

Terra/Wattel

# European Tax Law

*Volume II – Indirect Taxation*

Student Edition

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## PREFACE

This book is intended as a reference book for EU law and tax practitioners, administrators, academics, the judiciary, and tax law or Union law policy makers.

The present Volume 2 offers a systematic analysis of EU secondary legislation in the field of indirect taxation.

It is divided in four Chapters, as follows:

1. The Union Customs Code
2. The Recast VAT Directive
3. Excises and Energy taxation Directives
4. Administrative cooperation in the field of indirect taxes

This Seventh Edition has been edited by Marie Lamensch and Madeleine Merckx. They have also edited and elaborated the Chapters on the Recast VAT Directive and on administrative cooperation in the field of indirect taxes. The Chapters on the Union Customs Code and the Excises and Energy taxation Directives have been updated and elaborated by, respectively, Martijn Schippers and Ilona van den Eijnde.

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## CHAPTER 1

# The Union Customs Code

Update and elaboration by Martijn Schippers

### 1.1 Introduction

Article 28 TFEU provides that the Union shall comprise a customs union covering all trade in goods including the prohibition of customs duties between Member States on imports and exports and all charges having equivalent effect and the adoption of a common customs tariff in their relations with third countries. The provisions of the customs union apply to the products originating in Member States and to products coming from third countries which are in free circulation in the Member States.<sup>1</sup>

The general rules and procedures applicable to goods brought into or taken out of the customs territory of the Union<sup>2</sup> are laid down in the Union Customs Code (UCC), Regulation (EU) No. 952/2013.<sup>3</sup> The UCC is supplemented by the UCC Delegated Act (UCC DA), Regulation (EU) No. 2015/2446<sup>4</sup> with regards to non- essential elements. To ensure the existence of uniform conditions for the implementation of the UCC and a harmonized application of procedures by all Member States, the EC adopted the UCC Implementing Act (UCC IA), Regulation (EU) No. 2015/1447.<sup>5</sup> The UCC Transitional Delegated Act (UCC TA), Regulation (EU) 2016/341<sup>6</sup> establishes transitional rules for operators and customs authorities pending the upgrading or the development of the relevant IT systems to create a fully electronic

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1 Article 28(2) TFEU.

2 See Annex I for a comparison table between the customs territory, the VAT territory and the excise territory.

3 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (O.J. L 269, 10.10.2013, p. 1– 101).

4 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (O. J. L 343, 29.12.2015, p. 1).

5 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (O.J. L 343, 29.12.2015, p. 558).

6 Commission Delegated Regulation (EU) 2016/341 of 17 December 2015 supplementing Regulation (EU) 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 (O.J. L 69, 15.3.2016, p.1).



customs environment. These regulations along with the UCC Work Programme<sup>7</sup> setting out the planning of the IT systems constitute the UCC legal package.<sup>8</sup>

The UCC contains 9 Titles and 288 Articles. The UCC DA and UCC IA follow the same structure as the UCC and contain 9 Titles each. Combined they consist out of the impressive amount of 606 Articles and 76 Annexes. Our commentary below is restricted to the basic ideas of the UCC, UCC DA and UCC IA. It does, however, in section 1.2 explain how EU customs legislation fits into a Union's and broader international legal (customs) framework as this helps to understand how the legal package of the UCC is being applied and why it consists out of a basic, delegated and implementing act.

Basically, the provisions of the UCC can be arranged according to three themes:

- (1) General provisions (Titles I and IX) – section 1.3;
- (2) Methods of levying duties (Titles II and III) – section 1.4;
- (3) The system of formalities and supervision (Titles IV, V, VI, VII and VIII) – section 1.5.

## 1.2 Legal sources

### 1.2.1 *The international legal (customs) framework*

In the wake of World War II, initial steps have been taken to establish what are nowadays called the World Trade Organization (WTO) and the World Customs Organization (WCO). Under the auspices of these two organizations and their former appearances, international agreements have been concluded and soft law has been issued that regulate world trade. Examples of WTO agreements that found (partly) their way into the provisions of the UCC are the Agreement on Implementation of Article VII GATT 1994 (the Valuation Agreement) and the Agreement of Rules of Origin. Examples of WCO conventions that play an important role for the purpose of applying the UCC are the International Convention on the Harmonized Commodity Description and Coding System (HS Convention), the Customs Convention on the A.T.A. Carnet for the temporary admission of goods (A.T.A. Convention) (1961), the Istanbul Convention on Temporary Admission (1990) and the International Convention on the Simplification and Harmonization of Customs procedures (the Kyoto Convention) of which the revised version entered into force on 3 February 2006 (the revised Kyoto Convention).

