country where parties of a sale transaction are to be located, in order to recognise the sale as the sale for export to the country of importation. In this context, it is useful to note the European Court of Justice ruling dated 6 June 1990 (C-11/89²) where the Court underlines that “*The price stipulated in a contract of sale concluded between persons established in the Community may, therefore, be regarded as the transaction value (...)*”. Also the WCO Technical Committee on Customs Valuation pointed out in its *Advisory Opinion 14.1 – Meaning of the expression “sold for export to the country of importation”* that a country where a sale took place does not influence an understanding of the notion “sale for export to the country of importation” (see example 2 in the TCCV instrument)³.
4. Article 128(1) UCC IA stipulates that the relevant sale to determine the value of goods is the sale or export that brings the goods into the Union. This is the sale *occurring immediately before* the introduction of the goods into the customs territory of the Union.
5. This sale allows the application of the transaction value method in a manner that takes into account the substance of the entire commercial transaction at the time of acceptance of the customs declaration. It allows the proper application of other relevant provisions (e.g. provisions on additions and deductions). Where this is not possible, the application of the transaction value method is not possible.
6. Therefore, this is the sale that allows economic operators and customs to actually apply the transaction value method.
7. A simple example goes as follows:

B buys from A and the goods are brought into the Union. This sale is the sale that is occurring (takes place) before the goods arrive into the Union (see an example 1 under point 2.3).

or

² Judgement of the Court of 6 June 1990, *Unifert v Hauptzollamt Münster*, C-11/89, ECLI:EU:C:1990:237 (available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0011>) and Compendium of Customs Valuation Texts (see Section E)

³ See also Commentary 22.1 – Meaning of the expression “sold for export to the country of importation” in a series of sales, issued by the WCO Technical Committee on Customs Valuation.

B buys from A and then B sells to C, and this latter sale (B to C) is the sale occurring before the goods arrive into the EU. The sale from B to C is therefore the sale which qualifies as the sale (immediately) occurring before introduction into the Union (see an example 2 under point 2.3).

8. The WTO Valuation Agreement does not provide a definition for “sale”. However *Advisory Opinion 1.1 – The concept of “sale” in the Agreement*, issued by the WCO Technical Committee on Customs Valuation, stipulates that “...in conformity with the basic intention of the Agreement that the transaction value of imported goods should be used to the greatest extent possible for Customs valuation purposes, uniformity of interpretation and application can be achieved by taking the term “sale” in the widest sense...”
9. Article 128 UCC IA does not introduce changes in the scope of what can be deemed a sale of goods for customs valuation purposes. The fundamentals of the transaction value remain in place. The meaning (and concept) of what constitutes a sale is not altered.
10. It is of course necessary to ensure that the transaction being used as the basis of the customs value under Article 70 UCC takes the form of an actual sale, with an actual buyer and seller. In other words, in order to determine a customs value under Article 70 UCC, it must be established whether the parties to a transaction can be regarded as buyer and seller and thus whether the transaction constitutes a sale in legal terms, as well as in a commercial sense. For example, it is not possible to consider that an actual sale occurs when the goods were imported on consignment; were imported by branches of the same company which are not separate legal entities; or were imported under a hire or leasing contract (even if the contracts includes an option to purchase the goods). Also, a purchase order cannot serve as the basis for the determination of the customs value for the imported goods. A purchase order is an official offer submitted by a potential buyer to a potential seller, expressing the will of the first entity to conclude a sale agreement. Unlike a sales agreement, a purchase order in itself is not a binding contractual arrangement. Only when the future seller confirms (accepts) the purchase order a sale agreement is deemed to be concluded between the buyer and the seller. This applies to transactions in general, as offers may also be submitted by a potential seller (offeror/promisor) to a potential buyer (offeree/promisee).
11. Additionally, it should be underlined that in accordance with Article 145 UCC IA “*The invoice which relates to the declared transaction value is required as a supporting document*” in the meaning of Article 163 (1) UCC. Such invoice is issued in connection with the sale transaction not only concluded but also being performed by its parties. The price actually paid or payable is a basic element of the customs value determined under the transaction value method. Therefore, an invoice identified in Article 145 UCC IA is a fundamental

document from the point of the application of the Union customs provisions dedicated to the determination of the customs value under Article 70 UCC.

12. The information about a price for the purchased goods is only one of the pieces of data required for the customs valuation purposes (other required data to be provided by a declarant for the customs valuation purposes are set out in Annex B to UCC DA (Article 2 (2) UCC DA). The declarant shall be in possession of all information/data necessary to declare the customs value under Article 70 UCC, except where the provisions on simplified customs declarations are applicable (Articles 166 and 167 UCC).
13. The Union customs legislation indicates which data and documents are mandatory in order to place goods under a given customs procedure. In the absence of information and/or documents required by Union customs law in force to declare a customs value under Article 70 UCC, the transaction value method will not be applicable. Because of this fact, one of the secondary methods will have to be used (Article 74 UCC and its implementing provisions).

2.2 Article 128 (2) UCC IA - Sales of goods held under certain special customs situations before entry to free circulation

Article 128(2) UCC IA

Where the goods are sold for export to the customs territory of the Union not before they were brought into that customs territory but while in temporary storage or while placed under a special procedure other than internal transit, end-use or outward processing, the transaction value will be determined on the basis of that sale.

1. This relates to the customs value of goods, inter alia, in a customs warehouse, when these are declared for release for free circulation. This rule is not limited to goods sold while held in a customs warehouse. Other customs situations (goods in temporary storage or for goods placed under a special procedure other than internal transit, end-use or outward processing) are also eligible. However, for ease of reference and because the customs warehouse procedure is the most common procedure used in this context, this guidance will refer to the customs warehousing procedure only.
2. Article 128(2) UCC IA covers cases where the goods are “sold for export” in a warehouse, where there is no sale which covered the goods on arrival into the Union.
3. Therefore, the circumstances covered are those where, on entry into the Union, the goods are not declared for release for free circulation, but placed in temporary storage or under a special procedure (warehousing, inward processing, external transit or temporary admission) for which the customs debt is not incurred yet.
4. If a sale for export exists when the goods arrive into the Union that is the basis for the determination of customs value (Article 128(1) UCC IA).
5. When no such sale exists, the sale (deemed to be a “sale for export”) taking place when the goods are placed under the warehousing procedure will be the relevant basis for the declarant to declare a customs value under the transaction value method.
6. In such situations, where the goods are the subject of a sale and fulfil the conditions laid down in Article 70 UCC after being placed under a special procedure, such sale shall be used for the determination of the customs value under the transaction value method.

