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ARTICLES

The European Commission's Proposal for a Modernised Union Customs Code: A Brief Introduction

Eric Pickett[1], Hans-Michael Wolffgang[2]

[1] Möhrle Happ Luther (Germany), [2] AWB Tax Consultancy and Law firm (Germany)

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The European Union (EU) Customs Union has existed since 1968, but to this day it is not fully harmonised. Although customs law is Union law, there are 27 different national customs administrations, resulting in the customs legislation not being uniformly applied. To remedy this, the European Commission has proposed a comprehensive customs reform, the Modernised Union Customs Code (MUCC), a draft of which was presented by the Commission on 17 May 2023 (COM (2023)258 final). The following innovations are worth highlighting:

- establishing the new European Customs Authority to pool expertise and competence and support national customs authorities
- establishing a Union-wide Customs Data Hub to ensure the monitoring of the movement of goods, including the supply chain, on the one hand, but at the same time allowing for the simplification of procedures
- an independent legal regime for e-commerce: platform operators in e-commerce will become importers and customs debtors ('deemed importers') in the future. This is intended to reduce compliance costs and at the same time improve Union-wide risk analysis
- the new 'Trust and Check Trader (TCT)' (which will be alongside the Authorized Economic Operator [AEO] until the TCT permanently replaces it), will communicate electronically via the Customs Data Hub with Union-wide effect. TCTs can benefit from further facilitations, such as performing certain controls themselves. In return, complete electronic monitoring of the TCT's supply chain must be always ensured through real time access to the company's internal data.

The reform should be implemented within the next 10–15 years.
The reform is to be welcomed. However, there are still pitfalls hidden in the details. The standardisation of IT systems is necessary for Union-wide centralised customs clearance. Better risk analysis can be performed on a Union-

wide data platform, both to protect the EU's financial interests and to enforce import and export restrictions to protect the Union and its citizens. An EU customs authority can reduce divergent administrative practices across member states through governance and support. The further development of the AEO, the TCT, can establish better cooperation between administration and business, and the ability of companies to perform certain controls and release the goods themselves can speed up customs procedures. Harmonised sanctions for misconduct by economic operators will lead to a level playing field. Much will depend on the concretising legal acts that are now being drafted and discussed.

1. Introduction and background

On 17 May 2023 the European Commission (the 'Commission') published its proposal to reform the Union Customs Code.[1] The Commission described the proposal as 'the most ambitious and comprehensive reform of the EU Customs Union since its establishment in 1968',[2] intended to 'take the Customs Union to the next level'.[3] The proposal puts the administration, application and enforcement not only of the customs legislation but also of 'other legislation applied by the customs authorities'[4] on a new footing. The reform of the Union Customs Code has also resulted in the need for several other proposed reforms, in particular, to address the issue of e-commerce,[5] but the main focus of this paper is the MUCC.

The proposal is based on three core principles: making the Customs Union more efficient by simplifying and modernising customs procedures; creating a 'geopolitical Customs Union', which will harmonise inter alia risk prioritisation and the application of customs controls, enabling the Union to 'act as one'; and future-proofing the Customs Union to make it more agile, adapting flexibly and rapidly to changes in the supply chain.[6] The Commission summarises the objectives of the reform: the reduction of compliance costs and enabling EU Customs 'to better protect the financial

1 European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Customs Authority, and repealing Regulation (EU) No 925/2013, COM(2023) 258 final, hereinafter referred to as the Proposal or MUCC for Modernised Union Customs Code. The Union Customs Code (Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, Official Journal of the European Union, L 269, 10 October 2013, p. 1, as amended), on the other hand, is the currently prevailing basic regulation which the MUCC intends to reform and shall be referred to hereinafter as the UCC.

2 European Commission, *EU Customs Reform*, EU Customs Reform (europa.eu), visited 19 June 2023.

3 European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, customs reform: Taking the Customs Union to the next level*, COM(2023) 257 final, 17 May 2023.

4 The expression 'other legislation applied by the customs authorities' is defined in Article 5 No 3 MUCC as 'legislation other than customs legislation [this is defined in Arts. 5 No 2 of the Proposal] applicable to the goods entering, exiting, passing through the customs territory of the Union, or to be placed in the Union market, in the implementation of which the customs authorities are involved'. Within this context it should be noted that the definition of 'customs legislation' under the Proposal (Art. 5 No 2 of the Proposal) differs from the definition under the UCC (Art. 5 No 2 UCC): The wording of point d) is slightly different to the UCC, but is likely not to have an effect on the interpretation or application. Point e) of the Proposal, which concerns the EU Single Window (EU Customs Single Window Certificates Exchange System, or EU CSW-CERTEX), is entirely new, but in our view is best understood as a clarification, as it could arguably also be understood as falling within the scope of point a).

5 See Section B.III.3. below on e-commerce.

6 Cf. European Commission, note 3.

and non-financial interest of the EU and its member states as well as the Single Market, based on common, EU-wide risk management and more harmonised controls'.[7] Two of the primary innovations for accomplishing these objectives are centralising key functions and establishing new institutional and technological capacities at the Union level. Thus, the European Union Customs Authority ('EUCA')[8] – a new EU body[9] – will be established and the European Union Customs Data Hub ('EUCDH')[10] – the new Union-level database and IT environment for customs operations – will be set up and put into operation.

