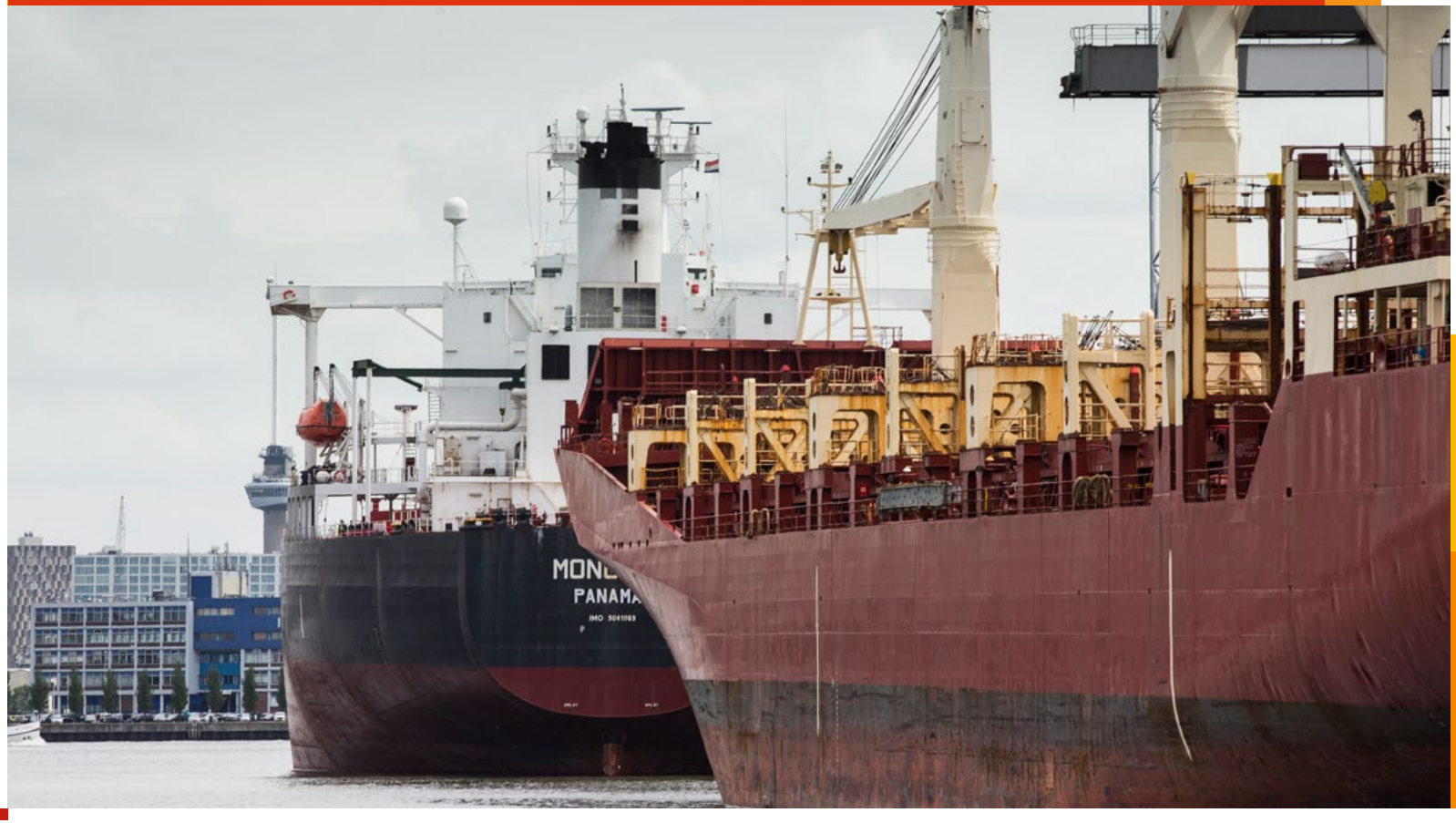
Customs & International Trade Communiqué – UCC edition

UCC implementing provisions finally published

Bringing you up to speed on the changes, possibilities and challenges

December 2015



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On 1 may 2016, the Union Customs Code (UCC) will become applicable. As now the implementation regulations to the UCC, the so-called Implementing Act and the Delegated Act, have been published, with this Communique we would like to give you a general overview of the most important changes.

