JUDGMENT OF THE COURT (Fifth Chamber)

9 March 2017 (*)

(Reference for a preliminary ruling — Customs Union — Community Customs Code — Article 32(1)(c) — Determination of the customs value — Royalties or licence fees in respect of the goods being valued — Meaning — Regulation (EEC) No 2454/93 — Article 160 — ‘Condition of sale’ of the goods being valued — Payment of royalties or licence fees to an undertaking related to both the seller and the buyer of the goods — Article 158(3) — Adjustment and apportionment measures)

In Case C-173/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), made by decision of 1 April 2015, received at the Court on 17 April 2015, in the proceedings

GE Healthcare GmbH

v

Hauptzollamt Düsseldorf,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, M. Berger, A. Borg Barthet (Rapporteur), E. Levits and F. Biltgen, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– GE Healthcare GmbH, by L. Harings and G. Schwendinger, Rechtsanwälte,

– Hauptzollamt Düsseldorf, by A. Wollschläger, acting as Agent,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

– the European Commission, by L. Grønfeldt and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 32(1)(c) and 32(5)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006

(OJ 2006 L 363, p. 1) (‘the Customs Code’), and of Articles 158(3) and 160 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1875/2006 of 18 December 2006 (OJ 2006 L 360, p. 64) (‘Regulation No 2454/93’).

2 The request has been made in proceedings between GE Healthcare GmbH and the Hauptzollamt Düsseldorf (Principal Customs Office, Düsseldorf, Germany; ‘the Customs Office’) concerning the taking into account of royalties and licence fees for the determination of the customs value of goods imported from third countries with a view to their release for free circulation within the European Union.

Legal context

The Customs Code

3 Under Article 29(1) and (2) of the Customs Code:

‘1. The customs value of imported 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 Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

(a) that there are no restrictions as to the disposal or use of the goods by the buyer, other than restrictions which:

– are imposed or required by a law or by the public authorities in the Community;

– limit the geographical area in which the goods may be resold

or

– do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with Article 32

and

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the customs authorities have grounds for considering that the relationship influenced the price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with paragraph 1 wherever the declarant demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales, between buyers and sellers who are not related in any particular case, of identical or similar goods for export to the Community;

(ii) the customs value of identical or similar goods, as determined under Article 30(2)(c);

(iii) the customs value of identical or similar goods, as determined under Article 30(2)(d);

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 32 and costs incurred by the seller in sales in which he and the buyer are not related and where such costs are not incurred by the seller in sales in which he and the buyer are related.

(c) The tests set forth in subparagraph (b) are to be used at the initiative of the declarant and only for comparison purposes. Substitute values may not be established under the said subparagraph.'

4 Article 30(1) and (2) of the Customs Code provides:

'1. Where the customs value cannot be determined under Article 29, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined, subject to the proviso that the order of application of subparagraphs (c) and (d) shall be reversed if the declarant so requests; it is only when such value cannot be determined under a particular subparagraph that the provisions of the next subparagraph in a sequence established by virtue of this paragraph can be applied.

2. The customs value as determined under this Article shall be:

(a) the transaction value of identical goods sold for export to the Community and exported at or about the same time as the goods being valued;

(b) the transaction value of similar goods sold for export to the Community and exported at or about the same time as the goods being valued;

(c) the value based on the unit price at which the imported goods for identical or similar imported goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers;

(d) the computed value, consisting of the sum of:

– the cost or value of materials and fabrication or other processing employed in producing the imported goods,

– an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the Community,

– the cost or value of the items referred to in Article 32(1)(e).'

5 Article 31 of the Customs Code provides:

'1. Where the customs value of imported goods cannot be determined under Articles 29 or 30, it shall be determined, on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of:

– the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade of 1994,

– Article VII of the General Agreement on Tariffs and Trade of 1994

and

– the provisions of this chapter.

2. No customs value shall be determined under paragraph 1 on the basis of:

(a) the selling price in the Community of goods produced in the Community;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production, other than computed values which have been determined for identical or similar goods in accordance with Article 30(2)(d);

(e) prices for export to a country not forming part of the customs territory of the Community;

(f) minimum customs values

or

(g) arbitrary or fictitious values.'

