

# The new European customs law

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## Abstract

Profound economic and legal changes have made it necessary to reform European customs law. The Modernised European Customs Code (MCC) was outdated before it had even entered into force and was therefore recast as the Union Customs Code (UCC). It entered into force in October 2013 and will take effect from 1 May 2016. Besides structural changes, the UCC features substantive changes and amendments, particularly concerning the incurrance and extinguishment of the customs debt, the customs debtor, penalties, repayment and remission, customs procedures as well as the Authorised Economic Operator (AEO). This paper provides an overview of these changes.

## 1. Reasons for reform

The need to modernise European customs law has resulted from profound changes in the European Union (EU). The new economic reality coupled with changes to European law and the tasks performed by Customs led to regulatory demands that could not be met by specific amendments to existing legislation.

The Modernised Customs Code (MCC)<sup>1</sup> was intended to be the new edition of the Customs Code (CC) and entered into force on 24 June 2008. It was to apply to the whole territory of the Union by June 2014. However, some aspects of the MCC were overtaken by events and a new edition was needed even before it took effect. On 9 October 2013, the new Union Customs Code (UCC)<sup>2</sup> was published in the Official Journal of the European Union (OJEU) in the form of a Regulation. It will apply from 1 May 2016.

### 1.1 Changes to the economic environment

International trade has fundamentally changed in terms of economic operations. As a result of globalisation, its complexity has increased considerably. Along with increased interdependencies there has been a continuous rise in international trade and cargo movements, resulting in greater administrative burdens.<sup>3</sup> Modern channels of communication and highly developed information technology have accelerated the flows and consumption of goods. Clearing ever more goods, ever more quickly, presents economic participants and customs authorities with new logistical and technical challenges. In particular, the shift in the EU's external borders owing to eastern expansion has changed the economic environment in Europe. The threat of international terrorism has also made it necessary to optimise regulations designed to secure the supply chain, to create trust between Customs and trade as well as to improve customs controls.

### 1.2 Changes to Union law

The entry into force of the Lisbon Treaty heralded fundamental changes to the primary sources of European law. In this respect, Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU), which grant the Commission the power to issue delegated acts and implementation acts, are of great importance for European customs law. The Customs Code had a Regulation establishing implementation provisions (CCIP) of general application. In future, however, it must be decided whether

the legal provisions concerned relate to delegation pursuant to Article 290 TFEU or implementation pursuant to Article 291 TFEU. This ‘splitting exercise’<sup>4</sup> required the existing implementation Regulation to be divided into delegated or implementing acts. It also required the UCC to provide separate delegated powers and legal foundations in order to issue new acts.

Categorising the provisions in this way complicates the application of customs law since there are potentially three sources of information about certain provisions. Although the Commission’s Delegated Act (UCC-DA)<sup>5</sup> and Implementing Act (UCC-IA)<sup>6</sup> largely follow the same structure, the correct legal basis in the UCC must first be identified in order to find the relevant rules.

During the transition period it will be even more difficult to apply the law. Member States do not currently have the IT infrastructure envisaged by the UCC and will only introduce the necessary electronic systems gradually over the next few years. Therefore, a transitional Regulation has been passed which permits the use of paper-based procedures until the computerised procedures are up and running.<sup>7</sup> It also contains provisions that will allow the UCC-DA to be amended again before it takes effect.

### 1.3 The changing role of Customs

Customs is no longer regarded as just the collector of import and export duties. The inexorable expansion of the multi-layered system of global trade based on numerous international agreements, together with the ever-greater need for security, has led to Customs being seen as a European security administration, which acts as the guardian of the EU’s external borders.<sup>8</sup>

Against this background, Article 3 UCC sets forth the mission of customs authorities for the first time. It describes the role of Customs in monitoring and managing free trade and establishes four specific aims which are to guide the acts of customs authorities. On the one hand, Customs is to ensure the financial interests of the Union and the security and safety of the internal market whilst promoting cooperation with economic operators. This is clear from recital no. 16 of the UCC which describes Customs as the ‘catalyst to the competitiveness of countries and companies’. Thereby, the customs authorities perform a leading role in the supply chain which combines supervisory and regulatory as well as mediatory and facilitative tasks. Article 3 UCC provides a framework for convergence and a point of alignment for the individual Member States, customs administrations and the Commission.<sup>9</sup>

### 1.4 Aims of modernisation

The renewed modernisation of customs law aims to further the objectives pursued by the MCC. These include, on the one hand, the facilitation of legitimate trade and, on the other, improved security and safety of the supply chain. The trade facilitation measures include the simplification and harmonisation of rules on customs debt, time limits and formalities.<sup>10</sup> There is a constant drive to improve efficiency, reduce costs and accelerate operations. For this reason, Article 6 (1) UCC imposes a general obligation to clear goods by way of electronic data-processing.