As a member of the WTO, the EU is obliged to convert WTO law into its own legislation, and the EU should adhere to the WCO conventions to the extent they are a signatory party to those conventions. It is, however, established case-law of the ECJ that these agreements

<sup>7</sup> Commission Implementing Decision (EU) 2019/2151 of 13 December 2019 establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code (O.J. L 325, 16.12.2019, p. 168–182), replacing the earlier version of the Programme set out in Commission Implementing Decision (EU) 2016/578 of 11 April 2016 (O.J. L 99 15.4.2016 p. 6).

<sup>8</sup> COM(2018) 39 final.

and conventions do not confer rights on citizens of the EU which they can invoke before the EU and Member States courts.<sup>9</sup>

### 1.2.2 The EU Customs Union

The EU Customs Union has been existing since 1968 and is considered one of the greatest achievements of the EU and one of the fundamental pillars of the EU.<sup>10</sup> Its principles are that there is one external border, one common tariff and a common legislative framework. This common legislative customs framework consisted out of more than 100 regulations each regulating part of the Union's customs legislation until the Community Customs Code became applicable on 1 January 1994.

During the years 1992–1993 the European Commission completed what was hailed at that time as 'the most far-reaching project of legislative consolidation ever undertaken in a field subject to Community law', by introducing the Community Customs Code (CCC), Regulation (EEC) No. 2913/92<sup>11</sup> and the implementing code (CCIP), Regulation (EEC) No. 2454/93.<sup>12</sup> With one stroke of the pen (or actually two) over one hundred (106) regulations and directives were repealed and replaced by 1168 Articles and 113 Annexes.<sup>13</sup> In addition to the CCC and the CCIP, two other regulations remained in force, dealing with specific areas of customs law, Regulation (EEC) No. 2658/87 on the customs tariff<sup>14</sup> and Regulation (EEC) No. 918/83, replaced by Regulation (EC) No. 1186/2009 setting up a Community system of reliefs from customs duty (codified version) from 1 January 2010.<sup>15</sup>

In its Communication to the Council and the European Parliament on a simple and paperless environment for customs and trade the Commission announced that it would modernize

9 Case 21 to 24-72 (*International Fruit Company NV and others v Produktschap voor Groenten en Fruit*), [1972] ECR 01219. There seem to be only two exceptions to this rule which can be derived from the Case C-69/89 (*Nakajima All Precision Co. Ltd.*), [1991] ECR I-02069 and C-70/87 (*Fediol*), [1989] ECR 01781. The ECJ held in these cases that provisions of the WTO agreement cannot be directly invoked in the Union or Member State courts, unless the Union intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements.

10 Celebrating the Customs Union: the world's largest trading bloc turns 50, press release of 30 June 2018 ([https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4265](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4265)) and M.L. Schippers & W. de Wit, Reflections on the 50<sup>th</sup> anniversary of the EU Customs Union, *Erasmus Law Review*, 13 (3), 217-218.

11 Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (O.J. L 302, 19.10.1992, p.1).

12 Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (O.J. L 253, 11.10.1993, p. 1).

13 In Case C-161/06 (*Skoma-Lux*), [2007] ECR I-10841, the ECJ held that the obligations contained in the Customs Code which had not yet been published in the Official Journal of the European Union in the language of a new Member State (Czech), where that language is an official language of the European Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means.

14 Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (O.J. L 256, 7.9.1987, p. 1).

15 O.J. 2009 L 324 p. 23.

and simplify customs rules and processes.<sup>16</sup> On 23 April 2008, Regulation (EC) No. 450/2008 was adopted laying down the Modernised Customs Code (MCC).<sup>17</sup> As the Lisbon Treaty<sup>18</sup> introduced a new legal framework with new rules and procedures concerning the adoption of implementing provisions accompanying main regulations, the Commission was obliged to recast the MCC into the UCC.

On 20 February 2012 a proposal was published by the Commission to recast the MCC, including articles empowering the Commission to adopt detailed supplementing and implementing rules. This resulted in the UCC legal package consisting out of the UCC, UCC DA, UCC IA, UCC TA, and Work Programme (section 1.1).<sup>19</sup> The UCC, being the basic regulation of the UCC legal package, was published on 9 October 2013 and entered into force on 30 October 2013. Most substantive provisions of the UCC are, however, applicable since 1 May 2016 and on that date it repealed and replaced the previous framework for customs legislation, contained in the CCC and CCIP.

