OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 26 January 2006 [1]

I — Introductory remarks

1. In these proceedings, the Gerechtshof te Amsterdam is asking the Court for an interpretation of the Community Customs Code [2] in relation to the customs value of portable computers with pre-installed operating software. In particular, it wishes to know whether or not the value of the operating software must be included in the customs value of the portable computers.

II — Relevant legislation

2. Article 29(1) of the Customs Code provides in relevant part as follows:

'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: ...

(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.'

3. Under Article 29(2) of the Customs Code, the transaction value is acceptable in a sale between related persons if it closely approximates to the market value at or about the same time.

1 — Original language: German.

2 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) (hereinafter 'the Customs Code' or 'CC').

4. Article 32 of the Customs Code provides in relevant part:

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

...

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods,

(ii) tools, dies, moulds and similar items used in the production of the imported goods,

(iii) materials consumed in the production of the imported goods,

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

(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;

...

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. Article 34 of the Customs Code provides:

'Specific rules may be laid down in accordance with the procedure of the committee to determine the customs value of carrier media for use in data processing equipment and bearing data or instructions.'

6. Article 147 of 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 [3] 'the implementing regulation') provides in relevant part:

'1. For the purposes of Article 29 of the Code, the fact that the goods which are the subject of a sale are declared for free circulation shall be regarded as adequate indication that they were sold for export to the customs territory of the Community. This indication shall also apply in the case of successive sales before valuation; in such case each price resulting from these sales may, subject to the provisions of Articles 178 to 181, be taken as a basis for valuation.

...

3. The buyer need satisfy no condition other than that of being a party to the contract of sale.'

7. Article 167 of the implementing regulation provides in relevant part:

'1. Notwithstanding Articles 29 to 33 of the Code, in determining the customs value of imported carrier media bearing data or instructions for use in data processing equipment, only the cost or value of the carrier medium itself shall be taken into account. The customs value of imported carrier media bearing data or instructions shall not, therefore, include the cost or value of the data or instructions, provided that such cost or value is distinguished from the cost or value of the carrier medium in question.'

III — Facts, main proceedings and question referred

8. These proceedings arise out of a legal dispute between Compaq Computer Inter-

3 — OJ 1993 L 253, p. 1.

national Corporation ('CCIC') and the Inspecteur van de belastingdienst — Douanedistrict Arnhem (Head of the Arnhem Customs District, 'the Customs Authority') concerning the customs value of portable computers introduced into free circulation by CCIC between 1 January 1995 and 31 December 1997. The Netherlands customs authorities are of the view that CCIC wrongly failed to include in the customs value the value of the operating software installed on the portable computers.

9. CCIC is part of the multinational Compaq group of companies, which carries on business in the information technology sector, and is responsible for the distribution of Compaq products in Europe. It operates a distribution centre in the Netherlands.

10. CCIC is a wholly-owned subsidiary of Compaq Computer Corporation ('CCC'), which has its headquarters in the United States of America. The parent company, CCC, has an agreement with the Microsoft Corporation under which computers manufactured by Compaq itself or under its brand name may be pre-installed and sold with the MS-DOS and MS Windows operating systems (hereinafter together referred to as 'the operating system'). CCC pays Microsoft USD 31 per Compaq computer having the operating system pre-installed.

11. CCC bought portable computers from two Taiwanese manufacturers with the stipulation that they were to be delivered with the operating system pre-installed on the hard drive. The software was supplied free of charge to the manufacturers by CCC and was installed on the portable computers. The computers were then delivered free-on-board (fob) Taiwan for sale in the Community.

12. CCC sold the portable computers on to CCIC and they were shipped directly from Taiwan to the Netherlands. Upon importation, CCIC declared the portable computers for free circulation. The basis on which the customs value of the portable computers was established in accordance with Article 29 of the Customs Code was the price at which they were sold to CCC by the Taiwanese manufacturers. The value of the operating system was evidently not included in that price.

13. In 1999, the Landelijk Waardeteam van de Douane (National Customs Valuation Team) carried out an inspection at CCIC to check that the customs value given for the portable computers was correct. The inspectors concluded that the value of the operating system should have been included in the customs value. In the light of the inspection, the customs authority increased the customs

value of the portable computers by the value of the software and issued the disputed post-clearance demand notes in respect of imports of portable computers declared for free circulation in the period between 1 January 1995 and 31 December 1997.

14. Its challenge to the post-clearance demand notes having been rejected by the customs authority, CCIC brought an action to challenge that decision before the Customs Division of the Gerechtshof te Amsterdam.

