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Article

Proposals to Reform the EU Customs Union *

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On 17 May 2023 the European Commission published the most ambitious and comprehensive proposals to reform the EU Customs Union since the establishing of the Customs Union in 1968. The Commission's proposals follow a series of studies and consultations and is intended as a response to tensions that have arisen in the customs world as a result of a huge increase in trade volumes, a rapidly rising number of EU standards to be checked at borders, the shifting geopolitical reality and various crises. This contribution provides an overview of and critical reflection on the highlights of the proposals, enabling readers with different levels of expertise in customs law to get familiar with what has been proposed by the European Commission and to pave the way for further, in-depth research on these proposals.

Keywords: EU Customs Union, reform, European Commission, customs legislation, UCC, e-commerce, importer, sanctions, EU Customs Data Hub, Trust and Check traders

1 Introduction

Since the establishment of the Customs Union on 1 July 1968, customs law in the European Union has largely been harmonized, firstly in a series of separate regulations, each covering a different aspect of customs law, and later, from 1 January 1994 onwards, in a comprehensive Customs Code. From 1 January 1994 to 30 April 2016, this was the Community Customs Code (CCC),[1] which was replaced on 1 May 2016 by the Union Customs Code (UCC).[2] The UCC was compiled along the lines of the Treaty of Lisbon, which essentially means that besides a basic regulation, the UCC legislative package comprises both a Delegated Act (DA UCC)[3] and an Implementing Act (IA UCC).[4]

On 17 May 2023, the European Commission published a proposal for dramatically amending this legislation[5] in a manner that the Commission itself described at the most ambitious and comprehensive reform of customs legislation since the European Union established a customs union. The proposal contains a completely new basic regulation, which is designed to replace the UCC and which I refer to in the rest of this contribution as 'the proposal', the 'new UCC' or the 'UCC (new)'.

The purpose of this contribution is to enable readers with different levels of expertise in customs law to get familiar with what has been proposed by the European Commission and to pave the way for further, in-depth research on particular features of these proposals and interactions with other fields of (EU) (tax) law. This contribution is therefore limited to providing an overview of and a critical reflection on the highlights of the proposals. To that end, I will first discuss the background to the proposal and introduce the three pillars on which it is based (section 2). Thereafter I examine the proposal in more detail, starting with the establishing of the EU Customs Data Hub and the Trust and Check traders (section 3) and followed by the establishing of the European Customs Authority (section 4), the e-commerce proposals (section 5), the newly introduced or clarified concepts of 'importer', 'exporter', 'carrier' and 'manufacturer' (section 6) and the partial harmonization of sanctions (section 7). I end the contribution by looking ahead to the future (section 8).

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1 Council Regulation (EEC) No 2913/92 of 12 Oct. 1992 establishing the Community Customs Code, *OJ* L 302 (19 Oct. 1992), at 1–50.

2 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 Oct. 2013 laying down the Union Customs Code (recast), *OJ* L 269 (10 Oct. 2013), at 1–101.

3 Commission Delegated Regulation (EU) 2015/2446 of 28 Jul. 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, *OJ* L 343 (29 Dec. 2015), at 1–557.

4 Commission Implementing Regulation (EU) 2015/2447 of 24 Nov. 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, *OJ* L 343 (29 Dec. 2015), at 558–893.

5 Proposal for a Regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013, COM(2023) 258 final of 11 May 2023.

2 Background to and a bird's eye view of the proposals

Increasing trade volumes, a rapidly rising number of EU standards to be checked at borders, the shifting geopolitical reality and various crises have combined created a need to reform current customs legislation. It is this that forms the background of the proposals published by the European Commission. In view of the rapid increase in standards needing to be checked at European borders, the proposals aim to align with existing legislation and proposals, such as the regulation on market surveillance and compliance of products,[6] the general product safety regulation,[7] the regulation to prevent products associated with deforestation and forest degradation (anti-deforestation regulation)[8] or forced labour[9] from becoming available in the European market, the regulation setting requirements for digital product passports[10] and the Carbon Border Adjustment Mechanism (CBAM).[11] In addition, it seeks to align with existing policy on, for example, legislation regarding the EU's own resources, VAT (e-commerce) legislation and the Windsor Framework.[12]

The proposal is based partly on the reports by the Commission's Joint Research Centre,[13] the European Court of Auditors[14] and the Wise Persons Group.[15] The 2022 report by the Wise Persons Group, comprising high-level representatives from the business sector (mainly without a customs background), contained a set of ten recommendations. As discussed below, many of these recommendations have been incorporated (in amended form) into the proposal. In addition to these reports, various public consultations were held to determine the changes wanted in customs law, as well as to ensure support for the European Commission's proposals. After being postponed on two occasions, the proposals were ultimately presented on 17 May 2023, with the package comprising a proposal for a new Customs Code,[16] amendment of the VAT Directive[17] and a change in the Combined Nomenclature.[18]