### 1.3 General Provisions (Titles I and IX)

The general provisions of the UCC can be found in Titles I (General provisions) and IX (Electronic systems, simplifications, delegation of power, committee procedure and final provisions).

#### 1.3.1 The General Provisions of Title I

##### 1.3.1.1 Scope of the customs legislation, mission of customs authorities and definitions

The 'general provisions' of Title I start in Article 1 and 5(2) UCC by stipulating that the Code, its supplementing and implementing provisions – at Union or national level –, the Common Customs Tariff, legislation setting-up a Union system for reliefs from customs duty and international agreements containing customs provisions, insofar as they are applicable in the Union, form the customs rules. They apply to trade between the EU and third countries, to goods covered by the Treaties.

<sup>16</sup> COM(2003) 452.

<sup>17</sup> O.J. 2008, L 145, p. 1.

<sup>18</sup> O.J. C 306, 17.12.2007, p. 1–271.

<sup>19</sup> In addition, explanatory notes and guidelines (commonly referred to as 'soft law') have been issued to provide guidance to Member States and/or stakeholders in applying and implementing EU customs law. The explanatory notes to the Combined Nomenclature and the TARIC (see section 1.4.2.1) are explicitly mentioned in Article 9(1)(a), second indent, of Regulation (EEC) No. 2658/87 and have been recognised by the ECJ as important aids to the interpretation of Union customs law. There is no fundamental structural difference between the explanatory notes and the guidelines. The "explanatory notes" explain, if anything, the content of a specific article whereas the "guidelines" describe the practices to be followed. Apart from the explanatory notes to the Combined Nomenclature and the TARIC, guidance documents also exist, for example, in the following fields: customs decisions, data integration and harmonization, AEO, decisions on binding information, origin, valuation, debts and guarantees, entry and import, simplifications, transit and customs status, special procedures, export, military mobility, customs representation and return-refill containers.

The second paragraph of Article 1(1) UCC provides:

Without prejudice to international law and conventions and Union legislation in other fields, the Code shall apply uniformly throughout the customs territory of the Union.

The mission of the customs authorities is set-out in Article 3 UCC. It becomes clear from this article that the customs authorities are not only responsible for levying customs duties, but also has missions and competences in the field of safety, health, the economy and environmental protection.

Article 4 UCC defines the customs territory. Here we encounter the first problem with regard to the indirect taxes since the customs territory is not identical to the territory where the European VAT system applies. When goods are within the customs territory, but in an area where VAT does not apply the movement of these goods within the customs territory to and from the area where VAT does not apply must be treated as importation or exportation (see Chapter 2, section 2.4), which clearly complicates legislation and is difficult to supervise.

The rather extensive Article 5 UCC is extremely useful for those who are 'starters' in the field of customs law. It offers a range of definitions such as Union goods, import duties and the pivotal concepts of 'customs procedure' and 'special procedure'. The definition of what is referred to as 'Union goods'<sup>20</sup> is set forth below (Article 5(23) UCC):

'Union goods' means goods:

- goods wholly obtained in the customs territory of the Union and not incorporating goods imported from countries or territories outside the customs territory of the Union, or
- goods brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation, or
- goods obtained or produced in the customs territory of the Union, either solely from goods referred to in the second indent or from goods referred to in the first and second indent.

'Non-Union goods' are goods other than those referred above. In principle, Union goods lose their status as such when they are actually removed from the customs territory of the Union.

The heart of the UCC is Title V dealing with, among others, placing goods under a customs procedure which means that goods are either released for free circulation, placed under a special procedure (e.g. transit, storage, specific use or processing) or exported from the customs territory of the Union. See further, section 1.5 below.

### 1.3.1.2 *Rights and obligations of persons with regard to the customs legislation*

Articles 6 through 55 UCC deal with rights and obligations in customs law regarding:

- exchange and storage of information and common data requirements;
- the right of representation (the representation acting in the name and for the account of another person or – the indirect representation – acting in one's own name but for the account of another) (section 1.3.1.3);

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<sup>20</sup> See also Art. 153 UCC on which goods are deemed to be Union goods.

- the possibility to obtain decisions from the customs authorities, including decisions on binding information with regard to tariff classification (BTI) and origin (BOI), valid throughout the customs union (section 1.3.1.4);<sup>21</sup>
- obtaining the status for authorised economic operator (AEO) (section 1.3.1.5);
- the obligation of Member States to provide for penalties for failure to comply with the customs legislation in their own national legislation;
- the right to an administrative decision with the right to appeal (section 1.3.1.6);
- the right for customs authorities to carry out any customs controls they deem necessary;
- keeping of documents and other information, and charges and costs.

