ARTICLE

The Role and Validity of Delegated and Implementing Acts under the Union Customs Code

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The Lisbon Treaty introduced the ability to transfer the power to adopt non-legislative acts of general application (delegated acts) and non-legislative acts to ensure the uniform conditions for implementing legally binding Union acts (implementing acts) in a legislative act to the European Commission. Delegated and implementing acts may not change the essential elements of the legislative act. Safeguards have been included in the legislative decision-making process to prevent the European Commission from abusing its delegated and implementing powers. Nevertheless, from time to time, a case is referred to the Court of Justice of the European Union (CJEU) about the validity of these types of acts. In this contribution, the author discusses the decision-making process for them and their position in the framework of EU customs legislation. It also analyses whether the European Commission abused its delegated and implementing powers granted in the Union Customs Code (UCC) based on several examples. The author concludes that it does so in numerous cases thereby increasing uncertainties about the legality of the delegated and implementing acts of the UCC. This conclusion may also be extended to and therefore be of interest for other areas of EU (tax) law.

Keywords: EU Customs Union, Lisbon Treaty, European Commission, Union Customs Code

1 Introduction

The Lisbon Treaty introduced the ability to transfer the power to adopt non-legislative acts of general application ('delegated acts') and non-legislative acts to ensure the uniform conditions for implementing legally binding Union acts ('implementing acts') in a legislative act to the European Commission. Many EU regulations in different fields of law use the ability to transfer powers to adopt delegated or implementing acts to the European Commission as is the case for EU customs legislation.

It is a requirement that, if powers are transferred to the European Commission, their delegated and implementing acts may not change the essential elements of the legislative act. Safeguards have been included in the legislative decision-making process to prevent it from abusing these powers. Nevertheless, from time to time, a case is referred to the Court of Justice of the European Union (Court or CJEU) about the validity of delegated or implemented acts of the European Commission. If it has abused its powers, the Court declares the corresponding provision of a delegated or implemented act invalid.

The framework of EU customs legislation also has been established on the principles of the Lisbon treaty which means that, besides the existence of a basic regulation (Union Customs Code or UCC),[1] the European Commission adopted delegated acts and an implementing act. These provide for (very) detailed rules and that raises the question of whether the European Commission remained within the limits of its delegated and implementing powers. This question is being assessed in this contribution by using three examples. This article is important because, if the European Commission exceeded its powers, this increases uncertainties about the legality of the delegated and implementing acts belonging to the UCC legal package. Such a conclusion is not only significant from a customs perspective but may also be extended to and therefore be of interest for other areas of EU (tax) law.[2]

Section 2 introduces the concept of delegated and implementing acts by discussing the background and rule-making process. It also presents the framework that the CJEU developed to review the legality of these acts. Section 3 continues by discussing the legislative framework of the UCC and particularly the role of these acts

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1 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.

2 *See* for instance, in the context of VAT: CJEU EU 28 Feb. 2023, C-695/20, (Fenix International Ltd.), *H&I* 2023/110 case note from Madeleine Merkx.

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within it. It concludes by discussing several preliminary rulings about the validity of customs acts but not any requests for annulment because these requests have not and can no longer be initiated under the UCC's legislative framework (*see* section 2.3). The examples will be discussed in section 4 by describing per example how the European Commission has used its delegating and implementing powers and by analysing whether it exceeded its powers based on the criteria that the CJEU developed in its rulings. This contribution is concluded in section 5.

2 Delegated and implementing acts

2.1 *Background and Difference Between Delegated and Implementing acts*

The Lisbon Treaty entered into force on 1 December 2009 and introduced the layered legal structure between basic regulations as well as delegated and implementing acts[3] that resulted in an intensification of the European Commission's transfer or rule-making competences. This is because Articles 290 and 291(2) of the Treaty on the Functioning of the European Union (TFEU) make it possible to delegate the power to adopt non-legislative acts of general application to it or, respectively, confer implementing powers on it in a legislative act.

As will be explained in section 2.2, the legislative rule-making process is 'lighter' for adopting delegated and implementing acts. It is therefore not without reason that there is a hierarchical differentiation between basic, delegated, and implementing acts whereby basic acts take the highest position on the ladder of hierarchy and are respectively followed by delegated and implementing acts.[4] While it is clear that only basic acts can include essential elements and delegated and implementing acts are not allowed to adopt, amend, or disregard essential elements, the demarcation between the latter two is difficult and rather fluid.[5] The powers to adopt implementing acts are even more restricted since the Court ruled that 'in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements'.[6]

Based on Article 290(1) TFEU,[7] the purpose of delegated acts is to amend or supplement non-essential elements in the basic act whereas implementing acts should ensure the uniform conditions for implementing legally binding EU acts according to Article 291(2) TFEU.[8] Although the EU legislature has the sole discretion to grant delegated and implementing powers, according to the CJEU, it should consider using a delegated act if the granted power amends the normative content of the basic act.[9] If it does not, then it should be an implementing act. Besides these instructions that attempt to contend with some delineation issues, the CJEU is not taking an active role in providing guidance to the EU legislature to decide between granting either of them.[10] Englisch discusses that delineation issues remain present and even new ones are created despite these CJEU instructions.[11] The EU institutions have, following the adoption of the Interinstitutional Agreement on Better Law-Making,[12] established a few principles to delineate delegated and implementing acts.[13] The non-binding principles, however, mainly provide examples of cases for which powers may be transferred but still without making a clear distinction between them. The blurring of lines between choosing the transfer of powers based on Article 290 or Article 291(2) TFEU is therefore still present.[14] This creates, for instance, language problems (i.e., what is considered 'amend' or 'supplement'), temporal problems (i.e., not possible to decide in which category it falls until it is made), and institutional problems (i.e., greater institutional

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3 Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007, *OJ* C 306, (17 Dec. 2007), at 1–271.

4 This does not, however, explicitly follow from the Lisbon Treaty; *see* M. Chamon, *The Legal Framework for Delegated and Implementing Powers ten years after the entry into force of the Lisbon Treaty*, 22 ERA Forum 22–24 (2021), doi: 10.1007/s12027-020-00646-2.

5 *See* for instance: L. Campo, *Delegated Versus Implementing acts: How to make the right Choice?*, 22 ERA Forum 194 (2021), doi: 10.1007/s12027-021-00662-w; S. Lange, *Delegated act or Implementing act: Clearly Delineated?*, 5 EIPA Briefing 1–3 (2020) and Chamon, *supra* n. 4, at 34–35.

6 Article 291(1), Treaty on the Functioning of the European Union (TFEU). CJEU 15 Oct. 2014, C-65/13 (European Parliament/European Commission), ECLI:EU:C:2014:2289, para. 45.

7 Article 290(1) TFEU reads as follows: 'A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power'.

8 Article 291(2) TFEU reads as follows: 'Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Arts 24 and 26 of the Treaty on European Union, on the Council'.

