

# From bad to worse ?!

The European Union's new Union Customs Code (UCC):  
The new definition of transaction value & abolishment of first sale



*In this news flash the now proposed changes of the customs valuation rules in relation to the definition of the transaction value will be discussed including the consequences and what it means for business in daily routine*

## Executive summary

The currently proposed texts of the Implementing Act of the UCC create uncertainty on which transaction value is to be used for customs valuation purposes.

This lack of clarity and the fact that the concept of first sale will be abolished, will make it necessary for every importer in the EU to analyse the customs value now declared and review whether it can still be used under the UCC (per May 2016).

As a striking example, we mention the use of the wording 'immediately before' in the now proposed text. This may easily lead to the interpretation that a sale between a Far East manufacturer and an EU buyer that occurs at the harbour of dispatch is denied because the ship only arrives 6 weeks later, this as the sale does not occur immediately before arrival at the EU territory. In such a case a later, higher value may have to be used as the basis of valuation or an alternative method may have to be applied where no other transaction is available.

Although the applicability of the UCC is still more than a year away, **action is required now** in order to be able to manage potential effects and resolve issue that may arise, where possible in co-operation with the Customs Authorities.

## A short recap

In the EU, for decades the system of customs valuation has been used in a harmonious and effective manner. Through the basic definition of article 29 of the Community Customs Code (CCC) and the further explanation in article 147 of the Implementation Regulation of the CCC, the transaction value that can be used as the basis for the customs value is defined in such way that both the regulatory aspects as well as the practical needs of business are met. Depending upon the specific situation, different transactions in a chain of sales can be used as long as it is clear that the goods subject of that sales are exported destined for the EU, which can also be a sale that happened before the goods physically entered the territory of the EU; better known as an earlier or first sale. This in fact is in line with the basic wording of the WTO valuation Code and is similar to the practise in place in the US.

Apparently, this was no longer wished for. When in 2008 the Modernised Customs Code was adopted (which never became applicable though), the work started on the Implementing Regulation of that Code. Soon it became clear that in the drafts of the provisions on customs valuation, the wording was very limitative, trying to only allow the transaction value that relates to the last sale based upon which the goods entered the territory of the EU. This attempt to define what constitutes a ‘sale for export’ under the definition of the transaction value led to discussions which showed that such is very difficult, if not impossible, whereas in fact the existing text of article 147 of the Implementing Regulation to the CCC (Reg. 2454/93) showed to be one of the most clear definitions one can arrive at.

Following this, the discussion got quiet as it was decided to replace the MCC by a new, adopted version of the customs code now named the Union Customs Code (UCC – Regulation 952/2013). Soon after publication of this new customs code, which will become applicable as of May 1, 2016, a renewed effort started to draft the implementing regulation for this Code (mainly based upon the work already in place on the MCC). After some earlier drafts, which were already showing that the earlier discussion fully revived, a final draft has been published early March.

## The latest draft

Recently, the final draft of the delegated and implementing acts on the UCC have been made public by the EU Commission (TAXUD/UCC-DA/2014-4 and TAXUD/UCC-IA/2014-4). Although on many aspects agreement on the implementing provisions was already in place, there were and still are elements / articles that are subject to discussion. This latest draft, required for the UCC to become applicable in May 2016, as we understand is now subject to the inter-services consultation within the EU Commission departments, which are expected to be finalised early April 2015.

The expectation is that this will not result in many changes/ further adjustments to the wordings of the current drafts. The Implementing Act, in which most of the articles on customs valuation are included, will then follow the Committee procedure and only be subject to one overall final approval.