6 Under Article 32 of the Customs Code:

'1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

…

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

…

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

…

5. Notwithstanding paragraph 1(c):

(a) charges for the right to reproduce the imported goods in the Community shall not be added to the price actually paid or payable for the imported goods in determining the customs value;

and

(b) payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the Community of the goods.'

7 Under Article 249 of the Customs Code:

'The [Customs Code] Committee may examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a Member State's

representative.’

Regulation No 2454/93

8 Article 143(1) of Regulation No 2454/93 provides:

‘For the purposes of Title II, Chapter 3 of the [Customs] Code and of this Title, persons shall be deemed to be related only if:

…

(f) both of them are directly or indirectly controlled by a third person;

…’

9 Under Article 145(2) and (3) of that regulation:

‘2. After release of the goods for free circulation, an adjustment made by the seller, to the benefit of the buyer, of the price actually paid or payable for the goods may be taken into consideration for the determination of the customs value in accordance with Article 29 of the [Customs] Code, if it is demonstrated to the satisfaction of the customs authorities that:

(a) the goods were defective at the moment referred to by Article 67 of the [Customs] Code;

(b) the seller made the adjustment in performance of a warranty obligation provided for in the contract of sale, concluded before release for free circulation of the goods;

(c) the defective nature of the goods has not already been taken into account in the relevant sales contract.

3. The price actually paid or payable for the goods, adjusted in accordance with paragraph 2, may be taken into account only if that adjustment was made within a period of 12 months following the date of acceptance of the declaration for entry to free circulation of the goods.’

10 Article 156a(1) of Regulation No 2454/93 provides:

‘The customs authorities may, at the request of the person concerned, authorise:

– by derogation from Article 32(2) of the [Customs] Code, certain elements which are to be added to the price actually paid or payable, although not quantifiable at the time of incurrence of the customs debt,

– by derogation from Article 33 of the [Customs] Code, certain charges which are not to be included in the customs value, in cases where the amounts relating to such elements are not shown separately at the time of incurrence of the customs debt,

to be determined on the basis of appropriate and specific criteria.

In such cases, the declared customs value is not to be considered as provisional within the meaning of the second indent of Article 254.’

11 Under Article 157 of that regulation:

‘1. For the purposes of Article 32(1)(c) of the [Customs] Code, royalties and licence fees shall be taken to mean in particular payment for the use of rights relating:

– to the manufacture of imported goods (in particular, patents, designs, models and manufacturing know-how),

or

– to the sale for exportation of imported goods (in particular, trade marks, registered designs),

or

– to the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods).

2. Without prejudice to Article 32(5) of the [Customs] Code, when the customs value of imported goods is determined under the provisions of Article 29 of the [Customs] Code, a royalty or licence fee shall be added to the price actually paid or payable only when this payment:

– is related to the goods being valued,

and

– constitutes a condition of sale of those goods.’

12 Article 158(3) of Regulation No 2454/93 provides:

‘If royalties or licence fees relate partly to the imported goods and partly to other ingredients or component parts added to the goods after their importation, or to post-importation activities or services, an appropriate apportionment shall be made only on the basis of objective and quantifiable data, in accordance with the interpretative note to Article 32(2) of the [Customs] Code in Annex 23.’

13 Article 160 of that regulation provides:

‘When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157(2) shall not be considered as met unless the seller or a person related to him requires the buyer to make that payment.’

14 Under Article 161 of that regulation:

‘Where the method of calculation of the amount of a royalty or licence fee derives from the price of the imported goods, it may be assumed in the absence of evidence to the contrary that the payment of that royalty or licence fee is related to the goods to be valued.

However, where the amount of a royalty or licence fee is calculated regardless of the price of the imported goods, the payment of that royalty or licence fee may nevertheless be related to the goods to be valued.’

15 Article 254 of the regulation provides:

‘If the declarant so requests, the customs authorities may accept declarations for release for free circulation which do not contain all the particulars set out in Annex 37.

However, those declarations shall contain at least the particulars for an incomplete declaration set out in Annex 30A.’

16 Article 256(1) of Regulation No 2454/93 provides:

‘The period allowed by the customs authorities to the declarant for the communication of particulars or production of documents missing at the time when the declaration was accepted may not exceed one month from the date of such acceptance.

…

Where the missing particulars to be communicated or documents to be supplied concern customs value, the customs authorities may, where this proves absolutely necessary, set a longer time limit or extend the period previously set. The total period allowed shall take account of the prescribed periods in force.’