The UCC (Regulation EU No 952/2013) is the result of an ongoing process of customs reform in the EU. The former legislation stems in basis from the time the internal market was established (1992/1993) and customs processes & procedures were mainly paper based. The present environment, however, requires legislation that has ICT processes as a starting point. Also there was a wish to further align the different parts of the legislation and a more harmonized application in practice is envisaged. A last reason for the structure of the present legislation is the Lisbon Treaty (applicable since 2009), where a distinction was made between rules that are delegated to the European Commission and can be established by it (in this case the delegated act – DA – Reg. 2015/2446) and implementing rules that need the regular approval process within the EU legal framework (in this case the Implementing Act – IA – Reg. 2015/2447). This is the reason why we, going forward, will have implementing rules laid down in two different Regulations.

Please note that the customs reform is not yet completed with the publication of these Regulations. The ICT framework, which is the backbone of the new EU customs framework, largely still needs to be established (envisaged final date is December 2020). To enable this process, the Commission has prepared a (delegated) Transitional Act, which was sent to the European Parliament for approval on 17 December 2015. This Transitional Act is in addition to the recently published IA and DA - not to be mixed up with the transitional rules in these Acts.

As said, the new framework of EU Customs legislation focusses also on a harmonization of the customs processes & procedures as implemented in daily routine by the Member States. As differences in interpretation of the legislation may still exist, the EU Commission has indicated that it will publish guidelines on how to apply and interpret the legislation in place.

This publication is established based upon our present understanding of the new legislation from a general perspective. It is not meant to be comprehensive, but rather provides an overview of the main changes in place and those believed to have the most impact. It should be noted that, based upon current routines in different Member States, the impact of these changes may differ per Member State. Therefore these or other changes in the new legislation can be main items in specific Member States (e.g. the changes of the definition of liable persons for a customs debt in certain Member States). Your local advisors can assist you with further information on these aspects.

The main aspects discussed are the changes on:

- AEO
- BTI's
- Customs Procedures
- Customs Valuation
- Definition of Exporter
- Non-Preferential Origin

AEO

When the UCC will enter into force, this will result in some changes to the rules regarding the Authorized Economic Operator concept (AEO). In this chapter, we will highlight the changes that we consider most relevant.

AEO will become an authorization

First of all, it is to be mentioned that the 'AEO status' will no longer be issued in the form of a certificate, but will become an authorization instead. We do not expect this change to result in any major issues – in practice, an AEO certificate is often perceived as an authorization already.

In the draft versions of the IA of the UCC, the currently available types (Customs Simplifications, Safety & Security and the combination of both) were reduced to Customs Simplifications and Safety & Security only (so no longer the combination). This, in our view, was to be considered an improvement, as a company holding the combination – certificate might lose its entire AEO status if it no longer would (for example) meet the safety & security requirements – as a result of which the application of simplified procedures might be at stake. In the final version of the IA, however, all three types are available again.

Increased importance of AEO status

Under the UCC, AEO status will become more relevant for companies involved in international trade as it will be(come) a hard requirement in the application process of a number of simplifications but also as the number of benefits will slightly increase.

New for AEO

- Practical standards of competence/ professional qualifications for AEO-C
- Scope AEO extended
- AEO to cover all EU based business locations of a legal entity

Changes in requirements – competence/ professional qualifications

As most requirements will remain as they are, also under the UCC the following categories remain relevant:

- the absence of any serious infringements or repeated infringements of customs legislation and taxation rules;
- financial solvency;
- a high level of control of the operations of the company and the flow of goods and;
- appropriate security standards (for a safety & security authorization – AEO-S).

