

In 2016 the European
Union will have a new
Customs Code.

But what's new?



Introduction

The developments surrounding the creation of a new, modernized, union customs code ('UCC')¹ have attracted attention in various articles and websites. First we had the Modernized Customs Code ('MCC')² to replace the current Community Customs Code ('CCC')³ and after a recast, we now have the UCC. The MCC was mainly drafted to implement IT solutions in order to create a simple and paperless environment for customs and trade. It introduced the electronic data processing techniques for all required exchanges of data, accompanying documents, decisions and notifications between customs authorities and between economic operators and customs authorities. However, these IT solutions have been the main reason that the deadline of the application of the MCC could not be met and the UCC was put in place. In 2013 the UCC has entered into force and the empowering provisions were directly applicable allowing the European Commission ('Commission') to draw up the implementing acts ('IA')⁴ and delegating acts ('DA')⁵, replacing the current Implementing provisions ('IPCCC')⁶. The UCC will become applicable in full on May 1, 2016 and repeal the CCC. But what changes will the UCC bring, besides IT solutions, some of which actually may only become applicable in 2020. This article will describe some of the main changes per Title, but is not meant as an exhaustive list of all the changes envisaged by the UCC. It is also worth noting that the negotiations on the IA and DA are still ongoing and changes to the current state of play are to be expected. This applies for example to the discussions on centralized clearance and the so called 'first sale for export' rule, which will be discussed further on in this article.

¹ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code. OJ L 269, 10.10.2013.

² **Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code)**. OJ L 145, 4.6.2008.

³ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. *OJ L 302, 19.10.1992*

⁴ This article is based on the latest version of the DA published by the European Commission, TAXUD/UCC-DA/2014-1 of January 13, 2014.

⁵ This article is based on the latest version of the IA published by the European Commission, TAXUD/UCC-IA/2014-1 of January 13, 2014.

⁶ **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**. OJ L 253, 11.10.1993.

Changes that the UCC brings

Title I – general provisions

AEO

The status of authorized economic operator ('AEO') will be granted by an authorization rather than a certificate and will only comprise of two types, where there are currently three. These changes are more form than practice. The real change is that in order to make use of certain customs simplifications, the authorization AEO Customs Simplification ('AEO (C)') becomes mandatory. In the IA, new conditions and criteria apply to obtain AEO (C). They relate to the practical standards of competence or professional qualifications. In respect of the standards of competence, one can think of a minimum of three years practical experience on customs matters.

Right to be heard

In reference to the Charter of Fundamental Rights of the European Union, the UCC codifies the right of every person to express his or her point of view, before a decision is taken which would adversely affect him or her (with some exceptions). Currently no such rule is included in the CCC. The ECJ did however already recognize this right in the famous *Sopropé*-case.⁷

Title II – Factors used to determine duties and other measures

BTI

The binding tariff information, which is used by economic operators to create legal certainty upon importation into / exportation out of the EU on the tariff classification of a certain product, becomes binding not only for the customs authorities, but also for the economic operators. This means that if a BTI is granted for a certain product, the economic operator can no longer disregard this BTI and has to use it upon importation/exportation. What this will mean for BTI's that are already in place when these articles of the UCC become applicable remains to be seen and is likely to be arranged for in the transitional provisions, which are currently been discussed but not known yet. However, the consequences of this change, are likely not to be that great in practice. Currently, if an economic operator disregards a BTI, the rules on filing an incorrect declaration (on purpose) may come into play, putting the economic operator in a difficult situation explaining why it used another tariff classification than considered by the authorities. Especially if one considers that a BTI can be appealed if one does not agree with the tariff classification. Another change is that the period of validity of the BTI has been reduced from 6 to 3 years.

In the UCC is not only possible to request for a decision on tariff classification. The UCC will in general allow for the request for a decision relating to the application of the customs legislation, but only in specific cases to be included in the IA. These decisions will then also be open for appeal.

Origin

Whereas preferential origin provisions remain, for the most part, unchanged, the non-preferential origin changes quite a bit. Currently goods deem to originate in the country 'where they underwent their last, substantial, economically justified processing or working.' This rule is rather subjective and not surprisingly subject to a lot of discussions in and outside of Court. Under the auspices of the Harmonized Working Program of the WTO, List Rules have been created, which aim to provide for more objective criteria and clear rules. However, the ECJ has ruled that these List Rules are not legally binding, since they do not constitute EU law.⁸ This means that they can be used as a helpful tool, but are not binding when non-preferential origin of goods has to be determined. With the UCC and then more specific the DA, some of these List Rules will be included as to determine non-preferential origin and thereby become legally binding in the EU. As a result the subjective criteria will be replaced with legally binding objective and specific primary rules. Also certain residual rules have been included, so that non-preferential origin can be determined (more) objectively for most of the goods. These rules will probably be included for all goods, but whether that will indeed be the case, remains to be seen.