The other aim is to increase the security and safety of operations. This includes the prevention of illicit trade, comprehensive controls on trade flows as well as a common risk management framework.<sup>11</sup> Minimising potential risks and threats aims to protect the interests of the Union and its citizens as well as stakeholders in the supply chain. It soon becomes apparent that the aims pursued and the corresponding measures are sometimes contradictory or rule each other out. Customs authorities and economic operators also have competing interests. In practice, the aim is to reconcile them appropriately.

## **2. Changes and amendments in the UCC**

### **2.1 Approach and structure**

The UCC is divided into nine titles. It is more comprehensive than its predecessors, containing 281 articles as opposed to 253 (CC) or 188 (MCC). This is mainly due to the inclusion of powers for the Commission. As with existing customs law, the UCC can be conceptually divided into three parts: formal customs law (Titles IV-VIII), substantive customs law (Titles II, III and parts of Titles VI and VIII) as well as the general provisions in Titles I and IX.<sup>12</sup>

Title I contains the general rules of customs law and establishes the scope of the customs provisions. It extends the catalogue of definitions in Article 5 UCC, establishes the general rights and duties of economic operators<sup>13</sup> and regulates customs representation and penalties. Title I also introduces the principle of electronic data-processing (Art. 6 (1) UCC) and comprehensive monitoring by the customs authorities in respect of all authorisations (Art. 23 (5) UCC).

Title II establishes the basis for collecting duties. It regulates customs tariff, rules of origin<sup>14</sup> and the customs value<sup>15</sup> of goods.

In contrast to the CC, Title III regulates the customs debt and provision of security. This represents an important structural change since the law on customs debt is now placed before the rules on individual customs procedures. This organisation is logical because the rules on customs debt apply to all customs procedures.<sup>16</sup>

Title IV regulates the introduction of goods into the customs territory of the Union. The chapters contain procedural rules on the entry summary declaration, entry of goods into the customs territory of the Union, presentation and the temporary storage of goods.

Title V contains general provisions on the customs status of goods as well as release and disposal. It regulates the standard customs declaration and related simplifications.

The customs procedures are the subject of Titles VI and VII. The former covers release for free circulation and relief from import duty, whereas the latter deals with the special procedures of the UCC. First of all, it lays down general provisions for all procedures. Here, it is clear that the legislator has used the 'bracketing technique' to place the general rules before special ones. In future, it will be imperative to read the general part of the special procedures and then proceed to the more specialised provisions.

Title VIII regulates how goods are taken out of the customs territory of the Union and the final provisions of Title IX contain rules on the delegation of implementing powers, delegated legal acts, the committee procedure as well as IT developments.<sup>17</sup>

### **2.2 Incurrence of a customs debt in the UCC**

Articles 77 to 88 UCC determine how the customs debt is incurred and cover both import and export duties.<sup>18</sup> An important change is that the UCC significantly reduces the grounds for the incurrence of a customs debt. The CC had more than six separate grounds that could, theoretically, give rise to a customs debt. By contrast, the UCC only has a few provisions determining when a customs debt is incurred. This change reflects the aim of restructuring and simplifying the law on customs debt that was already pursued by the MCC.<sup>19</sup>

### 2.2.1 Incurrence of a customs debt on import

There are two situations in which import duties can be incurred. On the one hand, there is the normal case of incurrence regulated by Article 77 UCC and, on the other, various cases of non-compliance found in Article 78 UCC. The special provisions of Article 78 UCC relating to non-originating goods only play a subordinate role in this respect.

#### Normal cases

Article 77 (1) UCC regulates the normal case in which import duties are incurred. Accordingly, a customs debt on import is incurred through the placing of non-Union goods liable to import duty under the procedure for release for free circulation, including under the end-use provisions or under the procedure for temporary admission with partial release from import duty.

With the exception of the new provisions on end-use, there are no substantive changes. In the German version, however, the ‘release for free circulation’ has been reformulated: ‘Überführung’ in Article 201 (1)(a) CC has been replaced by ‘Überlassung’ in Article 77 (1) UCC. The UCC does not provide a clear answer to the problem of when the customs debt is actually incurred. Consequently, the legislator has not resolved the debate surrounding the European Court of Justice’s (ECJ) controversial decision in the *Wandel* case.<sup>20</sup>

#### Cases of non-compliance

Article 79 UCC groups together the grounds for the incurrence of a customs debt in the case of non-compliance. It contains all instances of non-compliance previously contained in Articles 202–205 CC. They are now based on standardised provisions relating to potential remedies, customs debtor and the grounds for extinguishment. This eliminates the unclear distinctions between the grounds for the incurrence of a customs debt in the CC.<sup>21</sup> Accordingly, Article 79 (1) UCC states that a customs debt will be incurred in the case of non-compliance with:

- (a) obligations
- (b) obligations concerning end-use and
- (c) a condition governing the placing of non-Union goods under a customs procedure.