However, for a customs simplifications authorization (AEO-C) a new criterion is introduced: practical standards of competence or professional qualifications.

In practice, this means that the applicant (or the person in charge of customs matters) either has a minimum of three years of proven practical experience, or has successfully completed specific (approved) training. The latter is not yet defined, as the legislation states that it should either meet 'a quality standard concerning customs matters adopted by a European Standardization Body', which is not available (yet), or it should be 'qualified or recognized' training courses (which qualification and recognition standards are neither available yet).

For companies that are already AEO certified, the introduction of this requirement might result in the fact that they are no longer fully compliant. This, however, commonly means that time is given to resolve the issue (i.e. complete a qualifying training – once these would be known). Companies that are still to apply for AEO do need to seriously consider this criterion and make sure – should there be insufficient practical experience – and discuss potential training options with their consultant and/ or Customs Authorities.

Compliance record extended

As a basis for AEO certification, one should not have committed a serious infringement or repeated infringements of customs rules. With the introduction of the UCC, this scope is extended to also cover other areas of indirect taxation such as VAT and excise duties, but also direct tax (including corporate income tax).

Self-assessment questionnaire for application

In the application process, it becomes mandatory to submit a (completed) self-assessment questionnaire. In many Member States, nowadays a self-assessment summary suffices – while the complete questionnaire needs to be completed, but not necessarily submitted.

Business locations

Where under the current legislation, AEO certification only tends to apply to the business locations specified by the applicant (i.e. permanent establishments in other Member States are not by definition included), AEO under the UCC is to cover all EU based business locations of a legal entity – so including permanent establishments in other Member States.

AEO certified companies that have not (yet) covered their permanent establishments in other Member States in their AEO status, need to consider that they will have to do so in due course. Per May 2016, they theoretically will no longer be fully compliant and therefore need to deal with the deficiency (i.e. make sure permanent establishments will be covered).

BTI's

BTI's are considered (and intended to be) an important instrument to provide (legal) certainty to companies. With the introduction of the compulsory application of BTI's in import declarations, it might become questionable whether a BTI will remain the important element it used to be.

Summary of changes

In the initial proposal of the DA, it was mentioned that BTI's would only be issued to EU established persons – therewith excluding non-EU entities, who would then become highly dependent on the declarant of their declarations (i.e. a customs broker). In the final text, however, this limitation is no longer included. All parties in possession of an EORI number (Economic Operators Registration and Identification number) may still apply for BTI's.

In case a BTI is being applied for in another Member State as the one were the applicant is registered (i.e. where the EORI number has been issued), Customs in the country of application need to (immediately) inform their colleagues in the 'home country' of this application.

Once a BTI will be issued, it's validity period will be 3 years (currently this is 6 years). BTI's that have been issued prior to May 1,2016 will remain valid (up to 6 years).

A major change is the fact that under the UCC, the holder of a BTI is **obliged to apply** the classification as indicated in that BTI – moreover, a reference to the BTI is to be mentioned in the import declarations for the product(s) concerned (also for BTIs issued prior to May 1, 2016)!

New for BTI

- Holder is obliged to apply the classification indicated in BTI
- BTI can be applied for a group of companies/entities
- Option to suspend or invalidate a BTI in case of appeal not available

A final point of change is that under the UCC a BTI can also be applied for by a group of companies/entities, thus avoiding the present situation in which a company that is part of a group of companies, cannot make use of a BTI in place for another member of the group. However, still the company that wishes to use the BTI has to be entitled to it (i.e. mentioned on the BTI as such).

Complicated legal situation

In the situation where a BTI is issued that is not in line with the application (i.e. a 'not favorable' BTI), it can be appealed. A successful appeal procedure will ultimately result in a new BTI, with a different classification as the original BTI.