17 Under Article 257(3) of that regulation:

‘Where, pursuant to Article 254, a declaration contains a provisional indication of value, the customs authorities shall:

– enter immediately in the accounts the amount of duties determined on the basis of this indication,

– require, if necessary, the lodging of a security adequate to cover the difference between that amount and the amount to which the goods may ultimately be liable.’

18 The first paragraph of Article 259 of the regulation is worded as follows:

‘An incomplete declaration accepted under the conditions set out in Articles 254 to 257 may be either completed by the declarant or, by agreement with the customs authorities, replaced by another declaration which complies with the conditions laid down in Article 62 of the [Customs] Code.’

19 The interpretative note on customs value relating to Article 32(1)(c) of the Customs Code, set out in Annex 23 to Regulation No 2454/93, is worded as follows:

‘The royalties and licence fees referred to in Article 32(1)(c) may include, among other things, payments in respect to patents, trademarks and copyrights.’

20 The interpretative note on customs value relating to Article 32(2) of the Customs Code, set out in the same annex, is worded as follows:

‘Where objective and quantifiable data do not exist with regard to the additions required to be made under the provisions of Article 32, the transaction value cannot be determined under the provisions of Article 29. As an illustration of this, a royalty is paid on the basis of the price in a sale in the importing country of a litre of a particular product that was imported by the kilogram and made up into a solution after importation. If the royalty is based partially on the imported goods and partially on other factors which have nothing to do with the imported goods (such as when the imported goods are mixed with domestic ingredients and are no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 GE Medical Systems Deutschland GmbH & Co. KG (‘GE Germany’) concluded a standard-form licence agreement with Monogram Licensing International Inc. (‘M’), both undertakings belonging to the General Electrics group (‘the GE Group’).

22 Under Article II A of that agreement, M grants to GE Germany, subject to a royalty and strict adherence to the quality standards established by the parties, a non-exclusive licence to use the GE Group trade mark (‘the GE trade mark’) for goods and services manufactured, sold and supplied by GE Germany. In addition, M granted GE Germany a royalty-free, non-exclusive licence to use the GE trade mark as it thought fit for the sale of the goods to other subsidiaries belonging to the GE Group, their use for test purposes or as samples, or for scrap. GE Germany was also permitted, without royalties, to make use of products under the trade mark in its commercial dealings with another undertaking, also belonging to the GE Group, which had also been allowed to use the GE trade mark under similar conditions to those set out in the licence agreement between M and GE Germany.

23 In order to ensure strict adherence to the quality standards established by the parties regarding the goods and services manufactured, sold and supplied by GE Germany, M had extensive powers of supervision and could, if quality standards were not met, terminate the agreement at short notice. The date on which royalties were due under Article II A of the licence agreement was set at 31 December of each calendar year. For the use of the GE trade mark, the royalties amounted to 0.95% of GE

Germany's annual turnover and to 0.05% of GE Germany's annual turnover for the use of the trade name of the GE Group.

24 In a customs inspection covering the period from 1 October 2007 to 31 December 2009, the Customs Office found in a report of 8 September 2010, in particular, that GE Germany had acquired goods originating in third countries from undertakings belonging to the GE Group but had, wrongly according to that office, not declared the corresponding royalties in the customs value declarations for those goods. Consequently, on 30 September 2010, the Customs Office issued a notice of assessment for import duties in the amount of EUR 14 985.09.

25 After having paid those duties, GE Germany applied on 21 July 2011 to have them refunded under Article 236 of the Customs Code on the ground that, in its view, the royalties owed under the licence agreement should not have been added to the customs value of the goods at issue under Article 32 of the Customs Code.

26 By decision of 9 March 2015, the Customs Office turned down GE Germany's application for a refund on the ground that the customs values used as a basis were correct.

27 Meanwhile, on 31 August 2011, GE Healthcare had become the universal successor of GE Germany.

28 On 11 March 2015, GE Healthcare brought an action before the referring court against the decision of the Customs Office of 9 March 2015. That court, minded to apply Article 32(1)(c) of the Customs Code in the case brought before it, is unsure as to the precise scope of that provision.