### 2.2.2 Incurrence of a customs debt on export

The rules governing the customs debt on export follow the same structure as those relating to the customs debt on import. As with the latter, a distinction is made between the normal cases in which a customs debt is incurred (Art. 81 UCC) and cases of non-compliance (Art. 82 UCC). The provisions largely correspond to Articles 209–211 CC. In this respect, export duties can arise when re-exporting non-Union goods as well since they also require a customs declaration to be lodged in accordance with Article 87 (1) UCC.

## 2.3 Extinguishment of the customs debt

Articles 124–126 UCC redesign the rules on the extinguishment of the customs debt.<sup>22</sup> Article 124 UCC lists the various cases of extinguishment in detail. These include cases where the goods are confiscated or seized, destroyed, or abandoned to the state or irretrievably lost.

The UCC does not adopt the remedies of Articles 204 and 206 CC in their original form. However, the legislator has incorporated them under the provisions on extinguishment and expanded them.

### 2.3.1 Extinguishment in the case of failures with no significant effect

The most interesting change is the liberal provision of Article 124 paragraph 1 (h) UCC. This case of extinguishment refers to the grounds for incurring a customs debt in Articles 79 and 82 UCC. Accordingly, a customs debt can be extinguished even in cases of non-compliance, provided that the failure does not have any significant effect on the operation of the customs procedure concerned and does not constitute an attempt at deception. A further criterion is that all the formalities necessary to regularise the situation of the goods must have been carried out. Once all the criteria have been met the reason why the customs debt was incurred is irrelevant for extinguishment.<sup>23</sup>

The Regulation's legal text reflects Article 859 CCIP with the exception of the condition that there be no gross negligence. This condition has not been transferred to the UCC-DA (in conjunction with Art. 126 UCC) either. In addition, Article 103 UCC-DA has significantly condensed the catalogue of failures which have no significant effect on the correct operation of a customs procedure. The attempt at deception now represents the limit and responds to the demand to reduce the consequences of the customs debtor's negligence to a minimum.<sup>24</sup>

However, the fact that Article 124 (1)(h) UCC only focuses on customs procedures is problematic. It means that the provision does not cover cases of non-compliance in Article 79 (1)(a) UCC involving the introduction and temporary storage of goods. One solution would be to apply it *mutatis mutandis* to all customs debts, regardless of whether the cases of non-compliance have taken place before or after the goods were placed under the customs procedure or even during the customs procedure itself.<sup>25</sup> In addition, the legislator expressly refers to temporary storage in Article 103 UCC-DA thereby indicating that it is also to be regarded as customs procedure within the meaning of Article 124 (1)(h) UCC.

### 2.3.2 Extinguishment where there is evidence that the goods have been taken out of the customs territory

Article 124 (1)(k) UCC tackles another problem encountered in case law by providing that a customs debt can also be extinguished if the customs debtor submits evidence that the goods have not been used or consumed, and have been taken out of the customs territory of the Union and there has been no attempt at deception.

This should provide a solution to the controversial cases of Article 204 (1) CC, at least concerning the incurrance of the customs debt. Hitherto, the judgements of the ECJ have not provided operators with a satisfactory solution.<sup>26</sup> In such cases, a customs debt was incurred owing to non-compliance in the form of a failure or removal despite evidence that the goods concerned had already been taken out of the customs territory of the Union and had not entered economic circulation at any time.

This provision in the UCC makes clear that the law on customs debt should not be punitive in nature (contrary to what judgements of the ECH have suggested). Rather, it places emphasis on the economic theory of customs. Accordingly, the incurrance of a customs debt depends on the goods entering the economic circulation of the EU. In future, cases of non-compliance will be addressed according to a separate catalogue of penalties (for example, fines). That said, it is still possible to detect the punitive nature of the law on customs debt here and there. Accordingly, the effect of Article 124 (4)–(6) UCC is that, under certain circumstances, the customs debt will not be completely extinguished for all customs debtors. In addition, Article 125 UCC draws attention to the fact that the Member States can, in principle, still apply penalties even if the customs debt has been extinguished in accordance with Article 124 (1) (h) UCC.

## 2.4 Customs debtor

Regarding a customs debtor subject to a claim, the UCC brings a number of significant changes and stricter regulation. Legal differences mean that a distinction must be made between the customs debtor in normal cases of the incurrence of a customs debt on import and the customs debtor in cases of non-compliance.

### 2.4.1 Customs debtors in normal cases

As with the CC, Article 79 (3) UCC first takes the declarant and the party represented (in the case of indirect representation) into consideration as potential customs debtors. However, according to Article 77 (3) sub-paragraph 2 UCC, all persons are deemed to be customs debtors who have provided false information required to draw up the declaration and who knew or should have known that such information was false. This provision is no longer optional but binding on all Member States. This change promises to considerably increase the number of potential customs debtors since, theoretically, any party involved in the customs procedure can provide false information. It remains to be seen how strictly the subjective element of non-compliance will be interpreted and evaluated in cases of doubt.

