

The Revised UCC Definition of Exporter

An Analysis into the Relevance of the Revision and its Impact on Business & Trade

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EXECUTIVE SUMMARY

The revised UCC definition of Exporter has brought a wave of discussions among Customs, Business & Trade. The dimension this matter has gained by the media and press releases, bring us to give attention to this matter. The question that remains is if stakeholders have overrated the overall impact.

This research aims, therefore, to understand '*what is the impact of the revised definition of exporter on business and trade?*' For this end, three sub-questions were asked, namely (1) '*How can we scope the impact of the revised UCC definition of exporter on Business & Trade?*'; (2) '*What are the Customs and non-Customs related implications?*'; and lastly, (3) '*From a legal perspective, how relevant was to revise the definition?*'.

The first question aims to scope the impact of the revised UCC definition of Exporter on business & trade. For this end, a preliminary stakeholder identification¹ has been applied for a high-level understanding on the groups and persons directly or indirectly involved in the matter, namely: non-EU established businesses, Forwarding agent Associations (NL&EU), Forwarding agents (NL & EU), Ministry of Foreign Affairs, TAXUD, NL Customs, Overall EU business.

Once identified the stakeholders, we investigate who is the population impacted by the revised definition. This share is represented by all non-EU established businesses currently bringing Union goods out of the customs territory of the EU via Export. Surprisingly, export entries lodged² under indirect representation represents a high percentage. In the year 2019, almost one of each five entries were under indirect representation³. The other relevant figure was the growth trend shown from one year to the other.

Therefore, considering the significant portion of export entries under indirect representation, and the growth trend that these indicate, we may conclude that the scope of impacted business due to the revised definition is not limited.

The numbers above give us a notion of how many companies are impacted by the revised definition. However, it does not indicate how much they are impacted.

To understand how affected the population became, we investigate if there are alternatives available to businesses in order not to disrupt the flow of goods. We identified four main categories composing the split of the chosen alternative solutions by non-EU exporters⁴, namely revision of the sales incoterm, appointment of an

¹ See section 4.2 (Stakeholder analysis)

² in the Netherlands

³ Note as well that UK-established companies would, post-Brexit, no longer be able to act as exporter, directly increasing the number of non-EU companies impacted

⁴ See section 4.3.2 (Alternative solutions)

affiliated company to act as the exporter⁵, appointment of a forwarding agent as the exporter⁶, and lastly, are the ones establishing themselves in the EU⁷.

Most likely, the first step these impacted companies will take will be assessing if any of the alternative solutions available to them are, in fact, feasible to be achieved. This is an exercise highly dependent on the particularities of each business set up, internal group policies, and timeframe available⁸. In case a feasible alternative is found, the assumption is that no further claim nor further petition will be raised as the impact is reasonable small/accepted.

The second question we aim to answer in this research is: '*what are the Customs and non-Customs related implications?*'.

For those parties willing to act as an exporter on behalf of those non-EU established exporters which, given the revised definition of Exporter can no longer act as such, what implications, from a customs and non-customs perspective, should be considered?

From a customs perspective, the responsibilities appointed to the Exporter of Union goods are exactly the same as the ones appointed to the other two parties involved in the export, namely the Declarant and the Representative. Any representative currently acting as an indirect representative could take the additional role of exporter without considering that this will signify additional burden to him. Therefore, from a customs perspective, the impact of the revised definition is limited.

Nevertheless, if the export of restricted goods is not declared as such (deliberately or by negligence), the risk of facing criminal charges won't fall on this non-EU principal (due to constraints in prosecuting persons which are outside the EU). The party (i.e., forwarding agent) that presumably has performed due diligence and is acting in good faith will still be the one penalized. This research indicates although there are alternatives to mitigate the risks, none completely eliminates it

Even so, if this remaining risk is translated correctly into the service price and guarantees, this can become a business opportunity.

The last question we aim to answer in this research is "*From a legal perspective, how relevant was to revise the definition?*".

⁵ For this alternative, is expected that no relevant workload or cost will incur, although this option is dependent on internal group policies and business set up.

⁶ For this alternative, is expected that contractual amendments will take place, and most likely a price increase will occur, due to the additional burden the party will bear (see section 4.3).

⁷ For this alternative, is expected that the entity will grant itself a permanent business establishment, which means, according to Article 5 (32) of the UCC, a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partially carried out. For many companies, this option seems to be the most complex one, due to the costs involved (i.e.:rents, furniture, hiring) and formalities to be fulfilled (i.e.: registrations with governmental agencies).

⁸ The revised definition was published by the Commission (Reg (EU) 2018/1063) on 30th August 2018, but only one year later, on the 8th August 2019 the updated Annex A of the Guidance removed the permission given to MS's to enforce latest on the deployment of the AES. Each MS implemented the revised definition on different dates. In the Netherlands the implementation is planned to happen on the 1st October 2020, which means that business had 2 years to get ready for it.

At first sight, the elimination of indirect representation could have been avoided. The issue is that, in the event of non-compliance involving export controls (which in theory is outside the scope of exports involving non-EU entities, this non-EU party stated on box 2 remains outside the scope of EU prosecution.

Having indirect representation on exports is, in fact, is a loophole that could have been eliminated on past revisions, but presumably was never flagged as a risk neither given as a priority. The answer lies, most probably, on the scope that non-EU exporters took on past years. The increasing presence of entries under indirect representation could have been flagged as an increase in risk exposure requiring, therefore, measures against it. If this is the actual explanation, we consider here legitimate and well-founded reason which can't be treated as an unnecessary restriction⁹.

⁹ Neither a possible violation of GATT Art XI - General Elimination of Quantitative Restrictions

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LIST OF ABBREVIATIONS

CCC - Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code

CCIP - 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

UCC - Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code

UCC-DA - 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

UCC-IA - 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

EU Customs Territory – the territory defined under article 3 of the CCC and article 4 of the UCC

EU - Treaty Consolidated version of the Treaty on the Functioning of the European Union

SAD - Single Administrative Document

VAT Directive - Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax

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1. INTRODUCTION

The revised UCC definition of Exporter has brought a wave of discussions among Customs, Business & Trade. One of the main drivers of these discussions was the fact that non-EU established entities can no longer act as Exporter on Box 2¹⁰ of the customs declaration, even if by making use of indirect representation.

For these non-EU established entities¹¹, this new condition has triggered the question who could instead act as such not to disrupt their supply chain whilst still being able to bring Union¹² goods out of the customs territory of the EU via alternative option.

The exercise of appointing an eligible party to this role brings further concerns related to the implications and responsibilities this party will be subject to when accepting the role. As an example, the majority of the forwarding agents¹³ have opposed¹⁴ to the alternative where they would play the part of the exporter, mainly due to the implications and responsibilities they were not willing to take.

It's seen, though, a significant unclarity around the actual impact this revision has brought in terms of scope of business affected and alternative solutions left to these to comply with the new regulation. Another fundamental point for discussion is if this revision was needed.

Understanding the legal/historical background around the revised definition, identifying stakeholders, comparing roles and responsibilities of the parties involved in the export, exploring what alternatives could be proposed and implications of each one, and understanding the overall impact of this change in the regulation, is the aim of this study.

¹⁰ The reference to "Box 2" has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

¹¹ Post-Brexit, UK-established companies will no longer be part of the EU and therefore also not be able to act as exporter

¹² The requirement for the exporter to be established in the customs territory of the EU does not apply in case of re-export of non-Union goods in accordance with Article 270(1) UCC.

¹³ The term forwarding agent has been chosen as this terminology is consistent with the Dutch Forwarding Conditions.

¹⁴ It is estimated that only 5% of the forwarding agents (based in the Netherlands) are currently willing to accept to be appointed as Exporter.

2. METHODOLOGY

2.1 Introduction

This section concerns on how the research has been overall structured. The problem statement will define the core issue of this research. The Objective, Sub-objectives, the Research Question and the Scope will indicate what this research aims and to what extent. The Hypotheses and Methodological approach will determine the means this research will employ in order to extract from the references and data collected the answers to the appointed questions.

2.2 Problem Statement

The new definition of Exporter has brought a wave of discussions among Customs, Business & Trade. One of the main drivers on these discussions was the fact that non-EU established entities can no longer act as Exporter on Box 2¹⁵ of the customs declaration, even if by making use of indirect representation.

The elimination of indirect representation has impacted a portion of businesses directly. These are now required not only to adapt their flows in order to be compliant to the new regulation but also manage overall implications of it.

2.3 Research Objective, Sub-Objectives and Research Question

This research aims to understand: *what is the impact of the revised UCC definition of exporter?*

In the course of this study, the following sub-questions will be answered:

- How can we scope the impact of the revised UCC definition of exporter on Business & Trade?
- What are the Customs and non-Customs related implications?
- From a legal perspective, how relevant was to revise the definition?

For this end, the following sub-objectives have been set:

- Scope the impact of the revised UCC definition of Exporter on Business & Trade
 - Identification of the population affected
 - Stakeholder Identification
 - Investigation on the volume of non-EU established businesses currently bringing Union goods out of the customs territory of the EU via Export
 - Assessment on how affected the population is
 - Feasibility of alternative solutions to Businesses

¹⁵ The reference to “Box 2” has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

- Identify Customs and non-Customs related implications
 - Customs related
 - Identification of the roles and responsibilities of the main parties involved in the Export declaration
 - Non-Customs related
 - VAT implications
 - Exports involving controls
- Analyze the of the Revision from a legal perspective
 - Investigate the historical background
 - Examine the three legal concepts
 - *“being established in the customs territory of the Union”*,
 - the *“power to determine and have determined that the goods are to be taken out of the customs territory of the Union.”*
 - the concept of *“party to the contract under which the goods are to be taken out of the customs territory of the Union”*.
 - Examine the need to have eliminated Indirect Representation

2.4 The Scope of Research

The research aims to analyze the revised UCC definition of Exporter, brought by the Commission Delegated Regulation (EU) 2018/1063 of 16 May 2018 and reflected in the updated Annex A of the UCC Export & Exit Guidance. The analysis will focus on its impact on business and trade involved in bringing Union goods¹⁶ out of the Customs territory of the EU via export¹⁷.

The new regulation was enforced on all Member States of the Customs Union^[1]. The Netherlands has been chosen for analysis to narrow the scope of this research. As this research focuses on the impact of businesses affected by the revised definition of Exporter, and the non-EU entities are the ones impacted, it is, therefore, reasonable to focus on the Netherlands as a preference for many businesses. This preference is due to its geographic location¹⁸, logistics infrastructure¹⁹, and fiscal incentives.

¹⁶ Non-Union goods under any suspensive regime (e.g.: external transit procedure, customs warehousing, free zones, temporary admission, end-use, inward processing) which are in the customs territory of the Union are disregarded from this scope.

¹⁷If goods from the EU customs territory are to be moved to a place outside that territory (this may also be a conveyor platform or wind turbine at sea outside the 12-mile zone), this shall be done within the framework of the: export procedure (Art. 269 UCC) or outward processing (Articles 259-262 UCC) in the case of Union goods; or, the rules on re-export (Articles 270, 271, 274 UCC) in the case of non-Union goods. If Union goods leave the customs territory only temporarily because they are transported from one EU Member State to another (e.g. from Germany via Switzerland to Italy), there is no export and the only question then arises as to how the Union status can be demonstrated upon re-entry into the EU customs territory (see Article 269(3 UCC), Art. 119(2), 3 UCC-DA). Lux/Schrömbges, 2020.

¹⁸ Close to Europe's 500 million consumers

¹⁹ World class airport, top-ranked seaports and high-speed road, rail and broadband networks

This study will - when relevant – quote other member states (i.e. Germany) to investigate further how they are currently managing the implementation in their country²⁰.

In this analysis, insights from Business, Trade and Customs and other government agencies have been brought into this research.

2.5 Hypotheses of the Thesis

The substantial change brought by the revised definition of Exporter is, in fact, the elimination of the possibility to make use of indirect representation on Export side for non-EU established entities.

For these non-EU established entities²¹, this new condition has triggered the question who could instead act as such not to disrupt their Supply Chain whilst still being able to bring Union²² goods out of the customs territory of the EU via alternative option. Subsequently, a wave of discussions among Customs and Business & Trade on this topic was triggered.

Two hypotheses are presented in this research. The first one concerns the actual impact that this revision brought, and the second one takes a step back, and questions if the new condition imposed on businesses was needed.

Hypothesis 1 states that the overall impact of the revised definition is significant when considering the share of business impacted, but relatively low when considering the feasibility of the existing alternatives to mitigate its impact.

The second hypothesis goes a step back. It questions whether the new condition brought by the new regulation was needed. For this end, legal research is presented to support evidence it could have been avoided.

Hypothesis 2 states that the elimination of indirect representation as an alternative to non-EU exporters was needed, despite the fact it has triggered implications which have increased complexity for businesses and trade.

In the next section, it will be explained the methodological approach used to develop both hypotheses.

2.6 Methodological Approach

This study follows an exploratory approach, mixing up both qualitative and quantitative methods. Throughout the research, literature review, case study, data collection (via interview or data extract) and data analysis have been applied.

²⁰ German customs has already implemented, whilst in the Netherlands only as of 1st October the revised definition will come into force.

²¹ Post-Brexit, UK-established companies will no longer be part of the EU and therefore also not be able to act as exporter

²² The requirement for the exporter to be established in the customs territory of the EU does not apply in case of re-export of non-Union goods in accordance with Article 270(1) UCC.

In the preliminary stage of this research, an exploratory survey with an open-ended question was performed with a group of 6 stakeholders, namely customs officers²³, forwarding agents²⁴. This stage was meant to gain preliminary insight on the topic and provide a basis for more in-depth research. A questionnaire listing ten questions has been used as a base to the open discussion. These questions are listed on Annex G.

Figuring out what the problem is and what solutions might work is part of the problem, and, taking stakeholders into account is a crucial aspect of problem-solving (Bryson and Crosby 1992; Bardach 1998). Therefore, this research runs a preliminary stakeholder identification. This fundamental exercise has paved the way to scope and define the groups and persons on which to focus.

The second stage of this study was predominantly based on desk research. The aim was to map existing data and published material in the field of EU Customs Law, Export Control Law, Export restrictions, EU Commission Guidelines, Export taxes and relevant Court cases. Academic documents were researched, such as papers and journal articles. These sources were retrieved from physical and online libraries. This stage has also included consultation on the webpages from governmental agencies (i.e., Dutch Customs website), business & trade associations (i.e., Fenex website), as well consultants which has published relevant material to the discussion. This stage was fundamental to outline the theoretical framework as well as acquiring a further understanding of the subject.

Subsequently, information has been collected via a second wave of open-ended interviews with 13 stakeholders in the field, namely customs officers²⁵, EU Commission ex-officers²⁶, customs consultants²⁷, forwarding agents²⁸, as well Trade organizations/representatives²⁹. A questionnaire listing five questions has been used as a base to the open discussion. These questions are also listed on Annex F.