9 CJEU 16 Jul. 2015, C-88/14 (Commission *v.* European Parliament and Council), ECLI:EU:C:2015:499, para. 42.

10 Campo developed a step-by-step approach for making a selection; *see* Campo, *supra* n. 5, at 200–210.

11 J. Englisch, *'Detailing' EU Legislation through Implementing Acts*, 40 Y.B. Eur. L. 111–145 (2021), doi: 10.1093/yel/yeab007.

12 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 Apr. 2016 on Better Law-Making (OJ L 123, 12 May 2016, at 1).

13 Non-Binding Criteria for the application of Arts 290 and 291 of the Treaty on the Functioning of the European Union – 18 Jun. 2019, *OJ* C 223, 3 Jun. 2019, at 1–4.

14 A. H. Türk, *Legislative, Delegated acts, Comitology and Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces*, 26 Eur. L. J. 422 (2020), doi: 10.1111/eulj.12400.

complexity, selection based on maximizing control by principal institutional player establishing the powers, and risk of political advantage).[15]

Another problem has to do with the European Commission being entitled to exercise the powers conferred upon it but not being required to do so. This may not only undermine the harmonized application of EU legislation but may even result in authorities being selective on which provisions of a basic act they enforce and to what extent they allow market operators to invoke particular provisions of a basic act. Customs authorities, for instance, deny them the right to apply for a decision on valuation because the European Commission has not yet executed its delegated and implementing powers whereas the basic regulation provides for a legal basis to apply for such a decision.[16] In this author's view, however, provisions of a basic act should be applied even if the European Commission does not exercise the powers conferred upon it and also because the customs authorities do enforce other provisions from the basic act in cases when the European Commission does not do so.

2.2 *Rule-Making Process*[17]

The Union law-making process according to Türk is based on a combination of constitutional considerations of democracy, the rule of law, and a particular flavour of federalism that imbues the Union.[18] That is also reflected in the set-up of the ordinary legislative procedure whereby the European Commission, European Parliament, and European Council have distinct but, at the same time, complementary responsibilities. When the European Commission is exclusively entitled to influence the agenda by introducing proposals, the legislative proposal should be adopted by both the European Parliament and council. This will make the former an equal partner in the decision making and limit the executive dominance of the latter. Basic acts are, in principle, adopted in accordance with this ordinary legislative procedure. For certain fields of law like taxation, the special legislative procedure applies when only one of the institutions decide and the other has only a consultative role (i.e., the council and the parliament do not have equal roles in such cases).

The rule-making process for adopting delegated and implementing acts differs from the legislative procedures. Delegated acts are subject to ex-ante and ex-post controls. The commission first needs to consult national experts and stakeholders and subsequently submit them for ex-post control to the council and European Parliament which each have the right to veto. In the case of an implementing act, the European Commission needs to put forward a proposal for approval to Member State's representatives taking part in the comitology committees as part of the comitology procedure.[19] The European Parliament has no role in that case. It is a process by which the European Commission transfers implementing powers to expert committees composed of representatives from EU Member States to ensure that technical and detailed aspects of EU legislation are addressed collaboratively between the European Commission and Member States' representatives to foster transparency and expertise-driven decision making. There are two primary types of comitology procedures, i.e., the advisory and the examination. The choice between them is made by the EU legislature and depends on the implementing powers conferred upon the European Commission in the basic act. They differ from each other in their voting rules and the way their votes influence the European Commission's possibilities to adopt the implementing act in question. As the voting rules for each comitology procedure do not require unanimity, implementing acts in the area of tax matters can be adopted without it whereas this is a requirement for adopting basic acts in the area of tax matters.

To ensure democratic oversight to prevent excessive concentration of power for the European Commission and to uphold the principles of accountability and transparency in the rule-making process of delegated and implementing acts, both the European Parliament and Council can interfere in the rule-making process. For delegated acts, either the European Parliament or the Council may revoke the transfer of power to the commission. These institutions may also object to a delegated act proposed by the European Commission within the deadline set in the basic act. The European Parliament and the Council also have the right to scrutinize implementing acts, although this right cannot block their adoption:

2.3 *Direct and indirect actions brought before the CJEU on the legality of delegated and implementing acts*

Besides the right for scrutiny of the European Parliament and Council as set out in section 2.2, judicial review of the

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[15] P. P. Craig, *Political Constitutionalism and Judicial Role: A Response*, 5 Eur. L. Rev. 672–677 (2011).

[16] G. J. van Slooten, *Een 'inlichting' is pas een 'inlichting' als deze bindend is*, Wfr 21 (2018).

[17] *See* for a more extensive discussion of the ruling-making process, for instance: R. Spasova, *Powers of the European Commission – Delegated and Implementing acts in Practical Terms*, 22 ERA Forum 507–521 (2021), doi: 10.1007/s12027-021-00677-3.

[18] Türk, *supra* n. 14, at 417.

[19] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 Feb. 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* L 55, 28 Feb. 2011, at 13–18.

legality of delegated and implementing acts can take place by the CJEU. In that regard, a direct or indirect action can be brought before the Court to challenge their legality (of certain provisions). Based on Article 263 TFEU, it can be asked to review the legality of a non-legislative act and, if the action is well founded according to Article 264 TFEU, it is declared void. Afterwards, the party whose act has been annulled should take the necessary measures to comply with the Court's decision based on Article 266 TFEU. This direct action can be initiated by privileged applicants (i.e., EU countries, the European Parliament, the Council, and the European Commission), semi-privileged applicants (i.e., the Court of Auditors, the European Central Bank, and the Committee of the Regions) and non-privileged applicants (i.e., legal and natural persons). Under strict conditions, legal and private persons can thus also initiate a direct action, although this should be done within two months and ten days after the publication of the delegated or implementing act belonging to the UCC legal package.[20] To the extent of this author's knowledge, such action has not been initiated by any legal or private person and also not by any of the other two types of applicants.

If the time to appeal against the delegated or implementing act belonging to the UCC legal package has long been elapsed, Article 263 TFEU does not present a feasible option to challenge the legality of the current provisions of these acts. Therefore, the only way to do so is if a national court or tribunal requests the CJEU for a preliminary ruling on the validity of a provision of these acts. This procedure differs, however, from the decision to annul an act as it concerns an indirect action. Market operators rely on whether a national court or tribunal refers a preliminary ruling to the CJEU.

If a preliminary ruling request is referred to the CJEU about the validity of acts, it should first be assessed whether the European Commission is authorized in the basic act to adopt delegated or implementing acts for a particular matter. If a legal basis for the authorization exists, there are three matters that should be assessed for the purpose of checking whether the European Commission respected the limits of its authorization. First it should be determined whether the European Commission respected the essential objectives of the basic act and particularly the provision for which the powers are transferred to the European Commission. That means that the CJEU evaluates whether the European Commission respected the powers transferred to it based on the objectives, content, and scope of the powers granted in the basic act. As a second step, it should be assessed whether adopting the provisions in the delegated or implementing act was necessary or useful for implementing the basic legislation. Finally, as a third step, the CJEU determines whether the act has not adopted, amended, or disregarded the essential and, in the case of implementing powers, non-essential elements of the matter.[21] What elements are considered to be essential must be based 'on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned'.[22] This author agrees with Türk that the criteria as developed by the CJEU are rather abstract and merely have a signalling effect to detect abuses.[23] In section 3.3, a number of examples are presented within the context of EU customs legislation that elucidate how these matters are assessed by the CJEU.