Risk assessment and analysis will be 'supply-chain-based', rather than 'consignment-by-consignment', as now. The 'new partnership among EU customs authorities and between customs and business'[11] is key to the success of this new approach: it will only succeed if supply chains are transparent and first-hand data from multiple actors involved in the customs operation is entered into the EUCDH. The new partnership has two overarching, inherently linked objectives: the reduction of compliance costs and improving the protection of the financial and non-financial interests of the EU and the member states as well as the Single Market.[12] The 'non-financial interests' referred to include in particular regulatory matters (e.g. health, environment, security, and safety) and embargoes and export control.[13] Customs acts as the gatekeeper and is the first – and often last – line of defence in respect of these interests.

For businesses the trade-off is greater transparency in return for greater efficiency and increased simplifications and facilitations for customs operations. Some of the most strategically significant benefits for businesses[14] include only having to submit the customs data only one time for multiple

7 European Commission, note 3.

8 Title XII, Arts. 205-238 MUCC governs the EUCA as an institution, setting out the principles, tasks, organisational structure, and laying down provisions relating the budget and staff. Chapter 6 contains the general and final provisions.

9 Art. 205(1) MUCC.

10 Title III, Arts. 29-40 MUCC governs the EUCDH. Many of the provisions concern the storage, processing, access to, deletion etc. of personal data. Other provisions concern data sharing. However, there are few provisions protecting commercially sensitive data. One may criticise this as an imbalance since very little personal information is gathered in comparison to sensitive commercial information. However, this criticism may not be entirely fair insofar as such information must be shared to realise the Customs Single Window, one of the key elements for increasing customs efficiency for traders. The Customs Single Window can therefore be understood as a core element in the 'new partnership between customs and business', at the heart of which is a trade-off between security concerns and improvements in customs operations for traders. From this perspective, it is difficult to justify sharing information which was provided within the framework of the Single Window for customs purposes (see Art. 29(1) sentence 1 MUCC) with law enforcement as the information was not intended for law enforcement purposes.

11 European Commission, note 3.

12 European Commission, note 3, p. 4.

13 It bears noting that the Commission's European economic security strategy (*European economic security strategy*, JOIN (2023) 20 final, 20/06/2023), also focusses on national security and economic security. It remains to be seen whether the new strategy will remain defensive or will be used at least *de facto* as a means to achieve other policy goals, such as in the field of emissions. Ultimately, the answer to such questions will likely depend on one's point of view. From a GATT legal perspective, the policies should be designed and applied in a manner consistent with the applicable WTO legislation to avoid a dispute settlement proceeding. It is open to question whether, even if no violation can be found, a non-violation complaint may be successful.

14 Many of the benefits contained in the MUCC and mentioned by the Commission in its Communication (note 3) are already foreseen in the UCC, e.g. the single window, one-stop shop, self-assessment and centralised clearance, but have not been implemented due to IT issues.

consignments and dealing with one single system, namely the EUCDH,[15] the realisation of the EU Customs Single Window Certificate Exchange (EU CWS-CERTEX), Import Control System (ICS2) and the Digital Product Passport,[16] and a greater harmonisation of the application of customs controls.[17]

The changes in the field of customs are linked to other fields, in other words 'other legislation applied by the customs authorities'. For example, the customs authorities are tasked with preventing any of the goods mentioned in the Carbon Border Adjustment Mechanism Regulation from being imported by anyone other than an authorised CBAM declarant.[18] Access to the registrant database to automatically verify that the importer is authorised would save significant time and effort for all parties. Similarly, direct access to the database of the European Chemicals Agency (ECHA) would allow for controlling the existence of a valid registration number for each substance imported and allow the customs authorities to check authorisation decisions when the Commission has granted an exemption for substances prohibited under the REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) legislation.[19] Such access would improve both safety and efficiency. Another example is the Commission's proposed regulation to prohibit products made from forced labour from the EU market.[20] The proposal covers products made in the EU for domestic consumption and exports, and imported goods. Customs will be in charge of enforcement at the EU borders.[21]

2. A new body, a new IT infrastructure and new definitions

2.1. The EU Customs Authority

The EUCA will have its own legal personality (Art. 205(1) MUCC).[22] Its mission is set out in Article 207(2) MUCC and can be summarised as contributing to the operational management of the customs union; coordinating and supervising operational cooperation between customs authorities; pooling and providing technical expertise; developing, operating

15 Cf. European Commission, note 3, p. 5.

16 Cf. European Commission, note 3, p. 10.

17 Cf. European Commission, note 3, p. 11.

18 Cf. Art. 25(1) of Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, Official Journal of the European Union, L 130, 16.5.2023, p. 52.

19 Cf. European Commission, note 3 at footnote 36. For additional examples ranging from deforestation to slave labour European Commission, note 3 see p. 2.

