OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 2 May 1990 *

Mr President,
Members of the Court,

A — Facts

1. This case is a request for a preliminary ruling by the Finanzgericht München concerning the customs valuation of harvest seed in accordance with Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes. [1]

2. The main proceedings concern a dispute between BayWa AG ('the plaintiff') and Hauptzollamt (Principal Customs Office) Weiden ('the defendant') as to the customs valuation of seed imported from Poland and Czechoslovakia. That seed is imported on the following contractual terms.

3. The plaintiff buys basic seed from breeders established in the Federal Republic of Germany. As part of the contract, it is agreed that the plaintiff will resell that seed to propagation undertakings outside the Community for the purpose of propagating the basic seed to produce harvest seed. The legal relationships between the plaintiff and the propagation undertakings are governed by separate contracts.

4. It is also agreed in the contracts between the plaintiff and the breeders that the plaintiff may import harvest seed into the Federal Republic of Germany in order to market it there. Marketing in the country of propagation, or from that country into another, is not permitted without the breeders' consent. Once the harvest seed has been imported *and* marketed, a licence fee becomes payable by the plaintiff to the breeders. That licence fee must be paid by 31 May in the year following the harvest at the latest. If substantial quantities of the harvest seed remain unsold at that date, the breeder will grant, on request, a suitable extension to the time-limit for the payment of the licence fee.

5. In the contracts between the plaintiff and the propagators, it is agreed that the plaintiff is first to sell the basic seed to the propagators, who are to produce certified harvest seed and sell it exclusively to the plaintiff. A price is agreed upon for both the basic seed and the harvest seed, with a price range for the harvest seed in order to enable fluctuations in quality to be taken into account. The contractual terms governing the method of payment for the basic seed vary.

* Original language: German.

1 — Council Regulation (EEC) No 1224/80 of 28 May 1980 (OJ 1980 L 134, p. 1).

6. In one standard form of contract, there are two options, allowing for a choice of method of payment if the parties have not already settled for one option when concluding the contract. The relevant clause in the contract provides:

'Payment:

I. Net cash against documents, namely:

1. ...

...

6. ...

or

II. Payment for the basic seed, determined by the ratio between the price of the certified seed and the price of the basic seed, shall be made in kind on the return delivery of the first harvest. In the event of major changes to the land areas used for propagation or other events, *force majeure*, the seed is to be paid for at the invoice price by the propagation undertaking by the end of February 1984 at the latest'. [2]

2 — Contract between BayWa AG and Koospol AG in Annex 6 to the statement of claim in the procedural documents forwarded to the Court. The last sentence should no doubt read: 'In the event of major changes to the land areas used for propagation, other events or *force majeure*, the seed is to be paid for at the invoice price by the propagation undertaking by the end of February 1984 at the latest.'

7. In another form of contract, that alternative is not available. It reads as follows:

'Payment: Payment for the basic seed is made by the propagator after reception of the documents ... by offset against deliveries of propagation seed from Poland'. [3]

8. The defendant takes the view that the licence fees payable to the breeders form part of the value of the basic seed, which should be added to the transaction value of the goods when determining the customs valuation. The plaintiff, on the other hand, considers that that approach is not justified from any legal point of view. It therefore contested the decisions in which the customs authorities included the licence fees in the customs valuation of the imported harvest seed, and brought an action which gave rise to the main proceedings in this case.

9. The national court takes the view that to include the licence fees in the value is contrary to the principle that an intellectual service provided within the Community enjoys freedom from customs duty. It seeks a preliminary ruling from the Court of Justice on the following question:

'In the case of a sale of harvest seed for the production of which basic seed supplied by the buyer was used, should there be added to the price paid or payable, for the purpose

3 — Contract between BayWa AG and Rolimpex, Warsaw, Annex 8 to the statement of claim in the procedural documents forwarded to the Court.

of determining the customs value, licence fees which the buyer has to pay in respect of the harvest seed to the breeder of the basic seed, even where the breeder's service has been performed within the Community?'

10. I refer to the Report for the Hearing for a fuller account of the facts of the case and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for my reasoning.

B — Opinion

11. Customs value is determined in accordance with the provisions of Regulation No 1224/80, in particular Article 3 thereof as amended by Regulation No 3193/80,[4] certain items being added in certain circumstances in accordance with Article 8. Valuation must be effected, moreover, in compliance with the provisions of Regulation No 3158/83[5] on the incidence of royalties and licence fees in customs value.