Throughout the research, access to organizations such as Fenex, Evo-Fenedex³⁰ and CLECAT³¹ (EU) who, in turn, represent large memberships of companies enabled broad base to gather information

²³ From Dutch Customs

²⁴ Expeditors International UK, K&N NL

²⁵ From Dutch Customs

²⁶ Michael Lux

²⁷ EY, BDO, KPMG

²⁸ Expeditors International NL and UK, K&N NL

²⁹ Clecat BE, EvoFenedex NL

³⁰ <https://www.evoFenedex.nl/>

³¹ <https://www.clecat.org/>

3. REVIEW OF LITERATURE RESEARCH AND LEGAL RESEARCH

3.1 Introduction

Since its first appearance, the definition of Exporter has been subject to many discussions around EU member states, as well as non-EU countries. The application of its definition has always seemed to be too open for interpretation, particularly in what concerns “ownership condition” and the possibility for a “non-EU established entity” to act as the exporter.

The first definition of Exporter in the context of the (EU) Customs Union, came with the introduction of the Community Customs Code (CCC), which entered into force in 1992. Article 788 of the Consolidated Code Implementing Provisions (CCIP)³² stipulated that:

1. *The exporter, within the meaning of Article 161 (5) of the Code, shall be considered to be the person on whose behalf the export declaration is made and who is the **owner of the goods** or has a **similar right of disposal** over them at the time when the declaration is accepted.*
2. *Where ownership or a similar right of disposal over the goods belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be considered to be the contracting **party established in the Community**.*

Later in 2015, the Delegated Act (No 2015/2446) revises the definition of exporter in its Article 1 (19):

‘exporter’ means:

- (a) *the person established in the customs territory of the Union who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union,*
- (b) *the private individual carrying the goods to be exported where these goods are contained in the private individual’s personal baggage,*
- (c) *in other cases, the person established in the customs territory of the Union who has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union.*

The advantage of this rule is that it closely followed the definition of exporter set out in Art. 2 No 3 of Regulation (EC) No 428/2009 (the Dual-Use Regulation)³³:

‘exporter’ shall mean any natural or legal person or partnership:

- (i) *on whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the*

³² 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

³³ The Dual-use regulation sets up a community regime for the control of exports, transfer, brokering and transit of dual-use items. EU export controls reflect commitments agreed upon in key multilateral export control regimes such as the Australia Group, the Wassenaar Arrangement, the Nuclear Suppliers Group and the Missile Technology Control Regime. <https://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/>

consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Community. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the exporter shall mean the person who has the power for determining the sending of the item out of the customs territory of the Community;

(ii) which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to a destination outside the Community.

However, the shortcoming of this definition was that, for certain exports, there was no person who may lodge an export declaration.

Therefore, since the definition (Delegated Act (No 2015/2446) was too restrictive, according to the EU Commission³⁴, it has been later (2018) replaced by the following (Regulation 2018/1063³⁵):

‘exporter’ means:

- (i) a person **established in the customs territory of the Union, who has the power to determine and has determined that the goods are to be taken out of that customs territory;**
- (ii) where (i) does not apply, any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of that customs territory.

This revised definition of exporter reinforces that the entity stated on Box 2³⁶ shall be established in the EU, although when this condition can't be met, the exporter can also be any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of that customs territory.

In 2019, the amended “Annex A”³⁷ of the Export Guidance is published in the website of the European Commission. Despite not legally binding³⁸, the Annex provided

³⁴ The Regulation, introducing the new definition of exporter, states: “The current definition is problematic insofar as it determines as ‘exporter’ only one person, who has to meet three cumulative requirements: being established in the customs territory of the Union, holding a contract with a consignee in a third country, and having the power to determine that the goods are to be brought outside the customs territory of the Union. Therefore, the new definition of ‘exporter’ should be less restrictive and limit the conditions for being an exporter [...].”

³⁵ Commission Delegated Regulation (EU) 2018/1063 of 16 May 2018 amending and correcting Delegated Regulation (EU) 2015/2446 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.

³⁶ The reference to “Box 2” has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

³⁷ See ‘Annex A’ in the Appendix section

³⁸ As any Guidance Document issued by European Commission for MS's, it must be stressed that the document does not constitute a legally binding act and is of an explanatory nature. Legal provisions of customs legislation take precedence over the contents of this document and should always be consulted. The authentic texts of the EU legal instruments are those published in the Official Journal of the European Union. There may also exist national instructions or explanatory notes in addition to this document.

guidance to the member states (MS) in respect to the new definition, as well removed from its text the permission given to them allowing non-EU established entities acting as exporters until the end of the transition period³⁹. This condition has imposed time pressure to MS, as, the revised definition became immediately applicable. Although few MS's were already ahead in this matter (i.e.:Italy), some others were late in progress (i.e.:Portugal), whilst some still unclear (i.e.: UK). Figure 1 illustrates the current status on the MS's implementation⁴⁰:

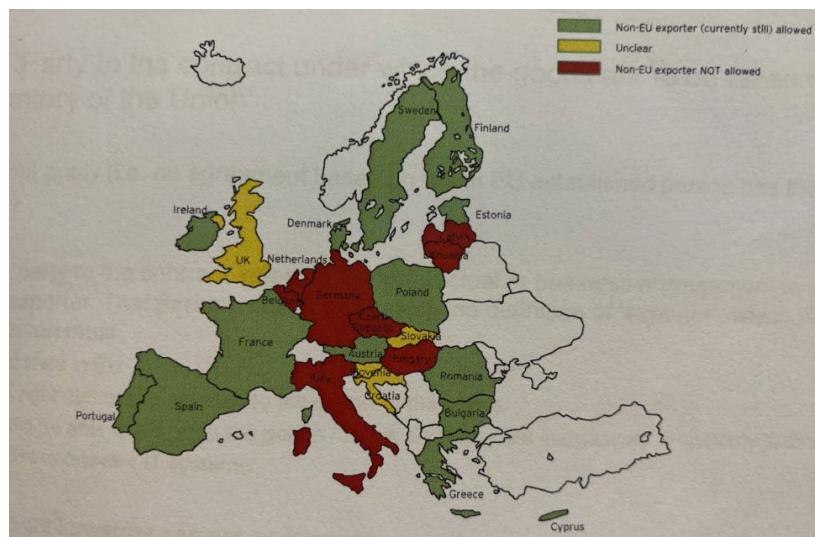


FIGURE 1 – Status MS' implementation (Revised definition Exporter)

At first glance, this new definition appears to bring “greater flexibility” in choosing the person who may act as exporter for customs purposes. Under the preceding definition, the exporter could only be a person who had the power for determining that the goods were to be brought to a destination outside the customs territory of the EU⁴¹. This would mean that, under the revised definition, a forwarding agent or any other party could take this role, as long as that person complies with the definition of “exporter” and agrees to take the role.

3.2 The previous Exporter definition vs the revised Exporter definition

When comparing the previous exporter definition (Art 1 (19) UCC DA) with the revised definition (Art 1 (19) UCC DA – Revised), we have the following:

³⁹ Which at that time, was still planned to be by end of 2023.

⁴⁰ As of 20/06/2020

⁴¹ <https://www.pwc.nl/en/insights-and-publications/tax-news/vat/new-definition-exporter-announced-in-amendments-to-delegated-act.html>

Art 1 (19) UCC DA	Art 1 (19) UCC DA Revised
<p>“exporter” means:</p> <p>(a) the person established in the customs territory of the Union who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union,</p> <p>(b) the private individual carrying the goods to be exported where these goods are contained in the private individual’s personal baggage,</p> <p>(c) in other cases, the person established in the customs territory of the Union who has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union.</p>	<p>“exporter” means:</p> <p>(i) a person established in the customs territory of the Union, who has the power to determine and has determined that the goods are to be taken out of that customs territory;</p> <p>(ii) where (i) does not apply, any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of that customs territory.</p>

TABLE 1 – Comparison Old vs New Definition Exporter (Text only)

We notice both similarities and changes, mostly related to the establishment condition (in EU), contractual terms with the consignee, and the power to bring goods outside the customs territory of the EU. We indicate these on Table 2:

OLD EXPORTER DEFINITION Art 1 (19) UCC DA	NEW EXPORTER DEFINITION Art 1 (19) UCC DA Revised
Being established in the customs territory of the Union	
Holding a contract with a consignee in a third country	Has the power to determine and has determined that the goods are to be brought outside the customs territory of the Union
and	or
Having the power to determine that the goods are to be brought outside the customs territory of the Union	Any party to the contract under which goods are to be taken out of that customs territory

TABLE 2 – Comparison Old vs New Definition Exporter

In both definitions, it's seen that the condition of “being established in the customs territory of the Union” remains the same. As for the following condition, it refers to the party “who holds a contract with the consignee in a third country”. The old definition indicates this as a requirement, whilst the new definition appoints this as an alternative in the case the party does not fulfil the previous condition (having the power to determine that the goods are to be brought outside the customs territory of the Union).

Same happens to the last condition; it refers to “the power to determine that the goods are to be brought outside the customs territory of the Union”, which is a requirement on the old definition, whilst the new definition appoints this as an alternative in the case the party doesn’t fulfil the other condition (“any party to the contract under which goods are to be taken out of that customs territory”). Note that the condition of *also* being EU established remains a requirement in both cases.

3.3 The “3 Concepts”

On the 8th August 2019⁴², the Commission publishes an amendment to Annex A⁴³ - Definition Exporter, reflecting, in the form of a Guidance, the revised definition of exporter as provided for in Commission Delegated Regulation (EU) 2018/1063.

Figure 2 illustrates who can act as exporter, indicating the conditions to be fulfilled and as well the sequence to be followed:

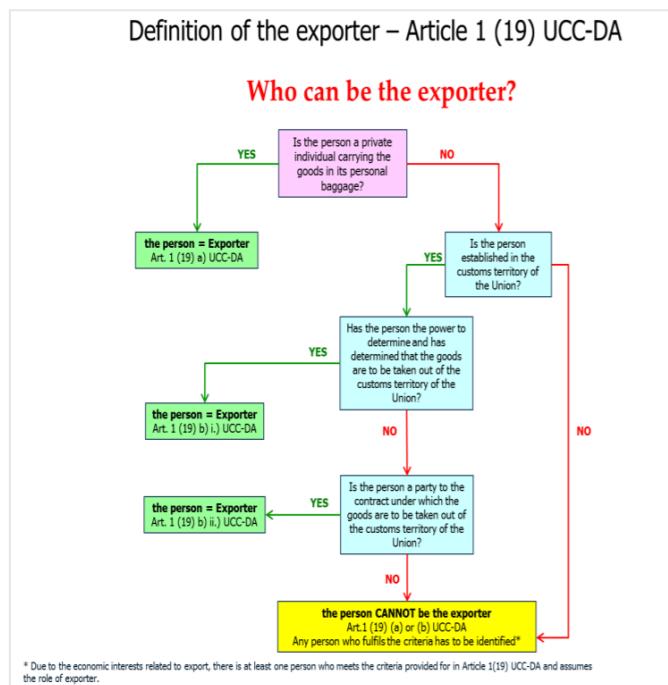


FIGURE 2 – Who can act as the Exporter (Revised Art 1 (19) UCC-DA)

Despite not legally binding⁴⁴, the document provides guidance to MS’s in respect to 3 relevant concepts, namely the concept of being “established in the customs territory of the Union”, the concept of “power to determine and have determined that the goods are to be taken out of the customs territory of the Union”, and the concept of “party to

⁴² Ref. Ares(2019)4346407 - 08/07/2019

⁴³ See Annex A in the Appendix section

⁴⁴ As any Guidance Document issued by European Commission for MS’s, it must be stressed that the document does not constitute a legally binding act and is of an explanatory nature. Legal provisions of customs legislation take precedence over the contents of this document and should always be consulted. The authentic texts of the EU legal instruments are those published in the Official Journal of the European Union. There may also exist national instructions or explanatory notes in addition to this document

the contract under which the goods are to be taken out of the customs territory of the Union”.

3.3.1 The concept of being “established in the customs territory of the Union”

The concept of being “established in the customs territory of the Union”⁴⁵ in case of a legal person (or an association of persons), is defined in Article 5 (31)(b) and (32) of the UCC:

(31) ‘**person established in the customs territory of the Union**’ means:

(b) in the case of a legal person or an association of persons, any person having its registered office, central headquarters or a permanent business establishment in the customs territory of the Union

(32) “**permanent business establishment**” means a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person’s customs-related operations are wholly or partially carried out

In case the legal person does not fulfill the mentioned conditions, the entity would not be eligible to act as exporter (on Box 2⁴⁶), as these are addressed as mandatory conditions⁴⁷. This means, therefore, that indirect representation is no longer an alternative to non-EU exporters. This is, in fact, the most substantial change this revision brings to business. On chapter 5⁴⁸ the effect of this condition will be further explored.

3.3.2 The concept of “power to determine and have determined that the goods are to be taken out of the customs territory of the Union”

This concept refers to the power that the parties involved in the transaction have on the basis of which the goods leave the customs territory of the EU. The power to determine that the goods are to be exported comes from an agreement between the parties in this transaction, which, may take any form provided for in the civil law of the Member State concerned. The Guidance⁴⁹ appoints few examples:

⁴⁵ EU customs territory as defined by article 3 of the CCC and article 4 of the UCC.

⁴⁶ The reference to “Box 2” has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

⁴⁷ Note that the requirement for the exporter to be established in the customs territory of the EU does not apply in case of re-export of non-Union goods in accordance with Article 270(1) UCC

⁴⁸ Chapter 5: ‘The elimination of Indirect Representation’

⁴⁹ The update of Annex A to the UCC Export & Exit Guidance reflects the revised definition of exporter as provided for in Commission Delegated Regulation (EU) 2018/1063 of 16 May 2018

- *where there is a direct sale from a company established in the customs territory of the EU to a buyer established outside the customs territory of the EU, or*
- *where the price of an export sale is payable only upon exchange of the bill of lading drawn by the seller for carriage outside the customs territory of the Union, or*
- *contracts with incoterm ‘ex works’ or similar, where the power for determining that the goods are to be brought to a destination outside the customs territory of the EU lies with a person established outside the Union pursuant to the contract on which the export is based (e.g. buyer), but this person decides to empower a person established in the EU to determine that the goods are to be taken to a destination outside the Union. This means that a person other than the seller may act as exporter under the condition that, for instance, the buyer has empowered that person to do so. The business partners involved have the flexibility to designate the person who has to act as exporter, as long as that person complies with the definition of ‘exporter’.*

Except for the Incoterm EXW, all other terms bring to the exporter the responsibility to have the goods exported. That being said, the “power to determine” lies with the seller in majority of the cases.

3.3.3 The concept of “party to the contract under which the goods are to be taken out of the customs territory of the Union”

In cases where Article 1(19)(b)(i) does not apply, the parties must agree⁵⁰ who will act as exporter. This latter may be a carrier, a freight forwarder or any other party, as long as the condition of being established in the customs territory of the EU is fulfilled and the party also agrees on taking the role.

⁵⁰ i.e.: contractual terms or business arrangements. Section 4.3.2 (alternative solutions) for further information.