### 2.4.2 Customs debtor in cases of non-compliance

In the CC, the customs debtor in a case of non-compliance was always mentioned in paragraph 3 of the relevant grounds for the incurrence of a customs debt. In Article 79 UCC, these rules are spread over paragraphs 3 and 4 and provide a link to the three cases in Article 79 (1) UCC. As in the CC, the potential customs debtors are the persons subject to an obligation, the aware representative or the aware owner or buyer of the goods. What is new, however, is that the aware operator and the direct or indirect representative can also become the customs debtor in a case of non-compliance, provided the corresponding subjective criteria have been met. This change results in a considerably stricter regulation than Article 204 (3) CC. It means that, theoretically, all persons (for example, employees, warehouse workers, freight drivers or factory workers) who the party under the obligation has hired to satisfy their obligations under customs law are potential customs debtors.<sup>27</sup>

## 2.5 Penalties

The Commission originally intended to harmonise penalties throughout the customs union. However, this turned out to be a bone of contention during the legislative passage of the UCC. As a result, the UCC did not adopt any uniform rules for cases of non-compliance and related penalties. The question of competence alone is problematic since criminal sanctions and their enforcement are regulated by national laws.

### 2.5.1 Measures according to Article 42 UCC

Article 42 (2) UCC basically provides for the application of administrative penalties in two forms. On the one hand, there is the imposition of a pecuniary charge and, on the other, the revocation, suspension or amendment of an authorisation issued. In this connection, the penalties imposed by the Member States are to be 'effective, proportionate and dissuasive' (Art. 42 (1) UCC). This wording adopted by the legislator responds to the judgements of the ECJ which has consistently called for such a practice.<sup>28</sup>

### 2.5.2 Framework guidelines of the Commission

At the same time, Article 42 CC indicates that there will be 28 more or less different systems of penalties in the future which will presumably adopt their own approaches to the nature and gravity of the failures as well as the degree of punishment. In order to prevent the fragmentation of penalties and to protect the principle of equal competition within the internal market, the Commission submitted a proposal

for framework guidelines on 13 December 2013.<sup>29</sup> It aimed to unify national penalties for cases of non-compliance with customs laws throughout the Union. It remains to be seen whether the Commission will introduce another proposal. In any case, it is expected that there will be revisions, new editions and, in cases of doubt, a tightening up of the national penalty systems in order to achieve uniform treatment.

## 2.6 Repayment and remission

Articles 116–123 UCC regulate repayment and remission. The legal definitions previously contained in Article 235 CC have been integrated in the catalogue of definitions in Article 5 numbers 28 and 29 UCC and reduced to their bare essentials. As before, they refer to both total and partial amounts. Accordingly, ‘repayment’ means the refunding of an amount of import or export duty that has been paid, whereas ‘remission’ means the waiving of the obligation to pay an amount of import or export duty which has not been paid. Changes and new features introduced by the UCC are mainly to be found in the provisions regulating errors by the competent authorities and equity.

### 2.6.1 General provisions of Article 116 UCC

The general rule in Article 116 UCC provides five grounds for the repayment and remission of potential import and export duties which are defined in subsequent provisions. Listing them in advance serves to break down the four groups of cases that were strictly separated in Article 236–239 CC.<sup>30</sup> The five new grounds are:

- (1) overcharged amounts of import or export duty (Art. 116 (1)(a) in conjunction with Article 117 UCC)
- (2) defective goods or goods not complying with the terms of the contract (Art. 116 (1)(b) in connection with Art. 118 UCC)
- (3) error by the competent authorities (Art. 116 (1)(c) in conjunction with Art. 119 UCC)
- (4) equity (Art. 116 (1)(d) in conjunction with Art. 120 UCC)
- (5) the repayment of duties in the case where the corresponding customs declaration is invalidated (Art. 116 (1) sub-para. 2 in conjunction with Art. 174 UCC).

The following paragraphs of Article 116 UCC contain more general provisions concerning the amount of duty to be repaid (para. 2), customs authorities acting on their own initiative (para. 4), no repayment or remission in the case of deception (para. 5), payment of interest (para. 6) and reinstatement of the customs debt (para. 7).

### 2.6.2 Error by the competent authorities

According to Article 119 UCC, repayment and remission are possible if the competent authorities have made an error owing to which the economic operator has paid too much duty. Paragraph 1 lays down the conditions that have to be fulfilled, namely that the debtor could not reasonably have detected that error and that they were acting in good faith.