However, during the appeal process (which may take up to a couple of years), the original BTI remains in place, and the classification mentioned in this BTI remains compulsory. The UCC does not include an option to suspend or invalidate a BTI in case of appeal. Neither does it include an option for retroactive adjustments or replacement, nor annulment for this situation.

Bottom line this means that up to the issuance of a 'new' (favorable) BTI, the 'old' (non-favorable) classification is to be used. It is then depending on the exact wording of the judgement on the appeal whether the outcome of the appeal might also apply to imports under the 'old' BTI.
Especially in situations whereby goods are (also) imported in another member state as the one where the BTI is applied/ appealed, we are concerned that this compulsory application is likely to result in complex discussions with Customs (as they do not consider themselves bound by a Judgement from another Member State).

Customs procedures

Under the UCC, the EU Commission has been able to finally realize its plans on simplifying and aligning customs procedures. Furthermore, also rules have been aligned e.g. with respect to customs debt and the application of equivalence. As a result of this, certain procedures that exists currently, will no longer be required or needed.

Simplification and alignment

Under the UCC, a customs declaration can only be issued for goods to be placed under one of the following three customs procedures:

1. release for free circulation,
2. special procedures, or
3. (re-)export.

The secondly mentioned **'special procedures'** is in fact the grouping of all procedures (other than release for free circulation and (re-)export), in which the following procedures can be distinguished:

- Transit: external transit and internal transit;
- Storage: customs warehousing and free warehousing;
- Specific use: temporary admission and end-use;
- Processing: inward processing and outward processing

Alignment Customs debt

A further important element is that under the UCC a standard approach will apply to all customs procedures where it concerns the (regular) moment of incurrence of a customs debt (instead of rules per procedure, as now applicable). A customs debt will, under the UCC, be established at the moment of release for free circulation. This is also the reason for a number of changes compared to the present processing and warehousing procedures (see below).

IPR suspension, IPR drawback and PCC are transformed into the new 'inward processing regime'

New for Customs procedures

- Compensatory interest will no longer be levied for inward processing
- Customs duties for outward processing based on value added method
- Wharehousing type D abolished transitional measures available
- IPR suspension, IPR drawback and PCC are transformed into the new 'inward processing regime'

New Inward Processing regime

'Processing' is the special procedure where the alignment/ simplification is most apparent.

The new inward processing relief will replace the current inward processing regimes (suspension and drawback) and Processing under Customs Control (PCC), whereby the format of inward processing with application of the refund system will no longer be available. Instead, the inward processing procedure is transferred into a real/full suspensive regime.

Under the new inward processing regime (IPR), duties levied for products that are released for free circulation of the EU, will be calculated based upon the processed products (comparable to the current PCC regime). However, upon (prior) request it can also be allowed to calculate the duties on the basis of the raw materials/components used for processing (the current IPR). Compensatory interest (as now applicable under IPR suspension) will no longer be levied (no longer wished for under the alignment and not necessary as IPR refund no longer exists).

Outward processing

With respect to outward processing, there will only be one method for calculating the customs duties when (re)importing processed products - the value added method. Thus, the differential method will disappear.

A further simplification regards the now standard option to have products re-imported by another party (than the exporter of the raw materials/components). It appears way easier to apply this option.

Storage

For storage (warehousing), only the distinction between public and private customs warehouses will remain. The further distinction (warehouse types A till F) is no longer required.

Further, the alignment on the customs debt, i.e. the fact that it will arise when goods are declared for free circulation, means that the current facility as in place under a customs warehouse type D will be abolished. It will therefore no longer be possible to set the amount of customs duties payable when the goods enter the customs warehouse. The only (partial) exception to this is where goods stored in a customs warehouse have undergone so called 'usual forms of handling', in which case the customs value and the customs debt can be calculated based upon the (status of the) goods before being processed.

Companies using a type D warehouse (i.e. having products stored in a type D warehouse), may call upon transitional measures till the end of 2018.