4. THE IMPACT OF THE REVISED DEFINITION ON BUSINESS AND TRADE

4.1 Introduction

Assessing the impact of the revised definition is not a straightforward exercise. Analyzing only by the attention this matter has gained from the media, the conclusion would likely be that this matter requires attention. Nevertheless, one may argue that this was the way out that stakeholders have found to escalate the topic ahead, missing fundamental aspects such as the actual volume of the businesses impacted. For the latter, is understood all non-EU established business currently bringing Union goods out of the customs territory of the EU via Export.

The volume of non-EU established exporters bringing goods out of the customs territory of the Union via export is not published by any governmental agency neither available by any public channel. Although customs in the EU have visibility on the data elements inserted on the customs declaration lodged, and, in theory, could have access to the country the exporter is established, the data is neither collected nor processed in a way where this information could be handily extracted.

Knowing the number of non-EU established entities acting as Exporter could give us a notion of how many companies were impacted by the revised definition. However this would still not determine the level of impact. For this exercise, we will examine available solutions to businesses and the implications of these.

4.2 Stakeholder Identification

Eden and Ackermann (1988) has defined a stakeholder as '*People or small groups with the power to respond to, negotiate with, and change the strategic future of the organization*'. Identifying the stakeholders involved, is a fundamental exercise to be done in first instance, in order to properly scope and define, in the research, the group (or individuals) who has directly or indirectly been affected by the revised definition.

Deciding who should be involved, how and when in doing stakeholder analyses is a key strategic choice. In general, people should be involved if they have information that cannot be gained otherwise (Thomas 1993, 1995).

All that considered, we have developed a preliminary stakeholder analysis, which is indicated in the following matrix "Power versus interest grids", by Eden and Ackernlann (1998: 121-5, 344-6), which identify and classify the stakeholders involved in this specific matter:

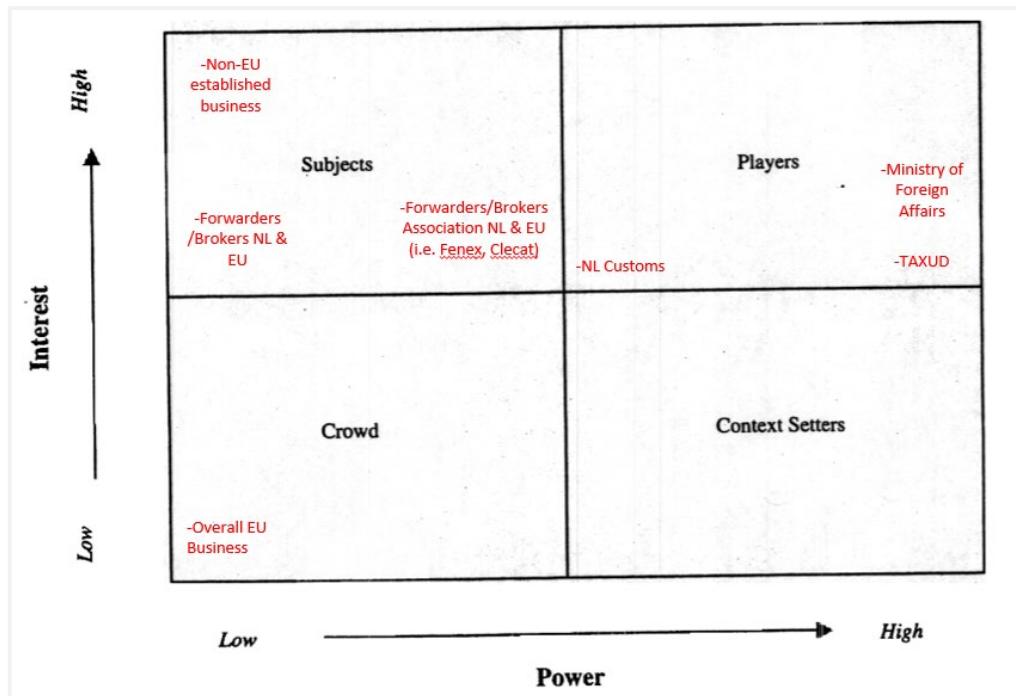


FIGURE 3: Power versus Interest Grid (Eden and Ackermann (1998:122)

In this model, four categories of stakeholders results: players who have both an interest and significant power.; subjects who have an interest but little power; context setters who have power but little direct interest; and the crowd which consists of stakeholders with little interest or power. Power versus interest grids typically help determine which players' interests and power bases must be taken into account in order to address the problem or issue at hand. They also help highlight coalitions to be encouraged or discouraged, what behavior should be fostered and whose 'buy in' should be sought or who should be 'co-opted'.

In the context of this study, seven stakeholders were identified using this model: non-EU established businesses, Forwarding agent Associations (NL&EU)⁵¹, Forwarding agents (NL & EU), Ministry of Foreign Affairs, TAXUD, NL Customs, and Overall EU business.

Depending on how stakeholders are organized, how they promote the topic, how influential they are, how much resistance opposing stakeholders will bring ahead, as well how the public perceives this movement, might over/underestimate the actual impact of the revised definition of exporter.

With all of the above considered, the argument behind the positioning of each stakeholder in the matrix is the following: non-EU established businesses have the highest interest, as the revision has a direct impact in their supply chains. Without a change to their current process (where they act as the exporter), their export declarations will, as soon as the revised definition would come into force⁵², no longer

⁵¹ i.e. BIFA (British International Freight Association), DSLV (Bundesverband Spedition und Logistik e.V.), FENEX (Nederlandse Organisatie voor Expeditie en Logistiek), FORWARD Belgium (Belgian Freight Forwarders' Association)

⁵² In the Netherlands will come into force on 1st October 2020.

be valid, immediately disrupting their flow of goods. Therefore, as this change in the regulation puts them in an unfavorable position, their strategy has been to proactively show resistance (i.e., fighting back to either reverse the revision or for a postponement to the deadline). And using, as much as possible, business and trade associations to escalate to those with more power and bring ahead their claim. Considering that a change to this regulation reversing the new condition has a low likelihood, and their power is low⁵³, their only alternative is to ensure a solution plan is in place in order to operate in compliance with no disruption. It is relevant to quote that UK-established companies would, post-Brexit, no longer be able to act as exporter, being also within the scope of business highly impacted and highly interested.

Forwarding agent associations (in NL and EU) are the second ones with the highest interest in this matter. They are committed to bringing ahead the forwarding agent's interest, which is ensuring clarity on the risks and responsibilities in case any additional role is taken. The Contract Model drafted by EvoFenedex and Fenex (Annex B) is an example of their support in this matter. Within the category "Subjects", they have the highest power, as they are the ones bridging the matter between forwarding agents and governmental agencies.

Forwarding agents (NL and EU) are also placed within the category "Subjects" and follow the same level of interest in this matter as the associations, though, count on less power than to the associations due to the lack of direct contact with governmental agencies. Their main concern is not to take any additional role unless having clarity on the risks and responsibilities. They also concern if acting as exporter becomes in the future a competitive advantage in the market, which would put them in an unfavorable position (i.e., loss of clients).

Ministry of Foreign Affairs is placed in the category "Players". As a governmental agency (EU level), they count on high power. Considering their primary concern in this matter is to decrease risks level to the Union (i.e., prosecution of an entity established out of the EU territory), their interest in this matter is high.

TAXUD is also placed in the category "Players" and, as a government agency (EU level), count on high power. Despite the fact on Export side the financial risks are nonexistent (no duty collection⁵⁴), they concern in collaborating to other EU agencies and enforcing compliance also to non-customs related regulations⁵⁵. Therefore, their interest in this matter is high.

Customs in the Netherlands is also placed in the category "Players", and as a governmental agency (national level), count on high power, although lower than EU level ones. Their interest follows the same logic as the TAXUD one.

Overall EU business is placed in the category "Crowd". This matter brings no impact to them, as they are already acting in compliance with the definition of exporter and are not required to adapt their process. In a certain extent, the revised definition might

⁵³ Low due to the fact their financial interest is not meant to be defended by the EU.

⁵⁴ See section 5.2 (The inequity in treatment Imports and Exports)

⁵⁵ See section 4.3.4.2 (Exports involving controls)

put them in an advantaged position if these non-EU exporters are direct competitors (i.e., as they will now face more burden/costs which will force their price to increase).

4.3 The Impact of the revised definition on Business and Trade

Stefan Verhagen, FENEX⁵⁶ advisor on customs affairs, refers to the revised definition of exporter, as, one of the most contentious subjects already addressed to their organization in the past three years. This matter has raised many requests for advice to them as well as numerous claims coming from business and trade.

From the side of forwarding agents⁵⁷, the claims were raised due to the fact they were not willing to take on the additional role of exporter. This concern was mainly driven by the uncertainty of implications and responsibilities. Dominique Willems, Senior Manager Customs & Indirect Taxation at Clecat, points out that the way communication on this publication was done, has opened up space for misunderstanding. In some countries, it gave the impression that forwarding agents *would have* to act as such. This misunderstanding has raised unnecessary discussion and counter-reactions from stakeholders.

Despite the fact some parties are not willing to take on the additional role of Exporter, some are. For the latter, parties should assure risks are controlled. Once appointed as Exporter, the possibility to be audited becomes a reality. Having the right process flow as well as ensuring the proper internal controls are in place (i.e., due diligence, change on contractual terms, etc.), is translated into an additional burden. As a consequence, this burden will be eventually reflected in the service price. Having the risk and burden well translated into financial means, signify that forwarding agents could also see this as a business opportunity. Stefan Verhagen, FENEX advisor on customs affairs, estimates that only 5% of forwarding agents are currently willing to take the role. Nevertheless, this percentage might increase if this becomes a market condition to keep customers⁵⁸.

4.3.1 The Scope

Exports play an essential role in the economy of the EU. In 2019, the Export value⁵⁹ from EU28 to non-EU destinations exceeded EUR 2tri. Below table⁶⁰ provides an overview of trade flows in goods between EU and non-EU countries.

⁵⁶ FENEX is a Dutch association for Forwarding and Logistics with nearly 400 members

⁵⁷ The term forwarding agent has been chosen as this terminology is consistent with the Dutch Forwarding Conditions.

⁵⁸ Competitive advantage for a forwarding agent to offer both services simultaneously

⁵⁹ The Trade value is the statistical value, i.e. the amount that would be invoiced in the event of sale or purchase at the national border of the reporting country.

⁶⁰ Source: https://madb.europa.eu/madb/statistical_form.htm accessed on 17/05/2020

Trade Statistics (Imports - Exports)						
Reporter(s) / Partner(s): EU28 / All partners						
Product(s): All products						
Year(s): 2019						
Indicators	Import Value to the EU/MS (EURO)				Export Value from the EU/MS (EURO)	
EU Member State(s)	EU28		EU28		EU28	
Years	2019		2019		2019	
Partners	% Partners		Partners		%	
China, People's Republic of	419.971.265.054		United States		449.582.021.857	
United States	293.957.428.510		China, People's Republic of		225.186.147.539	
Russian Federation	157.262.601.752		Switzerland		160.575.989.254	
Switzerland	132.634.099.007		Russian Federation		90.777.415.815	
Turkey	80.100.929.292		Turkey		74.020.040.056	
Total EXTRA-EU28	2.053.596.345.782			2.039.134.455.071		

TABLE 3: Trade Statistics EU28 ⁶¹

As indicated on Table 3⁶², in 2019, the total Export Value from the EU28 to non-EU destination amounts to €2.039.134.455.071, being China, US, Russia, Switzerland and Turkey the top 5 destinations in the ranking of trade value.

Both EU and non-EU Established exporters are being accounted for in these numbers representing the exports.

The exact portion of non-EU established entities acting as exporter in the EU is complex to be determined. This number is currently neither published nor measured by governmental agencies. Nevertheless, under special request to Dutch Customs, it was possible to get a data extract from the total number of export declarations lodged on the past three years, and how much of these are under indirect representation. Having these, we indicate on the last column how much the percentage represents:

Year	Total Number of Export entries lodged	Total Number of Export entries lodged under Indirect Representation	Percentage representing entries under Indirect Representation
2017	15.260.381	2.385.253	15,6%
2018	15.517.673	2.762.890	17,8%
2019	15.932.842	2.912.478	18,3%

TABLE 4 – Portion of Export Entries under Indirect Representation

Table 4 provides us with two surprising figures. The first is the high percentage that represents entries under indirect representation. In the year 2019, almost one of each five entries were under indirect representation. Hypothetically, if all entries in 2019 had

⁶¹ Table 3 is said to be a FOB valuation for exports/dispatches.

⁶² The import value has been also indicated only for comparison purposes – note that the same “top 5” countries are stated in the ranking: People’s Republic of China, United States, Russian Federation, Switzerland, and Turkey.

the same export value, approximately €373.161.605.277,99⁶³ would be just in exports under indirect representation.

The other relevant element to be pointed out is the increasing trend shown from one year to the other. From 2017 to 2018 the percentage grew by 16%. From 2018 to 2019, a further 5%.

Note as well that UK-established companies would, post-Brexit, no longer be able to act as exporter, directly increasing the number of non-EU companies impacted.

Therefore, considering the significant portion of export entries under indirect representation, and the growth trend that these indicate, we may conclude that the scope of impacted business due to the revised definition is not limited.

The numbers above give us a notion of how many companies are impacted by the revised definition. However, it does not indicate how much they are impacted.

The first step these impacted companies will likely take will be assessing if any of the alternative solutions available to them are, in fact, feasible to be achieved. In case a feasible alternative is found (i.e., Incoterm revision), the assumption is that no further claim nor further petition will be raised as the impact is reasonable small/accepted.

Nevertheless, there are companies that, depending on its business set up, still struggle with this change on regulation, as, adapting to any alternative would be costly and complex to embed.

4.3.2 Alternative Solutions

Throughout the interviews, the most frequent alternatives chosen by these non-EU established companies were identified. In conclusion, the most frequently chosen are known as: Incoterm change with Seller⁶⁴, the appointment of affiliated company (to play the role of exporter), appointment of forwarding agent (to play the role of exporter)⁶⁵, or creating its own EU customs presence by establishing a “permanent business establishment”⁶⁶ for customs purposes.

Most likely, the first step these companies will take will be to assess if any of these solutions are, in fact, feasible (cost/complexity) to be achieved considering their own business set up. In case a feasible alternative is found (i.e., Incoterm revision), the assumption is that no further claim nor further petition will be raised as the impact is reasonably small/accepted. Nevertheless, there are companies that, depending on its business set up, still struggle with this change on regulation, as, adapting to any alternative would be costly and complex.

⁶³ Considering 18.3% of the total Export Value from the EU/MS, which is €2.039.134.455.071 (See Table 3)

⁶⁴ Updating to an Incoterm that would require the other party be responsible for the Export. This alternative would be suitable -for instance – in EWX cases where buyer is non-EU established, and both parties agreed to move to FCA incoterm.

⁶⁵ This would likely involve updates on contractual arrangements

⁶⁶ See section 3.3.1 (“The concept of being ‘established in the customs territory of the Union”)

Figure 4, illustrates the as-is and the to-be situation in the Netherlands (where non-EU established exporters are still able to act as Exporters), and the future situation (where these businesses will need to seek to an alternative solution). The pie charts indicate rough percentages, based on the information estimated by the interviewees⁶⁷:



FIGURE 4: Pre & Post-implementation revised definition

Figure 4 indicates that out of the percentage of non-EU established exporters, four main categories compose the split of the chosen alternative solutions by non-EU exporters: the highest amount will likely revise the sales incoterm (i.e., from Ex-Works to FCA/FOB), ensuring by this, that the EU seller will act as exporter.