What is striking is that there is no equivalent to Article 220 (2)(b) CC, which required compliance with all the provisions laid down by the legislation in force as regards the customs declaration. Accordingly, the declarant was obliged to furnish all particulars required by community law or by the supplementary provisions of the respective Member State in relation to the customs treatment in question.<sup>31</sup> In the UCC, the legislator has dispensed with this third requirement for claiming an error by the authorities since (owing to minor imprecisions), a precise application of this provision would result in this ground being excluded in most cases and Article 119 UCC would thereby have no effect.<sup>32</sup>

Furthermore, Article 119 (3) UCC includes statements on the preferential treatment of goods. In the CC, the counterpart to these provisions was found in the section concerning the entry into the accounts of the amount of the customs debt. Accordingly, the UCC unifies the procedural and administrative operations that were previously dealt with separately and now subsumes the situation where there is no subsequent entry in the accounts under the grounds for repayment and remission. Owing to the legal, formal and substantive unification achieved it will not be necessary in future to have several procedures running in parallel with different grounds for repayment in relation to the same case. In practice, this will relieve the procedural and administrative burden on all entities – from the customs debtor to the Commission.

### 2.6.3 Grounds of equity

The repayment and remission of customs duties is also possible on grounds of equity. According to Article 120 (1) UCC, this will be the case if there are special circumstances and no evidence of deception or obvious negligence. Article 239 (1) CC defined the special circumstances inadequately, which repeatedly gave rise to discussions on how to interpret this general provision in practice. Now, Article 120 (2) UCC has introduced a definition of special circumstances: namely, if the debtor is in an exceptional situation as compared with other operators engaged in the same business. Thereby, the legislator has followed the tenor of the judgements and principles of the ECJ, sometimes word-for-word.<sup>33</sup>

Article 120 UCC also departs from Article 239 CC, insofar as it permits repayment or remission only if special circumstances apply. Before, Article 239 paragraph 1 CC provided for individual cases of equity in addition to special circumstances that were established by the Commission's committee procedure and listed in Article 900 following CCIP as an open-ended catalogue of cases. The UCC dispenses with this power: neither Article 122 nor Article 123 UCC provide for an explicit delegation of power that would allow the Commission to retain the catalogue of cases. In practice, this could have far-reaching consequences regarding the number of applications and the time needed to process them.<sup>34</sup>

In this context, it is worth mentioning that the Commission's proposal for laying down a new edition of the CC originally gave it the power to specify the special circumstances of Article 120 UCC.<sup>35</sup> The fact that the proposal was not adopted in the edition of the UCC that had already entered into force suggests the omission was deliberate. However, it is possible that the courts will still have regard to the cases established in the CCIP, based on the definition of special circumstances and the ECJ's existing judgements.

## 2.7 Customs procedures

The earlier law provided for eight separate customs procedures<sup>36</sup> that could be divided into economic and non-economic procedures. By contrast, Article 5 no. 16 UCC basically provides for only three customs procedures:

- (1) release for free circulation
- (2) export
- (3) the special procedures which, in turn, can be sub-divided into transit, storage, specific use and processing.

The aim of the reform was to restructure and simplify the dense and confusing procedural law.<sup>37</sup> Nevertheless, despite the restructuring and redesign, it was not intended to reduce the types of procedure to the detriment of economic operators.<sup>38</sup> The operators' freedom of choice in relation to the customs procedures is therefore retained by virtue of Article 150 UCC.



### 2.7.1 Release for free circulation

The procedure for the release of goods for free circulation is regulated in Article 201 UCC. Its contents reflect that of Article 79 CC. One change is that the wording of the German version replaces ‘Überführung’ with ‘Überlassung’. This ensures that the German translation of the UCC reflects the English wording more closely<sup>39</sup> (although it is not expected to have any effect on the legal situation or procedure).

### 2.7.2 Special procedures

The special procedures are divided into four types that are each sub-divided into two groups. It is therefore obvious that the number of existing customs procedures has not been significantly reduced but merely re-structured.

#### Transit

Unlike the other customs procedures, the special procedure for transit (Art. 226–236 UCC) has not been significantly changed. The reason for this is that these provisions are based on international agreements and cannot be changed by the Union alone. As before, a distinction is made between external and internal transit with its respective sub-divisions. In future, however, reference will be made to the external or internal *Union* transit procedure.

#### Storage

The special procedure for storage is regulated in Articles 237–249 UCC and, in accordance with Article 210 (b) UCC, consists of customs warehousing and the free zone. In this, it departs from the MCC which still envisaged temporary storage as a separate customs procedure in Articles 151–152. Like the free warehouse, it is no longer an independent procedure and now only represents a situation under customs law.<sup>40</sup>

Another new feature relates to the different categories of customs warehouse used. Article 525 CCIP differentiated between a number of different types of public and private customs warehouses. By contrast, the UCC adopts a far more general distinction. The delegated acts divide a public warehouse into two types: type I (Art. 1 no. 32 UCC-DA) places the responsibility on the holder of both the authorisation and the procedure, whereas type II warehouses (Art. 1 no. 33 UCC-DA) only places responsibility on the holder of the procedure. Article 1 no. 11 UCC-IA establishes another public customs warehouse (type III), which is operated by the customs authorities. There are no further definitions or specifications provided in relation to private customs warehouses. However, private customs warehouses of type C and D will presumably continue to exist under the new legal regime.