The proposals are based on three pillars:

(1) A new partnership with business;
(2) A smarter approach to customs checks;
(3) A more modern approach to e-commerce

The new partnership with business is to be built around the EU Customs Data Hub (section 3), which will act as a centralised point for collecting data on goods being imported into the EU and cater for the rapidly increasing number of obligations to be complied with at the border and on which data must be logged. Technological applications such as artificial intelligence, machine learning and analytics in combination with human interventions will provide authorities with a 360-degree overview of movements of goods thanks to the data logged in the EU Customs Data Hub. Importers using the Data Hub can expect fewer interventions in consignments, while 'Trust and Check traders' (section 3.3), an upgraded version of the authorised economic operators (AEO) programme, will be able to release their goods into free circulation in the EU without any active customs intervention at all (self-assessment), as well as enjoying various other benefits.

The second pillar, a smarter approach to customs checks, means that these checks will increasingly be applied to the general supply chain rather than to individual consignments. Access to real-time data should enable customs authorities to flag up risks more quickly, consistently and efficiently, even before the goods have been dispatched to the European Union. A new European Customs Authority will also be set up to help Member States prioritise risks and coordinate checks and inspections.

[6] Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 Jun. 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 (Text with EEA relevance), *OJ* L 169 of 25 Jun. 2019, at 1–44.

[7] Proposal for a Regulation of the European Parliament and of the Council on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council [COM(2021) 346].

[8] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (Text with EEA relevance), *OJ* L 150 of 9 Jun. 2023, at 206–247.

[9] Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market [COM(2022) 453 final].

[10] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for setting ecodesign requirements for sustainable products and repealing Directive 2009/125/EC (COM/2022/142 final).

[11] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance), *OJ* L 130 of 16 May 2023, at 52–104.

[12] Post-Brexit arrangement between the EU-27 and the United Kingdom (UK) of 27 Feb. 2023 to address the challenges concerning Northern Ireland following the UK's withdrawal from the EU. It introduces new rules for goods moving between Northern Ireland, the UK and the EU.

[13] A. Ghiran, A. Hakami, L. Bontoux & F. Scapolo, *The Future of Customs in the EU 2040*, Publications Office of the European Union: Luxembourg (2020).

[14] European Court of Auditors, Customs controls: insufficient harmonization hampers EU financial interests, special report 04/2021.

[15] Report by the Wise Persons Group on the Reform of the EU Customs Union: Brussels (Mar. 2022).

[16] *See* footnote 5.

[17] Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules relating to taxable persons who facilitate distance sales of imported goods and the application of the special scheme for distance sales of goods imported from third territories or third countries and special arrangements for declaration and payment of import VAT, COM(2023) 262 final of 17 May 2023.

[18] Proposal for a Council Regulation amending Regulation (EEC) No 2658/87 as regards the introduction of a simplified tariff treatment for the distance sales of goods and Regulation (EC) No 1186/2009 as regards the elimination of the customs duty relief threshold, COM(2023) 259 final of 17 May 2023.

The aim of the third pillar is to modernize the approach to e-commerce by assigning a more prominent role to e-commerce platforms in supply chains, abolishing the current duty exemption for low value consignments valued at below €150 and introducing five simplified customs duty categories.

3 EU Customs Data Hub and trust and check traders

3.1 Introduction

The establishing of an EU Customs Data Hub and the introduction of the upgraded AEO programme (i.e., Trust and Check traders) are both part of the above pillar 1 and are intended to create a new relationship between business and the customs authorities.

3.2 EU Customs Data Hub

The EU Customs Data Hub will act as a single, centralised portal through which economic operators can report their customs data to customs authorities. The aims in this respect include reducing customs interventions to a minimum without compromising the safety, security and anti-fraud obligations to be complied with at the EU's external borders, as well as giving customs authorities a 360-degree overview of economic operators' supply chains. The customs information to be submitted to the EU Customs Data Hub should enable the competent authorities to perform the necessary risk management and checks of compliance with customs and other legislation. The term 'other legislation' is formulated very widely and covers all legislation, other than customs legislation, applying to goods entering, leaving or passing through the EU customs area or being released into circulation in the European market and where the customs authorities play an implementing role. I expect, therefore, that this other legislation also includes legislation such as the anti-deforestation regulation and the CBAM. I base this view on the fact that although, in the case of this legislation, the customs authorities share implementing powers with other authorities, the proposal is underpinned by a wish to align customs legislation more closely with existing legislation or legislative proposals. This view would also align with European Commission's wish to address increasing EU standards that need to be checked at borders.

Under the proposal, e-commerce platforms will have to complete all their customs formalities from 1 March 2028 onwards through the EU Customs Data Hub (*see* section 5.1 for more details). From 1 March 2032, all other economic operators may start using it, and will be obliged to do so from 1 January 2038. The way in which they submit customs declarations will also change in line with the phasing-in of the EU Customs Data Hub. At present, declarants have to submit a customs declaration after presenting their goods to the customs authorities, while in future the importer (*see* section 6.2) will have to provide customs data to the authorities by logging the information in the EU Customs Data Hub managed by the European customs authorities (*see* section 4).