### 1.3.1.3 Representation

Performing acts and formalities under the customs legislation most often requires special IT systems/applications and ‘in-house’ customs expertise. In particular where customs operations are not a person’s ‘daily business’, that person may want to appoint another person in the capacity of customs representative that carries out the acts and formalities required under the customs legislation in his or her dealings with customs authorities on his or her behalf (Art. 5(6) UCC). If a person wants to import goods into the customs territory of the Union and is not established in that customs territory, that person needs to appoint an indirect customs representative. The reason is that the declarant needs to be established in the customs territory of the Union (Art. 170(2) read in conjunction with Art. 5(15) UCC).

A distinction can be made between a direct and indirect customs representative. A direct customs representative is acting in name and on behalf of the other person, where an indirect customs representative shall act in its own name, but still on behalf of that other person (i.e. the represented party). Irrespective of whether a person appoints another person in the capacity as customs representative, the represented party remains (one of) the person(s) liable for any customs debt that may occur. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor (see section 1.4.1.1).

A person that acts as customs presentative needs to be empowered in accordance with the requirements laid down in Article 19 UCC, because without being empowered the representative shall be deemed to be acting in their own name and on their own behalf. Additionally, a customs representative needs, in principle, to be established in the customs territory of the Union. Member States may set further requirements. Without prejudice to the application of less stringent criteria by the Member State concerned, a customs representative who complies with the criteria for an AEOC license (see section 1.3.1.5) shall be entitled to provide such services in a Member State other than the one where he or she is established.

<sup>21</sup> Article 35 UCC opens the possibility to obtain binding information regard to other factors referred to in Title II. As binding information with regard to tariff classification and origin can already be requested for based on Article 33 UCC, the only factor left from Title II is valuation. The lack of delegated and implementing acts seem at this point in time unable market operators from requesting for a binding information with regard to the valuation of imported goods.

#### 1.3.1.4 Binding Tariff Information

A BTI includes information in respect of the tariff classification of goods and is binding for a period of three years on the customs authorities, as against the holder of the decision, and on the holder of the decision, against the customs authorities. Safeguards are built in, such as an amendment to the Combined Nomenclature (CN) or a judgment of the ECJ, in which cases the holder of the binding information may still use that information for a period of six months if the conditions of Article 34(9) UCC are fulfilled.<sup>22</sup> It should be noted that the tariff information is binding on the customs authorities, *i.e.* it is not restricted to the Member State where the holder of the information is established.<sup>23</sup>

On 15 September 2005, the ECJ decided Case C-495/03 (*Intermodal Transports*)<sup>24</sup> concerning the classification in the CN of certain vehicles referred to as 'Magnum ET 120 Terminal Tractors'. The first question referred for a preliminary ruling relates to the relevance of binding tariff information issued by customs authorities of a Member State for the purposes of assessing whether the national courts of another Member State before which a question of tariff classification is raised are under an obligation to ask for a preliminary ruling. The ECJ (First Chamber) ruled that Article 234 EC (now Article 267 TFEU) must be interpreted as meaning that when, in proceedings relating to the tariff classification of specific goods before a national court or tribunal, a binding tariff information relating to similar goods

22 In Case C-315/96 (*Lopex Export GmbH*), [1999] ECR I-1287, the ECJ held that the aim of binding tariff information is to enable the trader to proceed with certainty where there are doubts as to the classification of goods in the existing customs nomenclature, thereby protecting him against any subsequent change in the position adopted by the customs authorities with regard to the classification of the goods. However, such information is not aimed at, nor can it have the effect of, guaranteeing that the tariff heading to which the trader refers will not subsequently be amended by a measure adopted by the Community legislature. See also Joined Cases C-133/02 and C-134/02 (*Timmermans Transport and Hoogenboom Production*), [2004] ECR I-1125, in which the ECJ held that where, on more detailed examination, it appears to the customs authorities that the interpretation based on which a BTI is issued is wrong, following an error of assessment or evolution in the thinking in relation to tariff classification, they are entitled to consider that one of the conditions laid down for the issue of a BTI is no longer fulfilled and to revoke that BTI with a view to amending the tariff classification of the goods concerned.