15. In the course of those proceedings, the Gerechtshof te Amsterdam, by order of 13 July 2004 received at the Court Registry on 19 July 2004, referred the following question to the Court of Justice of the European Communities for a preliminary ruling:

'Where computers equipped with operating systems by the seller are imported, must the value of the software made available to the seller by the buyer free of charge be added to the transaction value of the computers pursuant to Article 32(1)(b) of the Community Customs Code where the value of the software is not included in the transaction value?'

IV — The question referred

A — *Introductory remarks*

16. It may be briefly noted at the outset that customs value under Article 29(1) of the Customs Code is determined in principle by the 'transaction value'. This 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'.

17. Under Article 29 of the Customs Code, the customs value is determined in relation to a particular transaction between a seller and a buyer. This will normally be the transaction declared by the declarant, unless that is subsequently queried by the tax authority.

18. In some cases, however, this transaction value is not the proper basis for customs valuation. That may be so, for example, subject to various conditions, where the sale

declared was one between related undertakings. [4] The customs value in that case can be determined by the methods provided for in Articles 30 and 31 of the Customs Code. The transaction value may also be adjusted in accordance with Article 32(1) of the Customs Code, which requires various items to be added on if these are not already included in the transaction value.

19. As the Commission rightly notes, identifying the buyer and seller has an important bearing on the determination of transaction value and customs value. Questions such as the quantum and composition of the transaction value and whether items have to be added to the transaction value under Article 32 of the Customs Code can depend on which transaction is taken as the basis. Accordingly, in order to answer the question referred, the first point to be resolved is the identity of the buyer and seller for the purposes of Article 29 et seq. of the Customs Code and thereby the proper transaction for determining the customs value (hereinafter referred to inter alia as 'the relevant transaction').

4 — Article 29(2) of the Customs Code.

B — *Identification of the 'buyer' and of the relevant transaction for customs valuation*

20. The *Commission* takes the view that CCC is the seller and CCIC the buyer. In other words, the sale between CCC and CCIC is the relevant transaction for customs valuation purposes. At the hearing, this view was shared neither by CCIC nor by the Netherlands and United Kingdom Governments.

21. In the Commission's view, CCC cannot be regarded as the buyer for customs valuation purposes as CCC is not resident in Community territory.

22. According to the Commission, this does not mean, however, that when determining the customs value the customs authorities should consider only the transaction value of the sale between CCC and CCIC. CCC and CCIC were related undertakings and it was accordingly necessary to assess, under Article 29(2) of the Customs Code, whether the transaction value of the sale between related undertakings closely approximated to the transaction value in sales between unrelated undertakings of identical or similar goods at or about the same time. In other words, the

transaction value of the sale between the Taiwanese manufacturers and CCC represented a yardstick by which to judge the transaction value of the sale between CCC and CCIC.

23. The Commission's submission raises the question as to the proper criteria for identifying the relevant sale for customs valuation purposes, and, in particular, as to the relevance of the buyer being established in the Community.

24. In relation to the buyer being established in the Community, it should be noted that, as CCIC observed at the hearing, the *Caterpillar Overseas* judgment,[5] which the Commission cites, concerned the interpretation of provisions[6] which the Community had enacted on the basis of the Brussels Valuation Convention of 15 December 1950.[7] In addition, one of the provisions which had to be interpreted there stipulated that 'the price paid or payable shall be accepted as the value for customs purposes only if it has been made on a sale to a buyer established in the customs territory of the Community'.

25. Since then, however, the legal situation has changed in so far as customs valuation under the Community valuation rules based on the GATT Valuation Code is no longer based on normal price but on transaction value.

26. The definition of transaction value in Article 29(1), however, does not mention the buyer being established in the customs territory of the Community. Nor is there any explicit reference elsewhere in the Customs Code to the buyer being established in the Community.[8]

5 — Case 111/79 [1980] ECR 773.

6 — Article 1 of Regulation (EEC) No 603/72 of the Commission of 24 March 1972 on the buyer to be taken into consideration when determining the value of goods for customs purposes (OJ, English Special Edition 1972 (I), p. 156) provides: 'For the purposes of applying the provisions of Council Regulation (EEC) No 803/68 of 27 June 1968 on the valuation of goods for customs purposes, and without prejudice to the other conditions set out in that regulation , the price paid or payable shall be accepted as the value for customs purposes only if it has been made on a sale to a buyer established in the customs territory of the Community.'