The EU Customs Hub is one of the new features introduced in the proposals to reform the EU Customs Union that should address the increase of trade volumes. The experiences with the EU VAT Reform on e-commerce platforms, show, as explained by *Chen*,[19] that Member States will potentially experience challenges with adopting to new IT systems and data quality. From these experiences, we also learned that businesses will most likely face additional, financial burdens connected to adopting to the new rules which, in particular for small and medium-sized enterprises, could result in a disproportional burden and may even prevent them from continue trade with the EU.

3.3 Trust and Check Traders

The proposal includes the introduction of a new type of economic operator, with the aim of reinforcing the EU's AEO programme. This would certainly seem necessary, given that the objective of the AEO programme in its current form is, in my view, less than optimal. AEO status should result in customs authorities treating an economic operator as a 'trusted trader' and in the operator being granted certain benefits in return for complying with various obligations. In practice, however, the benefits of this status do not always seem to outweigh the obligations involved in applying for and maintaining AEO authorised.

A party wanting to be designated as a Trust and Check trader will have to fulfil certain criteria. These are largely the same as the criteria applying to economic operators applying for both the AEO Customs Simplifications authorization (AEO-C) and AEO Security and Safety authorization (AEO-S) status and who in any event have to demonstrate:

- An appropriate track record regarding compliance with customs rules and regulations;
- An efficient system for managing commercial and, in some cases, transport records so as to enable appropriate customs checks;
- Proven financial solvency;
- Practical standards of competence or professional qualifications; and
- Appropriate security measures.

Economic operators wanting to be designated as Trust and Check traders also, however, must have an electronic system in place that enables them to make real-time data available to the EU Customs Data Hub. The benefits

[19] S.-C. Chen, *EU Customs Reform in 2023: The Data-Driven Approach*, *Caribbean Tax Law Journal* 2023(4), at 25–26 and studies referred in her article.

specifically associated with Trust and Check trader status include:

- Being able to release goods into circulation without intervention by customs authorities (self-assessment);
- Being subject to fewer physical and document-based controls;
- Goods are regarded as being under customs supervision until their final destination, without having to be placed in transit;
- On request, an economic operator may defer calculation of customs duties and communication of customs debts for up to 31 days;
- A reduction in or exemption from the requirement to lodge security.

AEO-C license can be applied for until 1 March 2032.[20] By 31 December 2037, however, any existing license will have to be reviewed and will then be withdrawn or, where the operator complies with all the applicable criteria, will be replaced by Trust and Check trader status. AEO-S will continue to apply, probably because of the EU's Mutual Recognition Agreements (MRAs). These are agreements between the European Union and various third countries on the mutual recognition of each other's security certification and licensing procedures, such as the AEO-S in the case of the EU.

4 European customs authorities

The 27 EU Member States comprise a customs union, with the duties levied at the EU's external borders constituting part of the EU's traditional own resources. National customs authorities are responsible for levying import duties and, in return, receive a share of the duties collected. Failure by national customs authorities to perform systematic, risk-based customs controls in compliance with the applicable statutory EU obligations can result in undercollection of import duties and, therefore, in a loss of own resources. If the European Commission finds that statutory EU obligations have not been properly complied with, the relevant Member State has to compensate the loss of own resources.[21] This (increasing) 'pressure' from Brussels means that customs authorities tend to interpret legislation very strictly, with little if any scope for applying principles of reasonableness and fairness, for example, or hardship clauses.

In my view, this 'tension' between Brussels and national customs authorities has gradually created a climate favouring the institutionalizing of certain powers at an EU level. This, in turn, is reflected in the proposal to establish an EU Customs Authority with the following primary responsibilities:

- carrying out risk management tasks;
- carrying out tasks relating to restrictive measures and the crisis management mechanism;
- performing capacity-building activities and providing operational support and coordination;
- carrying out data management and processing activities for establishing the national applications needed for providing data to the EU Customs Data Hub.

Details of what these responsibilities entail can be found in various articles in the proposal. As well as laying down the primary responsibilities, the proposal defines other tasks and responsibilities of the European Customs Authority, including the aim to ensure uniform application of the customs legislation.[22] The plan is for the European Customs Authority to be established by 2026 and to become fully operational in 2028.

My expectation is that, over time and assuming a European Customs Authority is established, tasks currently performed by national customs authorities will gradually be transferred or, in the case of new tasks, assigned to the European Customs Authority. It is, however, questionable to what extent this authority would enable the EU to respond faster to, for instance, geopolitical changes and crises. The competency to issue sanction legislation or reduce trade barriers (e.g., waiving VAT and customs duties on vital medical equipment) will remain with the EU legislator. So without regulatory powers, the European Customs Authority might end up being regarded as paper tiger if it comes to the aim of the European Commission to respond faster to geopolitical changes and crises.