29 In those circumstances, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Can royalties or licence fees within the meaning of Article 32(1)(c) of [the Customs Code] be included in the customs value even if it is not established, either at the time at which the contract was concluded or at the relevant date as regards the incurring of the customs debt (the latter date being determined in the event of any dispute in accordance with Articles 201(2) and 214(1) of the [Customs] Code), that royalties or licence fees were owed?

2. If the reply to Question 1 is in the affirmative: can royalties or licence fees for trade marks within the meaning of Article 32(1)(c) of the [Customs] Code relate to the imported goods notwithstanding the fact that those royalties or licence fees are also paid for services and for the use of the first part of the name of the common group of undertakings?

3. If the reply to Question 2 is in the affirmative: can royalties or licence fees for trade marks within the meaning of Article 32(1)(c) of the [Customs] Code be a condition of the sale for export to the Community of the imported goods within the meaning of Article 32(5)(b) of the [Customs] Code even if they are payable, and paid, to an undertaking related to the seller and to the buyer?

4. If the reply to Question 3 is in the affirmative and the royalties or licence fees relate, as here, partly to the imported goods and partly to post-importation services: does it follow from the appropriate apportionment made only on the basis of objective and quantifiable data, in accordance with Article 158(3) of … [Regulation No 2454/93] and the interpretative note on Article 32(2) of the [Customs] Code in Annex 23 to … Regulation [No 2454/93], that only a customs value in accordance with Article 29 of the [Customs] Code may be corrected, or, if a customs value cannot be determined in accordance with Article 29 of the [Customs] Code, is the apportionment laid down in Article 158(3) of … Regulation [No 2454/93] also possible, in so far as those costs would not otherwise be taken into account, when determining a customs value to be established in accordance with Article 31 of the [Customs] Code?'

Consideration of the questions referred

Preliminary observations

30 At the outset, it should be borne in mind that, according to settled case-law of the Court, the objective of EU law on customs valuation is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. The customs value must thus reflect the real economic value of imported goods and therefore take into account all of the elements of such goods that have economic value (see, to that effect, judgments of 16 November 2006, *Compaq Computer International Corporation*, C-306/04, EU:C:2006:716, paragraph 30, and of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraphs 23 and 26).

31 In particular, by virtue of Article 29 of the Customs Code, the customs value of imported goods is, in principle, the transaction value, that is to say, the price actually paid or payable for the goods when they are sold for export to the customs territory of the European Union, adjusted, where necessary, in accordance with Article 32 of that code (see, to that effect, judgment of 12 December 2013, *Christodoulou and Others*, C-116/12, EU:C:2013:825, paragraphs 38, 44 and 50, and of 21 January 2016, *Stretinskis*, C-430/14, EU:C:2016:43, paragraph 15).

32 Article 32 of the Customs Code sets out the elements which must be added to the price actually paid or payable for the imported goods in order to determine their customs value. Thus, according to Article 32(1)(c) of the Customs Code, 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 licence fees are not included in the price actually paid or payable, must be added to the price actually paid or payable.

33 Under Article 157(1) of Regulation No 2454/93, ‘royalties and licence fees’ for the purposes of Article 32(1)(c) of the Customs Code are to be taken to mean, in particular, payment for the use of rights relating ‘to the sale for exportation of imported goods (in particular, trade marks, registered designs)’ or ‘to the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods)’.

34 Article 157(2) of Regulation No 2454/93 specifies, for its part, that royalties or licence fees must to be added to the price actually paid or payable where that payment is related to the goods being valued and constitutes a condition of sale of those goods.

35 Thus, the adjustment laid down in Article 32(1)(c) of the Customs Code is to be applied 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.

36 In the present case, as regards the first condition, it is undisputed, according to the order for reference, that, pursuant to the requirements of the licence agreement at issue in the main proceedings, GE Healthcare did not include the royalties or licence fees for the use of the GE trade mark in the customs value of the goods being valued.

The first and second questions

37 By its first and second questions, which it is appropriate to consider together in so far as they concern the second condition set out in paragraph 35 above, the referring court asks, in essence, whether Article 32(1)(c) of the Customs Code must be interpreted as meaning that royalties or licence fees are ‘related to the goods being valued’ where, first, the royalties or licence fees cannot be determined at the time when the agreement was concluded or when the customs debt was incurred and, second, those royalties or licence fees relate only partly to the goods being valued.