7 — Convention on the Valuation of Goods for Customs Purposes, signed in Brussels on 15 December 1950. This used a notional concept of value, the 'normal price', as the basis for customs valuation. The GATT Valuation Code was then drawn up during the GATT Tokyo Round (1973–1979). This introduced 'transaction value' as the basis for customs valuation. The GATT Valuation Code was adopted by the EEC on 17 March 1980 and immediately enacted into Community law by Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1). The Customs Code in force as of 1 January 1994 re-enacted the provisions of this regulation in identical terms.

8 — The Customs Code explicitly requires only that the *declarant* be established in the Community, subject to certain exceptions.

27. Since the entry into force of the Customs Valuation Regulation, [9] replaced as of 1 January 1994 by the Customs Code, the Court has only once, in *Unifert*, [10] considered the place of establishment of the parties to the 'relevant' transaction for customs valuation purposes. It must be pointed out, however, that in that case, unlike here, both the buyer and the seller in the declared transaction were established in the Community.

28. As the Court held in *Unifert*, Article 147(1) of the implementing regulation means that where, in successive sales of goods, more than one price actually paid or payable fulfils the requirements laid down in Article 29(1) of the Customs Code, [11] any of those prices may be chosen by the importer for the purposes of determining the transaction value. [12]

29. Article 29(1) of the Customs Code stipulates that in order for a sale to be eligible as the basis for customs valuation it must have taken place 'for export to the customs territory of the Community'.

30. In this regard, the Court decided in *Unifert* that the criterion which emerges from the term 'sold for export' relates to the goods and not to the place of establishment of the *seller*. [13] The Court further held that the definition of transaction value 'takes no account of the place of residence of the parties to the contract of sale'. [14] Accordingly, neither the place of establishment of the seller nor that of the buyer has any bearing on the matter.

31. This is also borne out by the fact that Article 147(3) of the implementing regulation expressly provides that the buyer in the transaction relevant for customs valuation purposes 'need satisfy no condition other than that of being a party to the contract of sale'.

32. As the Court held in *Unifert*, the expression 'sold for export', placed in its proper context, suggests however that it is agreed, at the time of sale, that the goods originating in a non-member country will be transported into the customs territory of the Community. [15] That would seem to mean that in order for a sale between two parties

9 — Regulation No 1224/80 (cited in footnote 7).

10 — Case C-11/89 [1990] ECR I-2275.

11 — The judgment in *Unifert* (cited in footnote 10) refers to Article 3(1) of Regulation No 1224/80, which was re-enacted in essentially the same terms in Article 29(1) of the Customs Code.

12 — *Unifert* (cited in footnote 10), paragraphs 16 and 21.

13 — *Unifert* (cited in footnote 10), paragraph 11. These statements of the Court are essentially based on the wording of Article 6 of Commission Regulation (EEC) No 1495/80 of 11 June 1980 implementing certain provisions of Articles 1, 3 and 8 of Regulation No 1224/80 (OJ 1980 L 154, p. 14), re-enacted in the same terms by Article 147(1) of the implementing regulation.

14 — *Unifert* (cited in footnote 10), paragraph 9.

15 — *Unifert* (cited in footnote 10), paragraphs 9 to 11.

resident outside the Community (such as the Taiwanese manufacturers and CCIC in this instance) to be declarable as the relevant transaction, it must be proved that the goods were sold for the purpose of export to the customs territory of the Community. Such proof would exist, for example, where the contract documents showed the destination of the goods to be the customs territory of the Community, where the goods were ordered by an intermediary but shipped directly to the Community by its supplier, or where the goods were specially manufactured for a seller in the Community.

33. In any case, the possibility for the declarant, in the case of successive sales of goods for export to the customs territory of the Community, to select one of the prices agreed for those sales as the basis for customs valuation is subject to the practical requirement that the declarant can furnish to the customs authorities all the necessary particulars and documents relating to the price selected, in accordance with Articles 178 to 181 of the implementing regulation. [16]

34. There seems to be no compelling reason, in any event, arising from the applicable Community law, to require that the buyer in the relevant transaction for customs valuation purposes be established in the Community.

35. As far as this case is concerned, the account of the facts provided by the referring court discloses that the goods were shipped directly to CCIC, and thus into the Community, by the Taiwanese manufacturers. From this it may be inferred that the contract of sale between the Taiwanese manufacturers and CCC was entered into for the purpose of export to the customs territory of the Community. Nor is there anything in the facts described by the referring court to suggest that the Netherlands customs authorities queried the documentation of the transaction between the Taiwanese manufacturers and CCC.

36. It can therefore be concluded that the sale between the Taiwanese manufacturers and CCC could properly be declared as the relevant transaction for customs valuation purposes.