5 E-commerce

5.1 Prominent Role for E-commerce Platforms

In line with the VAT e-commerce legislation that took effect on 1 July 2021, e-commerce platforms are being assigned a prominent role in customs law, too, from 1 March 2028. At present, customs clearance procedures

[20] Article 26(1) in conjunction with Art. 265(5) UCC (new).

[21] *See* e.g., the losses of EUR 2.7 billion claimed by the European Commission from the United Kingdom: CJEU 8 Mar. 2022, C-213/19 (*Commission v. United Kingdom*), ECLI:EU:C:2022:167 and a discussion of this and other cases in: M. L. Schippers & W. de Wit, *The Use of Statistical Values to Combat Undervaluation in the European Union*, 57(2) J. World Trade, at 253–276 (2023).

[22] Given that the EU Member States comprise a customs union and the EU is a member of the WTO, the EU is required under Arts XXIV and X:3(a) GATT to ensure uniform application of the legislation. In the past, other WTO members have brought various cases before the WTO's dispute settlement body in which they argued against the need for the legislation to be interpreted uniformly. *See* e.g., Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, (Bananas III); Appellate Body Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, (EC – Poultry); Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, (EC – Selected Customs Matters) and Panel Report, European Union and its Member States – Certain Measures Relating to the Energy Sector, WT/DS476/R, (EU – Energy Package).

for e-commerce packages are usually completed by couriers or consumers. From 1 March 2028, however, responsibility for completing these procedures will transfer to e-commerce platforms, which will from then on be referred to as 'deemed importers'. Economic operators will be designated as such if they are involved in distance sales of goods to be imported into the European Union from third countries and the operator is authorised to use the Import One Stop Shop (IOSS). For a distance sale[23]:

- The goods must be sold and dispatched directly to non-VAT registered customers in the European Union;
- The goods must be imported from a non-EU Member State;
- The goods must be shipped by or on behalf of the supplier.

Where a non-VAT registered customer purchases goods from a deemed importer, a customs debt will arise upon acceptance of the payment. One day after the payment, and in any event before the goods are released for free circulation, the deemed importer must notify the customs authorities by uploading information to the EU Customs Data Hub. The customs authorities may allow a deemed importer to defer until the end of the next month, at the latest, the calculation of the customs debt corresponding to the total amount of import or export duties relating to all the goods released during the month, with a breakdown of the amounts related to each specific consignments of goods.

The background to this rule is that it results not only in the customs rules aligning more closely with the rules applying to VAT on e-commerce sales, but also in e-commerce platforms being able to inform consumers of the final price from the start. This should result in fewer complaints and in fewer consignments having to be returned because consumers will no longer face additional (and often unexpected) costs relating to customs clearance procedures.

5.2 Abolishing the €150 Threshold

Under Article 23 of Regulation (EC) No. 1186/2009,[24] consignments comprising goods of negligible value and dispatched direct from a third country to a consignee in the European Union are admitted free of import duties, with 'goods of negligible value' being taken to mean goods with an intrinsic value of no more than EUR 150 per consignment.

In order to prevent import duties being avoided by goods being priced for customs purposes at just below this threshold, the plan is to abolish this exemption. In other words, and as explained in section 5.1, the intrinsic value of goods sold through an e-commerce platform will be of no relevance for determining whether the platform in question can be designated as a deemed importer.

Eliminating the relief on goods valued at less than EUR 150 also has implications for VAT, given that the proposal includes a plan to extend the IOSS to goods with an intrinsic value of EUR 150 or higher. The special arrangements allowing postal operators, express carriers and customs agents to complete customs clearance procedures on imports on behalf of their customers and to pay VAT collected on a monthly basis are also being extended, so that goods valued at EUR 150 or higher can also be imported under these arrangements.

5.3 Introduction of Five Simplified Duty Rates

An essential element when importing goods is to determine the applicable duty rate. The many different classifications currently available can present a challenge for parties importing consignments consisting of multiple different goods. This applies particularly in the case of e-commerce consignments, where suppliers ship a wide variety of products, each of which has to be assigned a different duty rate. This is the background to the decision, in the case of distance sales, to allow importers to assign their goods to five simplified 'buckets' with respective ad valorem duty rates of 0% (on books, printed materials and works of art, for example), 5% (on, for example, toys, musical instruments and metal cutlery), 8% (on silk and cotton products, ceramic products and photographic goods, for example), 12% (on, for example, leather articles and travel bags) and 17% (on products such as footwear and glassware). Despite this simplification, however, the Advance Cargo Information system means importers will continue having to specify the six-digit Harmonised System codes.