Equivalence

The exchange of equivalent Union goods and Non-Union goods, while applying a special procedure (i.e. equivalence), will be allowed on a broader scale (also for storage and specific use). Obviously the application of equivalence will remain conditional and prior approval is still required.

In that respect, it is important to point out a newly expressed criterion, namely that the application of equivalence may 'not lead to an unjustified import duty advantage'. As there is no further definition or explanation on the interpretation of what is considered 'unjustified', this criterion may in some instances or Member States become an obstacle for the actual application of equivalence, even in cases where it is currently permitted under the Community Customs Code (CCC).

Transitional rules

In view of the changes with respect to the customs procedures, transitional provisions will be in place, amongst others, for reassessment of authorizations and/or issuing new authorizations. The structuring of that will be handled by the customs authorities of the Member States and therefore are likely to differ per Member State.

Customs valuation

The changes regarding customs valuation appeared to be the hardest nut to crack. Where the abolishment of the first sale principle was known for quite some time, most other changes were only finalized in the very last draft. This has resulted in lots of discussion and ultimately even in some important last-minute clarifications in the texts.

Definition 'sale for export' (transaction value) - abolishing first sale

Under the UCC, the EU definition of transaction value basically only allows one sale to be used as the basis for customs valuation. This means that it will no longer be possible to apply a first or earlier sales transaction as the basis for appraisal of the customs value.

That one sale, is defined as 'the sale immediately before the goods are brought into the territory of the EU'. There is, however, (still) no further guidance yet as to what this will mean in case of a chain of transactions, i.e. which of these transactions qualifies (or is deemed to qualify) as 'the sale immediately before' entering the EU territory.

In absence of a sale as described above ('a sale immediately before…'), as an alternative, a sale of goods in temporary storage, in a customs warehouse or under another special procedure, may serve as the basis for the customs value. Please note that this alternative is only to be applied in case there would be no (qualifying) sale at the moment the goods entered the EU territory. In this respect it is important to note that there seem to be Member States that (wrongfully) see this alternative as an equivalent to the "sale immediately before" and argue that in case a latter sale under customs suspension in the EU would take place, that latter sale should always apply.

New for Customs valuation

- The sale immediately before the goods are brought into the EU (one sale) is the basis of the valuation
- Royalties and license fees will become dutiable more often

Companies that currently apply a first or earlier sale as the basis for their customs value, may benefit from a transitional provision. This 'sunset clause' allows them to continue using such a first sale until 31 December 2017, provided that the import entry is lodged on their behalf and that they are bound to purchase the goods being customs cleared under the sunset clause, by a contract concluded prior to the entry into force of the IA, i.e. prior to January 16, 2016.

All importers are advised to review whether the new definition of transaction value may have an impact for the customs value that is to be reported in their import entries.

Abolishment of Warehouse type D

As already mentioned, in some situations, companies applied customs valuation planning by the use of a Customs Warehouse type D (or the 'type D functionality' within type E warehousing). This enabled them to determine the customs value of the goods when entering the warehouse (where this commonly is done when leaving the warehouse). Therefore this was an effective way to avoid a customs value that is based on the sales price of goods.

However, as a result of the abolishment of the customs warehouse type D, this opportunity will end. Companies applying this approach are therefore advised to urgently reconsider their valuation approach.

Royalty payments

Royalties and license fees that are relating to imported goods and paid as a condition of sale, have to be included in the customs value. Under the current legislation, which is rather detailed where it concerns royalties and license fees, various scenarios exist in which such payments do not need to be included in the customs value of imported goods.

However, under the UCC implementing provisions, the scope on when royalties are considered to be paid as a condition of sale is broadened, as it mentions that a royalty is considered dutiable when 'the goods cannot be sold to, or purchased by the buyer without payment of the royalties or license fees to a licensor'. As a result of this, royalties and license fees (especially trade mark royalties) will become dutiable more often, e.g. trademark royalties that can currently, under the CCC, be excluded from the customs value will become dutiable as from 1 May, 2016.