23 In Case C-199/09 (*Schenker SIA*), [2010] ECR I-12311, the ECJ held that an application for BTI may relate to different goods provided that these all belong to one and the same type of goods. Only goods which have similar characteristics and whose distinguishing features are completely irrelevant for the purposes of their tariff classification may be regarded as belonging to one type of goods for the purposes of that provision. In Case C-153/10 (*Sony Logistics*), [2011] ECR I-02775, the ECJ held that a person who makes customs declarations in his own name and on his own behalf cannot rely on a binding tariff information of which he is not the holder, but which is held by an associated company on whose instructions he made those declarations. However, a BTI may be relied on as evidence by a person other than its holder. The Dutch customs authorities, responsible for applying European Union law, attributed to a BTI the same legal value whether it was invoked by a third party or its holder. According to the ECJ, those authorities, by applying the customs manual, acted in a manner which was inconsistent with European Union law and that conduct could not give rise to a legitimate expectation on the part of traders. In Joined Cases C-288/09 and C-289/09 (*BskyB, Pace*), [2011] ECR I- 02851, the ECJ held *inter alia* that, where a regulation updating the Combined Nomenclature is adopted and that regulation does not set a time period during which the holder of a BTI which has ceased to be valid can nonetheless continue to rely on it, that holder is not entitled to continue relying on that BTI.

24 Case C-495/03 (*Intermodal Transports*), [2005] ECR I-8151.

issued to a person not party to the dispute by the customs authorities of another Member State is submitted, and that court or tribunal takes the view that the tariff classification made in that information is wrong, those two circumstances:

- cannot result, in respect of a court or tribunal against whose decisions there is a judicial remedy under national law, in the court or tribunal being under an obligation to refer to the ECJ questions on interpretation;
- cannot, in themselves, automatically result, in respect of a court or tribunal against whose decisions there is no judicial remedy under national law, in the court or tribunal being under an obligation to refer to the ECJ questions on interpretation.

A court or tribunal against whose decisions there is no judicial remedy under national law is, however, required, where a question of Union law is raised before it, to comply with its obligation to make a reference, unless it has established that the question raised is irrelevant or that the Union provision in question has already been interpreted by the ECJ or that the correct application of Union law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Union law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Union; the existence of the above-mentioned binding tariff information must cause that court or tribunal to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the combined nomenclature, taking account, in particular, of the three criteria mentioned above.

#### 1.3.1.5 *Authorized Economic Operator*

Member States grant the status of *authorised economic operator* (AEO) to any economic operator that meets common criteria relating to the operator's control systems, financial solvency and compliance record since 2005. An economic operator with the AEO status is considered a trusted trader in the eyes of the customs authorities and confers certain benefits for the economic operator. The status of AEO, once granted by one Member State, must be recognised by the other Member States, but does not confer the right to benefit automatically in the other Member States from simplifications provided for in the customs rules. However, the other Member States must allow the use of simplifications by authorised economic operators provided they meet all the specific requirements for use of the particular simplifications. In considering a request to use simplifications, the other Member States need not repeat the evaluation of the operator's control systems, financial solvency or compliance record, which already have been completed by the Member State that granted the operator the status of authorised economic operator, but should ensure that any other specific requirements for use of the particular simplification are met.

#### 1.3.1.6 *The Right to Appeal*

Section 6 of Title I provides that any person has the right to appeal against decisions taken by customs authorities which concern him directly and individually. This right may be exercised initially before the designated customs authorities and subsequently before an independent body. Thus, appeal in two stages is guaranteed.

In Case C-1/99 (*Kofisa*)<sup>25</sup> two questions were referred to the ECJ. The first question was whether an appeal against the decisions of the customs authorities may be brought directly before the judicial authority or whether it must be brought before the customs authority first; in other words, is an appeal in two stages compulsory? According to the ECJ, the Union legislature did not preclude that national law might authorize a trader, in appropriate circumstances, to lodge an appeal directly before an independent authority. Nor is there anything in the Union legislation to support the conclusion that it authorizes a trader to bypass an appeal before the customs authority and appeal directly to the independent body, where under the applicable national law an appeal to the customs authority is mandatory.

The second question was whether Article 244 CCC (now Article 45 UCC) confers the power to suspend implementation of a contested decision exclusively on the customs authorities or whether it also confers such powers on the judicial authorities. (*Kofisa* has asked the Italian court suspension of the collection of ITL 1,112,526,600 in VAT plus interest on the ground of misapplying the ceiling of imports.) According to the ECJ, Article 244 CCC confers power exclusively on the customs authorities. But the ECJ held:

46. However, that provision cannot restrict the right to effective judicial protection. The requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Case 222/86 *Unectef v. Heylens*, paragraph 14, and Case C-97/91 *Oleificio Borelli v. Commission*, paragraph 14).