7. The application of Article 128 (2) UCC IA relies on the meaning intended by the Union legislator when saying that, in situations indicated in the provisions of paragraph 2 of the Article, *the transaction value will be determined **on the basis of that sale***. The provisions of paragraph 2 of the Article cannot be applied in isolation from the provisions of paragraph 1 of that Article. Taking into account the wording of the provisions of paragraph 1 of the Article, it should be assumed that ***that sale*** means the sale occurring closest to the moment of the introduction of the goods into the customs territory of the Union.
8. Moreover, a distinction should be made between identifying a sale for the customs valuation purpose and the acceptance of a customs declaration where the customs value is determined in order to calculate an amount of customs duties. The fact that there was no sale of goods to the customs territory of the Union before the goods were brought into that customs territory and placed under the warehousing procedure, and that the relevant sale took place only when the goods were already in warehousing, does not invalidate this distinction. Therefore, if the goods placed under the customs warehousing procedure were the subject of more than one sale, only the sale that was concluded closest to the moment of the introduction of the goods into the customs territory of the Union is the relevant sale for declaring the customs value ***under the transaction value method***. Any other subsequent sales, including the last sale before the goods are presented to be released for free circulation into the customs territory of the Union, cannot be used for this purpose.
9. In more general terms, the customs value should be based on transaction value of a sale taking place in / from a customs warehouse within the Union territory only if the following conditions are met cumulatively:
- There is no sale for export in accordance with Article 128(1) UCC IA;
 - The sale in the customs warehouse meets the requirements of Article 70 UCC.

2.3 *Practical examples to illustrate the relevant sale for the determination of the transaction value in accordance with Article 128 (1) and (2) UCC IA (where goods are placed under certain special customs situations (e.g. the warehousing procedure))*

1. The basic aim of the following examples is to illustrate the application of Article 128 UCC IA. Two key aspects were considered. First, the identification of a sale for export to the customs territory of the Union, which could serve to declare a customs value of the imported goods under the transaction value method as defined in Article 70 UCC. Second, the access to a commercial invoice as a supporting document in the meaning of Article 145 UCC IA in conjunction with Article 163 (1) UCC. The second issue becomes noticeable in cases of successive sales scenario.
2. In the framework of the Union customs legislation, taking into account the fulfilment of customs formalities, different actors can be identified, like, e.g. exporters and importers, consignors and consignees, buyers and sellers, declarants, carriers, holders of the authorisations and representatives. Sometimes, the same entity can assume several roles. For example a buyer of the imported goods could be also an importer and a declarant.
3. The examples below refer to *buyers* and *importers*. It is recalled that a key notion for the application of the Union customs provisions dedicated to the transaction value method is *a sale for export to the customs territory of the Union*. The existence of such sale is the first legal condition to apply the method. Therefore, the graphs below present the parties in sales transactions as *sellers* and *buyers*. As a legal aspect of the customs value appears in the context of import operations, it is also necessary to identify an importer in the below presented graphs. According to the Union customs legislation *an importer is the party who makes, or on whose behalf an import declaration is made*⁴.

⁴ Annex B to UCC DA, Common data requirements for declarations, notifications and proof of the customs status of Union goods, TITLE II Notes in relation with data requirements, Group 3 – Parties, data 3/15 Importer.

EXAMPLE 1

Article 128 (1) UCC IA

The sale between A and B takes place before the goods are brought into the customs territory of the Union. B declares the goods for free circulation.

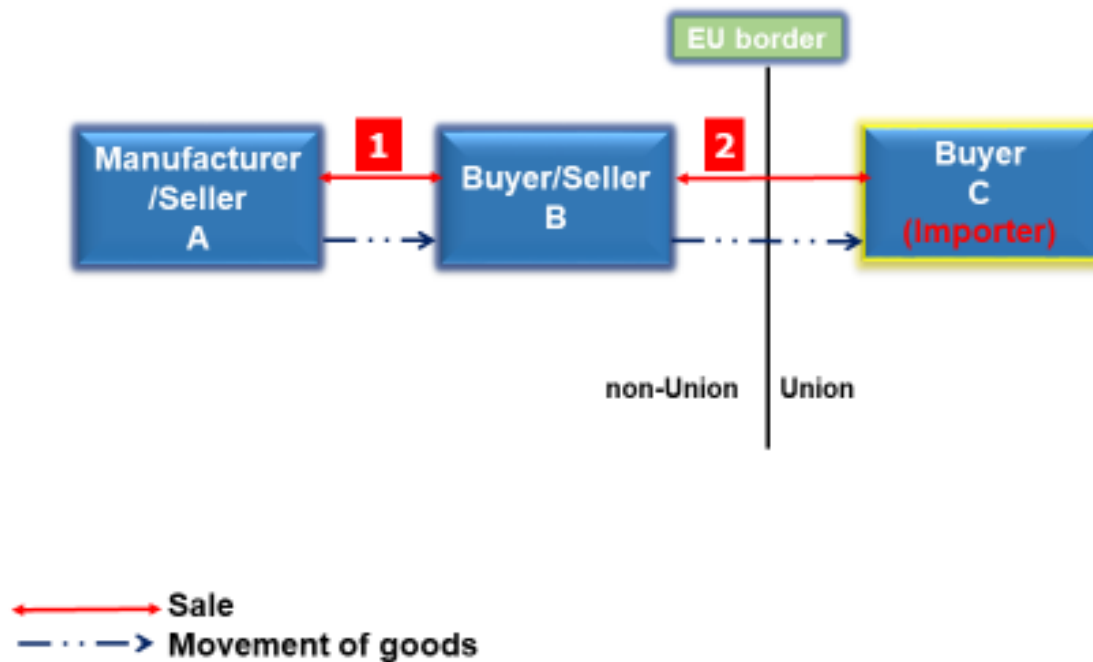


There is only one sale occurring immediately before the goods were brought into the customs territory of the Union. This sale shall be the basis for the declaration of the customs value under the transaction value method as defined in Article 70 (1) UCC.

EXAMPLE 2

Article 128 (1) UCC IA

The sale between **A** and **B**, as well as the sale between **B** and **C** take place before the goods are brought into the customs territory of the Union. **C** declares the goods for free circulation.