For this alternative, the sales price might potentially increase, to financially reflect the additional workload (i.e., export clearance related costs) and risks on the export side (i.e., potential audits). In this option, small operational adaptations are also expected (i.e., contract amendments between buyer & seller).

In second place, are those that will appoint an affiliated company to act as exporter. For this alternative, it is expected that no relevant workload or cost will incur, although this option is dependent on internal policies and the way the business is set up.

In third place, are those appointing a forwarding agent as exporter. For this alternative, it is expected that contractual amendments will take place, and most likely, a price increase will occur, due to the additional burden the party will bear (see section 4.3).

In fourth place, are those that will establish themselves in the EU. For this alternative, it is expected that the entity will grant itself a permanent business establishment, which means, according to Article 5 (32) of the UCC, a *fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partially carried out*. For many companies, this option seems to be the most complex one, due to the costs involved (i.e., rents, furniture, hiring) and formalities to be fulfilled (i.e., registrations with governmental agencies).

⁶⁷ First wave of interviews

The Dutch government has published⁶⁸ in February 2020 information about the record number of foreign companies choosing the Netherlands as a country to establish their business.

As mentioned previously, UK-established companies would, post-Brexit, no longer be able to act as exporter. Many of these are also assessing the possibility to establish themselves in the EU. Since the Brexit referendum in June 2016, 140 companies have opted for the Netherlands. 78 of these 140 companies made their decision in 2019. Media companies Discovery and Ridley Scott, credit rating agency AMBest and Life Sciences & Health manufacturer Shionogi were amongst the companies⁶⁹ choosing the Netherlands because of Brexit. They choose the Netherlands mainly due to necessary EU permits, access to the European market and the ability to attract European talent.

For all mentioned alternative solutions, it is expected that a different entity will play the role of an exporter. The first question here should be *who*, in their supply chain, could act as exporter in compliance with the revised definition. Detailed mapping of the flows impacted is recommended to identify all parties involved and what changes would be needed. Once flows are mapped, it's recommendable to examine which parties in the supply chain may act as exporter for customs purposes in the EU. Section 4.3.2.1 (Flows diagram) is dedicated to this exercise.

Once determined, which party in the supply chain will act as exporter, is advisable to ensure contractual terms are updated and reflect the changes accordingly, including customs related implications and other implications⁷⁰. To support businesses and trade in preparation of the actual entry into force of the revised definition, EvoFenedex and FENEX have developed a Contract model. The model is drawn up in two: a two-party agreement (client and forwarder) and a three-party agreement (buyer, seller and forwarder). Both agreements are available⁷¹ in both Dutch and English. The model is attached to Annex B.

Additionally to the above actions, is recommendable to business to address modifications to upcoming or existing IT implementation programs (e.g., implementation of ERP systems) resulting from the alterations to the roles of the stakeholders⁷².

4.3.2.1 Flows Diagram

⁶⁸ <https://www.government.nl/latest/news/2020/02/19/record-number-of-foreign-companies-choose-the-netherlands>

⁶⁹ The companies mostly find their origins in the services sector, for example Fintech, IT, and the Media & Advertising industry

⁷⁰ Section 4.3.3 (Customs Implications) and 4.3.4 (Other Implications) will provide further insight.

⁷¹ The Representation Agreement model and its explanation can be downloaded on: <https://www.evfenedex.nl/kennis/actualiteiten/modelovereenkomst-nieuwe-definitie-exporteur-gepubliceerd>

⁷² [https://www.ey.com/Publication/vwLUAssets/Dutch_Customs_announces_that_non-EU_company_can_no_longer_act_as_exporter_from_The_Netherlands_as_of_1_December_2019/\\$FILE/2019G_004734-19Gbl_Indirect_NL-%20Non-EU%20company%20cannot%20act%20as%20exporter%20as%20of%202019%20Dec%202019.pdf](https://www.ey.com/Publication/vwLUAssets/Dutch_Customs_announces_that_non-EU_company_can_no_longer_act_as_exporter_from_The_Netherlands_as_of_1_December_2019/$FILE/2019G_004734-19Gbl_Indirect_NL-%20Non-EU%20company%20cannot%20act%20as%20exporter%20as%20of%202019%20Dec%202019.pdf)

This section aims to illustrate five typical scenarios involving sales transactions where Union goods are taken out of the customs territory of the Union via export. The flow of goods and invoicing flow are indicated accordingly. In all scenarios, EU established companies and non-EU established companies are in scope. In each scenario, it is identified who could act as exporter⁷³. These models were drafted by German customs⁷⁴ to support businesses⁷⁵.

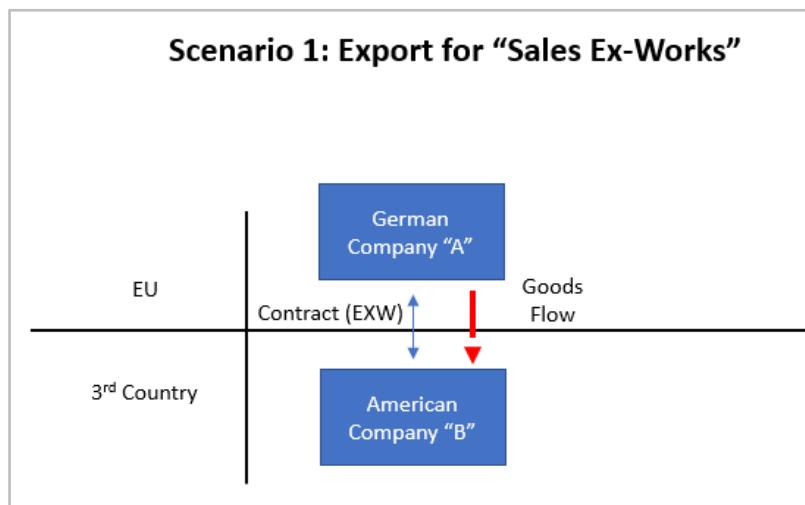


FIGURE 5 – Scenario 1: Export for “Sales Ex-works”

In **Scenario 1**, a German company “A” delivers “ex works” to an American company “B”, i.e. the seller provides the goods by making them available to the buyer on his company premises. Who could act as exporter?

“A” is not an exporter under Article 1(19) UCC-DA, because it doesn’t have “the power to determine that the goods are to be taken out of the EU”. “B” cannot be an exporter either because he is not established in the customs territory of the Union.

“B” may, however, transfer its power of determination under Article 1(19) (b) (i) UCC-DA to a subcontractor established in the EU (e.g. a freight forwarder) who then acts as a customs exporter as well control the transport operation and carry out the necessary customs formalities.

However, “A” may be designated as the exporter under Article 1(19) (b) (ii) UCC-DA, e.g. if no other resident of the Union is designated in accordance with point 19(b). The power of determination has been contractually transferred and, despite the ex-works

⁷³ Customs exporter according to the revised definition of ‘exporter’ as per Art 1(19) UCC-DA

⁷⁴https://www.zoll.de/DE/Fachthemen/Zoelle/Zollverfahren/Ausfuhrverfahren/Warenausfuhr-zweistufiges-Verfahren/Normales-Verfahren/normales-verfahren_node.html

⁷⁵ Although the German model presents 7 scenarios, in scope of this thesis are only flows involving “B to B”. Private individuals are therefore excluded from this exercise.

delivery clause⁷⁶, export has been agreed, or an export delivery free of VAT is available. If "A" acts as an exporter, it also receives the basic proof required for VAT purposes (Art. 334 UCC-IA).

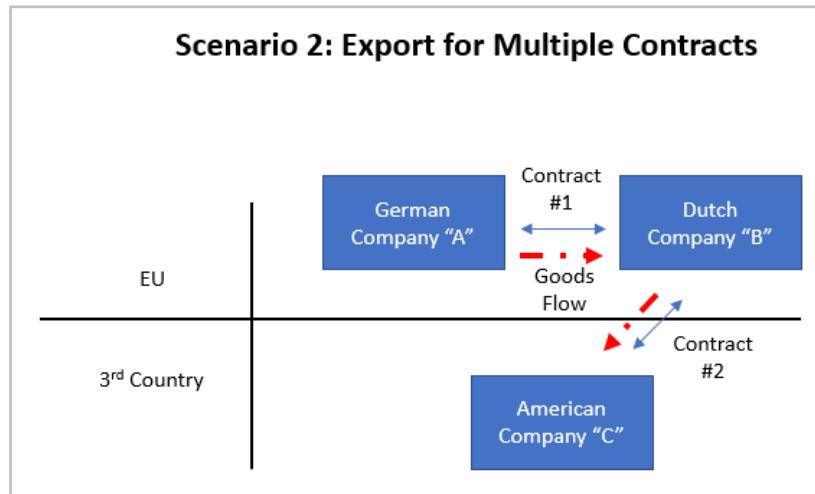


FIGURE 6 – Scenario 2: Export for Multiple Contracts

In **Scenario 2**, "A" sells and delivers the goods to "B". "B" sells and delivers the goods to "C". The goods are transported first from "A" to "B" and then from "B" to "C". The invoice is issued from "A" to "B" and then from "B" to "C". Who could act as exporter?

"B" is established in the EU and may act as an exporter under Article 1(19) (i) UCC-DA by exercising the power of determination, controlling the transport process and carrying out the necessary customs formalities. This solution has the advantage that "B" receives the customs proof of export required for an export supply exempt from VAT (Art. 334 UCC-IA). Another person resident of the Union may also act as an exporter if "B" confers on him the power of destination⁷⁷.

"C" cannot be an exporter because he is not resident in the customs territory of the Union.

⁷⁶ In this case, it is recommendable to amend contractual terms to the new Incoterm (i.e.: FCA/CPT) so as the operation reflects the costs, risks and responsibilities each party is agreeing with.

⁷⁷ Nevertheless, this is not recommended in terms of "proof of export". Check section 4.3.4.1 (VAT Implications)

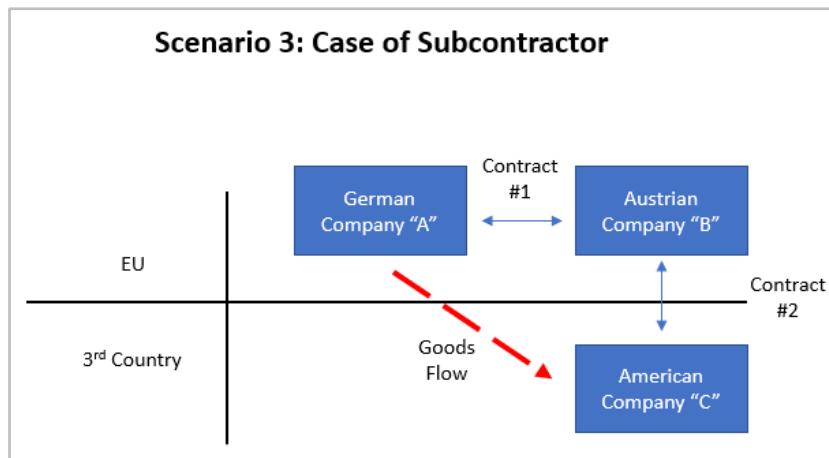


FIGURE 7 – Scenario 3: Case of Subcontractor

In **Scenario 3**, goods are sold by the manufacturer in Germany (A) to a dealer in Austria (B) and then to the USA (C). The goods are transported directly from Germany to the USA on behalf of "B". "A" has no contract with "C". Invoices are issued by "A" to "B" and from "B" to "C". Who could act as an exporter?

"A" may act as an exporter based on the contractual agreement with dealer "B" if it is agreed that "A" controls the transport process and makes the export declaration for its own account (Article 1 no 19 (b) (i) UCC-DA).

"B" may also make the export declaration. "A" then does not exercise the power to determine the transfer and is a subcontractor, despite carrying out the transport. "B" also does not exercise the transfer since it does not control the transport process. Therefore, since no person can be designated under Article 1(19) (i) UCC-DA, "B" is considered to be a party established in the Union to the contract for the movement of goods from the customs territory as an exporter (Article 1(1)(b) (ii) UCC-DA). Since he submits the export declaration or has it made by a representative, he shall also receive the proof of export in accordance with Article 334 UCC-IA.

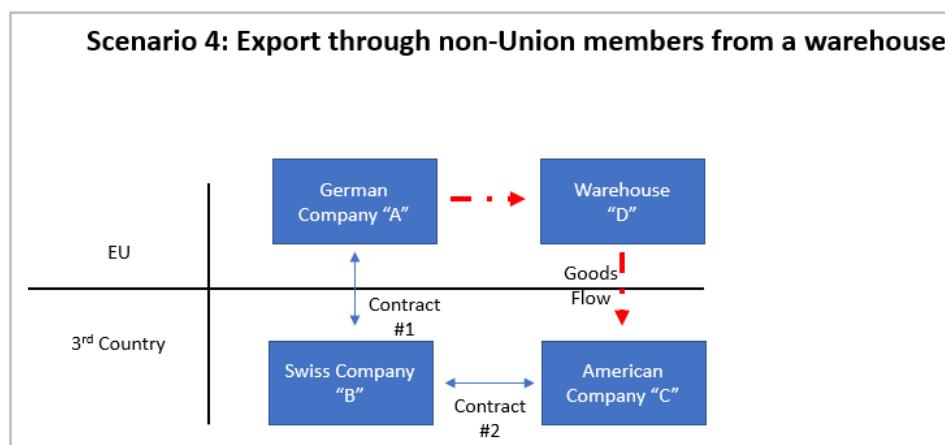


FIGURE 8 – Scenario 4: Export through non-Union members from a warehouse

In **Scenario 4**, goods are sold by "A" in Germany to "B" in Switzerland and from "B" to "C" in the USA. "A" delivers the goods to the forwarding warehouse "D" in Germany.

Only with a clear time interval does "B" have the goods shipped directly from Germany to the USA. There is no contract between "A" and "C". "B" has no establishment in the Union. Invoices are issued by "A" to "B" and from "B" to "C". Who could act as an exporter?

"A" is not an exporter since he is neither party to the transfer nor the contract for goods removal from the customs territory.

"B" and "C" cannot act as exporters because they are not established in the customs territory of the Union.

"B" may transfer the power of determination under Article 1(19) (b) (i) UCC-DA to a third-party resident of the Union (e.g. "A") in order to enable that person to act as an exporter. The third-party determines the removal by controlling the transport process and carrying out the necessary customs formalities. If no person is designated under (i), the "contract under which the goods are to leave the customs territory" may include the contract of carriage, with the result that the Union carrier (D) may act as exporter under Article 1(19)(b)(ii) UCC-DA.

B is an exporter under foreign trade law pursuant to Article 2(3) of the EC Dual Use Regulation, since no export contract has been concluded, but B actually determines the dispatch of the goods from the customs territory.