Importers that make payments for royalties or license fees that are currently not dutiable, are therefore strongly advised to review whether these payments may have to be included in the customs value as of May 1, 2016.

Expansion of forfeits

Through the use of forfeits an importer can simplify its import processes, as one does not have to submit provisional import declarations that, in time, require follow up through additional declarations (for example for valuation elements). Currently the use of such forfeits is limited to elements that have to be added to or can be deducted from an invoice price.

The UCC includes an expansion of the use of forfeits in determining the customs value. As of May 1, 2016 forfeits can also be applied to 'the price actually paid or payable' itself. Thus, a forfeit may also relate to the payments the importer makes or has to make as a condition of sale of the imported goods.

Exporter – a general definition

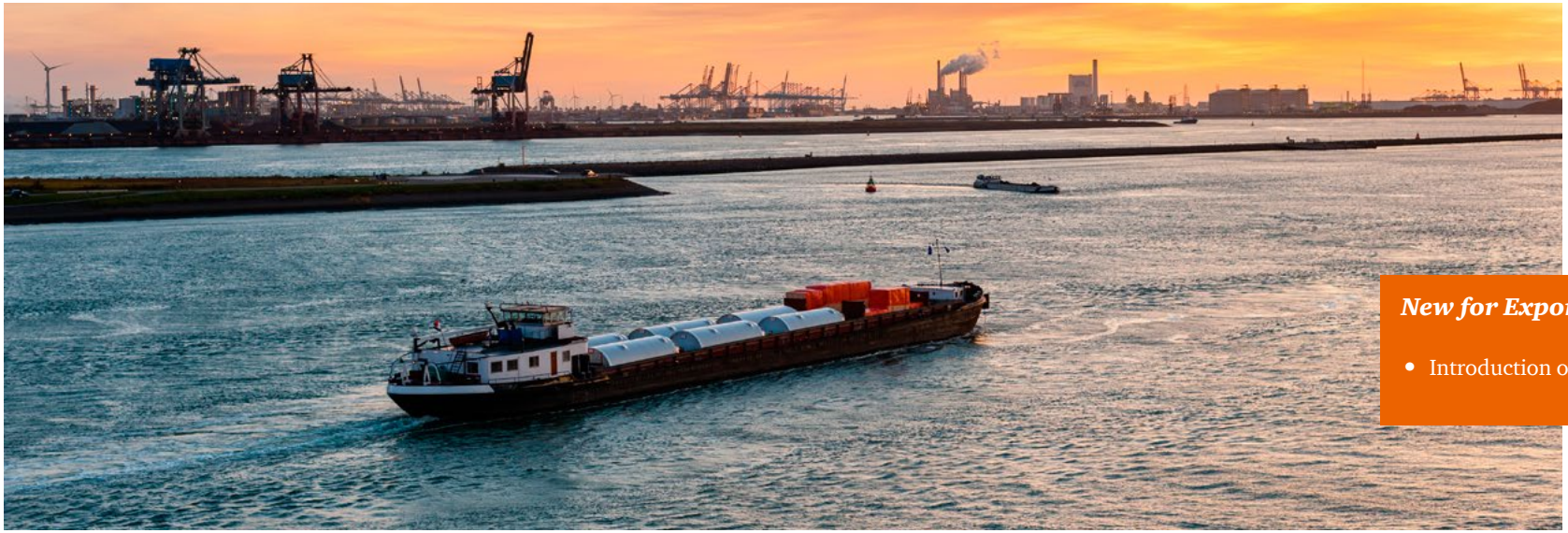
The Delegated Act contains a list of definitions - one of them is 'exporter'. The definition is strict and only refers to parties established in the EU. Does this mean that an non-EU entities may no longer act as exporter?

The current legislation contains an article referring to the entity that can/is to act as exporter. This, however, is not a general definition. It appears to be mainly there to determine which customs office is to be considered 'office of export'.