3 The legislative framework of the UCC and the role of delegated and implementing acts

3.1 *The Legislative Framework of the UCC*

The customs legislation in the EU has been harmonized since the establishment of the EU Customs Union in 1968. With the entry into force of the Community Customs Code (CCC)[24] on 1 January 1994, the customs provisions were assembled in one code. They were divided over a significant number of regulations and directives until that time. This code provided for a procedure that enabled the European Commission to adopt measures to implement the CCC and safeguarded its uniform application. This resulted in the issuance of an implementing regulation that was, in practice, often referred to as the Customs Code Implementing Provisions (CCIP).[25]

Plans were released by the European Commission already in 2005 to establish a Modernized Customs Code

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[20] Based on the last paragraph of Art. 263, the action must be brought within two months of the act's publication. Art. 51 of the Rules of Procedure of the Court of Justice provides an extension of ten days to allow for postal delays on account of distance.

[21] CJEU 5 Sep. 2021, C-355/10 (European Parliament *v.* Council), ECLI:EU:C:2012:516, para. 66; CJEU 26 Jul. 2017, C-696/15 P (Czech Republic *v.* Commission), ECLI:EU:C:2017:595, para. 51; CJEU 11 May 2017, C-44/16 P (Dyson *v.* Commission), ECLI:EU:C:2017:357, para. 65.

[22] CJEU 10 Sep. 2015, C-363/14 (European Parliament *v.* Council), ECLI:EU:C:2015:579, para. 47. For similar rulings, *see also* CJEU 5 Sep. 2012, C-355/10 (European Parliament *v.* Council), ECLI:EU:C:2012:516, paras 67 and 68; CJEU 22 Jun. 2016, C-540/14 (P – DK Recycling und Roheisen *v.* Commission), ECLI:EU:C:2016:469, para. 48; CJEU 26 Jul. 2017, C-696/15 (P – Czech Republic *v.* Commission), ECLI:EU:C:2017:595, para. 77; CJEU 11 May 2017, C-44/16 (P – Dyson *v.* Commission), ECLI:EU:C:2017:357, para. 62.

[23] Türk, *supra* n. 14, at 420.

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

[25] Commission Regulation (EEC) No 2454/93 of 2 Jul. 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *OJ* L 253, 11 Oct. 1993, at 1–766.

(MCC).[26] It entered into force on 24 June 2008 and should have become applicable by June 2014. However, before that date, the decision was taken to recast it to, among others, make it compatible with the Lisbon Treaty.[27] Based on the principles of the Lisbon Treaty, the core of the EU customs legislation has been based on a basic act (UCC[28]), two delegated acts (Delegated Act UCC (DA UCC),[29] and a Transitional Delegated Act (TA UCC)[30]) as well as one implementing act (Implementing Act UCC (IA UCC)[31]) since 1 May 2016.

On 17 May 2023, the European Commission introduced proposals to reform the EU Customs Union.[32] The ambitious and comprehensive reform is based on three pillars, i.e., establishing a new partnership with business, a smarter approach to customs checks, and a more modern approach to e-commerce. The European Parliament and the Council of the European Union now need to agree on the proposals before the new customs code can take effect. The reform will also mean that the delegated and implementing acts will eventually be revised. Despite that, the customs legislation will still be structured in accordance with the Lisbon Treaty. The analysis and conclusions of this article may therefore also be relevant under the reformed UCC and might even be considered during the legislative process of the proposals.

3.2 *The role of Delegated and Implementing acts in the UCC Legal Package*

Indents 2 and 3 of the preambles of the UCC elucidate the reason for allowing the European Commission to adopt delegated acts under the legal package of the UCC. This is needed, and this author quotes, to 'supplement or amend certain non-essential elements of this Regulation'. By adopting these delegated acts, it is important that the European Commission carries out appropriate consultations during its preparatory work including doing so at an expert level. Indent 5 of the preamble states that implementing powers should be conferred to the commission to ensure the uniform conditions for implementing the UCC. It continues by enumerating an extensive list of areas in which uniform application needs to be guaranteed by implementing provisions. Next to the preamble, several provisions at the end of chapters or sections of the UCC stipulate the transfer of powers to adopt delegated or implementing acts for certain areas of EU customs law. These provisions are, on the one hand, quite precise by indicating on provision or even paragraph level for what purpose powers should be transferred to the commission. However, on the other hand, they often do not provide detailed instructions as to the limits of the delegated or implementing powers. For the former, Article 290(1) TFEU requires that the basic act shall be explicit about the objectives, content, scope, and duration of that power. Finally, Article 285 of the UCC lays down the conditions that the commission is subject to with regard to exercising its delegating powers.

The proposal for a revised UCC as proposed by the European Commission on 17 May 2023 lists for which areas powers should be transferred to it in indent 67 of the preamble. Compared to the current UCC, it therewith provides far more detail as the UCC only sets out the purpose for adopting delegated acts. It also adds in indent 68 that, before adopting a delegated act, the European Commission should consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making. This procedural change is also reflected in the fourth paragraph of Article 261 of the revised UCC. For the implementing powers, the preamble of the proposal for a revised UCC provides two indents (70 and 71) to clarify for which areas an advisory procedure should be used for adopting implementing acts and which not. These seem to relate, however, to those that are different from the IA UCC.

In the proposals, the European Commission seems to acknowledge that some provisions of the current DA UCC and IA UCC are better suited to be placed in the basic act. Although this does not necessarily justify the conclusion that the European Commission abuses its delegated or implementing powers if these provisions would have again been part of the delegated or implementing acts, this statement is at least remarkable. In that regard, two examples can be given that show that the European Commission seems to acknowledge that it is more appropriate to transfer certain provisions from the DA UCC and

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[26] Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 Apr. 2008 laying down the Community Customs Code (Modernised Customs Code), *OJ* L 145, 4 Jun. 2008, at 1–64.

[27] Preamble 2 of the UCC.

[28] 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, 10.10.2013, at 1–101.

[29] 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.

[30] Commission Delegated Regulation (EU) 2016/341 of 17 Dec. 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, *OJ* L 69, 15 Mar. 2016, at 1–313.

[31] 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.

[32] 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.