The UCC’s provisions on free zones are clearly stricter than before. Considering the customs security initiative in 2005, which extended all security-related provisions to free zones, this gives the impression that the free zone in European customs law has become obsolete since the available discretion and definitions are increasingly restricted.<sup>41</sup>

#### Specific Use

Specific use is regulated in terms of temporary admission and end-use.

Temporary admission is regulated in Articles 250–253 UCC. According to Article 250 (1) UCC, this procedure serves to grant total or partial relief to the re-export of non-Union goods used temporarily in the customs territory of the Union.

There are obvious changes: under exceptional circumstances, it is possible to extend the duration of this procedure from 24 months to ten years (Art. 251 (3), (4) UCC). Furthermore, the procedure can usually only be used by persons who are resident outside the Union. Any exceptions would have to be established by delegated acts but none are provided.

The end-use represents another form of the procedure relating to the use of goods and is regulated in Article 254 UCC. It enables goods to be released for free circulation under a duty exemption or at a reduced rate of duty on account of their specific use (Art. 254 (1) UCC).

### **Processing**

The procedures relating to processing are regulated in Articles 255–263 UCC. As before, a distinction is made between inward and outward processing.

#### ***Inward processing***

Under inward processing, non-Union goods are subject to processing operations in the customs territory of the Union without being subject to import duty or commercial policy measures. The available processing operations are defined in Article 5 no. 37 UCC as the working, processing, destruction, repair, and use of goods. In future, inward processing will only exist as a suspensive procedure. Besides including destruction in this section, the procedure for processing under customs control (previously regulated under Article 130 CC), has been merged with inward processing.<sup>42</sup>

#### ***Outward processing***

The provisions on outward processing in Article 259 (1) UCC are the counterpart to those on inward processing. They relate to Union goods that are temporarily exported from the customs territory of the Union in order to undergo processing operations. On their re-importation, the goods may be granted total or partial relief from duties. The procedure has essentially remained the same. The only change is that the differential method has been dispensed with, leaving only the value-added method under Article 86 (5) UCC.

#### ***Rules on equivalent goods***

Importantly, the rules on equivalent goods are no longer reserved for compensating products. The general provision in Article 233 UCC has extended them to cover all procedures apart from the transit procedure. This significantly increases the scope of this rule. In practice, this could cause fundamental problems with the import duty advantage referred to in Article 223 (3) UCC.<sup>43</sup>

### **2.7.3 Export**

The third customs procedure in the UCC is export. The only change has been to the regulatory structure.<sup>44</sup> The obligation to lodge an export declaration corresponds to existing law and is subject to exceptions provided in the Commission's delegated or implementing acts. Article 245 UCC-UCC-DA provides more exceptions than the previously applicable Article 592a CCIP and now covers all cases.

## **2.8 The AEO concept in customs law**

The provisions regulating the Authorised Economic Operator (AEO) are contained in Articles 38–41 UCC and have been considerably expanded compared to Article 5a CC. The UCC distinguishes between two types of AEO in the legal text itself whereas before the different types were listed in Article 14a (1) CCIP. Operators can apply for an authorisation for customs simplifications ('AEO-C', Art. 38 (2)(a) UCC), or an authorisation for security and safety ('AEO-S', Art. 38 (2)(b) UCC). The authorisations are not mutually exclusive and may be held at the same time ('AEO-F', Art. 38 (3) UCC).

### **2.8.1 Authorisation criteria**

In order to obtain AEO status, the operator must apply for authorisation and meet the corresponding criteria (cf. Art. 38 (1), Art. 22ff. UCC). The authorisation issued is subject to monitoring by the customs authorities in accordance with Article 23 (5) UCC.<sup>45</sup> In this respect, Article 23 (2) UCC obliges operators to inform the customs authorities of any factor which may influence their AEO status.

In accordance with Article 38 (1) UCC, any economic operator established in the Union and who meets the criteria set out in Article 39 UCC can obtain the status of AEO. Article 38 (4) UCC ensures that the status is recognised by all Member States in the territory of the Union. The criteria determining the grant of AEO status are the same as those in Article 5a CC but defined more precisely with stricter wording. According to Article 39 UCC, the operator must meet the following criteria:

- (a) the absence of any serious or repeated infringements of customs legislation and taxation rules, including no record of serious criminal offences relating to the economic activity of the applicant
- (b) a high level of control of their operations by means of a system of managing records which allows appropriate customs controls
- (c) proven financial solvency
- (d) depending on the status, practical standards of competence or professional qualifications directly related to the activity carried out or evidence of appropriate safety or security standards.