Under the UCC, a general definition of exporter is introduced. In this definition, exporters are defined as EU based parties. The question arising from this, is whether this means that indeed only EU based parties can be considered to be exporter? Furthermore, it triggers the question what this would mean for non-EU companies exporting from the EU from a VAT perspective?

Having discussed the above with the Authorities of some Member States, it is to be concluded that the interpretation is not (yet) uniform. Some Authorities state that in absence of an EU party in the supply chain, one should appoint a representative acting as exporter (in their own name and one their own account – in line with the rules for representation). Others informed us that the rules do not explicitly exclude the option of a non-EU entity to act as exporter and thus nothing will change compared to the current rules (a reply that appears to be in line with BTI applications by non-EU established parties –for which an EORI number appears to be the decisive criterion).

As an outcome for now, in cases where a non EU party is in fact exporting the goods, it is recommended to analyze the situation and where so required, acquire clarification from the specific Member State customs authorities.



New for Exporters

- Introduction of a general definition

Non-preferential origin

The implementation of the UCC will bring significant changes with respect to determining the non-preferential origin of goods. The list of qualifying operations is extended but not conclusive, the list of minimum operations will apply to all products and also a residual rule for all products is included. Below we will outline these changes. The basis of these changes can be found in the Delegated Act.

New for non-preferential origin

- More detailed rules introduced for detemining non-preferential origin
- 'Qualifing operations' extended but differs from WTO 'list rules'
- Residual rules introduced for all products

Every product is subject to non-preferential origin rules. Under the current legislation (CCC) the rules were only detailed for textile products. For all other products, it was more complicated to determine the non-preferential origin of products. The UCC introduces more detailed rules for determining the non-preferential origin.

The basic principle for determining the non-preferential origin of a product will not change. The basis for conferring non-preferential origin will remain:

- goods are wholly obtained in a single country or territory; or
- if the production of the goods involves more than one country or territory, it shall deem to originate from where it underwent its last, substantial, economically-justified processing or working in an undertaking equipped for that purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture.

It is on this 'last substantial processing', that the new rules provide more clarity and guidance.

Qualifying operations

The list in which so called 'qualifying operations' are mentioned (for goods to qualify as having a certain non-preferential origin) has been extended. Currently, this list is limited to (mainly) textile products. Where a substantial number of goods has been added to the list, the list does still not cover all chapters of the Combined Nomenclature (CN).

Furthermore, as the list of qualifying operations for non-preferential origin that has been included in the UCC is not an exact copy of the 'list rules' drafted by the WTO, it is important to assess (in case the current 'list rule' is applied to substantiate the non-preferential origin) whether this will remain applicable under the UCC.

When for products mentioned in this list of qualifying operations a 'rule' is mentioned then this rule is to be applied. However, in case there is no rule specified for a product in the list, the residual rules of the applicable chapter need to be applied - every (CN) chapter included in the list has residual rules.

Non-listed products/chapters

In case a product is not covered by the list of qualifying operations, it is to be evaluated where the product 'underwent its last, substantial, economically-justified processing or working'. While doing so, the 'list rules' of the WTO can still be of guidance. However as always has been the case, these 'list rules' may only be seen as providing guidance and are not to be considered legally binding.

In case the last processing or working is not considered to be substantial and/or economically-justified, then the non-preferential origin will be determined on the basis on the general residual rule, namely the country where 'the major portion of the materials originated, as determined on the basis of the value of the material'.

Minimum operations

Minimum operations are processing activities that will never qualify as being sufficient for a product to obtain non-preferential origin (based on that activity). Currently the list containing these minimum operations only applies to textiles. Under the UCC, this list will become applicable to all goods.

Thus, in preparation for the UCC, where applicable, it is advisable to consider whether the non-preferential origin of your goods still applies, especially in cases where multiple production phases in different countries are in place.

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For more information on this publiation and the possible impact on your business, please contact you local PwC tax advisor or the editors mentioned below.

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