IA UCC to a legal act (i.e., revised UCC). The first relates to a proposal published earlier this year that would allow market operators to apply for a binding valuation agreement that provides the applicant legal certainty about the determination of the customs values of its imported goods.[33] The proposal intended to make this possible by amending the DA UCC and IA UCC. In indent 12 of the preamble of the proposal for a revised UCC, the European Commission now mentions, however, that 'in the interest of the users of customs legislation, it is appropriate to lay down the rules regarding those three types of decisions relating to binding information in the same legal act'. Apparently, laying down these provisions in the basic act is thus more appropriate. The second example relates to particular rules for duty suspensive procedures that are currently stipulated in the DA UCC and IA UCC but will, according to the proposal, now be transferred to the basic act. The reason for that follows from indent 42 of the preamble that reads as follows:

> To ensure that the duty-suspensive procedures are also transparent, it is appropriate to streamline the requirements provisions for the authorisations for special procedures. In particular, for the sake of clarity and legal certainty, the conditions for determining whether an opinion at Union level is necessary to assess if granting an authorisation could adversely affect the interests of Union producers, the so-called examination of the economic conditions, should be codified rather than being regulated in delegated rules. Moreover, as the effect on the Union producers' interests may depend on the quantity of goods that are placed under the special procedure, the EU Customs Authority should be entitled to propose a certain threshold under which it is estimated that there is no negative effect on the Union producers' interests.

3.3 *Preliminary Rulings about Validity of acts*

Thus far, one request for a preliminary ruling about the validity of the DA UCC, IA UCC, or TA UCC has been referred to the CJEU to the extent of this author's knowledge.[34] There have been a few court decisions, however, on this matter under the CCC and its predecessors. A selection of these cases is discussed in this section because, although the cases are quite factual, they provide considerations that can be applied in a more generalized manner for assessing whether the European Commission has exceeded its powers by adopting delegated and implementing acts under the UCC legal package.

In the *Firma Söhl & Söhlke* case,[35] 'Söhl & Söhlke and the German Government argue[d] that the Commission did not have a sufficient legal basis to list exhaustively, in the implementing Regulation, the situations liable to be covered by the provision at the end of Article 204(1) of the Customs Code'.[36] Based on Article 204 of the CCC, a customs debt is incurred in the event of non-fulfilment of any – to simply state it – customs obligations unless the failure to meet the conditions shall be considered to have no significant effect on performing the correct customs operation. Powers were delegated to the European Commission to list the failures without significant effect on performing the correct customs operations. The European Commission used its powers by adopting Article 859 of the CCIP that included an exhaustive list of failures that shall be considered to have no significant effect. The court concluded that there is a sufficient legal basis. In that regard, it considers that the CCC did not reserve the right to exhaustively list the categories of failures to the council, but, on the contrary, delegated this power to the European Commission.[37] That the CCC did not specify the essential components of the delegated power is also not exceptional because, according to the Court, 'a provision drafted in general terms provides a sufficient basis for the authority to act'.[38] The adoption of Article 859 of the CCIP is also necessary and appropriate for the implementation of the CCC and not contrary to it because it does not preclude the European Commission from adopting exhaustive rules on failures,[39] and its adoption is necessary to guarantee the uniform application of Article 204 of the CCC throughout the European Union.[40]

In the *Thomson Multimedia Sales Europe* case,[41] the contested provisions in the CCIP specified detailed rules for determining the non-preferential origin of imported goods which is important for applying the correct country-specific fiscal and non-fiscal measures. According to Article 24 of the CCC, imported goods are to be deemed to originate in the country where they underwent their last substantial economically justified processing or working if their production involves more than one country. For the

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[33] 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.

[34] CJEU 21 Sep. 2023, C-210/22 (Stappert Deutschland vs Haupzollamt Hannover), ECLI:EU:C:2023:693.

[35] CJEU 11 Nov. 1999, C-48/98 (Firma Söhl & Söhlke and Hauptzollamt Bremen), ECLI:EU:C:1999:548.

[36] *Ibid.*, para. 30.

[37] *Ibid.*, para. 33.

[38] *Ibid.*, para. 34 and CJEU 27 Oct. 1992, C-240/90 (Germany *v.* Commission), ECLI:EU:C:1992:408, para. 41.

[39] C-48/98 (Firma Söhl & Söhlke and Hauptzollamt Bremen), *supra* n. 35, para. 38.

[40] *Ibid.*, para. 40.

[41] CJEU 8 Mar. 2007, C-447/05 and C-448/05 (Thomson Multimedia Sales Europe and Vestel France *v.* Administration des douanes et droits indirects), ECLI:EU:C:2007:151.

contested imported goods, the provisions of Annex 11 of the CCIP included a criterion based on added value to determine if a there was non-preferential origin. In the context of seeking an answer to the question of whether the provisions of Annex 11 of the CCIP are necessary and appropriate for implementing the CCC and not contrary to it, the court recalls that the European Commission has a margin of discretion that allows it to define the abstract concepts of Article 24 of the CCC in exercising the powers conferred upon it.[42] The Court considers that, among others, based on international agreements, the choice of the criterion of added value is not per se incompatible with Article 24 of the CCC and, as such, does not inherently prove that the European Commission exceeded its powers. The Court, however, considers that 'the wide variety of operations covered by the concept of assembly throughout the industrial sector concerned justified reliance being placed on the criterion of added value'.[43] Another important consideration is that, according to the Court, the criterion is also not placing the contested imported goods in a more unfavourable position even if comparable by character to which the general criteria of Article 24 or other criteria apply.[44] The provisions of Annex 11 were therefore not invalid. The court came to another conclusion in the *Cousin and Others* and *Stappert Deutschland* cases, because in those cases the criterion to confer origin as the European Commission established by the implementation of the rules which it has promulgated in the basic act, because it provided for substantially more severe criteria for the determination of the origin between similar goods.[45]

A more recent ruling is provided by the Court in the *X BV* case.[46] It is about retroactively amending the customs value of imported goods that, at the time of acceptance of the customs declaration for release for free circulation, appears to be defective. However, this was only discovered after such time. Article 145 of the CCIP provided several conditions that needed to be complied with before a retroactive adjustment of the customs value was permitted. One of these conditions laid down in the third paragraph implied that the adjustment should be made within a period of 12 months following the date of acceptance of the declaration for entry for free circulation of the goods. The court ruled that this third paragraph should be declared invalid because it was contrary to the CCC. The court considered that the time barrier of 12 months was not useful. The argument that it would enable combating the risk of error or fraud in the application of reclaiming import duties for the defected goods failed. For a request to adjust the customs value to be granted, it should already be shown to the satisfaction of the customs authorities that the goods were defective at the time of the acceptance of the declaration for their entry for free circulation.[47] It is also not necessary to ensure legal certainty because the CCC already provided a general statute of limitation of three years for submitting requests for repayment of customs duties.[48]

4 Examples on the use of delegated and implementing powers by the European Commission in the context of the UCC

4.1 *Introduction*

The objective of this section is to assess whether the European Commission stayed within the limits of the powers transferred to it in the UCC and is not intended to evaluate the content of the rules laid down by the European Commission in the DA UCC or IA UCC. Stated otherwise, based on the approach for assessing the validity of provisions in a delegated and implementing act as established in section 2.3, three examples of whether the European Commission adopted the DA UCC and IA UCC in accordance with the limits of its authorization set out in the UCC are assessed. Section 4 is concluded with section 4.5 with some lessons learned that can be applied to any field of law where delegated or implementing acts exist:

4.2 *Example I: Introducing a new Concept: Last-sale-for-Export-rule*

4.2.1 *Background*[49]

If goods are imported into a customs territory such as the EU, the customs value of the goods needs to be determined. Besides the origin and classification of imported

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[42] CJEU 8 Mar. 2007, C-447/05 and C-448/05 (Thomson Multimedia Sales Europe and Vestel France Administration des douanes et droits indirects), ECLI:EU:C:2007:151, para. 25 and CJEU 23 Mar. 1983, 162/82 (Criminal proceedings against Paul Cousin and others), ECLI:EU:C:1983:93, para. 17.