Use of the simplified duty rate system is optional and not possible for all goods. Goods subject to excise duties or to anti-dumping, anti-subsidy or safeguard measures are excluded. So, too, are goods contained in Chapters 73, 98 and 99 of the Combined Nomenclature. If any of the five simplified duty rates are used, the customs value must include the transport costs to the place of destination. This differs from the current rules on customs values, where the customs value has to include transport costs to the place at which the goods enter the customs territory of the European Union ('CIF value'). The reason for this is that the Commission wants the value of goods for customs purposes to align more closely with the system used for calculating VAT on e-commerce consignments. The question, however, is whether this accords with the statutory provisions in the Customs Valuation Agreement (CVA) with which the European

[23] At present, only imported goods with an intrinsic value below EUR 150 are eligible for the IOSS. This condition, however, will lapse (s.5.2).

[24] Council Regulation (EC) No 1186/2009 of 16 Nov. 2009 setting up a Community system of reliefs from customs duty (Codified version), *OJ* L 324 (10 Dec. 2009), at 23–57.

Union, as a member of the World Trade Organization (WTO), has to comply. Article 8(2)(a) CVA states that:

> *In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:*
>
> *(a) the cost of transport of the imported goods to the port or place of importation.*

It could be concluded from this that the customs value should include only the costs of transport to the place of importation (which I also take to mean the place where the goods enter the EU customs territory) and not the costs of transport in the 'domestic market'. The Commission's proposal runs contrary to this and so may conceivably not be in conformity with the WTO rules.

6 New concepts: Importer, exporter and carrier

6.1 Introduction

A weak aspect in the current Customs Code, according to the Commission, is the role assigned in the procedure to stakeholders such as the declarant and the carrier. Although these parties are accountable to customs authorities, it can be very difficult for them in practice to comply with their financial and non-financial responsibilities. In order to clarify the roles and responsibilities of these stakeholders, the proposal assigns a major compliance role to importers and exporters, while also redefining the role of carriers. These changes intend to reinforce customs supervision. I discuss these definitions in sections 6.2 to 6.4, respectively.

The proposal also introduces various other terms, primarily reflecting the shift in the focus away from managing the risks of individual consignments and towards managing entire supply chains, and the use of the EU Customs Data Hub (including concepts such as 'risk signal', 'risk signal result', 'control recommendation', 'supervision strategy' and 'simplified treatment for distance sales'). The concept of the 'manufacturer' is also new and is discussed here in section 6.5.

6.2 Importer

Although in practice the term 'importer' (or 'importer of record') is often used to indicate the person responsible for importing the goods, it is not actually a term found in European customs law. Instead, it is the 'declarant' who is responsible for submitting customs declarations. This declarant is either the person submitting the declaration in his own name and for his own account or, if this is done by indirect representation, the representative. From 1 March 2032, however, economic operators, in contrast to deemed importers, may fulfil their reporting obligations via the EU Customs Data Hub as importers. From 2038, this will then be the standard method. In other words, the concept of the 'declarant' will be phased out between 2032 and 2038. Unlike declarants, importers will have to complete customs formalities by uploading data to the EU Customs Data Hub.

The proposal defines the importer as follows (Article 5(12) new UCC):

> *Any person who has the power to determine and has determined that goods from a third country are to be brought into the customs territory of the Union or, except otherwise provided, any person who is considered a deemed importer.*

Although ownership is not explicitly stipulated as a condition for being entitled to act as an importer, legal or economic ownership would implicitly seem to be required. After all, who else would be entitled to determine that goods are to be brought into the customs territory of the European Union? As indicated in Article 20(1) new UCC, importers have to comply with various obligations, with paragraph 2 of this article requiring such parties to be established in the customs territory of the European Union, except where a situation as referred to in paragraph 3 applies. The latter paragraph makes no mention of goods being released into circulation. The UCC resolves this by designating an indirect customs representative, who is then referred to as the declarant. But although the new UCC continues to provide for appointment of a customs representative, this would not seem to release importers from the obligation to be established in the European Union. In other words, legal or natural persons not established or resident in the European Union would no longer seem to be able to import goods (i.e., release them into circulation) without being established within this territory. We have seen the same development in the UCC with regard to the concept of the exporter: Article 1(19) DA UCC currently requires an exporter to be established in the European Union. Where, however, a legal or natural person not established or resident in the European Union has ownership of goods at the moment of their being exported, what happens in practice is that another party to the contract is designated or authorised to act as exporter. A similar approach could be adopted with regard to the concept of the importer under the new UCC. The disadvantage then is that the importer is probably not the party entitled to deduct the VAT due on the imports. This is because a judgment and an order of the Court of Justice,[25] and guidelines issued by the VAT Committee[26] show that the right to deduct VAT is conditional upon the right to freely dispose of goods as an owner.[27]

[25] CJEU 25 Jun. 2015, C-187/14 (*DSV Road*), ECLI:EU:C:2015:421 and CJEU 29 Oct. 2020, C-621/19 (*Weindel*), ECLI:EU:C:2020:814.