12. It is essentially common ground that where the purchase price of the basic seed is offset against the claim for the purchase price of the harvest seed the value of the basic seed is to be included in the customs value. The parties differ, however, as to what is the applicable legal basis. Either Article 3(3) of Regulation No 1224/80 or one of the provisions of Article 8, laying down items to be added, might be relevant.

13. For reasons of method which may be of importance for the decision on whether the licence fees are to be included in the customs value, the provision under which the value of the basic seed is to be taken into consideration must first be determined.

14. It must first be borne in mind that in the scheme of Regulation No 1224/80 the customs value of goods is assessed on the basis of its transaction value. Article 3(1) provides:

'The customs value of imported goods determined under this article 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 in accordance with Article 8 . . .'

15. That provision is clarified by Article 3(3)(a), which reads:

'The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by

4 — Council Regulation (EEC) No 3193/80 of 8 December 1980 amending Regulation (EEC) No 1224/80 on the valuation of goods for customs purposes (OJ 1980 L 333, p. 1).

5 — Commission Regulation (EEC) No 3158/83 of 9 November 1983 (OJ 1983 L 309, p. 19).

the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments and may be made directly or indirectly.'

16. Whether those criteria are met depends solely on the terms of the contracts between the parties. There is no difficulty in determining the customs value of the harvest seed, as compared with the basic seed, where the parties have agreed on the first of the alternative methods of payment, 'net cash against documents'. Because the sale of the basic seed is fully completed subject to that condition, there is no reason to take the value of the basic seed in any way into account when invoicing the harvest seed, so that the price of the harvest seed is the determining factor for the customs valuation — as provided, indeed, in the contracts.

17. The calculation only poses a problem where there is offset, and even then only where there is payment 'determined by the ratio between the price of the certified seed and the price of the basic seed, . . . made in kind'. Only in those circumstances may the application of Article 8(1)(b) be considered, because true offset merely involves balancing mutual claims for money and it is clear from the contracts what price is to be invoiced for the basic seed. Offset is thus just one method of payment of the 'price actually paid'. If, however, offset is not considered to meet the criterion of the 'price actually paid' within the meaning of Article 3 of the regulation on customs value, it must still be viewed as a part of the price 'payable'. That interpretation is borne out by the wording of Article 3(3)(a), which provides:

'The payment need not necessarily take the form of a transfer of money. Payment . . . may be made directly or indirectly.'

18. The interpretation put forward here is also confirmed by the invoicing practice used. As shown in a report by the customs authorities for the Munich tax district on an investigation concerning the plaintiff,[6] the full amount is shown on the invoices issued in the event of offset. Only in two cases had the value of the basic seed been *visibly* deducted from the amount invoiced, so that it could be included in the valuation without any difficulty.

19. Strictly speaking, payment for the basic seed determined by the ratio between the price of the certified seed and the price of the basic seed, made in kind on the return delivery of the first harvest, also constitutes payment. In so far as it is deducted from the price actually payable, therefore, the value of the basic seed forms part of the transaction value determining the customs value. Where that method of settling the amount due under the contract for the purchase of the basic seed is not a mere balancing out of (monetary) claims of the same kind, but entails invoicing in respect of the harvest seed a single amount from which the value of the basic seed has been deducted, the value of the basic seed must be added for the purpose of calculating the customs value in accordance with Article 8(1)(b). Those are the only circumstances in which there

6 — The report is included in the procedural documents forwarded to the Court of Justice

can be any question of goods or services supplied 'free of charge' within the meaning of Article 8(1)(b). A service cannot be regarded as having been 'supplied free of charge' where there is a balancing out or offset of mutual claims.

20. For the purpose of answering the national court's question it is immaterial whether the value of the basic seed is added under Article 8(1)(b)(i) or (iii).

21. It may also be pointed out, for the sake of completeness, that supplies of basic seed at a reduced price also give rise to an addition in accordance with Article 8(1)(b).[7]

22. Doubt arises as to whether the licence fees payable by the plaintiff to the breeders should be included in the customs valuation. That might be the case if they were to be regarded as a component part of the value of the basic seed. They would then have to be added to the price of the basic seed and to be taken into account as an increase in the customs value in accordance with Article 8(1)(b).

23. But inclusion of the licence fees in the customs value might also be possible in a situation in which, whatever the legal grounds, the propagators were obliged to pay the licence fees and the plaintiff in fact paid the licence fees to the German breeders to satisfy an obligation of the seller (Article 3(3)(a) of Regulation No 1224/80). The Commission appears to incline towards the latter view.