[43] CJEU 8 Mar. 2007, C-447/05 and C-448/05 (Thomson Multimedia Sales Europe and Vestel France *v.* Administration des douanes et droits indirects), ECLI:EU:C:2007:151, para. 37.

[44] CJEU 8 Mar. 2007, C-447/05 and C-448/05 (Thomson Multimedia Sales Europe and Vestel France *v.* Administration des douanes et droits indirects), ECLI:EU:C:2007:151, para. 40.

[45] CJEU 23 Mar. 1983, 162/82 (Cousin and Others), ECLI:EU:C:1983:93, para. 21 and 23 and CJEU 21 Sep. 2023, C-210/22 (Stappert Deutschland *v.* Haupzollamt Hannover), ECLI:EU:C:2023:693, para. 61–66.

[46] CJEU 12 Oct. 2017, C-661/15 (X BV *v.* Staatssecretaris), ECLI:EU:C:2017:753.

[47] *Ibid.*, para. 47–49.

[48] *Ibid.*, para. 50–52.

[49] A more detailed discussion on determining the customs value in a series of sales can be found here: M. L. Schippers, *Series of Sales: Determining the Customs Value Under the Union Customs Code*, 13(2) Global Trade & Cust. J. 36–48 (2018), doi: 10.54648/GTCJ2018007.

goods, it is one of the three elements to determine how much customs duties need to be paid if goods are released for free circulation. The rules to determine the customs value in the EU are based on the Customs Valuation Agreement (CVA)[50] of the World Trade Organization (WTO) which is the international accepted agreement to determine the customs value of imported goods. In accordance with Article 8 of the CVA, the primary and preferred basis to determine the customs value is the transaction value which is the price paid or payable for the goods 'sold for export to the country of importation'.

How this expression should be interpreted in the context of a series of sales (i.e., the situation in which there are two or more successive contracts for sales of goods) is not stipulated in the CVA. According to Commentary 22.1, a non-binding guidance document of the World Customs Organization, the transaction value should be based on the 'price paid in the last sale occurring prior to the introduction of the goods into the country of importation, instead of the first (or earlier) sale'.[51] In the EU, the predecessors of the UCC, however, allowed importers to determine the transaction value on a first (or earlier) sale for export.[52] These predecessors and the UCC legal package incorporated Article 8 of the CVA into the basic acts quite literally. However, it is now Article 128, paragraph 1 of the IA UCC that dictates that only the last sale occurring prior to the introduction of the goods introduced into the customs territory of the European Union can be used to determine the customs value.[53] The provision reads as follows: 'The transaction value of the goods sold for export to the customs territory of the Union shall be determined at the time of acceptance of the customs declaration on the basis of the sale occurring immediately before the goods were brought into that customs territory'.

The shift from allowing a first (or earlier) sale for export to the last sale for export as a basis for determining the transaction value is relevant as, in most cases, a later sale in the supply chain attracts a higher price, and the application of the last-sale-for-export principle would result in an increase of the incurred customs duties in the event of a series of sales. It is therefore arguable that the European Commission interfered by changing an essential or, at the very least, a non-essential element of the basic act. The question is whether it was permitted to only allow importers to use the last sale for export to determine the transaction value using a provision in an implementing act (*see* section 4.2.2).

In Article 128, paragraph 2 of the IA UCC, the European Commission adopted another provision of interest for this contribution. It allows importers to use the transaction value method under certain conditions even though a sale for export is lacking at the time the goods arrive in the European Union. The provision reads as follows:

> Where the goods are sold for export to the customs territory of the Union not before they were brought into that customs territory but while in temporary storage or while placed under a special procedure other than internal transit, end-use or outward processing, the transaction value will be determined on the basis of that sale.

This is a remarkable provision because Article 70, paragraph 1 of the UCC clearly indicates that the transaction value method can only be applied if there is a sale for export. The term seems to suggest that, with a such sale, the goods are being transported from a third country into the customs territory of the Union.[54] It is therefore relevant to also assess whether this provision has been adopted in accordance with the powers delegated to the European Commission (*see* section 4.2.2)

4.2.2 *Assessment on Whether the European Commission Misused its Powers*[55]

According to Article 76, paragraph 1 of the UCC, the European Commission is allowed to set procedural rules for, among others, determining the customs value in accordance with Articles 70, paragraphs 1 and 2 of the UCC. A legal basis for adopting procedural rules in an implementing act seems to therefore be present. The question, however, is whether this is in accordance with or contrary to what is stated in the UCC. It could be argued that Article 128, paragraph 1 of the IA UCC contradicts what is stipulated in the UCC and particularly its Article 70, paragraph 1. It may also be contended that Article 70 of the UCC is formulated unambiguously and should therefore be interpreted in

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[50] Agreement on Implementation of Art. VII of the General Agreement on Tariffs and Trade 1994.

[51] Commentary 22.1 Meaning of the expression 'sold for export to the country of importation' in a series of sales. (Adopted, 24th Session, 26 Apr. 2007, VT0564).

[52] Article 147, para. 1, CCIP as well as ECJ 6 Jun. 1990, C-11/89 (Unifert), ECLI:EU:C:1990:237 and ECJ 28 Feb. 2008, C-263/06 (Carboni e derivati), ECLI:EU:C:2008:128. For a more extensive discussion on the application of the first sale under Council Regulation (EEC) No 1224/80 and the Community Customs Code, *see* for instance: T. Walsh, European Union Customs Code, Wolters Kluwer 2015, at 361, M. Fabio, *Customs Law of the European Union (fifth edition)* 139–218 (Wolters Kluwer 2020) and Schippers, *supra* n. 49, at 36–48.

[53] According to the European Commission, the reasons for abolishing the first-sale-for-export principle have to do with (1) simplifying the determination of the customs value and verification by the European Commission, (2) aligning the treatment of the customs value in a series of sales with Commentary 22.1, (3) preventing an unequal competitive advantage between small-medium and multinational enterprises, and (4) preventing a difference between the customs value and accounting figures. *See* M. Perrick, P Vander Schueren & M. Neville, *'First Sale' Under Severe Pressure in the EU*, 3(6) Prac. Trade & Cust. Strategy 13–15 (2014).