38 In order to answer that question, it must, in the first place, be examined whether royalties or licence fees are, within the meaning of Article 32(1)(c) of the Customs Code, ‘related to the goods being valued’ even if the amount of those royalties or licence fees could not be determined at the time when the licence agreement was concluded or when the customs debt was incurred.

39 In that regard, according to the order for reference, the licence agreement at issue in the main proceedings provided for the obligation, on the part of GE Germany, to pay the royalties and licence

fees for the use of the GE trade mark for goods which it imported, save for certain goods capable of being used, under that trade mark, without payment of royalties, such as goods sold to other subsidiaries belonging to the GE Group, those used for test purposes, as samples, or for scrap.

40 Accordingly, and as the Advocate General stated in point 29 of his Opinion, such royalties or licence fees indeed relate to the goods being valued, even if their precise amount has not been determined at the time when the licence agreement was concluded or at a later stage, when the customs declaration was accepted or the customs debt incurred.

41 Article 32(1)(c) of the Customs Code does not provide for any condition as regards, in particular, whether the exact amount of the royalties or licence fees to be paid must be determined when the customs debt was incurred.

42 By contrast, Article 156a(1) of Regulation No 2454/93 provides that the customs authorities may, at the request of the person concerned and by derogation from Article 32(2) of the Customs Code, authorise certain elements required to be added to the price actually paid or payable but not quantifiable at the time when the customs debt is incurred to be determined on the basis of appropriate and specific criteria.

43 In addition, Article 254 of Regulation No 2454/93 provides for the possibility on the part of the declarant, if accepted by the customs authorities, to submit an incomplete declaration for release for free circulation, which, under Article 257(3) of that regulation, may give a provisional indication of the customs value of the goods intended to be imported, capable of being added to subsequently pursuant to Articles 256, 257 and 259 of that regulation.

44 Furthermore, paragraph 14 of Commentary No 3 (customs valuation section) on the incidence of royalties and licence fees in customs value, drawn up by the Customs Code Committee referred to in Article 247a of that code (‘the Customs Code Committee’), reads as follows:

‘In general royalties and licence fees are calculated after importation of the goods to be valued. In such cases final valuation may be delayed with reference to Article 257(3) of the [Customs Code]. A general adjustment may be determined based on results over a representative period and updated regularly. This is a matter for agreement between importers and customs authorities.’

45 The conclusions of the Customs Code Committee, although they do not have legally binding force, nevertheless constitute an important means of ensuring the uniform application of the Customs Code by the customs authorities of the Member States and as such may be regarded as a valid aid to the interpretation of the Code (judgment of 6 February 2014, *Humeau Beaupréau*, C-2/13, EU:C:2014:48, paragraph 51 and the case-law cited).

46 Article 32(1)(c) of the Customs Code does not therefore require the amount of royalties or licence fees to be determined at the time when the agreement was concluded or when the customs debt is incurred in order for that amount to be regarded as related to the goods being valued.

47 In the second place, it must be examined whether royalties or licence fees may be regarded as related to the goods being valued although they are related only partly. In the present case, the royalties or licence fees have also been paid for services provided after importation of the goods at issue in the main proceedings and for the use of the trade name of the group to which the declarant belonged.

48 In that regard, the second paragraph of Article 161 of Regulation No 2454/93 provides that where the amount of a royalty or licence fee is calculated regardless of the price of the imported goods, the payment of that royalty or licence fee may nevertheless be related to the goods to be valued.

49 According to the order for reference, the amount of the royalties or licence fees depends in the present case on a percentage of the turnover generated by the sale to third parties of the imported goods under the licence agreement. It follows that the payment of those royalties or fees ‘[is] related’ to the goods being valued within the meaning of the second paragraph of Article 161 of Regulation No 2454/93.

50 That finding cannot be brought into question by the fact that, according to that order for reference, the royalties and licence fees also relate to services provided after the goods were imported by GE Germany and to the use of the trade name of the GE Group by that undertaking.

51 Article 158(3) of Regulation No 2454/93 provides that if royalties or licence fees relate partly to the imported goods and partly to other ingredients or component parts added to the goods after their importation, or to post-importation activities or services, an appropriate apportionment is to be made only on the basis of objective and quantifiable data, in accordance with the interpretative note on Article 32(2) of the Customs Code set out in Annex 23 to Regulation No 2454/93.