⁷ Case C-349/07 of 18 December 2008, *Sopropé - Organizações de Calçado Lda v Fazenda Pública*.

⁸ Case C-260/08 of 10 December 2009, *Bundesfinanzdirektion West v HEKO Industrieerzeugnisse GmbH* & Case 373/08 of 11 February 2010, *Hoersch Metals and Alloys GmbH v Hauptzollamt Aachen*.

Legal certainty

As mentioned, the changes on preferential origin are minimal, as in 2012 these rules already had undergone substantive changes, which are included in the current legislation and remain (largely) unchanged in the UCC.

What is worth noting in this respect is that as of 2017, preferential treatment can no longer be claimed by using a certificate issued by authorities of a certain country, but by a declaration of the exporter of the products himself. This seems like a more flexible arrangement for companies, but comes with a price. In the current legislation, economic operators may rely on a certificate of origin when claiming preferential origin. Further, EU importers may (under certain conditions) also 'rely' on these certificates in case the certificate turns out to be incorrect, whereby it is assumed that the issuing authorities have made a mistake. In case a mistake has been made, which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration, legally owed duties will not be entered into the books. This legal certainty included in a provision of the CCC, will not change in the UCC. This means that the assumption of a mistake, in case of an incorrect certificate, will have less to no meaning when one considers that the authorities will no longer issue certificates as of 2017.

Valuation

First sale

The changes in the customs valuation are without a doubt the most known, given the extensive discussions on the use of the so called 'first sale for export' rule.

The primary basis for determining the customs value of goods is the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary. This is not new, except maybe that by adding the word 'primary', it is confirmed that the transaction value is the primary basis to determine the customs value.

The change lays in the wording of the current draft of the IA related to the case of successive sales. Under the current legislation it is possible to use a sale earlier in the chain, if it can be determined that the earlier sale took place for export to the EU. Meaning that if a Chinese manufacturer sells goods to a Hong Kong company, who in its turn sells the goods to an EU importer, the transaction between the Chinese manufacturer and the Hong Kong Company may be used to determine the customs value if that sale was for export to the EU.

In the IA it is currently included that 'the value of the goods shall be determined at the time of acceptance of the customs declaration on the basis of the transaction occurring immediately before the goods are declared for free circulation.' Many people argue that by this sentence the first sale for export can no longer be used. With reference to the aforementioned example, this means that the transaction between the Hong Kong Company and EU importer should be used instead of the transaction between the Chinese manufacturer and the Hong Kong Company.

Whether this is the final wording is, however, still under debate. Furthermore, there are solutions to think of if, for example, one is willing to cut out the sales companies in Hong Kong that are typically placed between the Asian producer and buying entity in the EU. When one realized that the Commission has stressed in earlier communications that it does not wish to target EU sales, the impact may not be as big as some people may think. Interesting to note in this respect is also that certain officials of the Commission are of the view that the first sale for export is not possible under the current rules and therefore there are no changes in the UCC.

Given the fact that many companies have argued that their supply chain will have to change quite dramatically if the first sale is no longer applicable and the fact that the Commission recognizes that impact on business can be substantial, a so called 'sunset clause' is being discussed alongside the discussions on the first sale rule itself. This sunset clause is still under negotiation, but it will most likely result in a transitional phase, whereby companies that currently make use of the first sale under a binding contract of sale, which complies with the conditions of the current legislation, will be allowed to use the first sale until 2017. This sunset clause allows business a transitional period aiming to provide them some additional time to align their business model and/or supply chain to the new legislation.

The aforementioned can be seen in the wider context of the authorities focusing more on the economic reality. This focus can in its turn be seen in light of the Commentary 22.1 of the World Customs Organization, which has been a topic of much debate. According to this Commentary a transaction value based on the last sale will more fully reflect the substance of the entire transaction as envisioned. In contrast, a transaction value based on the first sale may not fully reflect the substance of the inputs resulting from, or forming part of the entire

commercial chain. As an example, royalty payments are mentioned, by stating that by using the first sale the royalty payment is likely to remain outside the customs value, since it is rarely the buyer in the first chain who pays the royalty. In this context the changes in the conditions for dutiable royalty payments should be considered, which are discussed next.