[54] ECJ 6 Jun. 1990, C-11/89 (Unifert), ECLI:EU:C:1990:237, para. 11.

[55] *See* Schippers, *supra* n. 49, at 36–48.

accordance with its ordinary meaning.[56] Under the predecessors of the UCC, the court ruled that equivalents of this provision should be interpreted in such a way that it would allow the use of first (or earlier) sales transactions in the supply chain to be used as a basis for determining the customs value.[57] Since that is one of the three elements to determine the customs debt of the imported goods, it could therefore be argued that, by limiting the taxable basis to the last sale for export, an important feature of the basis for determining the customs duties payable has been amended by virtue of Article 128, paragraph 1 of the IA UCC. Although that should already provide sufficient grounds to declare this implementing provision invalid, it could additionally be argued that it is doubtful whether the provision is necessary or useful for implementing Article 70 of the UCC. In that regard, it could be stated that the introduction of the last-sale-for-export principle does not make the determination of the relevant sale for export in a series of sales clearer and also does not provide (more) legal certainty as contended by Ruesmann & Willems.[58] This can also be evidenced by the fact that guidelines needed to be adopted after the UCC legal package entered into force to help competent authorities and market operators determine the last sale for export and the fact that these guidelines have been amended significantly by removing the domestic sale concept.[59] On the other hand, it could be argued that the last-sale-for-export principle matches the international guidelines embedded in Commentary 22.1 and is more aligned with the basic principles of the CVA that forms the basis of the customs valuation provisions in the UCC. Insofar as that is true (which is debatable),[60] the last-sale-for-export principle should had been introduced in the UCC itself rather than the IA UCC in this author's view.[61] Based on these arguments, Article 128, paragraph 1 of the IA UCC should be declared invalid if a case is brought before the court.

Assessing the validity of Article 128, paragraph 2 of the IA UCC is (even) more straightforward. It allows using the transaction value in the circumstances that the goods are not sold for export to the customs territory of the European Union before they were brought into that customs territory. It lacks a legal basis in the CVA and even contradicts it as it stipulates that the transaction value can only be used as the basis to determine the customs value if there is a sale for export upon the arrival of the goods into the country of importation. Since the EU is a member of the WTO and is, as such, obligated to implement the CVA in its own customs legislation, this is a clear breach of the EU's obligations under WTO law. As can be deduced from the *Thomson Multimedia Sales Europe* case (*see* section 3.3), the court takes the compatibility of the contested provision with broader international law into account when assessing the validity of a provision. On that basis, it is clear that the European Commission has misused its implementing powers and therefore, if asked, the court should declare this provision invalid in this author's view.

4.3 *Example II: Strict Conditions Regarding an Anti-avoidance Origin Provision*[62]

4.3.1 *Background*

As explained in section 4.2.1, determining the origin of imported goods is one of the three elements for determining the customs debt. Based on the rules of non-preferential ('economic') origin, goods wholly obtained in a single country or territory shall be regarded as having their origin there.[63] If two or more countries are involved, the origin is based on where the last, substantial, economically-justified processing or working took place.[64] Article 33 of the DA UCC provides anti-avoidance rules and reads

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[56] A Canadian Court ruled that a provision in the Canadian Customs Act that was unambiguous at the time of the ruling identical to Art. 70, para. 1, UCC and should therefore be interpreted in accordance with its ordinary meaning which allows the use of the first-sale-for-export principle. *See* Harbour Sales (Windsor) Ltd *v.* D/MNR [1994] 4647 ETC.

[57] ECJ 6 Jun. 1990, C-11/89 (Unifert), ECLI:EU:C:1990:237 and ECJ 28 Feb. 2008, C-263/06 (Carboni e derivati), ECLI:EU:C:2008:128. Also in other customs jurisdictions like Canada, the equivalent of Art. 70 of the UCC is interpreted as such that it allows using an earlier or first sale for export as a basis for determining the customs value; *see* Canadian International Trade Tribunal 4 Nov. 1994, No. AP-93-322 (Harbour Sales (Windsor) Limited *v.* The Deputy Minister of NationalRevenue).

[58] L. Ruessmann & A. Willems, *Revisiting the First Sale for Export Rule: An Attempt to Remove Fairness in the Interests of Raising Revenues, Without Improving Legal Certainty*, 3(1) World Customs J. 45–52 (2009).

[59] The original guidelines introduced the domestic sale concept: European Commission, 17 Sep. 2020, Guidance Document on Customs Valuation Implementing Act Arts 128 and 136 UCC IA, and Art. 347 UCC IA, 17 Sep. 2020, TAXUD/2623395rev2/2020. It prohibited the use of a sale between two EU established entities to be used as the basis for determining the customs value. This concept was removed as it lacked a legal basis and was contrary to established case law; *see* ECJ 6 Jun. 1990, C-11/89 (Unifert), ECLI:EU:C:1990:237. The guidelines without the domestic sale concept are currently embedded in Commentary 13 of the EC Compendium of Customs Valuation Texts, 2022.

[60] It is debatable whether the last-sale-for-export principle is the correct interpretation in the context of the transaction value; *see* for instance: Ruessmann & Willems, *supra* n. 58, at 45–52. Some authors argue that the current phrasing of Art. 128 IA UCC even contradicts WCO Commentary 22.1, meaning that the EU violates its international obligations; *see* Perrick, Vander Schueren & Neville, *supra* n. 53, at 13–15.

[61] Schippers presents a proposal to introduce the last-sale-for-export principle in his dissertation; *see* M. L. Schippers, *Douanewaarde in een globaliserende wereld (Fiscale Monografieën No. 164) (dissertation Rotterdam)* 249–257 (Deventer: Wolters Kluwer 2021).

[62] *See* for a more detailed discussion on the anti-avoidance of origin provisions: Y. Melin en D. Arnold, *Non-Preferential Customs Origin Under EU Law*, 14(10) GTCJ 451–457 (2019), doi: 10.54648/GTCJ2019053.

[63] Article 60, para. 1, of the UCC.

[64] Article 60, para. 2, of the UCC.

as follows: 'Any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the Code'.

When the processing that is done is not economically justified based on Article 33 DA UCC, the country of origin of the final product is the country or territory where the major portion of the materials originated. This means that, for instance, if a company is moving its manufacturing operations from China to Indonesia and by doing so would avoid anti-dumping rights imposed on products originating from China, the customs authorities could invoke this anti-avoidance provision and levy the anti-dumping duties imposed against China under certain conditions.