20 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, 14 Sept. 2022, COM(2022) 453 final. For a brief summary of the proposed regulation see European Commission, Commission moves to ban products made with forced labour on the EU market, 14 September 2022.

21 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, 14 September 2022, COM(2022) 453 final. For a brief summary of the proposed regulation see European Commission, Commission moves to ban products made with forced labour on the EU market, 14 September 2022.

22 On the contractual liability of the EUCA see Art. 236 MUCC. The non-contractual liability will presumably be governed by the generally applicable rules as elaborated by the Court of Justice of the European Union.

and maintaining information technologies to implement the procedures laid down in the MUCC; making optimal use of the available data for customs supervision, control and risk management purposes; supporting customs authorities in achieving a uniform implementation of customs legislation, in particular by harmonising customs controls and risk management; and contributing to the enforcement of other legislation applied by the customs authorities (Art. 207(2) MUCC). The EUCA will be established as of 2026 and become fully operational on 1 January 2028 (cf. Art. 238(1) MUCC).[23]

The EUCA's core tasks are carrying out risk management tasks (Art. 208(1) MUCC), tasks in relation to restrictive measures and the (new) crisis management mechanism (Art. 208(2) MUCC),[24] tasks that can largely be summarised as 'coordinating and harmonising activities' (Art. 208(3) MUCC),[25] issuing an opinion on whether granting an authorisation for processing would adversely affect the interest of the Union producers[26] (Art. 208(3)(h) MUCC), and carrying out the data management and processing activities necessary for the member states' customs IT systems to connect with the EUCDH (cf. Art. 208(4) MUCC).

At the intra-Union-organisational level the role of the EUCA can formally be described as support for the Commission, for example by preparing reports, developing common standards and approaches or making recommendations, in addition to its activities in respect of the EUCDH.[27] The Commission remains the formally responsible institution.

The EUCA will also be responsible for ensuring that a greater degree of harmonisation of the application of customs law is achieved across the member states. In this respect it bears noting that the lack of uniform application of customs law across the EU member states, as required under Article XXIV in conjunction with Article X: 3(a) GATT, has been the subject of WTO dispute settlement proceedings[28] and the EU's failure to achieve full compliance with these obligations remains a problematic issue. It is therefore interesting that Arts. XXIV and X GATT were not expressly cited in the proposal given that the reform may significantly contribute to compliance.

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23 The EUCA will be established as of 2026. In the interim period the Commission will be responsible for the operation of the EUCA (Art. 238(2) MUCC).

24 This new mechanism will be addressed below.

25 Examples include carrying out diagnostics and monitoring of border crossing points and other control locations, develop common standards and issue recommendations for best practices (point a), carrying out performance measurement for the customs union (point b), elaborating and disseminating operational manuals for the practical application of customs processes and working methods and develop common standards in this regard (point g), coordinating and supporting the operational cooperation between customs authorities and between customs authorities and other authorities at national level (point j), and organising and coordinating the joint controls (point k).

26 See Arts. 102(3)-(5) MUCC.

27 Numerous provisions empower the Commission to delegate specific tasks to the EUCA.

28 See for example 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*). There is additional case on the matter where the EU was not the respondent.

The EUCA's primary function in relation to the member state's customs authorities is, in our view, to establish integrated, Union-wide risk management strategies and programs and ensure that they are implemented in a uniform manner. The EUCA will be responsible for issuing control recommendations to national customs authorities; they must justify not applying those recommendations. Thus, a common, EU-wide risk analysis will underpin control recommendations and a common risk management will be put into place,[29] thereby leading to a more harmonised application of customs controls by the customs authorities of the member states, which in turn will be monitored by the EUCA. In line with the Commission's views expressed in its economic security strategy paper, the new approach to risks involves a shift away from process compliance of individual consignments towards a focus on the problems and risks of overall supply chains.[30] The risks to be addressed include not only financial risks but also non-financial risks, which implies sharing data with and involving other authorities.[31]

Although the EUCA's recommendations, *et cetera*, formally appear to be advisory vis-a-vis the member states' customs authorities, in practice the latter are likely to treat them as binding. For example, where a national customs authority must seek the EUCA's opinion on whether granting an authorisation for a processing operation would adversely affect the essential interests of Union producers, they may disregard the EUCA's opinion, but then they must give reasons for their decision (Art. 102(5) sentence 3 MUCC). Similarly, they must provide a justification to the EUCA if a control recommendation was not executed (Art. 51(6)(h) MUCC). When this is combined with the EUCA's monitoring and reporting tasks, it can be expected that the customs authorities will enjoy less autonomy.

The EUCA will also coordinate cooperation between the customs authorities. This will be facilitated by the EUCDH. For example, non-compliant supply chains detected in any member state can directly feed into the common risk analysis, improving the intelligence for the control decisions of all member state.[32] Finally, the EUCA may conclude non-binding working arrangements with the authorities of third countries and international organisations (cf. Art. 243 MUCC) and exchange and share certain data with these (cf. Art. 244 MUCC).[33]

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29 However, the member states will still perform their own national risk analysis and management tailored to their respective specific profile, cf. European Commission, note 3, p. 11.