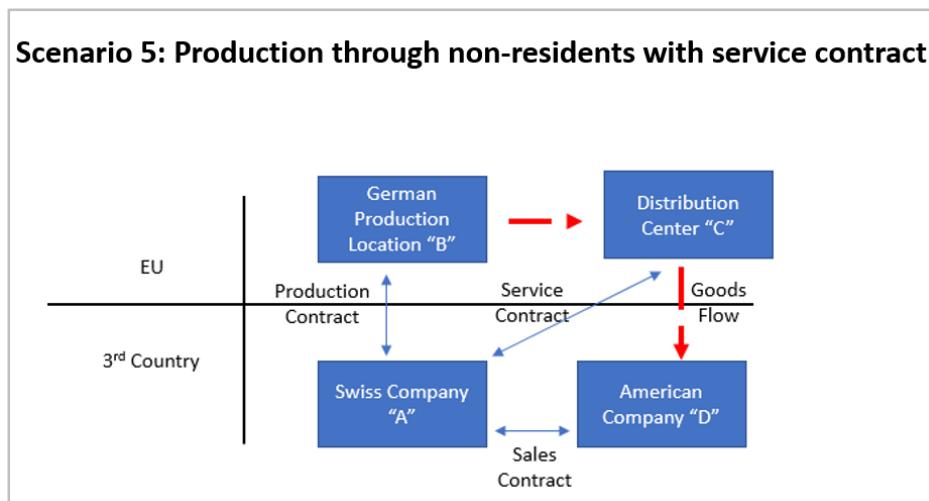


FIGURE 9 – Scenario 5: Production through non-residents with a service contract

In **Scenario 5**, "A" is based in Switzerland and has goods manufactured in a German factory. "B" is the operator of the factory and is only entrusted with the production of the goods. After production, "A" has the goods delivered to a distribution centre "C" in Belgium. "C" is the operator of the distribution centre. "A" sells the goods stored in the distribution centre for export to an American company "D". Who can act as exporter?

"A" and "D" cannot act as exporters because they are not established in the customs territory of the Union.

“B” cannot act as exporter because he does not have the power of determination; neither is a party to the contract for removal.

“A” may be grant “C” the power of determination under a service contract, so as “C” delivers the goods to the purchasers under the given instruction of “A”. “C” is intended to act as an exporter and determine the removal from the customs territory by controlling the transport process and carrying out the export customs formalities⁷⁸.

4.3.3 Customs Implications

On last sections, it has been explored alternative solutions to adapt business processes in compliance with the revised definition of exporter. For the entities that will now take the role of the exporter, it is critical to be aware of the customs and non-customs related implications.

The UCC makes a clear statement regarding the responsibilities appointed to those directly or indirectly involved in the accomplishment of customs formalities. Article 15 states the following:

1. **Any person directly or indirectly involved in the accomplishment of customs formalities** or in customs controls shall, at the request of the customs authorities and within any time limit specified, **provide those authorities with all the requisite documents** and information, in an appropriate form, and **all the assistance necessary for the completion of those formalities or controls**.
2. The **lodging of a customs declaration**, temporary storage declaration, entry summary declaration, exit summary declaration, re-export declaration or re-export notification by a person to the customs authorities, or the submission of an application for an authorization or any other decision, **shall render the person concerned responsible for all of the following:**
 - (a) the **accuracy and completeness** of the information given in the declaration, notification or application;
 - (b) the **authenticity, accuracy and validity** of any document supporting the declaration, notification or application
 - (c) where applicable, **compliance with all of the obligation relating** to the placing of the goods in question under the **customs procedure concerned**, or to the conduct of the authorized operations.

The first subparagraph shall also apply to the provision of any information in any other form required by, or given to, the customs authorities.

Where the declaration or notification is lodged, the application is submitted, or information is provided, by a customs representative of the person concerned, as referred to in Article 18, that customs representative shall also be bound by the obligations set out in the first subparagraph of this paragraph.

⁷⁸ In order for “A” to be able to claim the deduction of input tax and a tax-exempt export supply, he must either register for VAT in Belgium or appoint a fiscal representative (this role could be additionally taken over by “C”).

Provisions appointing responsibilities to the declarant and its representatives involved in the accomplishment of customs formalities are being enforced since the very beginning. In the first publication⁷⁹ of the Community Customs Code⁸⁰, its article 199 already appointed the declarant or his representative responsible for the *accuracy, authenticity and compliance with all the obligations* relating to the procedure concerned.

In the years thereafter, slight amendments were executed⁸¹, though, the set of responsibilities was kept, and this text was lifted into the UCC. Note that, strictly in terms of responsibilities⁸², the UCC holds both direct and indirect representative, as well the Exporter and the Declarant equally responsible⁸³ for the information given in the declaration⁸⁴, being customs authorities the one who can choose whom it asks.

Remark to the condition limiting the scope of this responsibility: applicability to only things he knows, or he could have known⁸⁵.

It's seen, however, that the modernization of supply chains in history has brought constraints to the accomplishment of the above provision. Business models, as well its logistic flows, have increased the overall complexity, particularly in the past decades. Trust and agreements were replaced by contracts, jurisdictions, different currencies and systems of payment and different languages, ships, containers and people (Hesketh, 2010)

Nowadays, from origin to its destination, goods are handled over multiple agencies, Intermediaries and Sub-contractors. The significant increase in volume traded overseas added to the high-speed operations are demanded to happen, has precluded controls in the handling of these goods over the parties.

Having the controls precluded results also in gaps where non-compliance could take place⁸⁶. The short timeframe and lack of sufficient resources to physically inspect all

⁷⁹ Position 01.11.1994 – See Annex C and Annex D

⁸⁰ See Appendix C and D

⁸¹ i.e.: different wording

⁸² And not debt liability

⁸³ Despite the UCC makes no distinction, national Law in the member states could potentially mislead people to interpret differently. Nevertheless, remark to the fact the UCC is directly applicable to all Member States.

⁸⁴ There is though, a Guidance published on 2019 by the Commission on Guarantees (Article 89(3)) which could be seen as contradictory to this, as it specify a situation where these responsibilities would not be applicable. Nevertheless, we disregard in this context, as Guarantees are directly linked to debt liability. On section 5.2 is further explained on debt liability on Export. Source: https://ec.europa.eu/taxation_customs/business/union-customs-code/ucc-guidance-documents_en#debts.

⁸⁵ For instance: declaration field stating which country shipment originates from (i.e.: Originates in China, but is incorrectly stated Vietnam); or product description (although check is mainly on documentary side, if there is any doubt concerning the physical goods, this should proactively be checked with the client); or the proper statement that goods are classified as restricted (i.e.: dual use goods)

⁸⁶ As an example to illustrate; on the 25th Nov 2012, gCaptain has published an article, about an investigation from Maritime New Zealand into 21 containers containing dangerous goods on board the

goods and cross-check the accuracy/completeness of the documentary flow represents a real constrain⁸⁷.

Nevertheless, it is essential to distinguish between: the necessary changes that provisions should undergo to be aligned with the reality of business & trade; *versus* provisions that regardless its fitness to the reality of trade, are in force and therefore mandatory to be considered.

4.3.3.1 Comparative Table

This section aims to provide an overview of the definition, roles and responsibilities concerning the main parties involved in the accomplishment of an export.

As a relevant side note on the meaning of *Liability* in the context of the UCC: despite the fact the word *Liability* is commonly used to refer to *legal responsibility*, the UCC (and DA, IA, TDA) always⁸⁸ refers to it strictly in association to the meaning of *financial debt*⁸⁹. Despite in theory art 81⁹⁰ UCC provides that the declarant shall be the debtor, on practical terms on export side there is no financial debt⁹¹: Under EU law, the distinction between direct and indirect representation is of practical importance only to the question of who becomes a debtor i.e. only in the case of import and not export declarations (Lux/Schrömbges, 2020).

stricken M/V Rena that were not originally declared by shippers on the ships manifest. Source: <https://gcaptain.com/additional-dangerous-goods/>

⁸⁷ Established practices in the carriage of goods by sea such as 'said to contain', challenged by legal precedent but not helped by Hague-Visby or Rotterdam Rules, mean that the Master of a vessel will not know what the vessel is carrying thereby risking life at sea and on land. Goods can move along the supply chain as part of contracts and sub-contracts and with varying degrees of transport or carrier integrity. Criminals and untrustworthy operators exploit these deficiencies and defraud about USD20 billion annually. (Hesketh, 2010)

⁸⁸ Hereby a list of all references where the wording "Liability" is quoted in the UCC. All of them are strictly associated to the meaning of financial debt: Art 98 (1,2) UCC; Art 83 (1)(C) UCC DA; Art 128b (1)* UCC DA; B ANNEX 32-05 UCC DA; B ANNEX 33-02 UCC DA; Art 163 UCC IA; B VI/4 33 UCC IA; C3 Art 128b (1)* UCC TDA.

The ones signed with an asterisk are referring to "*liability for the legal consequences arising from "T2L/T2LF"*". The wording liability here is also strictly linked to the financial debt: T2L/T2FL involves non-Union goods, therefore being in concern the financial debt arising in the event these non-Union goods are discharged from its procedure without the payment of duties.

⁸⁹ The Cambridge dictionary refers to liability in two meanings: Legal Responsibility and Debt <https://dictionary.cambridge.org/dictionary/english/liability>)

⁹⁰ Art 81 UCC (3) *The declarant shall be the debtor. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor. Where a customs declaration is drawn up on the basis of information which leads to all or part of the export duty not being collected, the person who provided the information required for the declaration and who knew, or who should reasonably have known, that such information was false shall also be a debtor.*

⁹¹ Governments generally encourage exports as a source of national income and production, thus they are more likely to subsidize exports rather than to restrict them. However, when applied, these are mainly on primary commodities, such as minerals, metals, and agricultural commodities (Piermartini 2004). In the agricultural sector, export restrictions are applied for a number of reasons, but in times of high or volatile prices, they are generally applied to guarantee domestic food supply and lower domestic prices (Anania 2014). In the future, in the event of non-compliance, the LVCR will apply a policy where the ID from the exporter (special VAT Reg#) will be withdrawn, so as the economic operator can't perform anymore (this will serve as a "punishment", but not as a customs duty to the exporter)

Furthermore, the scope here is strictly on the Export⁹² of *Union* goods⁹³, not including neither outward processing⁹⁴ nor re-export of *non-union* goods. If the latter were in scope, the debt liability for non-compliance⁹⁵ would be related to import⁹⁶, not export⁹⁷. We, therefore, disregard “liability” as a comparative element in this section.

⁹² Art 269

⁹³ Art 5, 153, 154 UCC

⁹⁴ Art 259-262 UCC

⁹⁵ Financially, errors in the re-export of non-Union goods are particularly serious because they may result in withdrawal from customs supervision or a breach of duty in the context of the procedure in question, which in principle results in the creation of a customs debt (Art. 79 (1) (a UCC). It is then necessary to examine whether the defect can be remedied in accordance with Article 124 of the UCC, e.g. by catching up on the prescribed formalities (Art. 124 sec. 1 sec. h UZK i.V.m. Art. 103 UCC-DA) or by proving that the goods were not consumed or used in the customs territory but were removed from the customs territory without an attempt to deceive (Art. 124(1) (k) and (6) paragraph 6). In addition, the offence of tax evasion or reckless tax reduction (Sections 370, 378 AO) may be satisfied, so that self-reporting is to be considered (Sections 371, 378(3) AO). Lux/Schrömbges, Zoll und Umsatzsteuer, Entwurf 2. Auflage (Pg 14)

⁹⁶ Art 79 UCC

⁹⁷ Art 82 UCC

TABLE 5: COMPARATIVE TABLE | EXPORT⁹⁸

PARTY	UCC DEFINITION & ROLE		RESPONSIBILITY
Exporter [Box 2]	<p><i>ART 1 (19) UCC DA 'exporter' means:</i></p> <p>(...) (b) in other cases, where (a) does not apply:</p> <p>(i) a person established in the customs territory of the Union, who has the power to determine and has determined that the goods are to be taken out of that customs territory;</p> <p>(ii) where (i) does not apply, any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of that customs territory.</p>		
Declarant⁹⁹ [Box 14]	<p><i>ART 5 (15) UCC 'declarant' means:</i></p> <p><i>the person lodging a customs declaration, a temporary storage declaration, an entry summary declaration, an exit summary declaration, a re-export declaration or a re-export notification in his or her own name or the person in whose name such a declaration or notification is lodged.</i></p> <p><i>Art 170 (2) UCC</i> <i>The 'declarant' shall be established in the customs territory of the Union.</i></p>		<p>As a person involved in the accomplishment of customs formalities, shall, at the request of the customs authorities and within any time limit specified, provide those authorities with all the requisite documents and information, in an appropriate form, and all the assistance necessary for the completion of those formalities or controls. [Art 15 (1) UCC]</p> <p>As a person involved in the lodging of a customs declaration, is responsible for the accuracy and completeness of the information given in the declaration; the authenticity, accuracy and validity of any document supporting the declaration; compliance with all of the obligation relating to the placing of the goods in question under the customs procedure concerned, or to the conduct of the authorized operations. [Art 15 (2) UCC]</p>
Representative¹⁰⁰ [Box 14]	Direct	<p><i>ART 18 (1) UCC</i> (...) <i>in which case the customs representative shall act in the name of and on behalf of another person...</i></p> <p>[The person represented is the Declarant (Art. 5(15))]</p>	
	Indirect ¹⁰¹	<p><i>ART 18 (1) UCC</i> (...) <i>in which case the customs representative shall act in his or her own name but on behalf of another person</i></p> <p>[The representative is the Declarant (Art. 5(15))]</p>	

⁹⁸ Scope is strictly on the Export of Union goods. If re-export of non-union goods was in scope, an additional column for liability would be relevant to be inserted. Nevertheless, note the liability for non-compliance in the case of non-Union goods is within the scope of import (Art 79 UCC), not export (Art 82 UCC)

⁹⁹ Although the person represented does not submit the customs declaration himself, he is considered to be the declarant (Art. 5 (15) UCC)

¹⁰⁰ In Germany and Austria, only direct representation exists in civil law. See Section 164 (1) of the German Civil Code: "A declaration of intent made by a person within the power of representation to which he is entitled on behalf of the representative acts directly for and against the representative. It makes no difference whether the declaration is made expressly on behalf of the representative or whether the circumstances indicate that it is to be made on his behalf."

¹⁰¹ Indirect representation is fundamentally not possible in the following cases: inward and outward processing, temporary and final use, private customs warehouse, as well as the use of the simplified registration or cover letter procedure for the above-mentioned special procedures, because in such cases the person represented holds the relevant authorization must be. [1] In the case of a release for free circulation, however, the representative can use the authorization granted to him to use the simplified registration or cover letter procedure for his (non-EU customers). [2] On the other hand, the requirement of resident in the Union for exporters (Art. 1 (19) UCC-DA) cannot be circumvented by appointing an indirect representative (resident in the Union).

As can be seen in Table 5, the definitions and roles of the exporter, declarant and representatives are distinct. Nevertheless, the responsibilities – appointed by Art 15 (1) UCC as well Art 15 (2) UCC - are straightforward in indicating that *any* person involved in the accomplishment of customs formalities, shall, at the request of the customs authorities and within any time limit specified, provide those authorities with all the requisite documents and information. The accuracy, completeness, authenticity and validity of the declaration lodged is also appointed (equally, with no distinction), as a responsibility of these persons.