Royalty

Royalty payments are likely to become easier to levy duties upon. One of the conditions for the dutiable payment of royalties is, and will remain, that the payment is a condition of the sale of the respective products. Meaning that if the seller requires the buyer to make the royalty payment to the third party licensor or otherwise it will not sell the product, this is considered a condition of sale. Typically most third country manufacturers (sellers) are not interested whether the royalty has been paid or not and the fact that the Licensor can, in many cases, not influence the manufacturer in this respect, many royalty payments remain 'outside the reach' of the customs value. Now looking at the current wording included in the IA, a royalty is considered to be paid as a condition of sale 'when the goods cannot be [...] purchased by the buyer without payment of the royalties or license fees to a licensor.' Whether or not the seller requires the payment becomes less important, now that the position of the buyer is considered. According to this wording the payment of the royalty will in most cases be a condition of sale, especially considering the aforementioned changes to the first sale rule, meaning that they can be considered as dutiable.

It is also worth noting in this respect that under the current legislation, in respect of trademarks three additional criteria are listed. Meaning that in order to determine whether a payment for the use of a trademark is dutiable, six conditions are applied. Under the current draft of the IA, only three criteria are listed and it seems that for payments for the use of a trademark no additional criteria will apply. This could mean that payments for the use of trademarks which are currently not included in the customs value of the goods because they do not meet all six criteria (typically the sixth criteria was the hardest), will under the new legislation become dutiable.

Title III – customs debt and guarantee

Customs debt

The articles on the establishment of a customs debt for irregular imports have been integrated in one article, changing the group of debtors. Also the much debated⁹ difference between a customs debt arising from article 203 CCC (unlawful removal) and 204 CCC (failure to comply), will become less pressing, due to a 'new article 859 IPCCC' included in the DA.

According to the DA the failure which led to the incurrance of a customs debt shall be considered to have no significant effect on the correct operation of the customs procedure when the person concerned informs the competent customs authorities about the non-compliance before either the customs debt has been notified or the customs authorities have informed that person that they intend to perform a control.

Herewith an open norm is created instead of an exhaustive list only covering one of the irregular imports currently included in article 204 CCC¹⁰. However, under these rules the customs debt does incur but may be extinguished, whereas under the current rules, no customs debt incurs when a failure has no significant effect. Furthermore the timeslot on the open norm is rather limited, making it difficult to be make use of this 'escape'.

Recovery

In case a customs debt has arisen, the notification of the debt to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This is not new. What is new is that in case the customs debt is incurred as the result of an act which, at the time it was committed, was liable to give rise to criminal court proceedings, the three-year period shall be extended to a period of a minimum of five years and a maximum of 10 years, whereas currently there is no minimum or maximum of this extended term. This could mean that EU member states, which currently do not use an extended term, will have to apply a minimum of 5 years, whereas countries that have an extended term of, for example 20 years will have to reduce this term to a maximum of 10 years.

Guarantee

The possibility for comprehensive guarantee and the reduction or waiver of a guarantee are, as such, not new. However, these possibilities are currently included more as an exception to the rule and are not laid down in a very precise way. In the UCC the aim is to provide for clear guidance in this respect.

⁹ Case C-480/12 of 15 May 2014, *Minister van Financiën v X BV*.

¹⁰ Case C-48/98 of 11 November 1999, *Firma Söhl & Söhlke v Hauptzollamt Bremen*.

According to the UCC, the possibility of reducing the level of the guarantee or of granting a guarantee waiver for a customs debt which may be incurred, is granted to an economic operator who has a high level of control of his or her operations and of the flow of goods and is financially solvent. For a customs debt which has already been incurred, the possibility of reducing the amount of the guarantee or of granting a guarantee waiver is only granted to economic operators with AEO C status. The use of a comprehensive guarantee as such is not restricted to AEO or AEO-like economic operators. The levels of reduction are, in their turn, included in the IA whereby the conditions for the levels of reduction and the guarantee waiver are included in the DA.

Title IV – goods brought into the territory

Though it has been considered, temporary storage remains a status rather than becoming a procedure. The main change is that the period in which the products have to be placed under a customs procedure or be re-exported has been extended to 90 days.

Title V – placing goods under a customs procedure

The simplified customs declarations have been reduced from 3 to 2, leaving the simplified declaration and the local clearance procedure. In order to make use of the waiver from the obligation for goods to be presented under the local clearance procedure, AEO (C) becomes a requirement whereas the lodging a customs declaration via entry in the declarant's records, as such, will not require an AEO authorization.