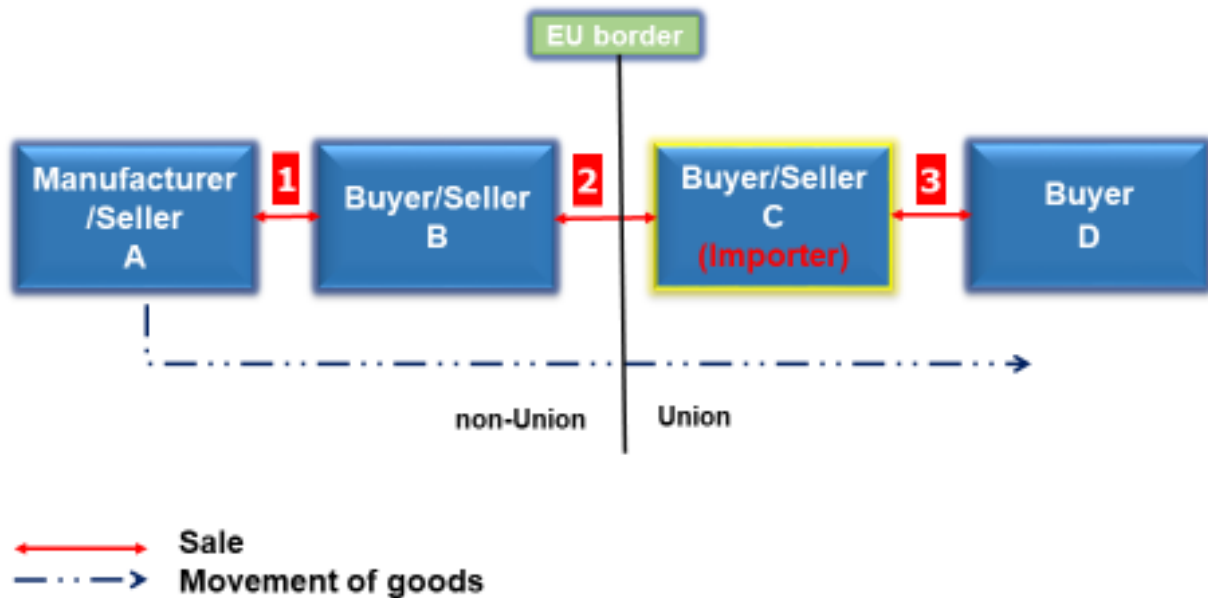


The sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **B** and **C**. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

EXAMPLE 3.a

Article 128 (1) UCC IA

The sale between **A** and **B**, as well as the sale between **B** and **C** take place before the goods are brought into the customs territory of the Union, while the sale between **C** and **D** takes place after the goods are brought into the customs territory of the Union. **C** declares the goods for free circulation.

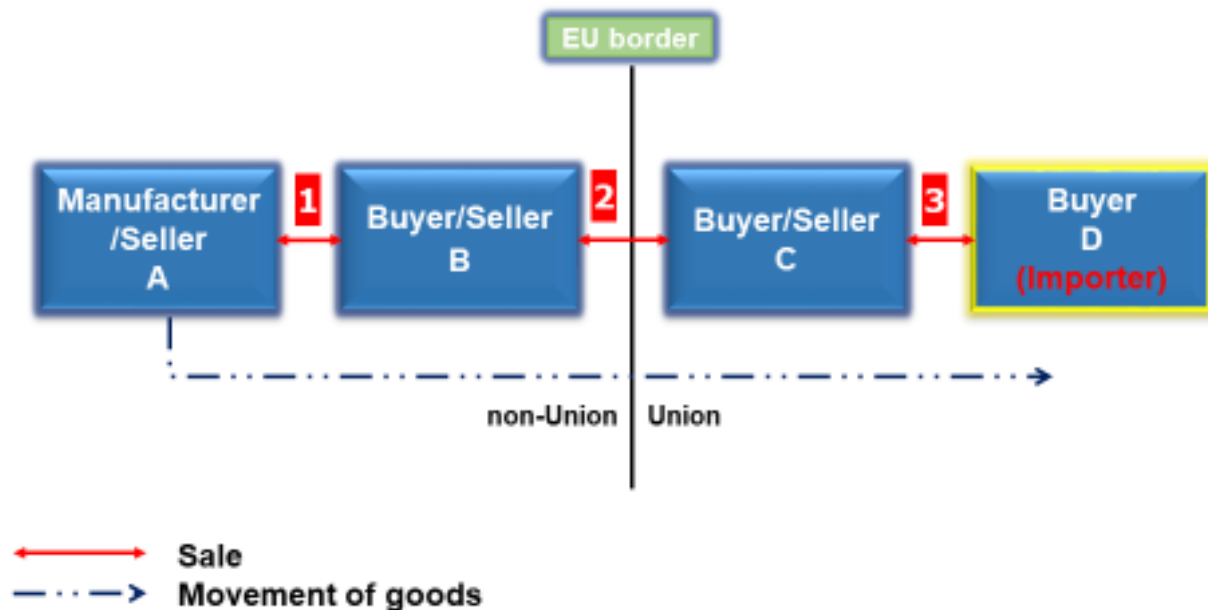


The sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **B** and **C**. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

EXAMPLE 3.b

Article 128 (1) UCC IA

The sale between **A** and **B**, as well as the sale between **B** and **C** take place before the goods are brought into the customs territory of the Union, while the sale between **C** and **D** takes place after the goods are brought into the customs territory of the Union. **D** declares the goods for free circulation.



The sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **B** and **C**. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

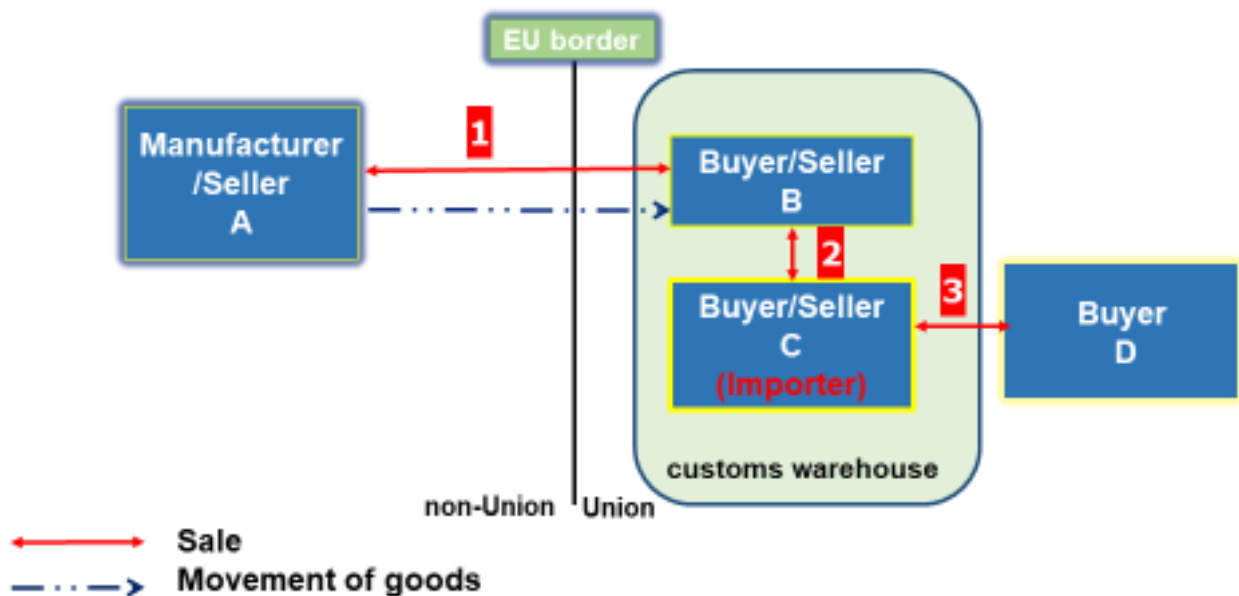
However, the possibility to use the transaction value method depends on the accessibility of the importer (**D**) to an invoice, which refers to the sale transaction concluded between **B** and **C** (Article 145 UCC IA in conjunction with Article 163 (1) UCC). When the importer does not have access to this invoice, the transaction value method is not applicable.

*N.B. the only difference between Example 3.a and 3.b is who acts as importer (in the Example 3.a the importer is **C**, in Example 3.b the importer is **D**).*

EXAMPLE 4.a

Article 128 (1) UCC IA

A sells the goods to **B** before the goods are brought into the customs territory of the Union. The goods are delivered directly from **A** to the Union, where **B** stores them in a customs warehouse. While the goods are stored in the customs warehouse **B** sells them to **C**. Then **C** sells the goods to **D**. **C** declares the goods for free circulation.



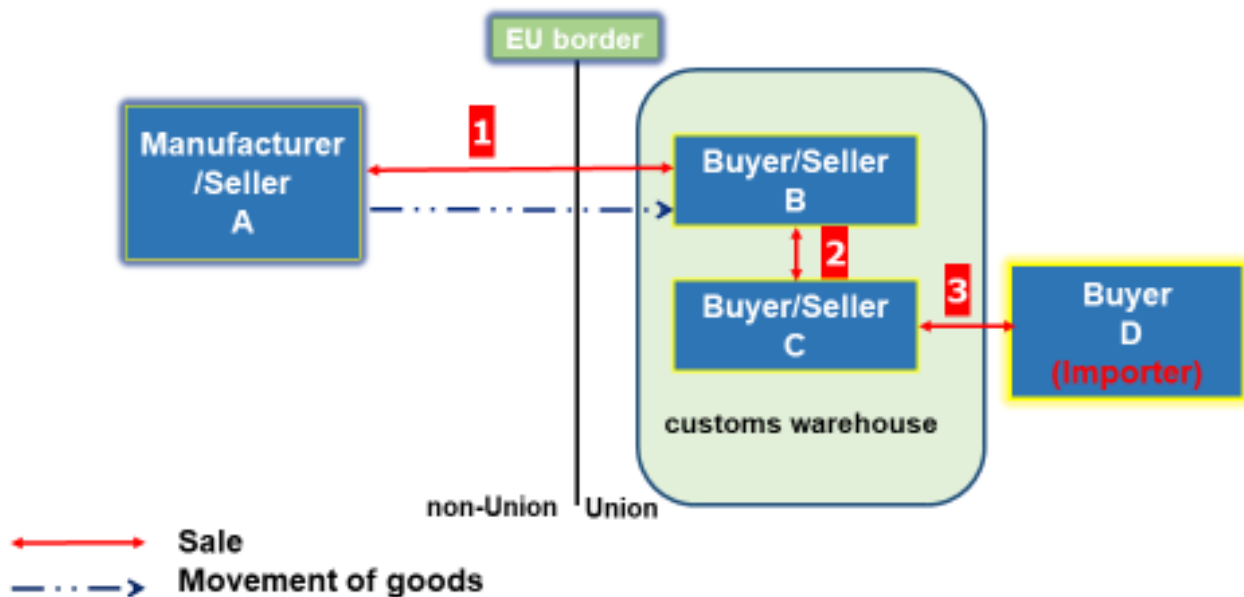
The sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **A** and **B**. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

However, the possibility to use the transaction value method depends on the accessibility of the importer (**C**) to an invoice, which refers to the sale transaction concluded between **A** and **B** (Article 145 UCC IA in conjunction with Article 163 (1) UCC). When **C** does not have access to this invoice, the transaction value method is not applicable.

EXAMPLE 4.b

Article 128 (1) UCC IA

A sells the goods to **B** before the goods are brought into the customs territory of the Union. The goods are delivered directly from **A** to the Union, where **B** stores them in a customs warehouse. While the goods are stored in the customs warehouse **B** sells them to **C**. Then **C** sells the goods to **D**. **D** declares the goods for free circulation.



The sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **A** and **B**. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

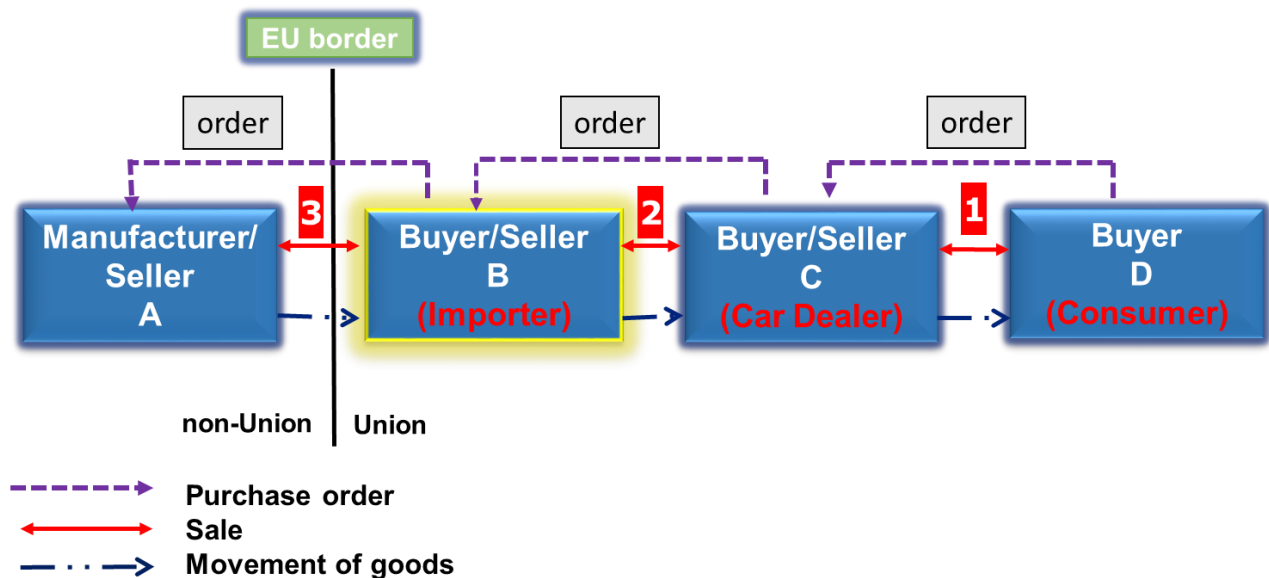
However, the possibility to use the transaction value method depends on the accessibility of the importer (**D**) to an invoice, which refers to the sale transaction concluded between **A** and **B** (Article 145 UCC IA in conjunction with Article 163 (1) UCC). When **D** does not have access to this invoice, the transaction value method is not applicable.

N.B. the only difference between Example 4.a and 4.b is who acts as importer (in the Example 4.a the importer is C, in Example 4.b the importer is D).

EXAMPLE 5

Article 128 (1) UCC IA

This is an example of a succession of orders followed by the corresponding acceptance of such orders, which leads to a succession of sales, starting from the EU consumer (Buyer **D**), through the car dealer (Buyer **C**), up to the importer (Buyer **B**). The sales transactions take place before the goods are brought into the customs territory of the Union. The sale concluded between **B** and **A** is the sale occurring immediately before the goods were brought into the customs territory of the Union. **B** declares the goods for free circulation.



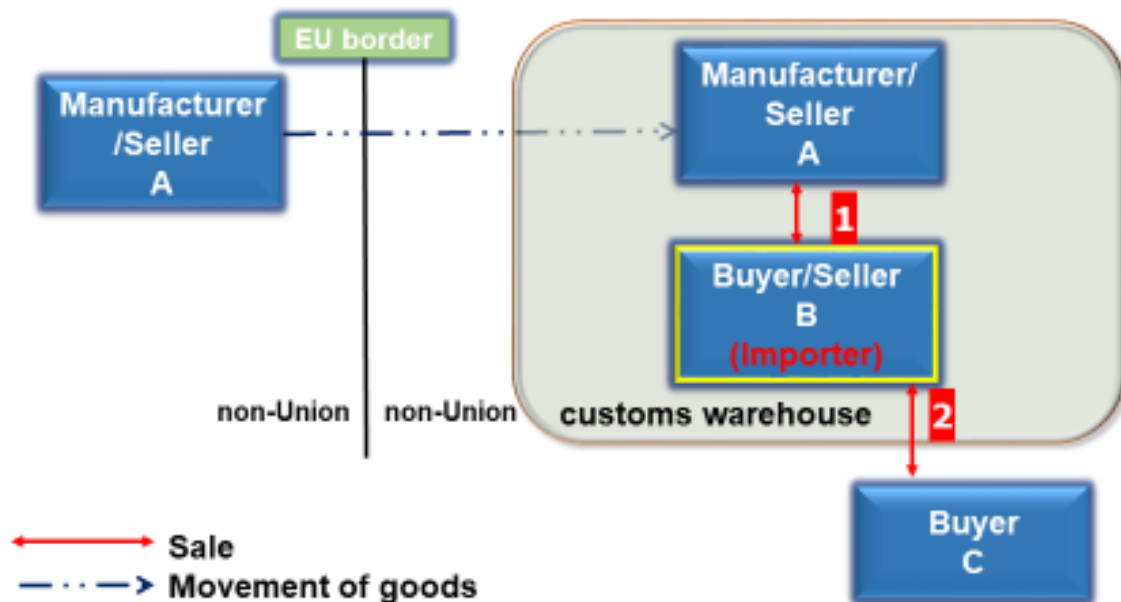
This is an example of a succession of orders followed by the corresponding acceptance of such orders, which leads to a succession of sales (see more on purchase orders in section 2.1, paragraph 10 above).

In the presented example the sale occurring immediately before the goods were brought into the customs territory of the Union is the sale concluded between **A** and **B**. The sale involved an actual transfer of the goods across the Union border. This sale is the sale for export to the customs territory of the Union and shall be used in order to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

EXAMPLE 6

Article 128 (2) UCC IA

A transfers the goods to the Union and stores them in a customs warehouse. While the goods are in the customs warehouse, A sells them to the B. The sale between A and B takes place after the goods are brought into the Union. B declares the goods for free circulation and after that sells them to C.



There is no sale occurring immediately before the goods were brought into the Union. Therefore the provisions of Article 128 (1) UCC IA are not applicable.