Considering the above, two conclusions can be outlined. One is that, from a customs perspective, the responsibilities appointed to the Exporter of Union goods are the same as the ones appointed to the other two parties involved in the export, namely the Declarant and the Representative. The second conclusion is that any representative currently acting as an indirect representative could take the additional role of exporter without considering that this will signify additional burden to him. Therefore, from a customs perspective, the impact of the revised definition is limited.

4.3.4 Other Implications

As concluded in the previous section, from a customs perspective, the implications of the revised definition are limited. Nevertheless, it is necessary to examine if implications – other than these – should apply. The present section will focus on this matter.

The definition of exporter can differ per legislation (EU Customs Law, or non-Customs Law such as VAT, Dual-use Reg, Sanctions list, Arms Reg, etc.). On the customs declaration only one field exists to indicate the (customs) exporter, which means, consequently, that if the exporter defined as per other regulations is a different person, it will not *per se* be regarded in the declaration. For easier understanding, the exporter defined as per other regulations will be here denominated as the “foreign trade exporter”.

Figure 10 illustrates an example of such deviation. The person acting as exporter according to the customs law is not the same person considered as exporter according to non-Customs law:

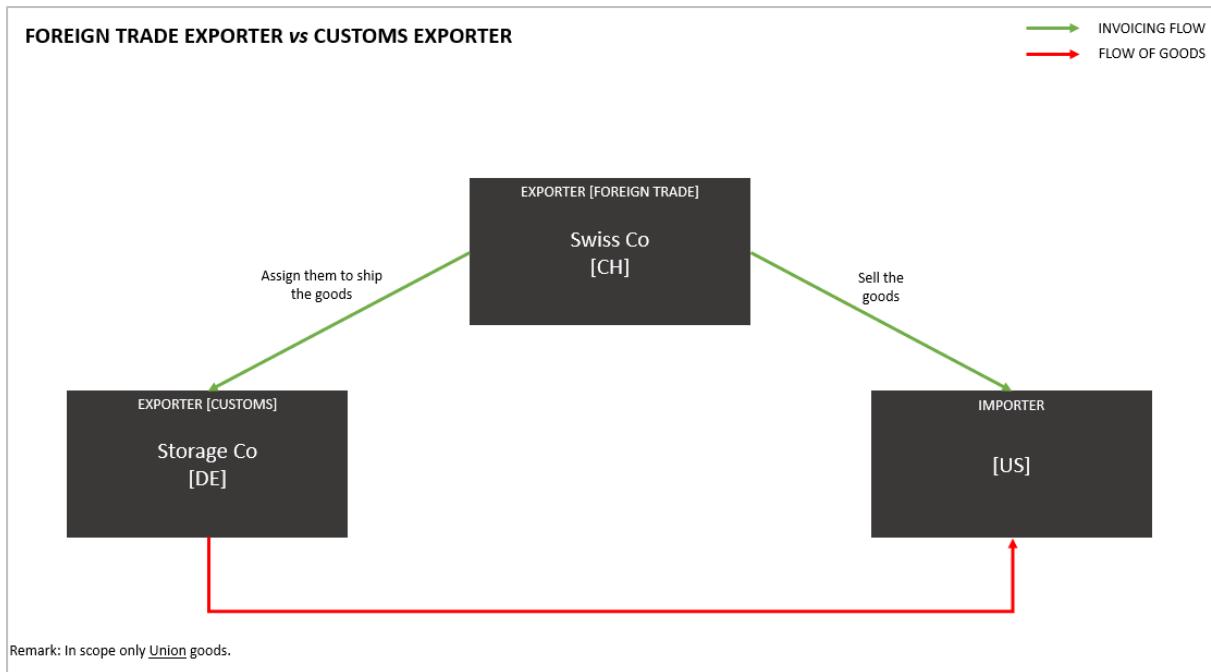


FIGURE 10: Case illustration “Deviation on Exporter definition”

In the example illustrated above, and according to EU Customs Law, DE is the MS where (Union) goods are presented to customs when being exported from the EU. Nevertheless, the ownership of the goods is already transferred to a CH entity previously to the moment goods are brought out of EU territory. Due to the revised UCC definition on (customs) "Exporter", CH party can't act as exporter for customs purposes as they are not established in the EU customs territory.

In this setup, the CH party assign a DE Party (or another EU established party) via contractual agreements to ship the goods (agreeing separate "sub-contractor" terms) and to act as the exporter. In this example, DE party uses its empowerment to determine that the goods are to be taken out of that customs territory.

Under Customs Law, DE party is the exporter. Under non-Customs law (i.e., VAT), CH party is the exporter. In some other cases, could even be that the party that is really transaction-wise involved in the exportation (i.e., the Seller) is not mentioned anywhere in the export declaration.

German customs has recently published¹⁰² a new requirement enforcing business to indicate such deviations in the declaration¹⁰³, and this requirement applies regardless of the nature of the goods (restricted or not restricted). The main reason for this new requirement is to strengthen enforcement towards having businesses proactively indicating when such "deviations" are applicable, instead of leaving this task to local

¹⁰² <https://www.buzer.de/gesetz/13882/a238445.htm>

¹⁰³ Coding 3LLK in the declaration and stating the EORI no. of the foreign trade exporter as "document reference"

authorities. Note that MS's needs to be compliant to both Customs Law and non-Customs Law, therefore their concern to assure internal controls when such deviations apply.

As mentioned in the case above, where the party that is really transaction-wise involved is not mentioned in the declaration, customs wants to have the latter identified. The German requirement indeed supports in risk *assessment* but offers little in risk *mitigation*. Note that in the event an export of restricted goods is not declared as such (deliberately or by negligence), the risk of facing criminal charges won't fall on this non-EU principal (due to constraints in prosecuting persons which are outside the EU). The party (i.e., forwarding agent) that has performed due diligence and is acting in good faith will still be the one penalized.

4.3.4.1 VAT Implications

The EU VAT legislation (Council Directive 2006/112/EC) does not define the term "Exporter", though, it provides in its Art 146 that *the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor or by or on behalf of the customer not established in the territory*¹⁰⁴ are considered as a transaction VAT exempted.

General rule followed by the Member States is that the exporter (stated on Box 2¹⁰⁵) is the taxable person eligible to apply for the VAT exemption. The Commercial Invoice is the document sustaining the proof of sales, and the customs declaration is the document sustaining the proof of export. Keeping records of the declarations, therefore, enables traceability and auditability.

Nevertheless, according to the revised definition of exporter, in the scenario where the exporter is non-EU established, this person can no longer be stated on Box 2¹⁰⁶. This latter, in order to bring goods out of the territory of the Union, may appoint a customs exporter (i.e., a forwarding agent EU established) to be stated on Box 2. Note that in this scenario, a dissociation from the VAT rules (ownership) occurs, as, someone who is not the owner of the goods is acting as exporter (for customs purposes).

VAT relief on export won't be valid unless the owner is VAT registered in the EU and receives the export notice. Therefore, an EXW supply to a non-EU customer is not the

¹⁰⁴ Art 146 COUNCIL DIRECTIVE 2006/112/EC, of 28 November 2006, on the common system of value added tax

¹⁰⁵ The reference to "Box 2" has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

¹⁰⁶ The reference to "Box 2" has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

desired way of doing business from the perspective of EU VAT rules. For VAT zero-rate controlling, the EU supplier is much more secure than giving a VAT refund to a non-EU customer who exports for his own account.

Deviations, as mentioned above, are not ideal and might trigger legal proceedings around the taxable person and its eligibility to rights (i.e., right of deduction). In the case between Skatteministeriet v DSV Road A/S¹⁰⁷, the Court interpreted Art 168(e) of Council Directive 2006/112/EC on the common system of value-added tax as not precluding national legislation which excludes the deduction of VAT on import which the carrier, who is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT. The right to deduct exists, therefore only in so far as the goods imported are used for the purposes of the taxed transactions of a taxable person. Since the value of the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration, the conditions for the application of Article 168 (e) of the VAT Directive are not satisfied in the case.

The practical solution which enables the customs declaration to be kept as proof of export is to state the name of the non-EU established exporter on another box. Nevertheless, Member States have different approaches on this matter: in some, only the exporter (stated on Box 2) can claim the export VAT exemption – for example, Romania (Romanian Fiscal Code – law 227/2015). In others (i.e., Belgium and the Netherlands), the use of Box 44 is being used as an alternative solution.

4.3.4.2 Exports involving controls

Under Customs Law, the responsibilities that the Exporter, the Declarant or the Representative will carry, are pointed out by Art 15 UCC (see section 4.3.3.1). These responsibilities apply regardless of the nature of the goods (restricted or not restricted).

If the export involves controls and/or sanction regulations and/or product regulations, then, only in the case the goods in question are under a classification that put them into the scope of that control, the regulation will then apply. As an example, under Dual-Use Reg, *only* if goods fall under the scope of the Art 2 (1) of Reg (EC) No 428/2009, then the exporter will carry the responsibilities under the (Dual-use) Regulation. The same logic applies to other regulations involving prohibitions and

¹⁰⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1598170449997&uri=CELEX:62014CJ0187>

restrictions, such as embargos, sanctions¹⁰⁸ and arms regulation. The full list issued¹⁰⁹ by the Dutch Ministry of Safety, Health, Economy, Environment (VGEM) and Central Import and Export Office (CDIU) can be seen on Table 6 (Overview Customs Authorizations for Restricted Goods).

Type of application	For what?	Application form
Drug precursors Cat. 1	To import and export Cat. 1 substances, hold or trade in these substances within the EU, and conduct intermediary activities involving these substances.	Explanatory notes
Consent for weapons and ammunition	For the entry, exit or transit of category II and III weapons, ammunition and parts thereof, in the Netherlands. These are not intended for public services or the armed forces.	Application form Explanatory notes
Export of dual use goods	To export certain dual use goods to specific destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Goods covered by (EU) regulation 2019/125 (torture devices)	To import, export or transit torture devices to and from EU countries. A prohibition applies in some situations.	Application form (in Dutch) Explanatory notes (in Dutch)
Goods covered by (EU) regulation 2019/125 (torture devices) - General	To export torture devices or medicines for example, suitable for use as capital punishment, to certain destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Export, transit or transfer of military goods	To supply goods included in the common EU list of military goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of drug precursors	To export registered substances, with the exception of any exemptions.	Explanatory notes (in Dutch)
Registration of Cat. 2	To trade, Export or import Cat. 2 substances or conduct intermediary activities with such substances, with exemption. Also when using a Cat. 2A substance and holding more than 100 litres.	Explanatory notes (in Dutch)
Registration of Cat. 3	To export Cat. 3 substances from the EU.	Explanatory notes (in Dutch)
Export and re-export of Annex II goods to Russia.	To export and re-export certain goods for the oil and gas industry to Russia.	Application form (in Dutch) Explanatory notes
Goods subject to sanctions	To export or transit goods which require a permit according to national or international sanction legislation. Also all other operations using these goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of dual use goods	To export dual use goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export or transit of military goods	To export or transit goods included in the common EU list of military goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of firearms, parts and essential components for firearms and ammunition	For the final export of certain firearms and ammunition from the EU.	Application form (in Dutch) Explanatory notes (in Dutch)
Classification request	In case you have doubts regarding the permit obligation, the exemption obligation, the possible embargo on goods to be exported, or the final use of non-permit goods.	Application form (in Dutch) Explanatory notes
Procedures for dual use goods	To export certain goods for dual use – not included in Annex I of directive 428/2009 – to certain destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of cultural property	To export cultural property from the EU.	Application form (in Dutch) Explanatory notes (in Dutch)
Temporary export of specific cultural property	For multiple, temporary export of 1 or more cultural property goods from the EU. This concerns cultural property temporarily used or exhibited in another country.	Application form (in Dutch) Explanatory notes (in Dutch)

¹⁰⁸ <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions>

¹⁰⁹<https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/customs/authorisations/customs-authorisations/overview-of-customs-authorisations/overview-customs-authorisations#vgem>

TABLE 6 – Overview Customs Authorizations for restricted goods (issued by VGEM/CDIU)¹¹⁰

Although only in the case goods are under restriction, the applicable regulation (i.e., Dual-use Reg) will apply, in the event goods are misclassified, deliberately or by negligence, and end up not being declared under restriction (whilst it should have been), the exporter faces serious risks.

This has been the primary concern addressed by forwarding agents reluctant to act as an exporter as the role of exporter does not limit to a mere formality for statistical purposes. It indicates who carries the responsibility for the goods being brought out of the customs territory of the Union.

In the scenario where a forwarding agent is appointed as the exporter, it should be noted that they are not the actual owner of the goods. Most likely also did not manufacture nor pack the goods. Therefore, the judgement on what goods are being exported, and the accuracy/completeness of the documentation referred to the transaction, is actually based on what the owner of the goods (presumably the Client) has said so. Therefore, efforts in assuring the accuracy/completeness of the data lodged via due diligence and internal controls are crucial in this context to ensure risks are controlled.

As highlighted in section 4.3.2.1, EvoFenedex and FENEX have developed a Representation Agreement¹¹¹ model to support business & trade in mitigating above risk. On its article 1, paragraph 3, it's stated the following:

The Client must ensure independently and on its own initiative that **the export of the goods is not restricted, subject to conditions or prohibited pursuant to applicable international, EU or national legislation, including but not limited to: export control and/or sanction regulations and product regulations**. The Client shall inform the Forwarding Agent of the results of this investigation in writing, no later than at the time of the assignment being given in respect of the goods to be exported. **The Client is obligated to provide the Forwarding Agent with all requisite information and documentation** (Including, but not limited to, export licenses, goods classification, destination, addressee, end user and end use), that is required to be able to carry out the assignment in accordance with the applicable legislation. **The Client guarantees that this information and documentation is correct, entirely valid, genuine and in no way whatsoever, misleading.**

¹¹⁰<https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/customs/authorisations/customs-authorisations/overview-of-customs-authorisations/overview-customs-authorisations#vgem>

¹¹¹ See Annex C

Above article bind the Client to three main conditions: *declare goods are not restricted/prohibited under EU or national legislation*, agrees to *provide all requisite information and documentation required to carry out the export*, and, as last, *guarantee that this information and documentation is correct*.

Contractual terms addressing the above concerns are essential to be in place. Nevertheless, it follows the purpose to mitigate risks, not eliminate it. Richard Albert, EY Partner (Indirect Tax & Global Trade) in Leipzig - Germany, comment having seen recent cases in practice in which logistic service firms excluded transportation of arms and weaponry in the Terms and Conditions but finally in practice transported the latter. Due to missing export/transhipment licenses, current criminal cases against the service provider and its personal are running.

Another alternative to mitigate these risks can be via issuance of a statement declaring that the goods to be exported are not under restriction, granting therefore, legal certainty to the exporter. In the Netherlands, a governmental agency called CDIU (Central Import and Export Service) provides a service where you may request such statement (in both English and Dutch) confirming that the goods concerned are (or not) subject to an export authorization. In Germany, the application can be made electronically (ELAN) at BAFA. Note to potential time constrains this alternative may trigger, as the answer may take a long time for critical countries (e.g. Iran). There is also the risk these agencies would be overwhelmed if too many requests start being raised.