52 Thus, Article 158(3) of Regulation No 2454/93 explicitly provides that royalties or licence fees to be paid may be regarded as being related partly to the goods and partly to services supplied after their importation in such a way that the adjustment provided for in Article 32(1)(c) of the Customs Code will be applicable, even if those royalties or licence fees would relate only partly to the goods imported, such an adjustment thereby needing 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.

53 It follows that, under Article 32(1)(c) of the Customs Code, royalties or licence fees may be ‘related to the goods being valued’, within the meaning of that provision, even if the royalties or licence fees relate only partly to those goods.

54 Having regard to the foregoing considerations, the answer to the first and second questions is that Article 32(1)(c) of the Customs Code must be interpreted as, first, not requiring the amount of royalties or licence fees to be determined at the time when a licence agreement was concluded or when the customs debt was incurred in order for those royalties or licence fees to be regarded as related to the goods being valued and, second, allowing such royalties or licence fees to be ‘related to the goods being valued’ even if those royalties or licence fees relate only partly to those goods.

The third question

55 By its third question, which concerns the third condition set out in paragraph 35 above, the referring court asks, in essence, whether Article 32(1)(c) of the Customs Code and Article 160 of Regulation No 2454/93 must be interpreted as meaning that royalties or licence fees are a ‘condition of sale’ of the goods being valued where, within a single group of undertakings, those royalties or licence fees are required to be paid by an undertaking related to both the seller and the buyer and were paid to that same undertaking.

56 It should be borne in mind that Article 157(2) of Regulation No 2454/93, which lays down the conditions for the application of Article 32(1)(c) of the Customs Code, provides that royalties or licence fees must be added to the price actually paid or payable where that payment is, first, related to the goods being valued and, second, constitutes a condition of sale of those goods.

57 However, neither Article 32(1)(c) of the Customs Code nor Article 157(2) of Regulation No 2454/93 specifies what is meant by ‘condition of sale’ of the goods being valued.

58 In that regard, the Customs Code Committee has taken the view, in paragraph 12 of Commentary No 3 (Customs Valuation Section) on the incidence of royalties and licence fees in customs value that ‘the question to be answered in this context is whether the seller would be prepared to sell the goods without the payment of a royalty or licence fee. The condition may be explicit or implicit. In the majority of cases it will be specified in the licence agreement whether the sale of the imported goods is conditional upon payment of a royalty or licence fee. It is not, however, essential that it should be so stipulated.’

59 Regard should be had to the guidelines provided by that commentary, as stated in paragraph 45 above.

60 In those circumstances, the Court considers, as the Advocate General stated in point 51 of his Opinion, that the payment of a royalty or of a licence fee is a ‘condition of sale’ of the goods being valued where, in the course of the contractual relations between the buyer, or the person related to him, and the seller, the payment of the royalty or of the licence fee is so important to the seller that, without such

payment, the seller would not have concluded the sales contract, this being a matter to be determined by the referring court.

61 As regards the case in the main proceedings, according to the order for reference, the licensor, M, which was related to both the seller and the buyer, was the recipient of the royalties or licence fees relating to the goods sold. That recipient was therefore, in the present case, the same undertaking as that which required the buyer of those goods to pay the related royalties or licence fees, the three undertakings forming part of the same group, the GE Group, and being controlled, directly or indirectly, by the parent company of that group.

62 In that connection, Article 160 of Regulation No 2454/93 provides that, when the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 157(2) of the regulation are not to be considered as met unless the seller or a person related to him requires the buyer to make that payment.

63 As a result, the referring court is uncertain whether the condition laid down in Article 160 of Regulation No 2454/93 is satisfied in a situation where the ‘third party’ to whom the royalty or licence fee is payable and the ‘person related’ to the seller are the same person.

64 In that regard, GE Healthcare claims that, in the German-language version, Article 160 of Regulation No 2454/93 provides that the person requiring payment of the royalty or licence fee and the third party to whom the royalty or licence fee is payable cannot be identical.

65 However, according to settled case-law of the Court, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement that EU law be applied uniformly. Where there is a divergence between the various language versions, the provision in question must thus be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 15 November 2011, *Kurcums Metal*, C-558/11, EU:C:2012:721, paragraph 48 and the case-law cited).