As stated, in this news flash, we particularly focus on the wording of the articles that define the transaction value that can be used for customs valuation. For a good understanding, it is needed to take a close look at the actual text as now included in the proposed text for the implementing act – article IA-II-3-02:

1. *For the purposes of article 70(1) of the Code (add. PwC =UCC), the transaction value of goods shall be determined at the time of acceptance of the customs declaration on the basis of the sale occurring immediately before the goods are brought into the customs territory of the Union (add. PwC =EU).*
2. *Where goods have not been sold for export to the customs territory of the Union before having been brought into that customs territory, the transaction value shall be determined on the basis of their sale at the moment the goods are in temporary storage or placed under a special procedure other than internal transit, end use or outward processing (add. PwC =i.e. goods under suspension of customs duties such a customs warehousing, inward processing external transit etc.).*

## What does this mean?

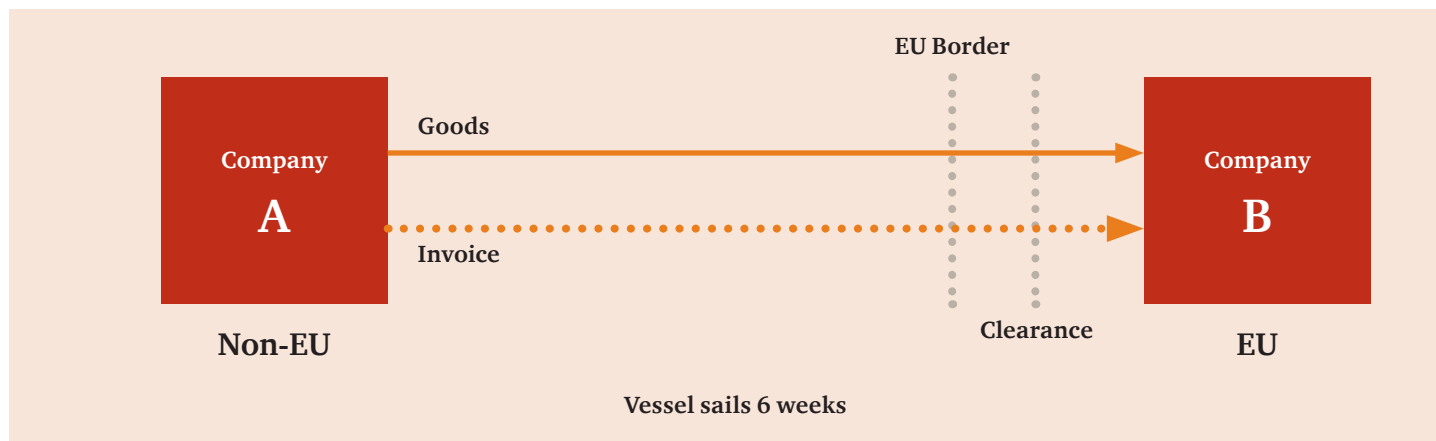
Looking at this draft text for the definition of transaction value, the first conclusion is that distinct changes are in place from the present customs valuation regulation and policy in the EU:

- There no longer will be a possibility to choose a transaction value in a chain of sales, only one sale qualifies:
  - Either the sale that occurs immediately before the goods enter the customs territory of the EU, or, in case such sale is not in place,
  - A sale that takes place while the goods are under customs suspension after entering the customs territory of the EU (i.e. before being cleared for free circulation in the EU)

and thus leads to:

- the abolishment of the use of and earlier or first sale, i.e. the present system where any sale that was destined for the EU but which took place before the last sale based upon which the goods entered the customs territory of the EU.

While it is clear that it is the **intention** of the EU to narrow the option to use the transaction value from any sale in a chain of sales (in which each sale itself already could qualify as ‘a sale for export to the EU’), to only one sale, the current wording is not sufficiently clear and therefore the question is whether it fits its purpose.



## Will it do what it intends to do?

While the abolishment of first sale seems to be clear, instead we now are facing the question which sale in practice can be used as a basis for transaction value.

The revised text is meant to create a uniform application of one and the same transaction as the basis for the customs value, however in fact it may **create the opposite** through the choice of the wording “immediately before”. Immediately before is typically understood to refer to a time frame and may therefore (in some Member States) be understood as limiting the transactions to only those that occur directly before the moment of arrival of the goods at the EU territory.

