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DS CUSTOMS NEWS

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MODERNISATION OF THE EUROPEAN CUSTOMS CODE

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What's about customs valuation and royalties?

The regulation (CE) n° 450/2008 of the European (EU) Parliament and the Council of April 23rd 2008 laying down the community customs code was published last June 4th (JOUE L 145).

Most of the comments about that new regulation focused on the economic operator agreement statute (EOA).

But one should not forget to look carefully at the many other changes not related to the security issues or to an environment without a paper-based support which is aimed by both customs and business community.

It is the case of the provisions of the customs code related to the taxation of the royalties.

In the **last version of the draft the Implementation provisions of the modernised customs code (MCCIP)** to be published soon, we have seen some very important changes on this issue.

This should encourage your company to check and, if necessary, review carefully its license and sale agreements.

DS customs lawyers provide some general comments aside with the draft provisions and remain at the disposal of your company to provide more details.

COMMENTS:

- From a formal perspective, article 230-11 of MCCIP is a unique provision dedicated to royalties which should replace the 6 existing articles of the current CCIP.

- Where the current version of the CCIP is stating *"the royalty shall* not *be dutiable unless… ,"* the current draft MCCIP provides examples where the royalty shall be found dutiable.

- The number of conditions for the royalty to be dutiable is reduced. For the trademark royalty, the 3 conditions currently provided by article 159 are removed.

- The draft is more explicit about the conditions under which the royalty is paid as a condition of sale:

    - The seller or a person related to the seller requires the buyer to make this payment [current article 160], or

    - The payment is made to fulfil an obligation of the seller [see commentary 3 of the Valuation Section of the CCC]

    - In general the condition of sale is met if the goods may not be produced or sold without the royalties or licence fees being paid directly or indirectly to the licensor. While under the current CCIP it is considered that the royalty payment should be a condition of sale if the seller/manufacturer would refuse to sell the goods in case if the royalty is not paid, the draft MCCIP provides that the royalty is a condition of sale if the goods may not be produced or sold without such payment.

    - The provisions pertaining to the control of licensor over the manufacturer remains.

DRAFT PROVISIONS

Article 230-11

Royalties and licence fees

MCC implemented provision	*MCC empowering provision*	*Current IP provision*
Article 41	*Article 43(a)*	*Article 157-161* *(Art. 32 CC)*

Draft amendment	***Current provisions***
Article 230-11 ***1.*** *For tile purposes of* ***Article 230-09 (1)(c),*** *royalties and licence fees shall be taken to mean payment for the use of rights relating to,* ***inter alia****, know-how, trade marks, copyright, patents, designs and models.*	***Article 157*** *1. For the purposes of Article 32 (1) (c) of the 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, trademarks, registered designs), or* *— to the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods).*
2. *Royalties and licence fees are related to the imported goods if the rights transferred under the licence or royalties agreement* ***are embodied*** *in them.*	*2. Without prejudice to Article 32 (5) of the Code, when the customs value of imported goods is determined under the provisions of Article 29 of the 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.*
The method of calculation of the amount of the royalty or licence fee is not the decisive factor here. *However, 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.*	***Article 161*** *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.*

Draft amendment	***Current provisions***
3. *Royalties and licence fees are paid as a condition of sale for the imported goods* ***a)*** *if the seller or a person related to the seller requires the buyer to make this payment,* ***or***	***Article 160*** *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.*
b) ***if the payment is made to fulfil an obligation of the seller***	
c) *In other cases the payment of the royalties or licence fees is considered to be paid as a condition of sale for the imported goods,* ***if the goods may not be produced or sold without the royalties or licence fees being paid directly or indirectly to the licensor.***	
4. *The country in which the recipient of the royalty or licence payment is established is not a material consideration.*	***Article 162*** *In applying Article 32 (1) (c) of the Code, the country of residence of the recipient of the payment of the royalty or licence fee shall not be a material consideration.* ***Article 158*** *1. When the imported goods are only an ingredient or component of goods manufactured in the Community, an adjustment to the price actually paid or payable for the imported goods shall only he made when the royalty or licence fee relates to those goods.* *2. Where goods are imported in an unassembled state or only have to undergo minor processing before resale, such as diluting or packing, this shall not prevent a royalty or licence fee from being considered related to the imported goods.* *3. 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 Code in Annex 23.*

Draft amendment	*Current provisions*
	Article 159 *A royalty or licence fee in respect of the right to use a trade mark is only to be added to the price actually paid or payable for the imported goods where:* *— the royalty or licence fee refers to goods which are resold in the same state or which are subject only to minor processing after importation,* *— the goods are marketed under the trade mark, affixed before or after importation, for which the royalty or licence fee* is *paid, and* *— the buyer is not free to obtain such goods from other suppliers unrelated to the seller.*