This provision is similar in terms of wording to Article 25 of the CCC which was deliberately not included in the UCC. Still, this article is now part of the UCC legal package as the European Commission included the provision in the DA UCC. It is important to note that, contrary to the current Article 33 DA UCC, Article 25 CCC was only applicable in the case that 'the sole' reason for an operation was to avoid the provisions of non-preferential origin. This condition is no longer part of Article 33 DA UCC, although it is doubtful whether it results in a different application (see section 4.3.2).[65]

4.3.2 *Assessment on Whether the European Commission Misused Its Powers*

Article 62 of the UCC empowers the European Commission to adopt delegated acts or provisions in the UCC related to the determination of non-preferential origin. The powers delegated to the European Commission are, according to the text of Article 62 UCC, quite broad and not limited in terms of instructions given to the European Commission. At the same time, it must be stressed that determining the non-preferential origin of goods is an important feature in EU customs legislation. The non-preferential origin of imported goods relates specifically to all types of commercial policy measures such as, for instance, the most-favoured-nation treatment, anti-dumping duties and countervailing duties, trade embargoes, safeguard measures, origin marking requirements, quantitative restrictions or tariff quotas, government procurement, and trade statistics. The anti-avoidance provision as stipulated in Article 33 DA UCC is essential especially as it seems to reintroduce Article 25 of the CCC that was, as explained in section 4.3.1, deliberately removed from the UCC by the European Parliament and the council during the legislative process. As it also removed the word 'sole' (reason to avoid the provisions on non-preferential origin), it can even be argued that Article 33 DA UCC reintroduces a stricter version of Article 25 CCC as the former if 'the purpose' of moving operations to another country is to avoid the provisions on non-preferential origin. The General Court ruled last year that:

> Article 33 of the UCC-DA does not provide for a 'multiplicity of reasons' to be weighed up or taken into consideration for the purposes of determining whether there is any 'economic justification', but merely provides that there cannot, as a matter of principle, be any such justification if there is a strategy in place that is aimed principally at avoiding the application of EU commercial policy measures.[66]

It seems that the General Court interprets Article 33 DA UCC in a stricter manner. If this is indeed true, it may result in the situation that similar cases are treated differently. Take the example of a company with a manufacturing site in Indonesia that makes goods that are similar to those manufactured by a company that moved its manufacturing site from China to Indonesia. The anti-avoidance provision might apply to the latter company despite the fact that avoiding anti-dumping duties was not the sole (and maybe even the least relevant) reason for moving its manufacturing side and the goods originate from Indonesia in accordance with Article 60, paragraph 1 UCC. According to the Stappert case (section 3.3), providing for substantially more severe criteria for determining the origin between similar goods is a reason to declare a provision invalid, however, the General Court does not do so for Article 33 DA UCC. According to it, the article provides clarifications to Article 60 of the UCC rather than making generally new rules or amendments. It holds that:

> even if the rules for determining origin are essential elements of the Customs Code, Article 33 of the UCC-DA is intended merely to supplement Article 60 of the Customs Code by providing a number of clarifications. Therefore, it cannot be held that Article 33 exceeds the limits of the delegation conferred on the Commission by Article 62 of the Customs Code or that the Commission amended an essential rule of the Customs Code. Moreover, in so far as Article 33 of the UCC-DA is intended solely to ensure, as is apparent from recital 21 of the UCC-DA, the effective application of the commercial policy measures introduced under other

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[65] *See* for instance: CJEU 13 Dec. 1989, C-26/88 (Brother International *v.* Hauptzollamt Giessen), ECLI:EU:C:1989:637.

[66] General Court of 1 Mar. 2023, T-324/21 (Harley-Davidson Europe and Neovia Logistics Services International *v.* Commission), ECLI:EU:T:2023:101, para. 97.

provisions of EU law, it must be held that the adoption of that article did not, as such, involve political choices falling within the responsibilities of the EU legislature.

This author stresses that appeals have been brought before the Court of Justice against this judgment of the General Court.[67] In that regard, it is also worthwhile mentioning that the Stappert case of the Court of Justice is of a later date than the one of the General Court. Moreover, the argument that providing for substantially more severe criteria for determining the origin between similar goods as reason to declare a provision invalid was not explicitly addressed in the case before the General Court. It therefore cannot not be ruled out that the outcome before the Court of Justice will be different.

4.4 *Example III: Strict Conditions Concerning the Invalidation of a Customs Declaration after Releasing the goods*

4.4.1 *Background*

Article 174 of the UCC introduces the possibility for declarants to invalidate a customs declaration that has already been accepted insofar as they are not under examination or the intention to do so has been expressed by the customs authorities. This provision can therefore be used as a remedy if goods are mistakenly placed under an incorrect customs procedure by the declarant. If a declarant wants to invalidate a customs declaration, the customs authorities must be satisfied that:

- The goods are immediately placed under another customs procedure; and
- as a result of special circumstances, the placing of the goods under the customs procedure for which they were declared is no longer justified.

It is not possible to invalidate a customs declaration for goods that have been released for free circulation according to the second paragraph of Article 174 unless otherwise provided. The European Commission is delegated to determine cases where declarants are still allowed to invalidate the customs declaration after the release of the goods for free circulation. The conditions that need to be met do so are stipulated in Article 148 of the DA UCC. The customs declarations of goods that are mistakenly released for free circulation instead of being placed under another customs procedure will be invalidated upon reasoned application of the declarant if the following conditions are fulfilled (Article 148, paragraph 1 of the DA UCC):

- the application is made within 90 days of the date of acceptance of the declaration;
- the goods have not been used in a way that is incompatible with the customs procedure under which they would have been declared had the error not occurred;
- at the time of the erroneous declaration, the conditions were fulfilled for placing the goods under the customs procedure under which they would have been declared had the error not occurred; and
- a customs declaration for the customs procedure under which the goods would have been declared had the error not occurred has been lodged.

The last three conditions can be considered as clarification of the conditions already set out in Article 174, paragraph 1 of the UCC. The first condition, however, places a time restriction on the period for requesting the customs authorities to invalidate an import declaration. The question is whether doing so lies within the boundaries of the powers transferred to the European Commission (*see* section 4.4.2)

4.4.2 *Assessment on whether the European Commission Misused Its Powers*

The invalidation of an import declaration is an important feature in the UCC as it affords an importer the opportunity to correct a mistake of having the goods released for free circulation instead of declaring them for a different customs procedure and thus allowing the importer to reclaim import duties that he should not have paid. Even if the European Commission adopted delegated acts in accordance with the limits of its authorization established in the UCC, reducing the time period to 90 days to invalidate a declaration to release goods for free circulation is not necessary or useful in this author's view.