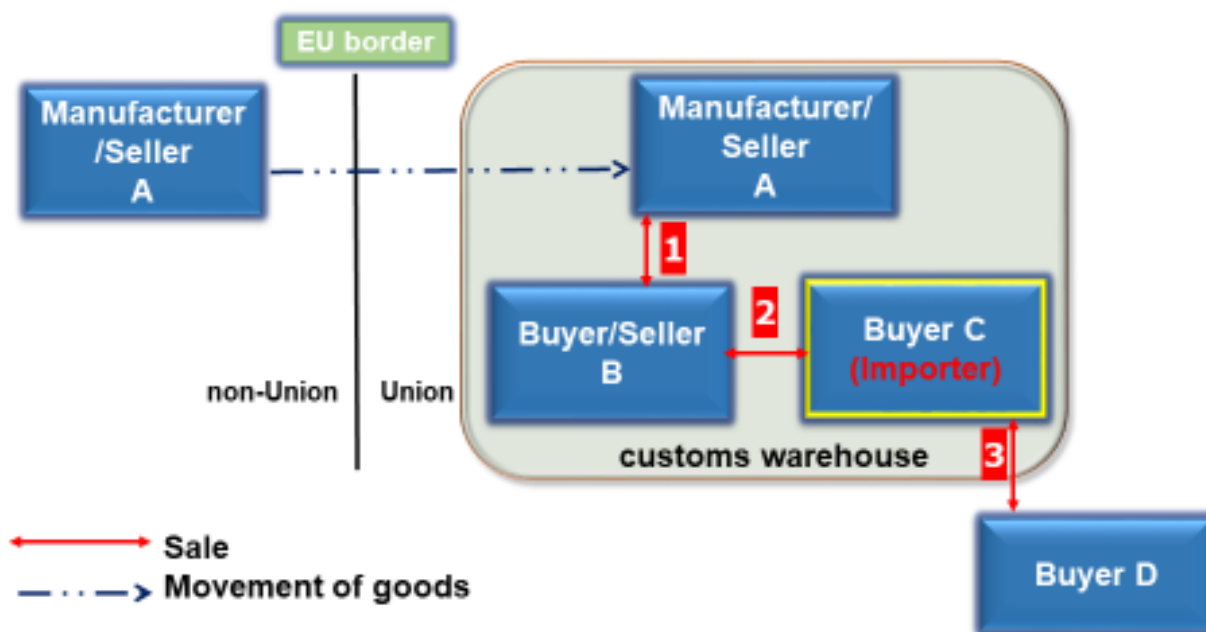
However, while placed under the customs warehousing procedure, the imported goods are subject of a sale concluded between **A** and **B**.

Taking into account that the provisions of paragraph 2 of the Article 128 UCC IA cannot be applied in isolation from the provisions of paragraph 1 of that Article, the sale concluded between **A** and **B** shall be used to determine the customs value under the transaction value method as defined in Article 70 (1) UCC.

EXAMPLE 7

Article 128 (2) UCC IA

A transfers the goods to the Union and stores them in a customs warehouse. While the goods are in the customs warehouse, **A** sells them to **B**. Then **B** sells the goods to **C**. The two sales (between **A** and **B**, and between **B** and **C**) take place after the goods are brought into the Union. **C** declares the goods for free circulation and after that sells them to **D**.



There is no sale occurring immediately before the goods were brought into the Union. Therefore the provisions of Article 128 (1) UCC IA are not applicable.

However, while placed under the customs warehousing procedure, the imported goods were subject of two sales: a sale concluded between **A** and **B** and a sale concluded between **B** and **C**.

Taking into account that the provisions of paragraph 2 of the Article 128 UCC IA cannot be applied in isolation from the provisions of paragraph 1 of that Article, the sale concluded between **A** and **B** shall be used to determine the customs value under the transaction value method as defined in Article 70 (1) UCC. Otherwise said, the sale that took place closest to the moment of the introduction of the goods into the customs territory of the Union is the relevant sale for declaring the customs value under the transaction value method.

However, the possibility to use the transaction value method depends on the accessibility of the importer (**C**) to an invoice, which refers to the sale transaction concluded between **A** and **B** (Article 145 UCC IA in conjunction with Article 163 (1) UCC). When **C** does not have access to this invoice, the transaction value method is not applicable.

2.4 *Transitional Measure in force until 31 December 2017*

Article 347 UCC IA

- 1. The transaction value of the goods may be determined on the basis of a sale occurring before the sale referred to in Article 128 (1) of this Regulation where the person on whose behalf the declaration is lodged is bound by a contract concluded prior to 18 January 2016.*
- 2. This Article shall apply until 31 December 2017.*

1. Article 347 UCC IA introduced a temporary measure, which allowed importers to take into account (honour) their bona fide contracts in place at the date of 18 January 2016 (time of entry into force of the new Regulation) and to provide them with reasonable time to adapt, where necessary, their relevant trade patterns. The provisions were applicable until 31 December 2017.
2. Even if Art. 347 UCC IA were applicable until 31 December 2017, there still may be cases concerning the application of the Article that are a subject of customs proceedings or judicial proceedings. In such situations, the customs authorities or the national administrative courts will have to examine facts and circumstances of a given case in the light of the said provisions.
3. As a result of this temporary measure, the importer was allowed to use a sale other than the sale indicated by Article 128(1) UCC IA - including for example, an “earlier” sale (a sale occurring before the sale specified in Article 128(1) UCC IA) - where the economic operator was constrained or bound in this respect by any contract concluded before the entry into force of the new legislation.
4. If such contract assumed the use of a specific sale (including an earlier sale) which, under the previous legislation⁵ would have been considered eligible as sale for export, then the same sale could still be used, provided that the contract remained in force, until 31 December 2017.
5. The reference to a “relevant contract” was not intended to be restricted to a sales contract between buyer and seller: such a contract might be concluded between parties such as between the buyer of the goods and parties with whom this buyer had forward contractual commitments and engagements. Economic operators were allowed “legitimate expectations” in relation to contractual arrangements in this regard.

⁵ Article 147 (1) of the 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

6. No specific conditions were set out in relation to the form or structure of the contract in question. As a consequence, this contract needed not relate exclusively to a product, a precise delivery date, quantity and a purchase price. Therefore, so-called “framework contracts” might be covered by this provision.

Section 3 – Royalties and licence fees

Article 71 UCC and Article 136 UCC IA

Article 71 UCC

Elements of the transaction value

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

....

(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;

This provision is implemented by Article 136 UCC IA

1. Article 136 UCC IA contains some new provisions which are relatively minor, and for the most part these do not go much further than to simply re-state some basic and self-evident aspects of the major rules in the UCC. The more significant changes relate to the fact that some rules that were found in the CCIP are no longer provided in the UCC legal package.