37. It is on the basis of that transaction that the applicability of the items listed under Article 32 of the Customs Code will now be considered.

16 — See to that effect *Unifert* (cited in footnote 10), paragraph 16.

C — *Applicability of the items listed under Article 32(1)(b) of the Customs Code*

38. It follows from the above discussion that the customs valuation was properly based on the value of the transaction between the Taiwanese manufacturers and CCC.

39. It was stated at the hearing that a fixed charge for the value of the operating system plus a profit margin was included in the selling price between CCC and CCIC but not in the selling price between the Taiwanese manufacturers and CCC which was the basis for customs valuation.

40. Under Article 32(1)(b) of the Customs Code, in determining the customs value, the value of so-called 'assists' must be added to the price actually paid for the imported goods if the following conditions are met: the goods or services in question (1) have been supplied directly or indirectly by the buyer (2) free of charge or at reduced cost (3) for use in connection with the production and sale for export of the imported goods, (4) to the extent that such value has not been included in the price actually paid or payable. In addition, the buyer must have been supplied with one of the categories of assists listed in subparagraphs (i) to (iv) of Article 32(1)(b) of the Customs Code.

41. The *Commission* doubts whether the factual conditions for the application of Article 32(1)(b) of the Customs Code are satisfied in this instance. In particular, it queries whether the operating system was supplied directly or indirectly by the buyer and whether its value was not included in the transaction value of the sale between CCC and CCIC. It also questions whether the operating system falls into any of the categories listed under Article 32(1)(b) of the Customs Code.

42. As stated by the referring court in its order for reference and not disputed by the parties in the main proceedings, CCC supplied the operating system free of charge to the Taiwanese manufacturers of the portable computers. CCC for its part made an agreement with Microsoft whereby computers manufactured by Compaq itself or under the Compaq brand-name may be sold with a pre-installed Microsoft operating system. Since CCC is the buyer in the transaction relevant to customs valuation, the operating system was in my view supplied to the seller (the Taiwanese manu-

facturers) directly or at least indirectly by the buyer (CCC) in accordance with Article 32(1)(b) of the Customs Code.

43. I have already established that the value of the operating system was evidently not included in the price actually paid by CCC to the Taiwanese manufacturers.

44. It is my view, therefore, that the conditions for the application of Article 32(1)(b) of the Customs Code are in those respects satisfied. It remains to be considered whether the operating system falls into one of the categories of assists listed in subparagraphs (i) to (iv).

45. *CCIC* argues that the operating system does not match any of the assists listed in subparagraphs (i), (ii) and (iii), because these consist solely of tangible goods. As for the so-called 'intellectual assists' in subparagraph (iv), these had to be added in only if they were necessary for the production of the imported goods, which was not the case here.

46. The *Commission* also takes the view that the operating system does not fit into any of the four categories.

47. The *United Kingdom* and *Spanish Governments*, on the other hand, take the view that the operating system comes within the category of 'materials, components, parts and similar items incorporated in the imported goods' under Article 32(1)(b)(i) of the Customs Code. The United Kingdom Government argues in particular that the operating system is a component of the portable computer because it constitutes a separate part having its own value and is also essential to the computer's operation, and that there are no grounds for differentiating between tangible and intangible components in customs valuation. The Spanish Government submits that the operating system is an intangible but integral part of the computer, without which it could not function in the same way.

48. The *Netherlands* and *German Governments* are of the view that the operating system is an intellectual assist caught by Article 32(1)(b)(iv) of the Customs Code. The German Government argues that the operating system constitutes a necessary input for the production of the imported product because the relevant contract of sale calls for the delivery of computers with the

operating system pre-installed. The Netherlands Government submits that the operating system is an essential component of the imported product without which the computer could not be used and is therefore necessary for its production.

49. Article 32(3) of the Customs Code provides that no additions are to be made to the price actually paid or payable in determining the customs value except as provided in Article 32. Viewed in isolation, those words could suggest that the provisions of Article 32 are to be construed narrowly. The use of the words 'and similar items', however, clearly indicates that the list in Article 32(1)(b)(i) of the Customs Code is not exhaustive.

50. It is the purpose of the Community legislation on customs valuation to introduce a fair, uniform and neutral system, excluding the use of arbitrary or fictitious customs values. [17] It follows that customs valuation is in principle meant to include all components of the imported product which have an economic value. The question is whether it is relevant that the 'materials, components, parts and similar items' incorporated in the imported goods are intangible.