Another alternative to mitigate potential risks when accepting the role of the exporter is to request the Client a bank guarantee which serves as collateral for the benefit of the forwarding agent in respect of the Client's liability. The amount to be determined could depend on volumes, values, and risks in scope.

A final consideration to be raised for those willing to act as the exporter is on the differentiation between long-term clients and one-time occasions. For clients who are known for many years, and the historical data presents evidence to be a trustworthy partner in control of its operations, the probability of non-compliance is severely reduced. For one-time occasions or occasions where the exporter is not known, the likelihood this party finds an exporter to accept the role is narrowed.

4.4 Conclusions

The previous sections have analyzed the impact of the revised definition from multiple perspectives.

Firstly, it has been identified who are the stakeholders involved in this matter and how do they position in terms of power and interest.

Secondly, we've scoped the impacted businesses via quantitative measures, evidencing the portion of entries affected by the revised definition (current exports via indirect representation), and concluded that this percentage is significant when considering the whole.

Thirdly, we've concluded that knowing the number of non-EU established entities acting as exporter could give us a notion of how many companies were impacted by the revised definition. However, this would still not determine the level of impact. For the latter, we investigated if there are alternatives available to businesses in order not to disrupt the flow of goods. Most likely, the first step these impacted companies will take will be assessing if any of the alternative solutions available to them are, in fact, feasible to be achieved. This is an individual exercise, highly dependent on the particularities of each business set up and internal group policies. In case an alternative is found (i.e., Incoterm revision¹¹²), the assumption is that no further claim nor further petition will be raised as the impact is reasonable small/accepted.

For a more detailed examination, a series of 5 flows diagram has also been illustrated indicating who could act as exporter depending on different SC scenarios.

Next, we analyzed what implications, from a customs and non-customs perspective should be considered for those parties willing to act as an exporter on behalf of those non-EU established exporters which, given the revised definition of exporter, can no longer act as such. The conclusion is that, from a customs perspective, implications are limited. However, it is important to analyze as well other implications, what risks these represent, and alternatives to mitigate these.

Lastly, it is concluded that having proper contractual terms addressing the above concerns are essential to be in place. Nevertheless, it follows the purpose to *mitigate* risks, not *eliminate* it. As explained in section 4.3, once appointed as the exporter, the risk, and the possibility to be audited becomes a reality. Nevertheless, having the risks and burden well translated into financial means, signify that forwarding agents could also see this as a business opportunity, especially when considering the potential market these non-EU exporters represents¹¹³.

¹¹² Or other alternatives i.e.: establishment of the business in the EU, appointment of a broker/forwarder to act as Exporter, appointment of an affiliated company to act as exporter.

¹¹³ See section 4.3.1 (Scope)

5. THE ELIMINATION OF INDIRECT REPRESENTATION

5.1 Introduction

The substantial change brought by the revised definition of exporter¹¹⁴ is, in fact, the elimination of indirect representation on Export side as an alternative to non-EU established companies.

As already discussed on previous sections, this change in the regulation has brought a wave of discussion, has impacted a significant portion of exports, has required these exporters to adapt their business in order to avoid a disruption in the flow of goods, among other implications. The question that remains is around the actual *need* to have eliminated indirect representation.

In answer to the above question, two points are addressed. One examines the possible reason why the Commission enforces this new condition only on exports whilst on imports it remains permitted. The second point will assess if the elimination could have, in fact, been avoided.

5.2 The inequity in treatment between Export and Import

In this section, we bring into discussion the fact that on imports, non-EU established business are still able to make use of indirect representation, although, on the export side that is no longer permitted.

The inequity in treatment between Export and Import in concern the use of indirect representation triggers the question what the root cause of it is. Although there is no official explanation, three elements are essential to be considered: the complexity in addressing violations, the risks involved, and the nature of EU controls.

In theory, the eligibility of both entities appointed on Box 2 (Exporter) or Box 8 (Consignee) relies upon the condition of being established in the EU customs territory. The primary justification for that lies on the risk mitigation of addressing violations to a legal person which is not established in the EU. Persons who are not established in the EU cannot be prosecuted¹¹⁵.

In terms of risks, despite being complex to compare, both import and export present financial and non-financial risks to the Union. On import, the exposure is mainly on the financial side. The risk of incorrect or no payment of customs duties goes opposite to the economic interest of the Union, which is to collect duties.

¹¹⁴ (EU) Reg 2018/1063

¹¹⁵ Even in cases that only a fine exists, is also difficult to collect in a country outside EU jurisdiction

On export, despite the absence of financial risks (duty collection)¹¹⁶, the exposure is mainly on the non-compliance concerning shipments of waste, and on a more warning category, non-compliance on the export of restricted goods¹¹⁷ as well its potential repercussion on the international Community. Besides the mentioned risks to the Union, businesses & trade are potentially exposed to criminal charges, seizures, holds, delays, revocations of (customs) authorizations, loss of contracts, among others.

Despite the fact, both sides present risks to the Union, a key element here is the nature of controls in the EU. Michael Lux, member of the Scientific Committee of the European Forum for External Trade, Customs and Excise Duties in Germany, comments that on imported goods is less complex to track down the transaction. In the event, goods are incorrectly declared (i.e., due to misclassification), the legal person, the goods, and its books can still be checked post-clearance. The main controls in the EU are made in audits and not when the goods are presented. Differently, customs in other parts of the globe (i.e., Brazilian customs) still control much of the flow of goods upon arrival at the border.

In fact, not much is known on cases of post-clearance audits on Exporters. Art 272 of the UCC brings the legal base for making sure the export procedure has been discharged within 150 days:

- (2) Where goods for which an exit summary declaration has been lodged are not taken out of the customs territory of the Union, the customs authorities shall invalidate that declaration in either of the following cases:
 - (a) upon application by the declarant
 - (b) within 150 days after the lodging of the declaration

Regarding post-clearance revisions on exports, relevant to quote a Court judgement hold on 12 July 2012, *Südzucker and Others* (C-608/10, C-10/11 and C-23/11, EU:C:2012:444, paragraph 50). In the case, the Court has stated that the mere fact that a physical check of the goods prior to being exported has become impossible since those goods have already left the territory of the European Union on the date of submission of the request for revision of the export declaration, does not mean that is impossible to carry out such revision.

As mentioned above, exports involving controls, are seen as the main risk on the export side, being, therefore, the main reason for post-clearance audits. Being the dual-use goods seen as the main risk on the export side for the Union, and representing a minority of the volumes exported out of the EU, shouldn't the conditions

¹¹⁶ See introductory part of section 4.3.3.1 (Comparative Table)

¹¹⁷ See section 4.3.4.2 (Exports involving controls)

(i.e., of being EU established) be imposed strictly to the export of these commodities, instead of imposing the same restriction to exporters of non-restricted goods? By that, the Union would run a risk-based approach and strengthen control only to those that represent a risk, freeing others from unnecessary restrictions.

Nevertheless, the issue is not only on the restricted goods declared as such but also on the restricted goods wrongly (not) declared as such. The law aims to act as an umbrella, bringing into scope those who evidently represents a risk, but also including those who could potentially represent a risk.

As an example, Ski Goggles and Night Vision Goggles are both classified under EU HTS Code 9004 90 90 00. The first goggle has no export restrictions, though, the second one could potentially also be used for military purposes. For the later, export restrictions would apply. Therefore, in order to capture the whole set of commodities that could potentially be under restrictions, and mitigate the risk of non-EU exporters bringing restricted goods out of the customs territory, the law needs to reach business in a broaden way.

5.3 The actual need to have eliminated indirect representation

Article 18 (1) of the UCC states that “*any person may appoint a customs representative.*” This condition also allows a non-EU established entity to appoint a customs representative to act on their behalf when dealing with customs. Article 18 (2) of the UCC, also states that a customs representative “*shall be established within the customs territory of the Union*”. Customs have, therefore, an EU established party to take responsibility for the customs activities even in cases where the trader is not established in the EU.

Generally, goods in the scope of exportation can be either restricted (i.e., dual-use goods) or non-restricted (i.e., standard goods).

Considering above, and considering the new condition brought by the revised definition of exporter, we see four possible scenarios, illustrated by Table 7: two “*prior*” to the revised definition, and two “*post*” the revised definition:

Export of Union Goods (prior to Reg 2018/1063)				Export of Union Goods (post Reg 2018/1063)			
Scenario	Qualified to act as Exporter (under EU Customs Law)	Qualified to act as Exporter (under Dual-Use Reg)	Scenario	Qualified to act as Exporter (under EU Customs Law)	Qualified to act as Exporter (under Dual-Use Reg)		
#1 Exporter is EU Established.	Yes	Yes (Only under condition of holding export authorization)	#1 Exporter is EU Established.	Yes	Yes (Only under condition of holding export authorization)		
#2 Exporter is non-EU Established.	Yes (Only if under indirect representation)	No	#2 Exporter is non-EU Established.	No	No		

TABLE 7: Qualification scenarios pre & post revised definition of exporter

Note that, if the export in question involved *restricted goods*, non-EU exporters in neither case could export, as you need to be established in the EU in order to apply for such export authorization¹¹⁸.

Observe that the scope of exports impacted by the revised definition represented a limited risk to the Union, as these goods were not under restrictions. Therefore, why bother changing the regulation and eliminating indirect representation?

One may argue that *in the event the exporter was not established in the EU, how could customs ensure that the data of the declaration could be controlled at the premises of someone established in the EU?* This argument is unfounded, as this risk was already being covered by the indirect representative (which, was necessarily established in the EU).

One may also argue that *the non-EU established exporter could, deliberately or not, misclassify the goods as “not under restriction”, and attempt bringing restricted goods out of the EU.* Though, this risk is not typically coming from non-EU exporters. It is generalized and, in theory, exist in all exports. The risk can, nevertheless, be highly mitigated having proper internal controls in place.

Another argument could be that *“the indirect representative is not the actual owner of the goods and might not have access to the data”*. Nevertheless, this risk equally exists when a forwarding agent is appointed as the exporter.

Considering the above arguments, the elimination of indirect representation could have been avoided. Keeping the non-EU established Exporter on Box 2¹¹⁹, and an EU established indirect representative on Box 14, would enable better traceability of the transaction, as, the person who is really transaction-wise involved would be kept on the export declaration. This would also eliminate potential cases of deviations between the exporter for customs purposes and the Exporter for other purposes (i.e., VAT). In the event of non-compliance found post clearance, customs have, an EU established party to take responsibility (the EU indirect representative).

An assumption is here proposed to explain why the change on the regulation, and why only now it occurs.

As explained in section 5.2, non-EU established business are not eligible to be prosecuted by the EU Court in the event of an infringement of customs regulations or other regulations involved in export controls¹²⁰. Indirect representation on exports is a loophole that could have been eliminated on past UCC revisions but presumably was never flagged as a risk neither given as a priority. The answer lies, most probably, on the scope that non-EU exporters took on past years. The increasing presence of entries under indirect representation could have been flagged as an increase in risk exposure requiring, therefore, measures against it. If this is the actual explanation, we

¹¹⁸ In such cases the person represented must be the holder of the corresponding authorization. Check Annex F for an overview of the export authorizations for restricted goods, issued by VGEM (Veiligheid, Gezondheid, Economie en Milieu) and CDIU (Central Import and Export Office)

¹¹⁹ The reference to “Box 2” has been used to facilitate the reference to Annex B of the UCC-DA for the column B1 (Export declaration), data element 3/9 (Consignee), as stipulated by EUCDM GUIDANCE DOCUMENT issued by the Commission on the 6 October 2016.TAXUD A3 (2016) 2696117

¹²⁰ See section 4.3.4.2 (Exports involving controls)

consider here as a legitimate and well-founded reason which can't be treated as an unnecessary restriction.

CONCLUSIONS & RECOMMENDATIONS

Conclusions

The revised UCC definition of exporter has brought a wave of discussions among Customs, Business & Trade. The dimension this matter has gained by the media and press releases, bring us to give attention to this matter. The question that remains is if the overall impact has been overrated by stakeholders

This research aimed, therefore, to understand '*what is the impact of the revised definition of exporter on business and trade?*' For this end, three sub-questions were asked, namely (1) '*How can we scope the impact of the revised UCC definition of exporter on Business & Trade?*'; (2) '*What are the Customs and non-Customs related implications?*'; and lastly, (3) '*From a Legal perspective, how relevant was to revise the definition?*'.

The first question aimed to scope the impact of the revised UCC definition of exporter on business & trade. For this end, the population affected by this revision has been identified. A preliminary stakeholder identification¹²¹ has been applied for a high-level understanding of the groups and persons directly or indirectly involved in the matter. A matrix based on *Power vs Interest grids* from Eden and Ackernlann (1998: 121-5, 344-6), was drafted, identifying and classifying the seven stakeholders involved, namely: non-EU established businesses, Forwarding agent Associations (NL&EU), Forwarding agents (NL & EU), Ministry of Foreign Affairs, TAXUD, NL Customs, Overall EU business.

Once identified the stakeholders, we investigate who is the population impacted by the revised definition. This share is represented by all non-EU established businesses currently bringing Union goods out of the customs territory of the EU via Export. With a data extract indicating the total number of export declarations lodged on the past three years in the Netherlands, we could identify how much of these are under indirect representation¹²².

Out of this data, two surprising figures were found out. One was the high percentage represented by entries under indirect representation: In the year 2019, almost one of each five entries were under indirect representation¹²³. The other relevant figure was the growth trend shown from one year to the other. From 2017 to 2018 the percentage grew to 16%. And from 2018 to 2019, an additional 5%.

¹²¹ See section 4.2 (Stakeholder analysis)

¹²² See section 4.3.1 (The scope)

¹²³ Note as well that UK-established companies would, post-Brexit, no longer be able to act as exporter, directly increasing the number of non-EU companies impacted

Therefore, considering the significant portion of export entries under indirect representation, and the growth trend that these indicate, we may conclude that the scope of impacted business due to the revised definition is not limited.

The numbers above give us a notion of how many companies are impacted by the revised definition. However, it does not indicate how much they are impacted.

To understand how affected the population became, we investigated if there are alternatives available to businesses in order not to disrupt the flow of goods. We identified four main categories composing the split of the chosen alternative solutions by non-EU exporters¹²⁴

The highest amount will likely revise the sales incoterm (i.e., from Ex-Works to FCA/FOB), ensuring by this, that the EU seller will act as the exporter¹²⁵. On second place, are the ones that will appoint an affiliated company to act as the exporter¹²⁶. On third place, are the ones appointing a forwarding agent as the exporter¹²⁷. On fourth place, are the ones establishing themselves in the EU¹²⁸.

Most likely, the first step these affected companies will take, will be assessing if any of the alternative solutions available to them are feasible to be achieved. This is an exercise highly dependent on the particularities of each business set up, internal group policies, and timeframe available¹²⁹. In case an alternative is found, the assumption is that no further claim nor further petition will be raised as impact is reasonable small/accepted.

In all mentioned alternative solutions, a new party will take the role of the exporter. For this end, a scheme with five flows diagram¹³⁰ has been illustrated indicating typical examples on 'who could act as exporter' depending on different SC scenarios.