3.1 Royalties and Licence Fees

1. Imported goods often incorporate elements (e.g., intellectual property rights) that are compensated for (paid for) by means of *payments which are described as royalties or licence fees*.
2. Article 71 UCC recognises that these payments are part of the customs value of goods. Where such payments are already included in the price of the goods, then such value is automatically included in the customs value.
3. Article 71 UCC also provides that, where the value of such elements is not included in the price of the goods, then the inclusion of such payments in the customs value is foreseen, in terms of an adjustment of the price of the goods.
4. Therefore, in accordance with Article 71 UCC, payments to use the rights in question (i.e., intangible property) are to be taken into consideration when the customs value of the imported goods is determined.

5. There is an implicit recognition that the commercial practices and the legal framework related to intellectual property rights, royalties and licence payments, are relevant and applicable. However, EU customs legislation does not provide a definition of royalties and licence fees⁶.

3.2 *Scope*

1. 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 (2017 Edition), as follows:

*“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 cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience”.*⁷

2. The above definition is useful⁸ and indicates that royalties and licence fees are payments for a range of rights (intangibles). The UCC framework does not distinguish between the various rights. Therefore, royalties and licence fees payments for the right to use, for example, a trade mark are no longer the subject of specific provisions, but fall under the general provisions of Article 71 UCC and 136 UCC IA.
3. The scope of licensing arrangements are not addressed in valuation rules, as these come under the relevant commercial contracts. However, typical examples include: the manufacture and/or sale for export of imported goods (incorporating, e.g., patents, designs, models and manufacturing know-how, trade marks), the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods).

3.3 *Contracts and Licensing*

1. When royalties and licence fees are payable, the arrangements are often set out in a separate formal written contract or agreement – usually defined as “licence agreement” - which specifies in detail the licensed product, the nature of the

⁶ Conversely, the WTO Valuation Agreement does not set out the scope of royalties or licence fees either.

⁷ https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en

⁸ This definition was included in the previous legislation (Article 157 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).

rights assigned and know-how provided, the responsibilities of the licensor and the licensee, the methods of calculation and payment of the royalties or licence fees, the legal consequences of their non-payment, etc.

2. Examination of the licence agreement will provide sufficient information on the relevance of the royalty or licence fee to the customs value of goods imported. However, it is also necessary to take into account the terms of the sale contract and the link which may exist between the sales contract and the licence agreement.
3. In most cases, the contract of sale for the goods does not explicitly mention that a payment for royalties or licence fees has to be made for the goods.
4. Article 71(1)(c) UCC states that royalties or licence fees must be added to the price paid or payable when:
 - they are not included in the price paid or payable;
 - they are related to the goods being valued; and
 - the buyer must pay them, either directly or indirectly, as a condition of sale of the goods being valued.

3.4 *Related to the goods being valued*

1. Article 136(1) UCC IA states that royalties or licence fees are related to the imported goods where, in particular, *the rights transferred under the licence or royalties agreement are embodied in the goods*.
2. A direct link to the imported goods is particularly clear where the imported goods are themselves the subject of the licence agreement (i.e. if the imported goods incorporate the trade mark for which the licence fee is paid, this must be considered as related to the imported goods). The same link may also exist where the licensed goods are ingredients or components of the imported goods.

3.5 *Existing guidance*

1. In order to establish whether a royalty relates to the goods to be valued, the key issue is to determine what the licensee receives in return for the payment. For instance, "know-how" provided under a licence agreement will often involve the supply of designs, recipes, formulae and basic instructions as to the use of the licensed product.
2. Where such know-how applies to the imported goods, any royalty or licence fee payment will therefore need to be considered for inclusion in the customs value.

3. A licence agreement (for example in the area of "franchising") sometimes involves the supply of services such as the training of the licensee's staff in the manufacture of the licensed product or in the use of machinery/plant. Technical assistance in the areas of management, administration, marketing, accounting, etc. may also be involved. In such cases the royalty or licence fee payment for those services would not be eligible for inclusion in the customs value.
4. The way the amount of royalties paid is calculated is not a decisive factor for the determination of their inclusion in the customs value (see the last sentence of Article 136 (1) UCC IA).

Example:

in the case of an imported component or ingredient of the licensed product, or in the case of imported production machinery or plant, a royalty payment based on the realisation of a sale of the licensed product may relate wholly, partially or not at all to the imported goods.

3.6 Condition of sale of the imported goods

1. Article 136 (4) UCC IA states that royalties and licence *fees are considered to be paid as a condition of sale for the imported goods* if
 - (a) the seller or a person related to the seller requires the buyer to make this payment, or
 - (b) the payment is made to satisfy an obligation of the seller, or
 - (c) the goods cannot be sold to, or purchased by the buyer without payment of the royalties or licence fees.
2. The criterion⁹ applicable is whether the seller can sell or whether the buyer can buy the goods without the payment of a royalty or licence fee. The condition may be explicit or implicit. In some cases it will be specified 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, required that it should be so stipulated.
3. A further indication is also now provided in 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.¹⁰

⁹ Largely reflecting current guidance (see for example Commentary No 3: Incidence of royalties and licence fees in the customs value, Compendium of Customs Valuation Texts, https://ec.europa.eu/taxation_customs/sites/taxation/files/customs_valuation_compendium_2018_en.pdf)

¹⁰ Article 136 (4) (c) also reflects Commentary No 25.1 of the Technical Committee on Customs Valuation in this regard (see point 7 of Commentary No 25.1).

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.
5. This also reflects the wording of Article 71(1)(c) UCC which refers to:
“*royalties and licence fees related to the goods being valued that the buyer must pay*”, **as a condition of sale of the goods** being valued.
6. Therefore, the underlying *condition of sale test* will continue to play a role.

3.7 *Royalties paid to third parties*

1. Royalties may be paid to the seller or to a third party. Royalties paid to a third party may arise where the payment to the third party is made, for example, to satisfy an obligation of the seller.
2. A third party may be the owner or licensor of the relevant rights. In such cases, the relevance (and therefore the application) of the “condition of sale” test may not be directly applicable, because the commercial circumstances are outside of the circumstances governed by the “condition of sale” rule in the first place.
3. However, it is advisable to apply the same basic approach and that is what is set out in the UCC IA.
4. Thus, this clause reflects basic elements of the sale of goods, including the transfer of title and all rights in the goods, within the contractual framework in force. It is not intended that customs should seek to determine whether a seller can sell, or a buyer can buy the goods, in terms of independent or new criteria, without taking into account contractual provisions (including royalty contracts). Therefore, priority should be given to the commercial circumstances and the relevant contractual arrangements.
5. All the circumstances surrounding the sale (and the import of the goods) should be examined if required. This includes, in particular, possible links between sale and licensing agreements and other relevant information.
6. Each individual situation must be analysed based on all facts surrounding the sale and import of the goods, including contractual and legal obligation of the parties, and other pertinent information.
7. Persons to whom royalties or licence fees are paid are not relevant, in terms of the place of residence of such persons. EU legislation has always made this clear (see Article 136 (5) UCC IA).