30 On the new focus on supply chains see European Commission, note 3, p. 6.

31 This is a necessary consequence of implementing the Customs Single Window.

32 European Commission, note 3, p. 10.

33 This is without prejudice to Regulation (EC) 515/97 on mutual assistance between the administrative authorities of the member states and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters. Article 244(5) MUCC contains a clerical error and refers to Regulation (EC) 517/97.

2.2. The EU Customs Data Hub

The EUCDH will 'act as the engine of the new system.'[34] Article 29 MUCC lays down the functionalities and purpose of the EUCDH. As the EUCDH's operational capacity progressively comes online importers,[35] carriers, warehouse operators, e-commerce platforms and others will have to make their relevant information for the customs operation available to the EUCDH. In other words, multiple parties will be providing first-hand information on the same consignment, which the Commission regards as critical to the 'supply-chain-based risk strategy'. Perhaps due to there being multiple parties providing the customs declaration information the rules for modifying and/or invalidating the data provided have been revised.[36]

The relationship with member state IT systems and the ultimate fate of these remain unknown.[37] However, the Commission has expressed the view that only IT systems where national specificities or integration require customisation would be maintained nationally and even in those cases it would be done using the EUCDH capabilities.[38]

The risk analysis, risk management, *et cetera* should be data driven. It is important to recall that the risks are not only financial but also non-financial. The interoperability with other systems (i.e. non-customs systems, e.g. ECHA) is thus a *sine qua non*. It is therefore significant that Article 29(1)(f) MUCC expressly mentions the EU CWS-CERTEX as one of functionalities the EUCDH will provide. Article 40(3) MUCC is designed to avoid having to duplicate certain information for customs purposes where that information has already been provided to a non-customs authority and the customs authority is able to obtain that information via the EU CWS-CERTEX. Where the supply chains are stable, the same information may be used for multiple consignments, meaning that they will have to submit the data only once for multiple consignments insofar as a single portal is used.[39] In this context it is also worth mentioning that the single window principle means that importers and other persons affected will not need to deal with the current multitude of IT environments. Finally, the Commission envisages that the EUCDH will have connectivity with the systems of other authorities, which will enable the realisation of the one-stop shop principle.

As of 1 March 2032 importers, exporters and holders of a transit procedure may start using the EUCDH; as of 1 January 2038 use of the EUCDH becomes mandatory (cf. Art. 63(2) MUCC). Deemed importers (see B.III.3 below) should make use of the EUCDH already as of 2028.

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34 European Commission, Press Release of 17 May 2023.

35 The term 'importer' will be examined below.

36 See Arts. 62, 82 MUCC. In respect of the modification and invalidation of pre-departure information see Art. 96 MUCC.

37 On the integration of the national IT systems into the Union-wide IT infrastructure see especially Article 30 MUCC.

38 European Commission, note 3, Legislative financial statement, 1.4.3.

39 Cf. European Commission, note 29. This is a significant improvement for businesses.

2.3. New definitions

Article 5 MUCC sets out a number of new definitions,[40] for example 'other legislation applied by the customs authorities', 'data', 'risk signal', 'risk signal result', 'control recommendation', 'common priority control area', 'common risk criteria and standards', 'supervision strategy', 'consignment', 'manufacturer', 'product supplier' 'simplified treatment for distance sales' and 'crisis'. These new definitions follow in particular from the new focus on the overall supply chain and use of the EUCDH.

2.3.1. Importer

The proposal also defines the term 'importer', which is left undefined in the UCC.[41] Whereas under the UCC the importer is considered to be the person who submits the customs declaration or in whose name and whose behalf the customs declaration is submitted, Article 5 No 12 MUCC defines the importer as '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'.[42] Furthermore, the importer must be established in the customs territory (Art. 20(2) MUCC) unless one of the exceptions enumerated in Article 20(3) MUCC applies.

The importer's primary obligations are providing, keeping and making available to customs authorities, prior to the release of the goods, all the information required;[43] ensuring the correct calculation and payment of customs duties and any other charges applicable; ensuring that the goods entering or exiting the customs territory of the Union comply with the relevant other legislation applied by the customs authorities; and any other obligation on the importer established in customs legislation.[44] Importers should note that release for free circulation is not proof of conformity with the relevant other legislation applied by the customs authorities (cf. Art. 88(2) MUCC).

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40 There are some other legal definitions in the MUCC not contained in Article 5 MUCC, e.g. Art. 102(2)(g) defines the expression 'examination of the economic conditions'. The expression 'advance cargo information', which is governed by Articles 79, 80 MUCC, is given a quasi-legal definition in Recital 34 to the MUCC.

41 Under the current customs legislation there is significant difficulty in determining the financial and non-financial compliance obligations of the persons involved in the customs operation. The new definition of 'importer' is intended to remedy this situation, see Recital 7 MUCC. Also in this way Michael Lux, *Die Reform des UZK*, AW-Prax 2023, 303.

42 This definition is modelled on the definition of the exporter, which has been revised and moved to Article 5 No 14 MUCC. Also in this way Lux, note 39.