[26] Guidelines resulting from the 94th meeting of 19 Oct. 2011, Document C – taxud.c.1(2012)243615–716.

[27] The European Commission recently started an infringement procedure against the Netherlands on the right to deduct VAT due upon import by the importer of a good of which he is not the owner. This occurs, e.g., if a lessee releases a good into free circulation. In

Seeking to continue classic toll manufacturing and agent arrangements, where goods often continue to be owned by a principal established outside the European Union, would therefore seem to present something of a challenge under the new UCC.[28]

6.3 Exporter

The concept of the exporter is currently defined in Article 1(19) DA UCC. Under Article 5(14) UCC (new), the exporter is defined as:

> *Any person who has the power to determine and has determined that the goods are to be taken out of the customs territory of the Union.*

This differs from the current definition, where a separate concept of exporter exists for private individuals and where provision is made, in cases not complying with the above definition, to designate as the exporter a person who is a party to the contract under which the goods will leave the customs territory.

Both the current and the new UCC require the exporter to be established in the customs territory of the European Union. The problems that this causes for legal and natural persons not established or resident in the European Union and wanting to export goods has been extensively discussed in the literature,[29] and these discussions can be expected to continue.

Article 22 UCC (new) specifies the obligations applying to exporters. This represents a substantial change compared to the current UCC, in which exporters' precise obligations are not made entirely clear.[30]

6.4 Carrier

The proposal also includes a more detailed definition of the carrier, who is defined in Article 5(22) UCC (new) as follows:

> *In the context of entry, the person who brings the goods, or who assumes responsibility for the carriage of the goods, into the customs territory of the Union. […]*
>
> *In the context of exit, the person who takes the goods, or who assumes responsibility for the carriage of the goods, out of the customs territory of the Union.*

The prime responsibilities in this respect involve providing brief details before the goods are released for a customs procedure so that customs authorities can carry out a risk analysis. Once the concept of the declarant has been phased out (*see* section 6.1), the carrier will also play a role (to be defined in more detail) in the special procedure for customs transit.

6.5 Manufacturer

Article 5(48) UCC (new) defines the manufacturer as:

- the manufacturer of the product pursuant to the other legislation applicable to that product; or
- the producer with respect to agricultural products as defined in Article 38(1) TFEU or to raw materials; *or*
- if there is no manufacturer or producer as referred to in points (a) and (b), the natural or legal person or association of persons who manufactured the product or had the product manufactured, and markets that product under that person's name or trademark.

The data submitted before goods are released for free circulation must include the name of the manufacturer and, where this is different, the name of the product supplier.[31] This also applies when, for example, goods are placed in storage under a special, end-use or inward processing procedure.[32] This requirement ties in with a wider trend for new European legislation – such as the CBAM, the anti-deforestation regulation and the regulation setting requirements for digital product passports – to require importers, at the time of importing goods, to provide data covering the whole product lifecycle of the goods they are importing. Although the European Commission realises that this imposes an additional burden on importers, this is not regarded as disproportionate, given the simplifications and reductions in customs procedures provided for in the new UCC.

7 Partial harmonisation of sanctions provisions

7.1 Current Position: A Divided Playing Field

Article 42 UCC requires each Member State to provide for penalties for failing to comply with customs legislation and states that any such penalties must be effective, proportionate and dissuasive,[33] with Article 42(2) stating that any administrative penalties applied may comprise one or both of the following forms:

principle, the Netherlands allows deduction of VAT due on import to the lessee if he uses the leased good for his VAT-taxable services and there is no abuse. The European Commission is of the opinion that a lessee is not entitled to deduct VAT due at import.

[28] For a more detailed discussion of toll manufacturing and agent arrangements, *see* M. L. Schippers, *Douanewaarde in een globaliserende wereld* (*Fiscale Monografieën* no. 164) (diss. Rotterdam) 13 et seq. (Deventer: Wolters Kluwer 2021).

[29] *See* e.g., J. Hollebeek & F. Hababa, *Het begrip exporteur: wederom een update*, Btw-bulletin 2020/32, at 9–10 and the literature referred to there.

[30] *Ibid.*, at 6.

[31] Article 88 UCC (new).

[32] Articles 118, 135 and 137 UCC (new).

[33] Based on a recent judgment, a fine would not easily seem to be considered disproportionate; *see* CJEU 8 Jun. 2023, C-640/21 (*Zes Zollner Electronic*), ECLI:EU:C:2023:457.

– a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty;
– the revocation, suspension or amendment of any authorization held by the person concerned.