8. Finally, Article 136 UCC IA does not indicate an assumption that royalties and licence fees are *automatically includible* in the customs value.
9. There can be various situations where the payment of royalties or licence fees is considered a condition of sale when paid to an unrelated third party.
10. However, *Article 136 UCC IA does not state* that the basic conditions (i.e., *related to the goods and a condition of sale*) are assumed to be met, and that royalties and licence fees are therefore includible in the customs value *unless the declarant demonstrates the contrary*. Customs will examine all commercial contracts or reach conclusions on contractual intentions or obligations, where necessary.

3.8 International Guidance

1. There is substantial guidance available from the WCO Technical Committee on Customs Valuation. Notably, WCO Commentary N° 25.1 provides for a non-exhaustive list of factors that can be taken into account in determining whether the payment of an amount for royalties or licence fees constitutes a condition of sale of the imported goods.

3.9 Practical examples

Hereafter, three different cases are examined, and an approach to the treatment of each case is put forward.

CASE 1

Facts

The license agreement obliges the licensee to conclude a manufacturing agreement with the manufacturer of the licensed products to deliver them exclusively to the licensee. The manufacturer is not related to the licensor in the meaning of Article 127 UCC IA. The license agreement requires the licensee to use a template for such manufacturing agreement or to instruct manufacturers of the licensed products to produce these goods only for the licensee and supply them only to him. In the cases in question the products are neither created nor developed by the licensor.

The rationale of such approach may be to ensure that the licensed goods are only supplied to the licensee, so that he can benefit from the exclusive trade mark rights within a given territory. This protects, on the one hand, the trade mark and, on the other hand, it is ensured that the licensor receives the royalty or license fee from the licensee after the resale of the products.

In some cases the licensor does not explicitly indicate or influence the choice of the manufacturer. The manufacturer is therefore chosen by the licensee and signs the manufacturing agreement, which may contain the clause that the manufacturer only produces for the licensee. There are no further links or interdependencies between the license agreement and the sale contract.

The question is whether in such cases the payments for the license fees are to be considered as made as a condition of sale, in the meaning of Article 136 (4)(c) UCC IA, and therefore included in the customs value of the imported goods.

Analysis and conclusion

In the cases described above, the seller is obliged by virtue of a manufacturing agreement to sell the goods only to licensees – who in turn have to pay royalties or license fees to the licensor pursuant to the license agreement.

As a consequence, therefore, the goods covered by the license agreement may be sold by the manufacturer/seller only to licensees designated by the licensor.

Moreover, the obligation to conclude a manufacturing agreement (or the obligation for the exclusive delivery to the licensees) is set up by the licensor, who is therefore guaranteed to receive royalties and license fees for all the goods supplied by the manufacturer.

The licensee/buyer cannot purchase the goods in question without payment of the royalties or license fees to the licensor. It seems appropriate to conclude that, for the case described, the payment for the license fees/royalty is made as a condition of sale in accordance with Article 136 (4)(c) UCC IA and must therefore be included in the customs value in accordance with Article 71 of the Code .

CASE 2

Facts

A buying agent – related both with the licensor as owner of trade mark/property right and with the licensee - is involved in the import of licensed goods. The producer/seller is not related with any of the other parties (licensor, buyer/licensee, buying agent).

The buying agent is in charge of choosing for the buyer/licensee suitable producers/sellers of the goods. He also carries out general tasks of a buying agent in the context of purchases. The licensor, as the owner of trade mark/property right, will ensure that the producer/seller of the licensed goods sells only to buyers – the licensees - designated by him, which are paying royalties for these goods.

In this context, the buying agent is able to intervene in the production process and/or the sale by imposing limits on sales volume, stipulating selling prices etc.

Are the payments for the license fees, made by the buyer/licensee, to be considered as made as a condition of sale, in the meaning of Article 136(4)(c) UCC IA, and therefore included in the customs value of the imported goods.

Analysis and conclusion

The situation described above is in principle identical to that of case 1. Here, it is the buying agent (related both to the licensor and the buyer/licensee) who, in its functions of buying agent, ensures that the goods are sold by the seller only to licensees, thus guaranteeing the licensor on the payment of royalties for all goods sold.

Therefore, it is appropriate to conclude that the payment for the license fees/royalty is made as a condition of sale in accordance with Article 136(4)(c) UCC IA and these payments must therefore be included in the customs value in accordance with Article 71 of the Code.

CASE 3

Facts

The buyer provides the producer/seller (not related with the licensor in the meaning of Article 127 UCC IA) with free of charge services in order to produce the imported goods. This concerns in particular design and manufacturing know-how. Without these services the producer/seller would not be able to produce and supply the imported goods.

The above-mentioned free of charge services were previously provided by the licensor to the licensee/buyer, who paid in turn royalties to the licensor. Therefore the payment of a royalty is a requirement for the production and delivery of the imported goods to the licensee/buyer. Often, the buyer is also obligated to pay a royalty to the licensor to obtain the right to use a trade mark on the imported goods.

Analysis and conclusion

The production factors which are provided free of charge to the producer/seller of the imported goods for their manufacturing (for example design or manufacturing know-how) must be assessed in the light of the criteria in Article 71(1)(b) of the UCC ("assists"), even if the availability of these production factors is depending on the payment of royalties.¹¹

Should the license agreement also impose on the buyer the obligation to pay royalties for the right to use other forms of intellectual properties paid as a condition of sale of the goods being valued (e.g. trade marks), Article 71(1)(c) of the UCC in conjunction with Article 136(4)(c) UCC IA would be applicable.

¹¹ See also Conclusion No 30: Application of Articles 71(1)(b) and 71(1)(c) of the UCC (relationship between assists and royalties; Compendium of Customs Valuation Texts, https://ec.europa.eu/taxation_customs/sites/taxation/files/customs_valuation_compendium_2018_en.pdf