24. In order to decide whether the licence fees are to be included in the value of the basic seed or for whose benefit they were paid, it is necessary to understand what event gave rise to the licence fees and on what ground they were paid.

25. If the obligation to pay the licence fees is not a statutory obligation, it is governed solely by the terms of the contract between the parties to the transaction. It must therefore first be determined whether the law itself gives any entitlement to the payment of licence fees. Such an entitlement might arise in Germany under the Sortenschutzgesetz (Law on the Protection of Plant Varieties), on which the details and extent of the protection afforded to seed varieties are based. That law does not, however, regulate the factual circumstances in which licence rights may be enforced; it is up to the owner of the protected variety to decide whether and how to make use of his right. He must therefore exercise and enforce his right consistently with the right of freedom to contract.

26. Nor do there appear to be any independent grounds in Community law for a claim to the payment of licence fees under national law governing the protection of plant varieties.

27. As the plaintiff's representative stated at the hearing — and she was not contradicted

7 — It appears from the customs investigation report that such transactions took place.

on that point — no protection is afforded to plant varieties in Poland or Czechoslovakia, which is of significance with regard to the question whether the propagators may be under any independent obligation to pay licence fees. Since that is not the case under the legal rules in force in the countries of propagation, the basis for the licence fees payable in connection with the transaction is to be sought only in the context of the legal relationships governing the business dealings between the parties.

28. Those legal relationships are governed by the separate contractual relationships between the plaintiff and the breeders, on the one hand, and between the plaintiff and the propagators on the other. The view that the contract terms are the sole determining factor finds further support in the method by which customs value is calculated, since the transaction value is the price fixed by contract.

29. That view is buttressed by the Commentary by the Customs Valuation Committee on Regulation No 3158/83 on the incidence of royalties and licence fees in customs value.[8] In several places,[9] that Commentary refers, with regard to resolving possible points of dispute, to the form and interpretation of the contracts, whether the licence agreements or the contracts of sale.

30. The origin of the licence fees in issue in the present proceedings and the grounds for their payment are to be found, therefore, in the contracts.

31. No licence obligations are laid down or transferred in the contracts between the plaintiff and the propagators for the sale and propagation of the seed. On the contrary, the contract stipulates, with regard to the description of the quality of the harvest seed:

'If, according to Czechoslovakian analyses, the seed grown does not meet the quality agreed upon in this contract, the seed shall remain free of charge in the CSSR without there being any obligation to pay the supplier any licence fees or charges whatever'.[10]

32. Since the propagators are under no obligation to pay licence fees on return delivery in compliance with the contract either, that means that they are never under such an obligation in any circumstances. Particulars of how the licence rights come into existence and when they may be enforced must therefore be sought in the terms of the contracts between the plaintiff and the German breeders. In the standard forms of contract, the clause concerning licence fees reads as follows:

'The propagation firm (in this case BayWa AG) shall pay a licence fee in respect of each decitonne of seed qualifying for authorization or certification produced in the country of propagation. That licence fee shall be of the same amount as for seed of the same variety produced in the home country, and is to be paid *when the propagation firm has marketed* in Poland, Germany or another country *the seed* produced in Poland. The licence fees must be paid by 31 May in the year following the

8 — Reproduced in *Customs valuation*, published by the Commission of the European Communities, 1989, p 310

9 — Points 7, 10 and 18 of the Commentary

10 — Propagation contract between BayWa AG and Koospol AG, in Part C of Annex 6 to the statement of claim in the documents in the main proceedings.

harvest at the latest. If substantial quantities of the harvest seed remain unsold at that date, the breeder will grant a suitable extension to the time-limit for the payment of the licence fee in respect of those quantities, if the propagation firm so requests.' [11]

33. A number of conclusions may be drawn from that wording. First, the charging basis for the licence fee is not the basic seed delivered to the propagator but the harvest seed produced in the country of propagation.

34. Secondly, the amount of the licence fee payable is determined at the time of marketing. Before that time, not all the elements giving rise to the licence fee have materialized to their full extent.

35. Thirdly, the date on which payment falls due is 31 May in the year following the harvest — but only if the seed has actually been sold by then.