As a result a sale of products that occurred in for example a Chinese harbour of dispatch when the products are loaded into a vessel, may then be denied as the basis for customs value, as the ship sails a couple of weeks before arriving in an EU port (so the sale is not immediately before arriving). Where no other sale is available, alternative methods will have to be applied, which is clearly not in line with the basic principles of the transaction value methodology.

Furthermore, there is no definition of what a sale is. This however will be an absolute requirement as the sale that can be used is limited to one and no choice is in place like now is the case. Will there only be a sale when there is an invoice? Or is there already a sale when there is a purchase order? Does the sale occur when there is a legal obligation on the transfer of ownership? Also, now that no definition is in place, things are further complicated as almost every Member State has its own definition of a sale/supply under civil law.

Due to the lack of a definition, it is unclear what the basis can be and thus also whether and when that basis will be available. This leads to the risk of different treatment in the various EU Member States, as a result of which still the intended uniform application will not be in place.

But even more problematic is the fact that the legislation itself as worded now, does not provide clarity to importers, who will initially have to depend on their local customs authorities' interpretation and application.

We understand that representatives of the EU Commission have given some unofficial comments, where they have explained their views. Apparently, their aim is to have the sale from a non-EU seller, e.g. in the Far East, to an EU buyer as the basis for the customs value. Where such EU buyer would subsequently sell the products to another EU buyer before the goods have entered the EU territory, that latter sale is considered to be an internal EU sale. This ‘internal’ EU sale does, in their view, not qualify as a sale destined for the EU and should therefore not be the basis for customs valuation in that scenario.

The above views would mean that there then should not be an issue with respect to the interpretation of the wording ‘*immediately before*’. However, these views are not official nor are they published. Although we understand that the intention is to publish guidelines, it is uncertain whether this will be the case and if so, what the legal value will be in case a guideline adds elements which are not in the text of the Code itself. Furthermore, practise has shown that guidelines of the Commission are not always applied by the Member States.

Thus uncertainty remains, whereby the wording of the Implementing Act gives in itself no basis for the views as described, e.g. on what basis would a sale between two EU parties - while the goods are on high seas - not qualify, and who prevents Customs in any EU Member State to still apply such sale as the basis for customs valuation? Furthermore, what happens if the intermediate buyer will sell the products to a non-EU client whilst the goods are being delivered to a EU destination?

## For whom will the changes have an impact?

Obviously, those importers that are applying an earlier or first sale should review to which extent they will have to adjust their valuation strategy.

Furthermore, although the discussions on the revised customs valuation rules have often focussed on the abolishment of first sale, it are certainly **not only the importers that are applying first or earlier sales transactions** as the basis for their customs value, **to whom the changes will have an impact**. Based upon the lack of clarity, other importers may be forced to adjust their basis for valuation as well. For instance apart from the situations as described above, what about companies that consolidate shipments before (further) shipment to the EU, or companies that do have pre-orders from EU customers.



# Transition arrangement

New in the latest version is a draft for a transition arrangement. This Article IA-II-3-02a (230-02-IA) ‘Temporary alternative rule on transaction value’ intends to create a kind of period of grace for the application of first sale until 31 December 2017. However, also here a closer look into the actual wording of Article IA-II-3-02a (230-02-IA) reveals that it may not achieve its objective:

1. For the purposes of Article 70(1) of the Code, the transaction value of the goods may be determined on the basis of a sale occurring before the sale referred to in Article IA –II-3-02 (1), where the declarant is bound by a contract concluded prior to the entry into force of this Regulation and referring to that sale to determine the price paid or payable, and can prove it to the satisfaction of the customs authorities.
2. This Article shall apply until 31 December 2017.

The article makes the transition arrangement only applicable for the declarant that is bound by a contract, i.e. this only occurs where the **declarant** is one of the parties involved in the transaction, for example in case the buyer itself submits the import declarations or where he is represented by a customs agent through direct representation. If, however, the buyer does not qualify as a declarant under the legislation, the sunset clause will not be applicable.