The combination of this statutory framework and the Court of Justice's findings in customs cases, including some ongoing cases,[34] means that Member States are free under the UCC to decide on their own sanctions. This consequently results in a divided playing field.[35] Although the Commission has made various attempts to harmonise sanctions legislation, its efforts have so far proved fruitless.[36] In 2017, however, Directive 2017/1371 was adopted to provide measures in criminal law aimed at combatting fraud affecting the Union's financial interests.[37] As a result, behaviour intentionally damaging these financial interests now constitutes a criminal offence. This directive sets minimum standards for determining criminal offences and the applicable sanctions. Although the directive does not primarily target infringements of customs regulations, certain infringements are covered because customs duties comprise part of the European Union's own resources. It should be noted that a legal person intentionally avoiding customs duties, irrespective of the amount involved, is regarded as committing a criminal offence. It is interesting, however, that no threshold has been set in this respect, given that a threshold does now apply in the case of VAT fraud.[38]

The lack of harmonization and the significant divergences in the ways in which Member States interpret Article 42 UCC prompted the inclusion in the proposal for a new UCC of provisions establishing a basic core of customs infringements and non-criminal sanctions. The inclusion of these provisions is intended to combat the distortion of competition, legislative loopholes and 'customs shopping' by economic operators.

[34] CJEU 4 Mar. 2020, C-655/18 (*Schenker EOOD*), ECLI:EU:C:2020:157; request from the Fővárosi Törvényszék (Hungary) for a preliminary ruling, lodged on 18 Oct. 2022, C-653/22; request from the Rayonen sad Svilengrad (Bulgaria) for a preliminary ruling, lodged on 23 Nov. 2022, C-717/22.

[35] For a discussion of the differences, *see* e.g., J. J. Milla-Ibáñez (2023), *The Statute of Limitation in Case of Customs Criminal Offences in the EU: A Comparative Study*, 18(6) *GTCJ*, at 220–227, doi: 10.54648/GTCJ2023025.

[36] *See* e.g., Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM/2013/0884 final.

[37] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 Jul. 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ* L 198 (28 Jul. 2017), at 29–41.

[38] P. Muñiz (2018), *EU Harmonization of Customs Infringements and Sanctions Is Needed but the EU Must Proceed with Caution*, 13(7&8) *GTCJ*, doi: 10.54648/GTCJ2018031.

7.2 Customs Infringements and Non-criminal Sanctions

Title XIV sets out the basic provisions on customs infringements and non-criminal sanctions.

Inciting or aiding and abetting an act or omission referred to in Article 252 UCC (new) constitute customs infringements. This does not apply in the case of unintentional clerical errors or minor errors or where the economic operator has not made a manifest error or been obviously negligent. The acts or omissions referred to in Article 252 include failure to lodge a customs declaration; the provision of incomplete, inaccurate or false documents to customs; failure to keep proper records; and the removal of goods from customs supervision.

Various conditions have to be met before a sanction can be imposed for an act or omission referred to in Article 252. Any such sanction must:

– Take one or more of the forms referred to in Article 254 (section 7.3);
– Be effective, proportionate and dissuasive;
– Take account of any extenuating, mitigating or aggravating circumstances (section 7.4).

7.3 Forms of Sanctions

The sanctions specified in Article 254 UCC (new) comprise the minimum core of non-criminal sanctions that can be imposed by customs authorities in the event of customs infringements. Any sanctions imposed must be recorded in the EU Customs Data Hub. This is because economic operators applying for AEO certification or for authorised declarant status under the CBAM have to be able to demonstrate that they have not committed any serious or repeated infringements of, for example, customs legislation. The fact that sanctions have to be recorded will make them more readily visible to the Member State in which the application is being made, even if the infringement was committed in another Member State.

Under Article 254 UCC (new), sanctions may include monetary penalties and the revocation, suspension or amendment of customs decisions or confiscation of goods and means of transport. For monetary penalties, minimum and, in some cases, maximum percentages and amounts have been set. Monetary penalties may also be applied as a settlement in place of a criminal penalty. The percentages must be based on the customs duties avoided and, if the infringement does not affect the amount of the customs debt, on the customs value of the goods. This latter provision is remarkable. Say, for example, goods with a customs value of €1 million are assigned to an incorrect duty tariff and EUR 10,000 of customs duties are avoided in scenario A, while assignment to an incorrect duty tariff has no consequences for the customs debt in scenario B. Under Article 254 UCC

(new), the penalty in such cases would range between 100% and 200% of the customs duties avoided or the customs value, respectively, if the infringement was intentional and, in other cases, between 30% and 100%, respectively, of the customs duties or customs value. In the event, therefore, of an intentional act or omission, the penalties would be of up to EUR 20,000 in scenario A and EUR two million in scenario B, while the infringement in both cases was the same and the latter case did not involve any customs duties being avoided. It should be noted, however, that any sanctions determined should take account of any extenuating or mitigating circumstances, as discussed in section 7.4, with one of these circumstances being where the infringement has no effect on the customs debt or on any other tax due upon import.