36. It may be concluded from those factors that the circumstances giving rise to the licence fee have materialized when the seed is marketed. The date on which payment falls due is thereby deferred until later. That interpretation is in line with the plaintiff's submission that the obligation to pay licence fees arises under a marketing licence. It is further borne out by the fact that in the contracts the plaintiff is given the right to market the harvest seed directly from the country of propagation — albeit only with the breeders' consent. [12]

11 — Contracts included in the documents relating to the case; emphasis added.

12 — The clause in the contract between BayWa and one breeder (Süddeutsche Saatzucht- und Saatbaugenossenschaft e.G.) reads: 'The propagation firm may import this seed into Germany; it shall not leave any or all of the seed in (name of country) and market it there or from there into another country without the breeder's consent. The right to market the seed does not extend to the following countries: . . . '.

37. Since the propagators are under no legal or contractual obligation to pay licence fees, and since the circumstances giving rise to the obligation to pay materialize only within the customs territory of the Community, it is doubtful whether the licence fees may nevertheless be included in the customs value.

38. Inclusion under Article 3(3)(a) could not be envisaged unless the licence fee were a condition of the sale between the plaintiff and the propagators and unless the buyer (the plaintiff) were to pay it to a third party to satisfy an obligation of the seller (the propagation undertakings). As has been seen from the examination of the contract terms, the obligation to pay the licence fees lies not on the propagators but on the plaintiff as licensee. Furthermore, the licence fee is not mentioned in the contract of sale — far less is it a condition thereof — so that inclusion of the fee in the customs value is out of the question.

39. The exclusion provided for in Article 3(4)(b) is not applicable, since licence fees are neither customs duties nor taxes.

40. The rules in Article 8 of Regulation No 1224/80 governing the items to be added to the price require closer consideration. The first circumstances in which additions might be made are those set out in Article 8(1)(b)(i) and (iii). They could only apply if the value given in the payment of the licence fees were comprised in the basic seed and

the basic seed were to be included in the customs value in accordance with the provisions cited. Apart from the fact that because of the offset agreements that will seldom be the case, the licence fee is linked to the propagation seed, since only the *exercise* of the seed variety protection right in respect of which the licence fee is to be paid — subject to the conditions agreed upon in the contract — gives rise to the licence right. Additions under Article 8(1)(b) of Regulation No 1224/80 are therefore impossible.

41. But an addition in accordance with Article 8(1)(c) does appear possible. Article 8(1)(c) provides for the addition of:

'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'.

42. At first sight, that provision appears applicable. A careful reading, however, reveals that the licence fees must be payable 'as a condition of sale', which is, precisely, not the case here. Furthermore, the licence fees are in fact payable not in respect of the imported goods but in respect of their distribution, so that Article 8(5)(b) applies. Under that provision, without prejudice to Article 8(1)(c), payments made by the buyer for the right to distribute or resell the imported goods are not to be added to the price actually paid or payable if such payments are not a condition of the sale for export to the Community of the goods. It has already been established, in another context, that the payment of the licence fees was not a condition of sale in the contracts between the plaintiff and the propagation undertakings.

43. Finally, it remains to be determined whether the provisions of Regulation No 3158/83 on licence fees affect the conclusions reached so far. Article 1(2) of that regulation stipulates:

'Without prejudice to Article 8(5) of Regulation (EEC) No 1224/80, when the customs value of imported goods is determined under the provisions of Article 3 of that regulation, a royalty or licence fee is to 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.'

44. For licence fees to be included in customs valuation under that provision, those conditions must both be met. That is not the case here, since the licence fees are not a condition of sale. Furthermore, Article 1(2) must be read in conjunction with Article 4 of Regulation No 3158/83, which states:

'When the buyer pays royalties or licence fees to a third party, the conditions provided for in Article 1(2) shall not be considered as met unless the seller or a person related to him requires the buyer to make that payment.'

45. Since the propagators have not the slightest influence on the licence fee payments, there can be no doubt that the value of those payments is not to be included in the customs valuation.

Costs

46. These proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court. The decision on costs is a matter for that court. The costs incurred by the Commission are not recoverable.

C — Conclusion

47. In conclusion to the foregoing considerations, I propose that the Finanzgericht's question should be answered as follows:

'In the case of a sale of harvest seed produced from basic seed supplied by the buyer, licence fees which the buyer has to pay in respect of the harvest seed to the breeder of the basic seed are not to be added to the price paid or payable, for the purpose of determining the customs value, if the buyer's obligation to pay the licence fees arises out of a transaction unrelated to the sale in question.'