43 In the case of release for free circulation the minimum required information is the importer responsible for the goods, the seller, the buyer, the manufacturer, the product supplier where this is different from the manufacturer, the economic operator in the Union responsible for compliance with EU general product safety rules, the value, the origin, the tariff classification and a description of the goods, the unique reference of the consignment and its location, and the list of relevant other legislation applied by the customs authorities (cf. Art. 88(3)(a) MUCC).

44 Cf. Art. 20(1) MUCC.

2.3.2. Advance cargo information

Advance cargo information must be provided in order for the goods to enter the customs territory (Art. 79 MUCC).[45] The minimum information that must be provided is the importer responsible for the goods,[46] the unique reference for the consignment, the consignor, the consignee, a description of the goods, the tariff classification, the value, the data on the route and the nature and identification of the means of transport bringing the goods and the transportation cost (Art. 80(2) MUCC). In essence, the advance cargo information will replace the Entry Summary Declarations (ENS) under the UCC.[47] It is the carrier (defined in Art. 5 No 25 MUCC) who must provide the information (Art. 80(1) MUCC). However, the importer may also provide part of the advance cargo information, in which case the carrier must link its own additional information to the importer's (Art. 80(3) MUCC) and the importer will be notified (Art. 80(4) MUCC).

2.3.3. Deemed importer

A 'deemed importer' is 'any person involved in the distance sales of goods to be imported from third countries into the customs territory of the Union who is authorised to use the special scheme laid down in Title XII, Chapter 6, Section 4 of Directive 2006/112/EC'.[48] In other words, this concerns a platform involved in business-to-consumer (B2C) online sales from a third country.

There are two primary reasons for introducing new rules for e-commerce where the seller is located outside the customs territory. First, the consumer should have greater transparency and not have to deal with unexpected costs (e.g. customs duties) and customs formalities.[49] Second, there are significant financial and non-financial risks involved in e-commerce under the current legislation. Currently goods having a value of EUR150 or less are exempt from customs duties. About 65 per cent of e-commerce consignments understate the value of the goods or consignments are artificially split to exploit the duty exemption.[50] The Commission also cites studies suggesting that about 66 per cent of products purchased online do not meet EU safety requirements.[51]

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45 Article 80(6) MUCC enumerates those cases in which the obligation to provide advance cargo information shall be waived. The counterpart to advance cargo information when exporting is pre-departure information, see Article 95 MUCC.

46 The importer must be named in the advance cargo information to identify the person responsible for compliance.

47 Sandra Rinnert, *Die Zollunion der Zukunft*, AW-Prax 2023, 267.

48 Art. 5 No 13 MUCC.

49 Cf. European Commission, note 3, p. 6. See also e.g. Recital 7 MUCC.

50 Cf. European Commission, note 3, p. 3.

51 Cf. European Commission, note 3, p. 3.

In brief, the MUCC introduces a 'tailor-made customs regime for e-commerce'. Deemed importers shall be responsible for all customs formalities and payments (cf. Art. 159(3) MUCC) and the duties and VAT will be charged at the moment of sale and paid by the deemed importer to the respective member state (cf. Art. 21(1) MUCC). The EUR150 *de minimis* threshold for imposing customs duties will be abolished,[52] but in return the deemed import may apply to have the new simplified '5-bucket system' for calculating the customs duties owed, ranging from 0 per cent to 17 per cent, depending on the classification of the good.[53] There are both advantages (e.g. the product need only be classified to the 8-digit level, it is not necessary to state the origin (Art. 149(4) MUCC) and disadvantages (e.g. a higher duty rate, no deductions for transportation after the frontier has been crossed). The simplified system applies only to those goods listed in the Annex and even then, does not apply if, for example the goods are subject to anti-dumping duties.

3. The Trust and Check Trader: a new status for Economic Operators

During the transitional period the AEO status under the UCC will remain in effect; the customs authorities may continue to grant this status to applicants until 1 March 2032.[54] However, the customs authorities must assess the status AEOs by no later than 31 December 2037 to check whether they may be granted Trust and Check trader ('TCT') status.[55] AEO authorisations will remain valid until that cut-off date or the outcome of the reassessment, whichever is earlier (Art. 26(3) MUCC). There are two outcomes of the reassessment: either the AEO status is revoked without TCT status being granted, meaning that the economic operator is a 'normal' trader, or AEO status is revoked and replaced by the new TCT status.

TCT is sometimes also referred to as 'AEO-plus': the conditions for granting this status are identical to those for AEO, but, in addition, the TCT applicant must have conducted regular customs operations in the course of their business for at least three years (Art. 25(1) MUCC) and have an electronic system providing or making available to the customs authorities real time all data on (a) the movement of the goods (including e.g. customs records, accounting system, commercial and transport records, licences and authorisations granted under other legislation applied by the customs authorities) and (b) compliance with all requirements applicable on those goods (cf. Art. 25(3)(f) MUCC). The TCT applicant will also

52 European Commission, 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), Article 2.

53 This will be done by amending the Combined Nomenclature to add a new Point G of Annex I, Part I Section II, see European Commission, note 50, Article 1. For the details concerning goods in the respective 'buckets' see European Commission, note 50, ANNEX.