The criterion relating to the practical standards of competence or professional qualifications is new and reveals the legislator's intention to guarantee the competence of the applicants and quality standards. Article 27 (1)(a) UCC-IA links the required competence to a minimum of three years of practical experience in customs matters or the application of a quality standard adopted by a European Standardisation body.

In future, evidence of professional qualifications will take the form of a certificate showing that the applicant has undergone successful training in customs legislation and customs-related activities (Art. 27 (1)(b) UCC-IA). Entities permitted to issue such certificates are customs authorities and certified educational establishments or professional or trade associations. The evidence must be provided by the applicant, the person in charge of customs matters or the customs representative. This new rule might have significant consequences in practice. On the one hand, it requires large groups of persons in companies to be regularly trained and educated; on the other, the educational establishments concerned are obliged to gain accreditation from the customs authorities or agencies recognised under national law.

### **2.8.2 Advantages**

The UCC improves the advantages conferred by AEO status. Besides the advantages previously granted by Article 14b CCIP (for example, easier access to customs simplifications or a priority treatment for customs controls), the AEO is now granted exclusive advantages for the first time. These include self-assessment according to Article 185 (2) UCC, the authorisation to use a comprehensive guarantee with a reduced amount according to Article 95 (3) UCC, centralised clearance according to Article 179 (2) UCC and the waiver of the obligation for goods to be presented upon application in accordance with Article 182 (3)(a). The UCC thereby makes clear that, without AEO status, companies will no longer be able to take advantage of simplifications that considerably streamline and optimise company operations.

The advantages of AEO-S and AEO-C are differentiated more clearly than before. In future, holders of AEO-C may expect fewer benefits.<sup>46</sup> This can be seen in the UCC-DA which only grants advantages to holders of AEO-S status.<sup>47</sup> This is clear evidence that the EU wishes to establish AEO-S as the standard and suggests that AEO-C will gradually lose its significance. As a result, companies will be increasingly obliged to obtain AEO-S certification in future.

### 3. Conclusions and outlook

It is clear that European customs law will undergo substantive and structural change in future. The new concept enshrined in the UCC is therefore to be welcomed. As expected, the fundamental concepts and structures of the CC have not greatly changed: after all, they have been around for a long time and the intention of the revision was not to produce a completely new customs law. Rather, the aim was to adapt European customs law to the new legal, economic and security conditions.

A large number of changes relate to the UCC's structure. The wording of the Regulation and its systematic arrangement appear more precise, structured and coherent than before. This can be seen, in particular, from the use of the bracketing technique, the re-grouping of the provisions on customs debt and the inclusion of the powers to adopt delegated and implementing acts. These are the most obvious differences between the MCC and the UCC.

At a substantive level, the new concept of the UCC is largely seen in the reform of the law on customs debt and the simplification of the customs procedures. In places, the legislator also displays a clear tendency not only to harmonise European customs law but also to tighten it. Examples of this can be found in the provisions regulating the AEO, penalties and customs debtors.

Furthermore, the UCC reacts to problems, tendencies and developments in case law and customs practice, which have repeatedly arisen in relation to the CC. The UCC shows that the legislator has learned from experience and attempts to find answers to problems that have hitherto not been satisfactorily resolved. Examples include the attempt to simplify the grounds for incurring a customs debt, the emphasis placed on the economic theory of customs and mitigation of the consequences of negligent conduct. Thereby, the UCC takes into account new conditions and legal challenges. Unsurprisingly, it reflects the previous codes but also makes its own mark. The starting point of the UCC is promising and raises hopes that the customs authorities and economic operators will adopt an improved, more efficient and unified approach in future.

### Notes

- 1 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) [Official Journal of the European Union (OJEU) L145 of 04.06.2008].
- 2 Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [OJEU L 269 of 10.10.2013].
- 3 Lux, AW-Prax 2008, 283 (284).
- 4 Gellert, AW-Prax 2014, 72 (74).
- 5 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code [OJEU L 343/1 of 29.12.2015]; [cited as 'Art. xx UCC-DA'].
- 6 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [O.J. L 343/558 of 29.12.2015]; [cited as 'Art. xx UCC-IA'].
- 7 Commission Delegated Regulation (EU) 2016/341 of 17 December 2015 supplementing Regulation (EU) No. 952/2013 of the European Parliament and of the Council as regards transitional rules for certain provisions of the Union Customs Code where the relevant electronic systems are not yet operational and amending Delegated Regulation (EU) 2015/2446, [OJEU L 69/1 of 15.03.2016]
- 8 Kammerzell in: Witte/Henke/Kammerzell, Der UZK, p. 28.
- 9 Lux, ZfZ 2014, 178 (180); Lux/Larrieu, ZfZ 2006, 329 (335).
- 10 Recital No. 5 of Reg. (EU) 952/2013, [O.J. L 269/1 of 10.10.2013].
- 11 Recitals Nos 28 and 29 of Reg. (EU) 952/2013 [OJEU L 269/5 of 10.10. 2013].
- 12 Cf. also: Witte, AW-Prax 2014, 373 (374).