47. In the exercise of their control, it is for the national courts, pursuant to the principle of cooperation laid down in Article 5 of the EC Treaty (now Article 10 EC), to ensure the legal protection which persons derive from the direct effect of provisions of Community law (Case C-213/89 *Factortame and Others*, paragraph 19). 48. With more specific regard to the possibility of suspending implementation of a decision of a customs authority, it should be pointed out that a court seized of a dispute governed by Community law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law (*Factortame*, cited above, paragraph 21).

Thus, an unequivocal provision must yield for a general principle of Union law and of the European convention (the requirement of judicial control), as well as for the fundamental principle of cooperation.<sup>26</sup>

### 1.3.2 Final Provisions

In Title IX, Articles 278 to 281 UCC deal with the development of electronical systems and provide for transitional measures for some explicitly mentioned provision where their application depend on electronic data-processing techniques that are not yet operational. Under conditions, Member States are allowed to test simplifications for a limited period.

<sup>25</sup> Case C-1/99 (*Kofisa*) [2001] ECR I-0207.

<sup>26</sup> See also Case C-130/95 (*Bernd Giloy*), [1997] ECR I-1492.



In the UCC, 39 provisions empower the Commission to adopt delegated acts and 47 provisions empower the Commission to adopt implementing acts, which aligns EU customs legislation with the requirements of the Lisbon Treaty. With regard to the delegation of power to the Commission, the conditions and committee procedure are laid down in Articles 284 and 285 UCC. In executing its delegating power, the Commission may only adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the UCC according to Article 290(1) TFEU. When executing its implementing powers the ECJ held that '[...] *the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements*'.<sup>27</sup> If the Commission nevertheless exceeds its delegated or implementing powers, the ECJ may seek action for annulment of the particular provision in the delegated or implementing act.<sup>28</sup>

The last Article of the Code provide that the Code applies from 1 May 2016.<sup>29</sup> The provisions conferring delegating and implementing power to the Commission and Articles 52 ('Cost and charges'), 284 ('Exercise of the delegation'), 285 ('Committee procedures') and 286 ('Repeal and amendment of legislation in force') UCC already applied as from 30 October 2013.<sup>30</sup> Finally, the MCC, CCC, CCIP and Regulation (EC) No. 1207/2001<sup>31</sup> have been repealed as of 1 May 2016.

#### 1.4 Methods of Levying Duties (Titles II and III)

Two Titles deal with this subject:

- II. Factors on the basis of which import duties and export duties are applied (section 1.4.2);
- III. Customs debt and guarantees (section 1.4.1).

<sup>27</sup> See Case C-65/13 (*European Parliament v European Commission*), [2014] ECLI: EU:C:2014:2289.

<sup>28</sup> In literature it is argued that certain provisions in the UCC DA and UCC IA alter the scope of UCC and should therefore be declared invalid by the ECJ in case an action for annulment is started. In that regard reference can be made to Article 33 UCC DA which contains an anti-avoidance rule for non-preferential origin which should, according to Melin and Arnold, be declared invalid, see Y. Melin and D. Arnold, Non-Preferential Customs Origin Under EU Law, *GTJ* 14(10), p. 455. Schippers argues that Article 128(1) UCC IA, prescribing that the transaction value in a succession of sales should be determined based on the last sale of export, should be declared invalid, see M.L. Schippers, A Series of Sales: Determining the Customs Value Under the Union Customs Code, *GTJ* 13(2), p. 44-45.

<sup>29</sup> Originally Article 288(2) UCC stipulated that the provisions of the UCC, other than those mentioned in Article 288(1) UCC, would apply as from 1 June 2016. This was corrected soon after the publication of the UCC in the Corrigendum to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (O.J. L 269, 10.10.2013, p. 1) O.J. L 287, 29.10.2013, p. 90-90.

<sup>30</sup> Article 288(1) UCC.

<sup>31</sup> Council Regulation (EC) No 1207/2001 of 11 June 2001 on procedures to facilitate the issue of movement certificates EUR.1, the making-out of invoice declarations and forms EUR.2 and the issue of certain approved exporter authorisations under the provisions governing preferential trade between the European Community and certain countries and repealing Regulation (EEC) No 3351/83, O.J. L 165, 21.6.2001, p. 1-12.