54 Art. 26(1) in conjunction with Art. 265(4) MUCC.

55 Art. 26(2) in conjunction with Art. 265(3) MUCC.

need to give the competent customs authority access to the relevant data of the applicant for the last three years to assess compliance (cf. Art. 25(2) MUCC).[56]

The advantages of TCT status are set out in Article 25(7)-(9) MUCC. The authorisations available to TCTs largely correspond to simplified declarations, periodic payments, deferred payments, entry in the declarant's records, self-assessment and centralised clearance. Thus, they will, for example, be able to provide part of the data after the release of the goods (Art. 25(7)(a) MUCC),[57] perform certain controls and release the goods themselves at their premises (Art. 25(7)(b) MUCC), are deemed to have provided the necessary assurance of the proper conduct of operations to obtain authorisations for special procedures (Art. 25(7)(c) MUCC), determine themselves the total amount of customs debt they owe for up to 31 calendar days (cf. Art. 25(7)(d) in conjunction with Article 181(4) MUCC) and defer payment of the customs debt for up to 30 days (Art. 25(7)(e) in conjunction with Article 188(1) MUCC).

Furthermore, TCTs are to 'enjoy more facilitations than other economic operators in respect of customs controls according to the authorisation granted, including fewer physical and document-based controls', and their TCT status is to be 'taken into account favourably for customs risk management purposes' (Art. 25(8) MUCC).

One of the main benefits of these authorisations for TCTs is that they will have only one single customs administration as a partner, namely the responsible customs office at the place where they are established, irrespective of the member state in which the goods are imported or sent.[58] The intent is that TCTs will not have to use the transit procedure to bring the goods to their place of business.[59] Another significant benefit is that they will be liable for payment of the customs duties, other taxes and other charges only in their own member state.[60]

On the Commission's view the key to these facilitations and simplifications is transparency. The Commission's vision of the trade-off is that '[t]ransparent trade flows will be able to move via 'green lanes' without formal customs interaction and free of administrative burden, while customs will request a control only if necessary.'[61]

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56 A customs representative's status as TCT can only be recognised if they are acting as an indirect representative; in the case of direct representation their status as a TCT can only be recognised if the represented party is a TCT, cf. Art. 27(3) MUCC.

57 This does not affect the required data for the advance cargo information, however.

58 Cf. Art. 25(9) MUCC. See also European Commission, note 3, p. 5. Pending a review in 2035 this approach may be extended to all traders, *ibid*, p. 6.

59 However, unless the VAT System Directive is also amended, they will have to continue using the Code 42 import procedure in order to avoid the import VAT arising in the country of import while the customs duties arise in the member state where they are established. Also in this way *Lux*, note 39, pp. 303, 304.

60 Cf. Art. 29(9) MUCC. In contrast, pursuant to Article 169(1) subpara. 2 MUCC traders who are not TCTs incur a customs debt at the place where the customs declaration was lodged.

61 European Commission, note 3, p. 7.

'Tis a consummation devoutly to be wished. Indeed, many businesses see the simplifications and facilitations provided in the reform as a gamechanger, for example periodically determining the customs debt corresponding to the total amount of import or export duty relating to all the goods released by that trader, thus avoiding having to lodge individual customs declarations, or performing certain controls and releasing the goods themselves at their place of business.[62] However, many of these benefits depend on implementing the new IT system(s). If the past is any guidance, this will prove to be a challenge and delays should be expected. In respect of customs controls and risk management, these advantages already exist for AEOs on paper, but the practical application has been at best disappointing in the eyes of industry. The MUCC has not incorporated any incentives to encourage the customs administrations of the member states to act otherwise. It therefore remains to be seen whether the MUCC will lead to a different result.

4. Temporary storage and release for free circulation

Prior to being released for a customs procedure non-Union goods are put in temporary storage. 'Temporary storage' means the situation of non-Union goods temporarily stored under customs supervision in the period between the moment in which the carrier notifies their arrival to the customs territory and their placement under a customs procedure (Art. 5 No 50 MUCC). Non-Union goods are in temporary storage from the moment the carrier notifies their arrival to the customs territory, until they are placed under a customs procedure (Art. 86(1) MUCC), or the customs authorities regularise their situation by disposing of them (Arts. 86(6), 75-78 MUCC).[63] The importer must place the goods under a customs procedure no later than three days after the notification of their arrival or no later than six days after the notification of their arrival in the case of an authorised consignee (cf. Art. 86(5) MUCC).[64] Goods arriving in transit are also regarded as being in temporary storage after they have been presented to the customs office of destination in the customs territory (cf. Art. 86(2) MUCC).

If an importer brings goods into the customs territory and these goods remain in temporary storage, the importer does not need to be established in the customs territory (Art. 20(3)(b) MUCC).[65]

62 As noted above, however, for this to have the desired effect for businesses work still needs to be done, e.g. in respect of VAT and national prohibitions and restrictions.