- 13 See Lux, *ZfZ* 2014, 178 (182ff.).
- 14 In this respect there are no notable changes in the UCC.
- 15 The most important change here is that it is no longer possible to use the first sale for the transaction value (cf. Art. 128 (1) IA). Furthermore, licence fees are separated from the contractual relationship between the buyer and seller (cf. Art. 136 (4) (c) IA), so that only the objective legal situation in the respective territory is decisive and not an inter pares consideration; see also *Rinnert*, *ZfZ* 2015, 142 (146f.).
- 16 Lux, *ZfZ Sonderheft* 2009, 1 (17).
- 17 Cf. the Work Programme on IT development in customs: Commission Implementing Decision of 29 April 2014 establishing the Work Programme for the Union Customs Code, 2014/255/EU, [OJEU L 134/46 of 07.05.2014] and Weerth, *AW-Prax* 2015, 235 (235f.).
- 18 See also: Lux, *ZfZ* 2014, 243 (243ff.).
- 19 Witte, *AW-Prax* 2013, 373 (377).
- 20 ECJ judgement of 01.02.2001, Case C-66/99 ('Wandel').
- 21 Recital no. 32 of Reg (EU) 952/2013, [OJEU L 269/5 of 10.10. 2013]
- 22 See also Witte, *AW-Prax* 2014, 229 (229ff.).
- 23 Witte, *AW-Prax*, 2013, 373 (378).
- 24 Recital no. 38 of Reg. (EU) 952/2013, [OJEU L 269/6 of 10.10. 2013]
- 25 Witte, *AW Prax* 2014, 197 (197).
- 26 ECJ judgement of 06.09.2012, Case C-262/10 ('Döhler Neuenkirchen'); judgement of 06.09.2012, Case C-28/11 ('Eurogate').
- 27 Witte in Witte/Henke/Kammerzell, *Der UZK*, p. 101.
- 28 For example, ECJ judgement of 7.12.2000, Case C-213/99 ('De Andrade'), at para. 19; judgement of 16.10.2003, Case C-91/02 ('Hannl/ Hofstetter'), para. 17; judgement of 26.10.1995 Case C-36/94 ('SieBe'), para. 20.
- 29 Commission Document COM (2013) 884 final of 13.12.2013.
- 30 Lux, *ZfZ Sonderheft* 2009, 1 (20f.).
- 31 ECJ judgement of 23.5.1989, Case C-378/87 (Top Hit), paras. 22, 26; judgement of 27.6.1991, Case C-348/89 (Mecanarte), para. 28.
- 32 Gellert, *AW Prax* 2014, 72 (73).
- 33 ECJ judgement of 25.2.1999 Case C-86/97 (Trans-Ex-Import), para. 21; judgement of 7.9.1999 Case C-61/98 ('De Haan Beheer BV'), paras. 50-52.
- 34 Gellert, *AW Prax* 2014, 72 (73).
- 35 Commission Document COM (2012) 64 final, 2012/0027 of 20.02.2012, Art. 109 d), p. 118.
- 36 See also Witte, *AW-Prax* 2015, 77 (77ff.).
- 37 Recitals no. 46–51 of EU Reg. 952/2013, [OJEU L 269/6–7, 10.10.2013].
- 38 Recital no. 10 of EU Reg. 952/2013, [OJEU L 269/3, 10.10.2013].
- 39 Lux, *ZfZ Sonderheft* 2009, 1 (29).
- 40 Witte, *AW-Prax* 2013, 373 (374).
- 41 Recital no. 7 of EU Reg. 648/2005, [OJEU L 117/14 of 04.05.2005]; Henke in Witte/Henke/Kammerzell, *Der UZK*, p. 206f.
- 42 Recital no. 50 of EU Reg. 952/2013, [OJEU L 269/7 of 10.10.2013].
- 43 Witte/Kammerzell in Witte/Henke/Kammerzell, *Der UZK*, pp. 194f.
- 44 For details see: Böhne, *AW-Prax* 2014, 343 (343ff.).
- 45 Cf. also: Witte, *Der AEO im UZK*, Teil 1, *AW-Prax* 2016, 75 (75f.) and Witte, *AW-Prax* 2015, 109 (109), pointing out that Art. 23 (5) will automatically produce anonymous AEOs owing to the lack of influence.
- 46 Weerth, *AW-Prax*, 2015, 90 (94).
- 47 Cf. Art. 23 – 25 DA.

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