Furthermore, unlike the current situation, the particulars of the declaration lodged by entry into the records are at the disposal of the customs authorities in the declarant's electronic system at the time of entry in the declarant's records. This means that even more so than today, companies will have to operate and administer in 'real time'. Two new concepts have been introduced with the aim of facilitating trade. These are the 'self-assessment' and 'centralized clearance'. Self-assessment can be seen as a 'local clearance plus' upon import. With centralized clearance, an AEO (C) can lodge his summary and/or customs declaration in electronic form from his premises, irrespective of the Member State in which the goods are entering into or leaving the EU, so allowing companies to conduct all of their EU business with one customs office. This topic is however still under heavy debate, which may be due to the fact that besides customs duties, national taxes, such as VAT and excises, come into play when declaring goods in the EU, which national taxes should then also become centralized. However, unlike customs, VAT and excise legislation is governed by a Directive, leaving room for the Member States to make their own arrangements. This leads to differences in treatment, depending on where the goods enter the EU. Whether the Member States are willing to hand over their power over national taxes to the EU, remains to be seen. Also the IT solution to facilitate the exchange of data between customs authorities and economic operators, will only be in place in 2020.

How both concepts will work in practice remains to be seen.

Title VI

This title does not bring about real changes as compared to the current legislation.

Title VII – special procedures

Customs warehousing

The current legislation refers to public and private warehouses, which are further divided in five different types of customs warehouses, all with their own specifics. In the UCC and the current drafts of the IA and DA only reference is made to public and private warehouses, without further specifying the types of warehouses. Therefore, it remains to be seen what these types will entail and what the changes will be for business.

Processing

In the new legislation former procedures including, among others, external transit, customs warehousing, inward processing suspension system, processing under customs control, inward processing drawback system ('IP drawback'), outward processing, have been aligned and grouped together within four special procedures, namely transit, storage, specific use and processing.

According to the Commission this is one of the key features of the simplification and modernisation of the CCC and this solution should provide for a number of advantages. One of the advantages is that the alignment of similar procedures has made it possible to merge inward processing (suspension system) with processing under customs control and to abandon the IP drawback system, given that the intention of re-exportation is no longer necessary. Leaving only two forms of processing in the UCC, namely inward and outward processing.

In order to make use of the processing procedure, certain conditions apply such as the necessity of an authorization. Also it should be possible to identify and follow the goods in the administration that are placed under the procedures. This last condition may bring changes to the current (administrative) processes a company may have if it currently uses the IP drawback system. However, the changes in practice are probably not that great, if one considers that also for the current IP drawback system an authorization is necessary and certain other conditions apply.

Usual forms of handling in their turn are mentioned in a separate article in the UCC and not only in the context of storage, but also when goods are placed under a processing procedure they may undergo usual forms of handling intended to preserve them, improve their appearance or marketable quality or prepare them for distribution or resale. In case of usual forms of handling it is allowed (under conditions) to use the original tariff classification and customs value of the goods in the state in which they were imported.

Title VIII – goods leaving the EU

Interesting to note, although not as such part of Title VIII, is that the group of exporters has been amended. The DA provides for 5 definitions of the concept 'exporter'. Especially considering the final definition provided for, namely that 'the exporter shall be the person who brings the goods out of the customs territory of the Union', it seems that the EU legislator wanted to end the 'open norm' as currently given in the CCC, which provides for an unclear definition leading to much debate. By this definition there always an exporter, which should be easy to identify. But the effect in practice of this definition is not completely clear, as it would seem that by this definition the carrier (of the truck/vessel), which could well be a third country individual, could become the exporter, having to deal with the formalities around export. Also, it is unclear whether the 5 definitions have a specific order or if one can pick a definition best suited.

Conclusion

As seen above, there are a number of changes that the UCC brings and impact the way that business currently operates. For example, the need for an AEO (C) authorization in order to be able to use the waiver of the obligation for the goods to be presented under the local clearance procedure, means that many companies should apply for this authorization if they want to (continue to) use this procedure. On the other hand there are many changes that may look impressive on paper but will probably not be that great in practice. Such as the changes to the BTI. It should be remembered that the discussions on the IA and DA are still ongoing and changes are to be expected, certainly in respect of controversial topics such as centralized clearance and customs valuation. Also many annexes still have to be drawn up as well as the transitional provisions, which are expected only by the end of next year. So the full impact of the changes in legislation, remains to be seen. It is expected that all legislation is drawn up by May 2015, leaving business with a year to adapt to the new legislation. Question is, whether this term is met and will be sufficient, also considering the changes that have to be made on the IT level.

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