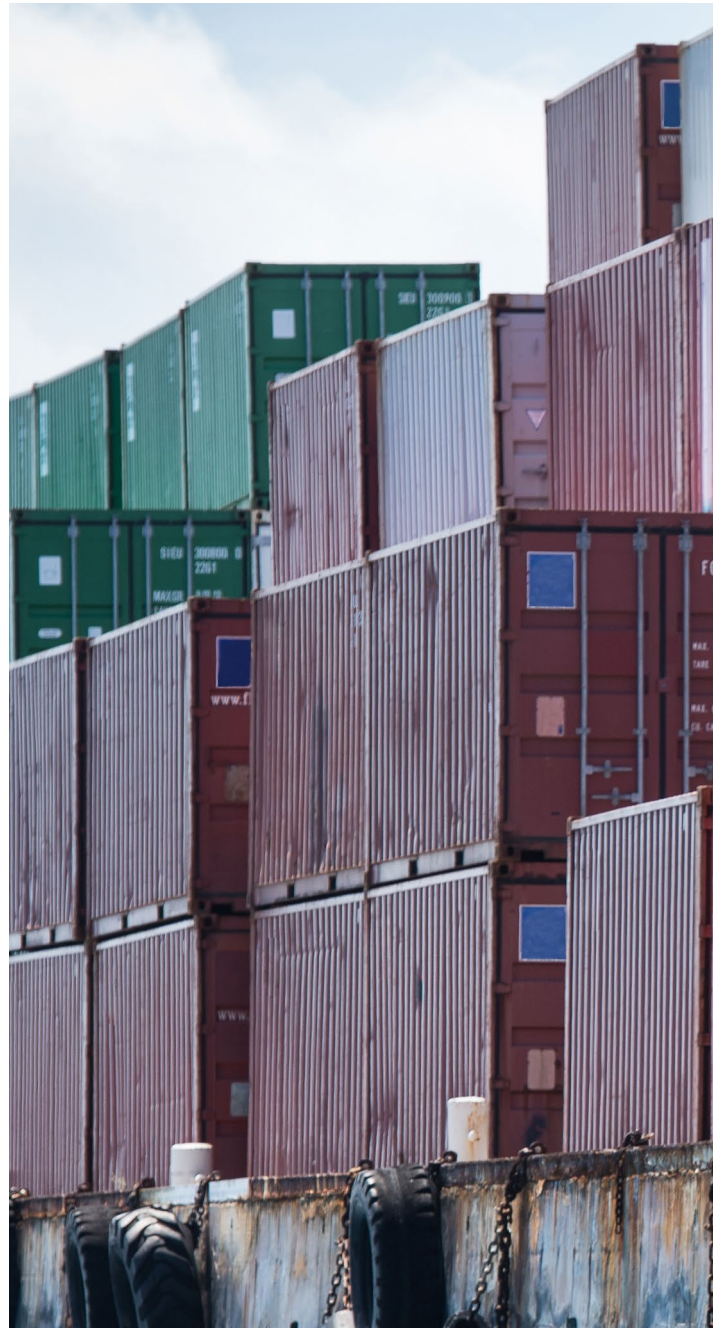
Furthermore, the contract should make reference to the first or earlier sale to be used as the basis for the customs value. Such clauses are very uncommon and unlikely as the seller does typically not have any interest in the manner in which the buyer will report his customs value.

Therefore, in our view, the transition arrangement (‘sunset clause’) likely will not be applicable in most of the regular import flows where first sale currently applies. In this respect, we are wondering why not a similar clause has been chosen as is in place in case a BTI is withdrawn, i.e. an existing contract and an existing, customs approved application of a first or earlier transaction.

## What should you do?

In view of the lack of clarity on which transaction should/can be used as the basis for the customs value upon import into the EU, **all importers** are advised to review their customs valuation processes and verify whether adjustments may be required on the basis of the new proposed legislation.

While reviewing the customs value position, you can seek assistance from your regular customs advisor or a PwC customs expert and / or liaise with the local customs authorities in the country of importation to verify how they will interpret and apply the revised legislation and where possible obtain confirmation from your local customs authorities.



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