66 As the Advocate General stated in point 63 of his Opinion, none of the other language versions of Article 160 of Regulation No 2454/93 contain a second reference to the ‘third party’ to whom royalties or licence fees are payable.

67 Furthermore, as the Advocate General also stated in point 65 of his Opinion, it cannot be concluded from the fact that a person related to the seller is not classified as a ‘third party’ within the meaning of Article 160 of Regulation No 2454/93 that the payment of royalties or licence fees is not a ‘condition of sale’ of the goods being valued within the meaning of Article 32(1)(c) of the Customs Code.

68 On the contrary, it is necessary to ascertain whether the person related to the seller has any control over the seller or the buyer such as to enable him to ensure that imports of the goods to which his licence fee relates are subject to the payment to him of the royalty or licence fee for those goods.

69 It is for the national court to ascertain whether that is the position in the main proceedings.

70 In addition, paragraph 13 of Commentary No 3 (Customs Valuation Section) on the incidence of royalties and licence fees in customs value, drawn up by the Customs Code Committee, states that ‘when goods are purchased from one person and a royalty or licence fee is paid to another person, the payment may nevertheless be regarded as a condition of sale of the goods … The seller, or a person related to him, may be regarded as requiring the buyer to make that payment when, for example, in a multinational group goods are bought from one member of the group and the royalty is required to be paid to another member of the same group. Likewise, the same would apply when the seller is a licensee of the recipient of the royalty and the latter controls the conditions of the sale’.

71 Having regard to the foregoing, the answer to the third question is that Article 32(1)(c) of the Customs Code and Article 160 of Regulation No 2454/93 must be interpreted as meaning that royalties or licence fees are a ‘condition of sale’ of the goods being valued where, within a single group of

undertakings, those royalties or licence fees are required to be paid by an undertaking related to both the seller and the buyer and were paid to that same undertaking.

The fourth question

72 By its fourth question, the referring court asks, in essence, whether Article 32(1)(c) of the Customs Code and Article 158(3) of Regulation No 2454/93 must be interpreted as meaning that the adjustment and apportionment measures, referred to in those provisions respectively, may be applied where the customs value of the goods at issue has been determined, not on the basis of Article 29 of the Customs Code, but on the basis of the alternative method laid down in Article 31 of that code.

73 It is clear from the case file before the Court that, in regard to several tax years before the 2009 tax year, the Principal Customs Office, Düsseldorf, did not receive the data necessary to enable it to apply the adjustment, under Article 32(1)(c) of the Customs Code, of the transaction value calculated according to the method provided for in Article 29 of that code. Consequently, the method for determining the customs value referred to in Article 31 of the Customs Code was used, since the methods laid down in Articles 29 and 30 thereof were not, a priori, applicable.

74 In so far as Article 32(1)(c) of the Customs Code provides that an adjustment may be applied in order to determine the customs value solely under Article 29 thereof, the question arises as to whether that adjustment, and in particular the apportionment provided for in Article 158(3) of Regulation No 2454/93, may also be applied where the customs value of the goods imported has been determined according to the method provided for in Article 31 of that code.

75 It should be borne in mind that, where the customs value cannot be determined by the transaction value of the goods being valued in accordance with Article 29 of the Customs Code, the customs valuation is to be carried out in accordance with the provisions of Article 30 of that code by applying sequentially the methods laid down in subparagraphs (a) to (d) of paragraph 2 of that article (judgment of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 27 and the case-law cited).

76 If it is no longer possible to determine the customs value of the imported goods on the basis of Article 30 of the Customs Code, the customs valuation is to be carried out in accordance with the provisions under Article 31 of that code (judgment of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 28 and the case-law cited).

77 Consequently, it is clear, both from the wording of Articles 29 to 31 of the Customs Code and from the order in which the criteria for determining the customs value must be applied pursuant to those articles, that those provisions are subordinately linked to each other. Thus, when the customs value cannot be determined by applying a given provision, only then is it appropriate to refer to the provision which comes immediately after it in the established order (judgment of 16 June 2016, *EURO 2004. Hungary*, C-291/15, EU:C:2016:455, paragraph 29 and the case-law cited).

78 Article 31(1) of the Customs Code provides that the customs value of imported goods is to be determined on the basis of data available in the European Union, using reasonable means consistent with the principles and general provisions of the international agreements and the provisions of Chapter 3 thereof which it sets out.