To a certain extent, therefore, Article 254 UCC (new) creates a level playing field as far as the imposition of sanctions is concerned. According, however, to Article 245 UCC (new), EU Member States are free to apply more stringent measures by providing for administrative or criminal sanctions. I understand the Commission's reasoning for granting Member States more freedom in this respect, given the need to generate support for the proposal and because Member States usually want to retain their autonomy to decide on administrative or criminal sanctions. At present, however, it is precisely the divergence between Member States' administrative and criminal sanctions that creates the potential for distortion of competition, exploitation of legislative loopholes and 'customs shopping' among economic operators. For that reason, the fact that Article 245 UCC (new) allows Member States to apply more stringent measures is a missed opportunity, even though the Member States still have to ensure, like under the current UCC, that any measures they take are proportional.

7.4 Extenuating, Mitigating and Aggravating Circumstances

Articles 247 and 248 UCC (new) stipulate various extenuating, mitigating and aggravating circumstances to be taken into account when determining the sanctions applying to the customs infringements referred to in Article 252 UCC (new). It should in any event be emphasised that extenuating or mitigating circumstances are relevant only if parties committing an infringement can prove that they acted in good faith. If so, the cases to which such circumstances apply are those where the goods involved are not subject to other legislation applied by customs authorities, where the infringement has no impact on the amount of customs duties or any other taxes payable, or where the person responsible for the infringement cooperates effectively with the customs authorities.

Aggravating circumstances apply in those cases where the person responsible for the customs infringement has been sanctioned for such an infringement in the past, where the infringement has a significant impact on other legislation applied by the customs authorities or a significant financial impact on the collecting of customs duties or other charges, or where the infringement poses a threat to the security and safety of the European Union and its residents.

7.5 Time Limitation for Customs Debts

Under Article 182(1) UCC (new), customs debts expire three years after the date on which they were incurred, while paragraph 2 of the same article states that if a customs debt is incurred as a result of an act that, at the time it was committed, was liable to result in proceedings in a criminal court, the three-year period is extended to a minimum of five and a maximum of ten years in accordance with the applicable national law. In the case of sanctions for the customs infringements referred to in Article 252 UCC (new), Member States must apply a limitation period of between five and ten years when imposing sanctions. This is remarkable and will, in my view, give rise to an undesirable situation, given that the limitation period in the case of non-criminal customs infringements is three years, but penalties can be imposed during a minimum of five and a maximum of ten years.

8 Closing comments and looking ahead

In this contribution I discuss a selection of the most important recent developments in the field of customs. Obviously, various subjects have not been examined here and will need to be considered in more detail on another occasion. These include the fact that the proposal on binding valuation information is now an integral part of the proposal for a new UCC and the rules on decisions are being amended and would seem to grant more rights to economic operators.[39]

The proposal has now been sent to the European Parliament and the Council for approval. My expectation is that both institutions will present amendments to the proposal and that tripartite consultations will be needed before a final regulation can be agreed on, with account possibly also being taken of various parties' reactions to the proposal.[40]

[39] Commission Delegated Regulation (EU) … / … of XXX amending Delegated Regulation (EU) 2015/2446 as regards decisions relating to binding information in the field of customs valuation and decisions relating to binding origin information and Commission Implementing Regulation (EU) … / … of XXX amending Implementing Regulation (EU) 2015/2447 as regards decisions relating to binding information in the field of customs valuation and introducing an electronic system for binding origin and valuation information.

[40] The feedback can be found on, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13316-Revision-of-the-Union-Customs-Code/feedback_en?p_id=32155318 (accessed 29 Jun. 2023).

After the regulation has been approved, the European Commission intends for it to be published as soon as possible and for the current UCC consequently to be repealed. As discussed earlier in this contribution, the application of certain articles in the new UCC will be phased in. In the case of most of the provisions, however, the proposal does not specify a date on which they are intended to become applicable. They will therefore come into force when the regulation takes effect; in other words, twenty days after publication in the *Official Journal of the European Union*. This is remarkable, given that it is only then that the European Commission is entitled to exercise the delegated and implementing powers that it has been granted. The European Commission will consequently have very little time to adopt delegated or implementing regulations. Similarly, customs authorities and economic operators will have little if any time to prepare themselves for the change. It is recommended, therefore, that, in the case of all the provisions, a date should be specified so that it is clear when they will come into force.

Although the plans are promising, I question whether implementing them within the timeframe set out in the proposal will prove feasible, given that the envisaged timeframe is considerably shorter than the time that was needed for the existing Customs Code to be adopted.[41] This question is also particularly relevant in view of the introduction of new systems such as the EU Customs Data Hub, and remembering how the introduction of new digital systems resulted in the deadlines set for implementing the UCC having to be postponed time and time again. At the same time, the European Union has a duty to itself to make every effort to face up to the challenges of international customs and continue being able to compete with the emerging markets and other major trading blocs.

[41] H.-M. Wolffgang & K. Harden (2016), *The new European Customs Law*, 10(1) World Cust. J., at 3–16 and the inaugural lecture by W. de Wit, as reported on in: M. L. Schippers, *Op weg naar het Douanewetboek van de Unie*, *WFR* 2014/1048, at 1048–1051.