63 Special rules apply in respect of the transit and customs warehouse procedures (Art.86(2), (3) MUCC).

64 As Lux, note 39, 304, points out, if the goods are to be stored for a longer period of time, then the goods must be placed under the customs warehouse procedure unless the delay is because the customs authority has ordered that they be presented to them.

65 A similar rule applies to exporters (Art. 22(3)(b) MUCC, where the goods are exported from temporary storage).

5. Incurrence of a customs debt

Essentially, a customs debt is incurred when the goods are released for free circulation, or for the end-use procedure, or for the temporary admission procedure with partial relief of duties, or, in the case of e-commerce (Art. 159(1) MUCC), when payment for the distance sale is accepted (Art. 159(3) MUCC).

Typically, the importer requests that the goods be placed under release for free circulation procedure. Article 88(3) MUCC lays down four conditions for placing goods under that procedure:[66] the required data has been provided or made available to customs authorities (point a);[67] any import duty or other charges due, including anti-dumping duties, countervailing duties or safeguard measures have been be paid or guaranteed (point b);[68] the goods have arrived to the customs territory (point c); and the goods comply with the relevant other legislation applied by the customs authorities (point d).

The importer is the debtor when the goods are released for free circulation[69] (Art. 159(2) MUCC). Unless the importer is a TCT (see Section C above), the customs debt is incurred at the place where the customs declaration has been lodged.[70]

Article 161 MUCC lays down special rules governing the incurrence of a customs debt in the case of non-compliance upon import;[71] Article 169(1) subparas. 3, 4 (3), (4) MUCC sets out the rules governing the determination of the place where the customs debt is incurred in the case of non-compliance. In both cases the rules are essentially the same as the existing rules under the UCC.

6. Crisis management mechanism

The MUCC has put a crisis management mechanism in place (Title XI, Arts. 201-204 MUCC), largely as a response to the COVID crisis. The EUCA is to be the pivotal actor: maintaining crisis response readiness, and preparing, coordinating and monitoring the implementation of the practical measures and arrangements that the Commission decides to put in place

66 Special rules apply to distance sales. However, a detailed presentation is beyond the scope of this paper.

67 This information must include at least the importer, the seller, the buyer, the manufacturer, the product supplier where this is different from the manufacturer, the responsible economic operator in the Union, the value, the origin, the tariff classification and a description of the goods, the unique reference of the consignment and its location, and the list of relevant other legislation applied by the customs authorities.

68 Unless the goods are the subject of a drawing request on a tariff quota, or the importer is a Trust and Check trader. In Germany there has recently been some debate as to whether anti-dumping duties are customs duties under the customs legislation and for the purposes of Section 370 of the German Tax Code. The German Federal Court of Justice (*Bundesgerichtshof*, *BGH*) affirmed both questions in its judgment of 6 September 2022 (BGH, 1 StR 389/21). The inclusion of customs duties owed due to the application of trade remedies in this provision tends to confirm the BGH's interpretation.

69 Where an indirect representative is used, both that representative and the party represented are joint and several debtors, as under the UCC.

70 Or would have been incurred but for the modification of the customs declaration (Art. 169(1) subpara. 2 MUCC).

71 Unfortunately, a detailed presentation of these rules is beyond the scope of this paper. On the incurrence of a customs debt in the case of non-compliance in the case of exports/outward processing, see Art. 164 MUCC.

when a crisis occurs.[72] A 'crisis' is defined as 'an event or a situation that suddenly endangers the safety, the security, the health and life of the citizens, economic operators and personnel of customs authorities and requires urgent measures as regards the entry, exit or transit of goods' (Art. 5 No 64 MUCC).

7. Extinguishment of a customs debt

Article 199 MUCC governs the extinguishment of a customs debt.

Both the general three-year-notification rule as well as the limitation range of between five and 10 years in the case of criminal conduct were left in place (cf. Art. 182(1); (2) MUCC).[73]

Article 193(7) subpara. 1 MUCC clarifies an issue that is controversial under the UCC: where repayment or remission were granted in error, the original customs debt is to be reinstated insofar as it is not time-barred under Article 182 MUCC. However, under certain circumstances interest may have to be reimbursed (Art. 193(7) subpara. 2 MUCC).

8. Sanctions

Title XIV concerns customs infringements and non-criminal sanctions. Although the MUCC introduces some harmonisation, jurisdiction over customs infringements remains with the member states (Art. 250 MUCC).

Article 252 MUCC sets out a non-exhaustive list (Art. 252(2) MUCC) of customs infringements, thereby contributing to a greater degree of harmonisation.[74] Article 254 MUCC lays down the minimum, albeit mandatory, non-criminal sanctions applicable to the customs infringements mentioned in Article 252 MUCC. Extenuating and mitigating circumstances (Art. 247 MUCC) and aggravating circumstances (Art. 248 MUCC) are to be considered when determining the level of the penalty. Clerical and minor errors do not constitute a customs infringement unless they were committed intentionally or as the result of obvious negligence (Art. 246(4) MUCC). Customs infringements due to what amounts to force majeure (cf. Art. 246(5) MUCC) are also exempted.