51. The case-law of the Court on the customs valuation of intangible assists is at first sight of little help in settling this question because of its seeming inconsistency. In *Bosch*, [18] the Court decided that the customs value of a machine should include only the intrinsic value of the article and not the value of incorporeal property such as processes, services or know-how. [19] In *Brown Boveri*, [20] it held that if the software is embodied in the imported goods and integrated into it, its value is an integral part of the price paid or payable. [21]

52. This apparent contradiction can be resolved, however, if intangible assists are differentiated as follows: on the one hand, intellectual assists supplied for the purposes of manufacturing the product, such as, for example, a patent, a design or a model. Such assists may, if the other factual conditions are satisfied, come within subparagraph (iv) of Article 32(1)(b) of the Customs Code. These must be distinguished, on the other

17 — Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 25.

18 — Case 1/77 [1977] ECR 1473.

19 — *Bosch* (cited in footnote 18), paragraph 4.

20 — Case C-79/89 [1991] ECR I-1853.

21 — *Brown Boveri* (cited in footnote 20), paragraphs 21 and 22.

hand, from intangible components which are installed in the imported goods in order for them to work, for example the wash programme in a washing machine or the software in an on-board computer in a car. Unlike, for example, a patent, a model or a design, an intangible component is not directly necessary for the production of the imported product. Despite its incorporeality, however, an intangible assist is still a constituent part of the end product, since it is integrated into it, [22] enhances its capabilities or even adds a new functionality and thereby contributes not insignificantly to the value of the imported product. This category of intangible components embodied in an imported product in my view includes the software considered in *Brown Boveri*, for example.

53. In summary, therefore, the key issue in this case is whether the portable computer and the operating system form a single product, that is, whether the operating system is in economic and practical terms a constituent part of the imported product. As is the case with other components — tangible components included — that would not necessarily mean that the portable computer is entirely incapable of functioning without that intangible component.

54. Also to be considered in the present case is the fact that the contracting parties stipulated that the portable computers were to be delivered with a pre-installed operating system — in this case the operating system produced by Microsoft. Accordingly, the goods ordered by the buyer in this case consist of the portable computer together with the operating system and delivery would therefore be incomplete without the operating system.

55. In CCIC's view, it would be contrary to the scheme of the Customs Code for the value of the operating system in the present case to be included in the customs value on the basis of Article 32(1)(b) of the Customs Code, whereas it would not be included, according to Article 34 of the Customs Code and Article 167 of the implementing regulation, if the software were stored on a carrier medium and its value stated separately from that of the carrier medium.

22 — According to the facts described, the operating system is installed on the hard drive. It still has to be activated, however, in order to be fully functional.

56. That argument does not hold here in so far as this case concerns primarily the import of portable computers on which an operating system has been installed, and not the import of software for sale as such. Moreover, the provisions of Article 34 of the Customs Code and Article 167 of the implementing regulation clearly constitute exceptions to the rule and must accordingly be strictly construed. Under Article 167(2) of the implementing regulation, software contained in products incorporating integrated circuits, semiconductors or similar devices is excluded from the scope of the article. That clearly excludes portable computers from the scope of Article 34 of the Customs Code and Article 167 of the implementing regulation. The exception seems thus to apply only to the sale of software which is stored on a carrier medium for purposes of supply and not, as in the present case, to software which is supplied as an intangible component of a portable computer. The limited scope of the provisions of Article 34 of the Customs Code and Article 167 of the implementing regulation in my view prevents the application of the rules for software stored on carrier media to software installed on the hard drives of portable computers.

57. In the light of all this, it is my view that, on a proper interpretation, the category of 'materials, components, parts and similar items incorporated in the imported goods' in Article 32(1)(b)(i) also includes, where the specified conditions are met, an operating system pre-installed on a portable computer by the manufacturer.

58. Accordingly, the answer to be given to the question referred is that where computers are imported with operating systems pre-installed by the seller, the value of the operating system supplied to the seller free of charge by the buyer must be added to the transaction value of the computers in accordance with Article 32(1)(b) of the Customs Code where that value is not included in the transaction value.

59. In that light, the parties' arguments based on an interpretation of Article 32(1)(c) and Article 34 of the Customs Code do not need to be considered further.

V — Costs

60. The costs incurred by the Netherlands, United Kingdom, German and Spanish Governments and by the Commission are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

VI — Conclusion

61. In the light of the foregoing, I am of opinion that the Court should answer the question referred in the following terms:

Where computers are imported with operating systems pre-installed by the seller, the value of the software supplied to the seller free of charge by the buyer must be added to the transaction value of the computers in accordance with Article 32(1)(b) of the Customs Code (Regulation (EEC) No 2913/92) where that value is not included in the transaction value.