Article 175 of the UCC states that 'the Commission shall be empowered to adopt delegated acts […] in order to determine the cases where the customs declaration is invalidated after the release of the goods, as referred to in Article 174(2)'. The European Commission is therefore entitled to adopt delegated acts, however, only insofar as it provides for 'cases' when the customs declaration is invalidated as stipulated in Article 148, paragraph 1 of the DA UCC. It also provides several conditions with which there must be compliance. These conditions, as enumerated in section 4.4.1, should enable the combatting of the risk of fraud in the application of Article 174 of the UCC. This author opines that the conditions listed under b, c, and d are repeating or have, at the very least, the purpose of clarifying the conditions included in that article. The condition listed under a introduces a time limit of 90 days, however, and effectively reduces the normal statute of limitation of three years as embedded in Article 103 of the UCC for filing a request for refund of overpaid import

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[67] *See* the pending case C-297/23 P.

duties. Like for the *X B.V.* case (*see* section 3.3), it could be argued that reducing the time period is not necessary or useful for the implementation of Article 174 of the UCC although, in that case, it concerned a retrospective decline in value beyond the control of the importer whereas the invalidation is invoked by the importer itself. Still, it may be argued that the time period is not necessary or useful because the applicant should already prove, according the Article 174 of the UCC, that the goods have been placed immediately under another customs procedure. This already ensures customs supervision (i.e., action taken in general by the customs authorities with an intention to ensuring that customs legislation), and it is therefore no longer necessary or even beneficial to reduce the time period to 90 days. The reduction is also not needed to ensure legal certainty and for the uniform application of Article 174 of the UCC. Any application for repayment or remission of import duties must be submitted to the appropriate customs office within three years from the date on which the amount of the duties was communicated to the debtor. Thus, the same conditions and time period of three years would apply also for a refund following the invalidation of an import declaration. It is therefore difficult to conceive any reason for reducing the time limit to 90 days. In this author's view, the European Commission thus misused its delegating powers and the provision should be declared invalid by the court if asked. The mere fact that a similar provision was already included under the CCC (i.e., Article 251 CCIP) and has not been disputed in all those years does not change this view since market operators might not have been aware that this provision might be invalid. If they were, they were potentially not willing to 'fight' the provision in a very lengthy procedure during which they would have to rely on a national court to refer the case to the CJEU.

4.5 *Boundaries of the European Commission's to adopt delegated and implementing acts*

To explore the boundaries of the European Commission's power to adopt delegated acts, the essentiality requirement is significantly relevant since, according to Article 290, paragraph 1 TFEU, essential elements of an area of law shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. According to the Court, 'which elements of a matter must be categorised as essential [...] must be based on objective factors amenable to judicial review'.[68] Since objective criteria to determine what should be considered as essential elements have not been identified by the court, the case law is not very clear and might be regarded as tautological. According to Chamon, however, it follows from the *SBC* case[69] that 'what is essential is political, and what is political is essential'.[70] Political is, in that regard, what is necessary to define a policy. This top-down approach can help to define what is essential and thus help in determining what areas may be subject to a delegation of power. It is important to note in that regard that, in exercising an implementing power, the commission may neither amend nor supplement the legislative act and not even its non-essential elements. The essentiality requirement is therefore for assessing the boundaries to adopt implementing acts of less importance.

This author posits that the examples in sections 4.2 to 4.4 indicate that the European Commission might have exceeded its powers in certain cases. In both examples 1 and 2, the provisions in the DA UCC and IA UCC touch on an essential part of the UCC as it could be argued that the respective provisions define a policy by affecting the basis of the assessment of the customs debt. There are arguments that support that the respective provisions are contrary to the essential objectives of customs law. Concerning example 1, the achievement of the UCC's objective is disregarded by the effect of Article 128, paragraph 2 IA UCC that, in some cases, even a domestic supply may form the basis for determining the value for customs purposes. This contravenes the objectives of customs law that seek to protect domestic industry by imposing an import duty on the value of goods from outside the EU at the border. In addition, for Article 128, paragraphs 1 and 2 IA UCC, it does not appear to be necessary or useful to introduce Article 128 IA UCC given the clarifications that had to be made after the introduction and the Court's existing case law. Additionally, for example 2, the essential objective that means that goods deemed to originate in the country where they underwent their last, substantial, economically justified processing or working if the production of the imported goods involves more than one country is undermined. However, there are also arguments that support that this article is only a clarification of Article 60 UCC. This author stresses that providing substantially more severe criteria for the determination of the origin between similar goods may eventually be the reason to still declare this provision invalid. The third example, unlike the first and second examples, is not so much about an infringement of an essential element of customs law. However, as discussed in section 4.4.2, it can be argued that the provision in the DA UCC is not useful and necessary and is therefore invalid. The foregoing leads this author to conclude that, in certain cases, provisions contained in a delegated

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[68] *See* for instance: CJEU 5 Sep. 2012, C-355/10 (European Parliament *v.* Council of the European Union), ECLI:EU:C:2012:516, para. 67.

[69] *See* for instance: CJEU 5 Sep. 2012, C-355/10 (European Parliament *v.* Council of the European Union), ECLI:EU:C:2012:516, para. 65.

[70] Chamon, *supra* n. 4, at 26.

or implementing regulation that affect the basis of assessment of the customs debt do not correspond to the essential elements of customs law. The situation seems to be different in the case of time limits although, in those cases, it should be assessed to what extent they are useful and necessary.

5 Conclusion

The Lisbon Treaty grants the European Commission a more prominent role in the development of EU legislation and the establishment of non-legislative acts in particular. Although 'non-legislative' might suggest otherwise, these acts are significantly relevant in steering the direction of EU (customs) law and daily customs operations. Acknowledging that this contribution is not a comprehensive assessment to the validity of all provisions in the delegated and implementing acts of the UCC, a cautious observation is that the legality of those in the UCC legal package is at risk for at least the matters assessed in the examples (*see* section 4). While this author is not necessarily against the provisions at issue, there is opposition to the way that the European Commission exercised its powers in these areas. This in itself is no immediate threat for the rule of law because the European Parliament and the council have the right to scrutinize delegated and implementing acts, and direct and indirect actions can be brought before the court. However, a market operator will face significant challenges before they can make their case if confronted with a provision in delegated or implementing acts adopted beyond the powers of the European Commission. This raises concerns particularly given the growing transfer or rule-making competences to the European Commission and Member States that do not enforce the basic act if the European Commission does not executive the powers delegated or conferred to it. This is not only a concern for EU customs law but could also be extended to other areas of EU (tax) law.[71] As the proposals for a reform of the EU Customs Union are still in the legislative process, this seems to be an excellent time to take these concerns into account, and this author encourages that this occurs in the final version. Although it is sufficient, according to the court in the *Firma Söhl & Söhlke* case (*see* section 3.3), that powers are transferred to the European Commission in general terms, it would therefore at least help if the boundaries of the authorization are specified in the revised UCC as they are in the current one.

Notes

[71] *See* for instance, in the context of the EU Carbon Border Adjustment Mechanism (CBAM): R. Pehlivan & G. J. van Slooten, *De CBAM-rapportageverplichting gedurende de overgangsfase: next level compliance?*, 47 MBB 11–24 (2023). In this article, the authors conclude that Art. 8(2) Commission Implementing Regulation (EU) 2023/1773 should be declared invalid as it contravenes Art. 2(1)(c) Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism. The latter regulates that, when an import is done by a non-EU established entity, the CBAM requirements should be taken care of by an indirect customs representative. Art. 8(2) suggests, however, that an indirect customs representative in such cases may refuse taking on the CBAM compliance obligations.