The sanctions may take one or more of several forms and must be effective, proportionate and dissuasive: a pecuniary charge (fine); the revocation, suspension or amendment of customs decisions; or the confiscation of the goods and means of transport (Art. 254 MUCC). Very basically, the amount of the fine is to be between 100 per cent and 200 per cent of the eluded customs duties and other charges where the infringement was committed intentionally and between 30 per cent and 100 per cent in other cases (Art. 254(a)(i)(1), (2) MUCC). Where the customs infringement does not relate

72 See Recital 52 MUCC.

73 Lux, note 39 expresses dismay that the limitation was not more fully harmonised and refers to the ten-year period foreseen in the draft of a Modernised Customs Code.

74 Where a member state provides for additional acts or omissions that constitute a customs infringement subject to sanctions, it must notify the Commission (Art. 252(3) MUCC). They may also provide for additional sanctions; these must also be notified to the Commission (Art. 253 MUCC).

to specific goods the fine shall be between EUR150 and EUR150,000. In addition, the acts or decisions on sanctions will be uploaded to the EUCDH (cf. Art. 254 MUCC). Article 249(1) MUCC establishes a limitation of between five to 10 years for initiating proceeding for a customs infringement mentioned in Article 252 MUCC.

One especially problematic area is the application of sanctions in respect of TCTs who have performed controls and released the goods themselves at their premises and determined themselves the total amount of customs debt they owe, that is, availed themselves of their rights. Already today there are issues when the customs authority releases the goods without examination and subsequently take a view other than the declarant's.[75] If a TCT now has to expect that they will face non-criminal sanctions where they have taken a reasonable view and undertaken all the measures necessary to become a TCT, including demonstrating their trustworthiness and sharing sensitive business data in real time, merely because the competent customs authority takes a different view, then the trade-off has effectively been undermined.[76] In our opinion, the proposal should be amended accordingly as it moves through the legislative process.

9. Moving forward: the next steps

Under the proposal the MUCC is to apply from 1 January 2028, but in practice will only become applicable in several stages. Essentially, the provisions relating to distance sales and deemed importers should apply from 1 January 2028 (cf. Art. 265(2) MUCC). Although economic operators may start fulfilling their reporting obligations under the MUCC as early as 1 March 2032 (cf. Art. 265(4) MUCC), the EUCDH is not scheduled to become fully operational until 31 December 2037 (cf. Art. 265(3) MUCC). Without the EUCDH being fully operational, it is unlikely that some of the key benefits foreseen for TCTs will be available in practice.

The Commission drafted this proposal on its own and would have benefited from closer cooperation with the business community. While many of the proposals are to be welcomed and others are long overdue, there is still significant room for improvement. In addition to those points we have already highlighted, the potential for liberally sharing sensitive business information should be reined in. Similarly, sharing information with other authorities not involved in the customs operation where this is not necessary for the customs procedure (e.g. in the context of the Single Window) is concerning, particularly where this triggers a criminal investigation of a TCT. Another issue is the failure to address reconciliation in transfer pricing in

75 These typically concern the origin of the goods, their classification for customs purposes, the applicability of prohibitions and restrictions or the basis for calculating the customs debt.

76 In our view this is the case even where a court rules in favour of the customs authority's interpretation or view. Lux, note 39, 305 expresses a similar view.

the wake of the ECJ's *Hamamatsu* judgment.[77] The business community has already criticised the proposed timetable for realising the benefits for TCTs as being too long.

The reform is heavily focused on addressing financial and non-financial risks. The new e-commerce regime seems at first glance to be at the forefront of gaining better control over the financial risks (lost revenue due to incorrect customs declarations), but a closer look reveals that the application of trade remedies (in particular, anti-dumping duties) is also in focus. In respect of the latter, anti-dumping (or countervailing) duties are usually dependent on the non-preferential origin of the imported goods, which is often misstated, unbeknownst to the importer. A transparent supply chain could show changes in trade patterns, thus more efficient and effective application of these duties under customs law.[78]

It is apparent from the proposal that non-financial risks (generally known as prohibitions and restrictions) are becoming increasingly important and that this trend will likely only increase. There are, however, certain challenges that will need to be worked out if the desired efficiency in customs operations and necessary legal protections and certainty are to be achieved for businesses. For example, where centralised clearance is used issues may arise in respect of national prohibitions and restrictions. An additional issue which will need to be resolved is the precise responsibility of the respective authority in respect of goods subject to prohibitions and restrictions: Customs or the other agency, for example the food and health administration.

The proposal now moves to the European Parliament and Council in accordance with the ordinary legislative procedure (cf. Arts. 289, 294 Treaty on the Functioning of the European Union) for debate and adoption. The member states will now be more involved in the drafting and discussion of the proposal. Businesses and their representative federations should therefore use this opportunity to make their views known so that they can be considered accordingly when amending and adopting the legislation.

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77 For a specific legislative proposal see Michael Lux and Sandra Rinnert, *Are flat rate adjustments of the customs value possible on the basis of a transfer price arrangement?*, Global Trade and Customs Journal 2023, 126.

78 It could also lead to a circumvention proceeding under the Basic Anti-Dumping (or Anti-Subsidy) Regulation to be initiated.