79 In that regard, as the Advocate General stated in point 86 of his Opinion, the reference in Article 31(1) of the Customs Code to Chapter 3 thereof means that the general provisions of that chapter, of which Article 32 of the code forms part, also apply where the customs value of imported goods is determined in accordance with Article 31(1) of the code.

80 As stated in paragraph 30 above, the objective of EU law on the valuation of goods for customs purposes is to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values. In accordance with point 2 of the interpretative note on customs value concerning Article 31(1) of the Customs Code, set out in Annex 23 to Regulation No 2454/93, the methods of valuation to be used under Article 31(1) should be those laid down in Articles 29 and 30(2) of the Code but a ‘reasonable flexibility’ in the application of those methods would be in conformity with the

objectives and provisions of Article 31(1) of the Code (see, to that effect, judgment of 28 February 2008, *Carboni e derivati*, C-263/06, EU:C:2008:128, paragraph 60).

81 Having regard to the need to establish a customs value if an undertaking fails to provide full information relating to the relevant tax years and to the ‘reasonable flexibility’ mentioned in point 2 of the interpretative note, it must be accepted that taking into account data relating to other tax years of the undertaking may constitute data available in the European Union which Article 31(1) of the Customs Code allows to be used as a basis for determining customs value. Reference to such data constitutes a means of determining a customs value which is both ‘reasonable’ within the meaning of Article 31(1) and consistent with the principles and general provisions of the international agreements and the provisions referred to in Article 31(1) (see, by analogy, judgment of 28 February 2008, *Carboni e derivati*, C-263/06, EU:C:2008:128, paragraph 61).

82 As regards Article 158(3) of Regulation No 2454/93, this provides that if royalties or licence fees relate partly to the imported goods and partly to other ingredients or component parts added to the goods after their importation, or to post-importation activities or services, an appropriate apportionment ‘shall to be made only on the basis of objective and quantifiable data’, in accordance with the interpretative note on Article 32(2) of the Customs Code in Annex 23 to Regulation No 2454/93.

83 It follows from paragraph 81 above, and from point 91 of the Advocate General’s Opinion, that data relating to other tax years of the undertaking in question may be regarded as ‘objective and quantifiable’ within the meaning of Article 158(3) of Regulation No 2454/93 and, accordingly, that the apportionment provided for in that article may be applicable.

84 Furthermore, as the Commission and the German Government submit, to hold otherwise could give rise to undue advantages for importers who refused to provide full information, thereby preventing proper determination of the customs value of the imported goods.

85 Having regard to the foregoing, the answer to the fourth question is that Article 32(1)(c) of the Customs Code and Article 158(3) of Regulation No 2454/93 must be interpreted as meaning that the adjustment and apportionment measures, referred to in those provisions respectively, may be applied where the customs value of the goods at issue has been determined, not on the basis of Article 29 of the Customs Code, but on the basis of the alternative method laid down in Article 31 of that code.

Costs

86 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 32(1)(c) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, must be interpreted as, first, not requiring the amount of royalties or licence fees to be determined at the time when a licence agreement was concluded or when the customs debt was incurred in order for those royalties or licence fees to be regarded as related to the goods being valued and, second, allowing such royalties or licence fees to be ‘related to the goods being valued’ even if those royalties or licence fees relate only partly to those goods.**

2. **Article 32(1)(c) of Regulation No 2913/92, as amended by Regulation No 1791/2006, and Article 160 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92, as amended by Commission Regulation (EC) No 1875/2006 of 18 December 2006, must be interpreted as meaning that royalties or licence fees are a ‘condition of sale’ of the goods being valued where, within a**

single group of undertakings, those royalties or licence fees are required to be paid by an undertaking related to both the seller and the buyer and were paid to that same undertaking.

3. Article 32(1)(c) of Regulation No 2913/92, as amended by Regulation No 1791/2006, and Article 158(3) of Regulation No 2454/93, as amended by Regulation No 1875/2006, must be interpreted as meaning that the adjustment and apportionment measures, referred to in those provisions respectively, may be applied where the customs value of the goods at issue has been determined, not on the basis of Article 29 of Regulation No 2913/92, as amended, but on the basis of the alternative method laid down in Article 31 of that regulation.

[Signatures]

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* Language of the case: German.