The second question we aimed to answer in this research was: '*what are the Customs and non-Customs related implications?*'.

¹²⁴ See section 4.3.2 (Alternative solutions)

¹²⁵ For this alternative, the sales price might have slight increase, to reflect financially the additional workload (i.e.: export clearance related costs) and risks on export side (i.e.: potential audits). In this option, small operational adaptations are also expected (i.e.: contract amendments between buyer & seller).

¹²⁶ For this alternative, is expected that no relevant workload or cost will incur, although this option is dependent on internal group policies and business set up.

¹²⁷ For this alternative, is expected that contractual amendments will take place, and most likely a price increase will occur, due to the additional burden the party will bear (see section 4.3).

¹²⁸ For this alternative, is expected that the entity will grant itself a permanent business establishment, which means, according to Article 5 (32) of the UCC, a fixed place of business, where both the necessary human and technical resources are permanently present and through which a person's customs-related operations are wholly or partially carried out. For many companies, this option seems to be the most complex one, due to the costs involved (i.e.: rents, furniture, hiring) and formalities to be fulfilled (i.e.: registrations with governmental agencies).

¹²⁹ The revised definition was published by the Commission (Reg (EU) 2018/1063) on 30th August 2018, but only one year later, on the 8th August 2019 the updated Annex A of the Guidance removed the permission given to MS's to enforce latest on the deployment of the AES. Although each MS implemented the revised definition on different dates (i.e.: the Netherlands the implementation is scheduled to the 1st October 2020, which means that business had 2 years to get ready for it) all MS gave at least one year to business to get ready to it before the revision came into force.

¹³⁰ See section 4.3.2.1 (Flows diagram)

For those parties willing to act as the exporter on behalf of those non-EU established exporters which, given the revised definition of exporter, can no longer act as such, what implications from a customs and non-customs perspective should be considered?

From a customs perspective, two conclusions were outlined. One was that according to the UCC, the responsibilities appointed to the Exporter of Union goods are exactly the same as the ones appointed to the other two parties involved in the export, namely the Declarant and the Representative. The other conclusion is that any representative currently acting as an indirect representative could take the additional role of exporter without considering that this will signify additional burden to him. Therefore, strictly from a customs perspective, the impact of the revised definition is limited¹³¹.

Under Customs Law, the responsibilities that the Exporter, the Declarant or the Representative will carry, applies regardless of the nature of the goods (restricted or not restricted). But if the export involves controls and/or sanction regulations and/or product regulations, then, *only* in the case the goods in question are under a classification that put them into the scope of that control, the regulation applies. As an example, under Dual-Use Reg, *only* if goods fall under the scope of the Art 2 (1) of Reg (EC) No 428/2009, then the exporter will carry the responsibilities under the (Dual-use) Regulation. The same logic applies to other regulations¹³² involving prohibitions and restrictions, such as embargos, sanctions¹³³ and arms regulation.

On the customs declaration only one field exists to indicate the (customs) exporter, which means, consequently, that if the exporter defined as per other regulations is a different person, it will not *per se* be regarded in the declaration.

Therefore, from a non-customs perspective, there are other regulations to comply with when taking the role of an exporter, and the risks and responsibilities involved should not be disregarded. Note that in the event an export of restricted goods is not declared as such (deliberately or by negligence), the risk of facing criminal charges won't fall on this non-EU principal (due to constraints in prosecuting persons which are outside the EU). The party (i.e., forwarding agent) which has presumably performed due diligence and is acting in good faith, will still be the one penalized. The latter has been seen as the primary concern appointed by forwarding agents reluctant to take the additional role of exporters.

Lastly, it is concluded that having proper contractual terms addressing the above concerns are essential to be in place. Nevertheless, it follows the purpose to *mitigate* risks, not *eliminate* it. As explained in section 4.3, once appointed as the exporter, the risks and the possibility to be audited becomes a reality. Nevertheless, having the risks and burden well translated into financial means, signify that forwarding agents could

¹³¹ See section 4.3.3.1 (Comparative table)

¹³² The full list issued by the Dutch Ministry of Safety, Health, Economy, Environment (VGEM) and Central Import and Export Office (CDIU) can be seen on Table 6 (Overview Customs Authorizations for Restricted Goods).

¹³³ <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions>

also see this as a business opportunity, especially when considering the potential market these non-EU exporters represents¹³⁴.

The last question we aimed to answer was: '*From a Legal perspective, how relevant was to revise the definition?*'.

At first sight, the elimination of indirect representation could have been avoided. Keeping indirect representation would eliminate potential cases of deviations between the exporter for customs purposes and the exporter for other purposes (See section 4.3.4 - Other Implications). Additionally, in the event non-compliance is found post clearance, customs would have an EU established party to take responsibility (the EU indirect representative).

The issue is that, in the event of non-compliance involving export controls (which in theory is outside the scope of exports involving non-EU entities¹³⁵), the party stated in box 2 remains outside the scope of EU prosecution.

Note this limitation has always existed ever since the foundation of the Customs Union, as, since that time, indirect representation was already an alternative to non-EU exporters, so why only now changing the regulation?

Indirect representation on exports, in fact, is a loophole that could have been eliminated on past UCC revisions, but presumably was never flagged as a risk neither given as a priority. The answer lies, most probably, on the scope that non-EU exporters took on past years. The increasing presence of entries under indirect representation could have been flagged as an increase in risk exposure requiring, therefore, measures against it. If this is the actual explanation, we consider here as a legitimate and well-founded reason which can't be treated as an unnecessary restriction¹³⁶.

Accordingly, this thesis asserts that *the overall impact of the revised definition is significant when considering the share of business impacted, but relatively low when considering the feasibility of the existing alternatives to mitigate its impact (Hypothesis 1)*, and also states that *the elimination of indirect representation as an alternative to non-EU exporters was needed, despite the fact it has triggered additional implications which have increased complexity for businesses and trade (Hypothesis 2)*.

¹³⁴ See section 4.3.1 (Scope)

¹³⁵ See Table 7 - Qualification scenarios pre & post revised definition of Exporter

¹³⁶ Neither a possible violation of GATT Art XI - General Elimination of Quantitative Restrictions

Recommendations

This section aims to present recommendations to those involved in the revised definition of exporter. These recommendations are addressed to Business, Forwarding Agents, and Customs.

For all business impacted, is recommendable, firstly, a detailed mapping of the flows affected. It should be identified the goods flow, the invoicing flow, parties involved, and any other relevant detail to be captured. Once flows are mapped, it can be assessed what alternative solutions would be feasible to be achieved. Section 4.3.2 (Alternative solutions) examines the four most frequent alternatives chosen by businesses.

The second assessment should be on examining which parties may act as exporter for customs purposes in the EU. Section 4.3.2.1 (Flows diagram) illustrates five different scenarios. For those business planning to assign a forwarding agent as the exporter, would be advisable to assess upfront if this option is available and under what conditions (i.e., cost and contractual terms). Once flows and parties are identified, is advisable to assess VAT impact¹³⁷, and also address overall modifications to upcoming or existing IT implementation programs (e.g., implementation of ERP systems) resulting from the alterations to the roles of the stakeholders. Lastly, contractual terms with the parties involved should be reviewed accordingly, reflecting the conditions agreed on the new model.

For all forwarding agents¹³⁸ assessing the possibility to now take the role of an exporter, it is critical to be aware of the customs and non-customs related implications. Purely from a customs perspective, any representative currently acting as an indirect representative could take the additional role of exporter without considering that this will signify additional burden to him. Nevertheless, in case the export involves controls where other applicable regulations should be in scope, the risk is significant if non-compliance is disclosed. In the event goods are misclassified, deliberately or by negligence, and end up not being declared under restriction (whilst it should have been), the exporter faces serious risks (i.e., under dual-use Regulation).

Therefore, we recommend assurance (via contractual terms¹³⁹) that goods are not restricted/prohibited under EU, national or international legislation, agrees to provide all requisite information and documentation required to carry out the export, and, as last, guarantee that this information and documentation is correct.

Another alternative to mitigate these risks can be via a statement, issued by a government agency, declaring that the goods to be exported are not under restriction granting therefore, legal certainty to the exporter. In the Netherlands, a governmental agency called CDIU (Central Import and Export Service) provides a service where you may request such statement (in both English and Dutch) confirming that the goods concerned are (or not) subject to an export authorization. In Germany, the application can be made electronically (ELAN) at BAFA. Note to potential time constrains this

¹³⁷ See section 4.3.4.1 (VAT Implications)

¹³⁸ or any EU entity that fulfills the conditions required by the revised regulation

¹³⁹ See Annex B (FENEX and EvoFenedex Agreement Model) for reference

alternative may trigger, as the answer may take a long time for critical countries (e.g. Iran).

Another alternative to mitigate potential risks when accepting the role of the exporter is to request the Client a bank guarantee which serves as collateral for the benefit of the forwarding agent in respect of the Client's liability. The amount to be determined could depend on volumes, values, and risks in scope.

Depending on cases, perform on-site physical checks on the goods to be dispatched could also be prudent¹⁴⁰.

A final consideration is on the differentiation between long-term clients and one-time occasions. For clients who are known for many years, and the historical data presents evidence to be a trustworthy partner in control of its operations, the probability of non-compliance is severely reduced. For one-time occasions or occasions where the exporter is not known, the risks are significantly higher.

Although there are alternatives to mitigate the risks, none completely eliminates it. Even so, if this remaining risk is translated correctly into the service price and guarantees, this can become a business opportunity.

For Customs administration in the Netherlands, is recommendable strengthening cooperation with other governmental agencies such as CDIU¹⁴¹ towards a more accessible and efficient solution that grants forwarding agents¹⁴² legal certainty that the goods to be dispatched are outside scope of export controls. This option would facilitate trade to those willing to act in compliance.

APPENDICES

¹⁴⁰ i.e.: if it concerns a one-time operation exporting a machine to Japan

¹⁴¹ Centrale Dienst In- en Uitvoer

¹⁴² Or any other company assessing possibilities to act as exporter

1. Annex A | Guidance Definition Exporter¹⁴³

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ANNEX A

DEFINITION OF "EXPORTER"

ARTICLE 1 (19) UCC DA

REVISED

The update of Annex A to the UCC Export & Exit Guidance reflects the revised definition of exporter as provided for in **Commission Delegated Regulation (EU) 2018/1063** of 16 May 2018.

1. CASES

Article 1 (19) UCC DA defines two main possibilities for a person to qualify as an exporter.

In accordance with Article 1 (19) (a) UCC DA an exporter is a private individual who carries the goods to be taken out of the customs territory of the EU in his personal baggage.

In accordance with Article 1 (19) (b) (i) UCC DA, in case the exporter is not a private individual who carries the goods in his personal baggage, it is any person who is:

- established in the customs territory of the EU, and
- has the power to determine and has determined that the goods are to be taken out of the customs territory of the EU.

In accordance with Article 1 (19) (b) (ii) UCC DA, where the two paragraphs above do not apply, the exporter is a contracting party established in the customs territory of the EU pursuant to the contract under which the goods are to be taken out of the customs territory of the EU.

When a person qualifies to be an exporter, his EORI number has to be provided in Box 2 (D.E. 3/2 Exporter identification N°) of the customs export declaration. If the person does not have an EORI number (e.g. a private individual), his/her name and address has to be provided instead.

If a person does not qualify to be an exporter, the business partners concerned must make contractual or business arrangements in order to establish who is the person responsible for taking the goods out of the customs territory of the EU.

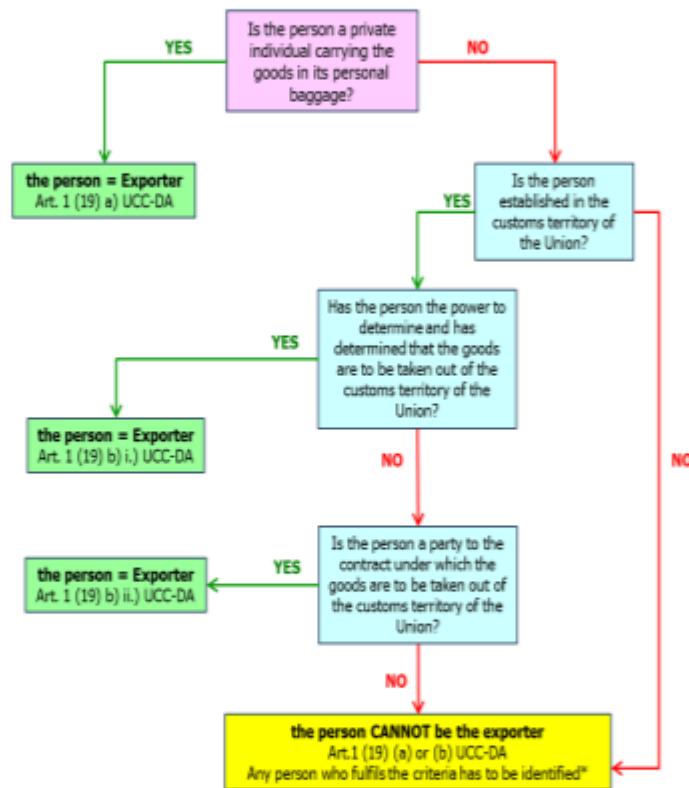
The new definition of 'exporter' provides for greater flexibility in choosing the person who may act as exporter for customs purposes.

¹⁴³https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_code/guidance_definition_exporter_en.pdf

The diagram below illustrates the sequence in which these criteria should be examined.

Definition of the exporter – Article 1 (19) UCC-DA

Who can be the exporter?



* Due to the economic interests related to export, there is at least one person who meets the criteria provided for in Article 1(19) UCC-DA and assumes the role of exporter.

2. THE CONCEPT OF BEING "ESTABLISHED IN THE CUSTOMS TERRITORY OF THE UNION"

The concept "established in the customs territory of the Union" is defined in Article 5 (31).

In case of private individuals (natural persons), the person must have his or her habitual residence in the customs territory of the EU.

In the case of a legal person or an association of persons, the definition should be read together with Article 5 (32) UCC. Based on this, the exporter must have in the customs territory of the EU:

- its registered office, or
- its central headquarters, or
- a permanent business establishment, *i.e.* a fixed place of business where:
 - the necessary human and technical resources are permanently present, and
 - through which person's customs related operations are wholly or partly carried out.

A person who is not established in the customs territory of the EU cannot be an exporter and his EORI number or name and address cannot appear in Box 2 (D.E. 3/2 or 3/1 respectively) of the export declaration. Other contractual or business arrangements are needed in order to establish who is the exporter.

Please note that the requirement for the exporter to be established in the customs territory of the EU, does not apply in case of re-export of non-Union goods in accordance with Article 270(1) UCC.

3. THE CONCEPT OF "POWER TO DETERMINE AND HAVE DETERMINED THAT THE GOODS ARE TO BE TAKEN OUT OF THE CUSTOMS TERRITORY OF THE UNION"

The power to determine that the goods are to be taken out of the customs territory of the EU must follow unequivocally from the acts of the parties to the transaction on the basis of which the goods leave the customs territory of the EU.

The phrase "and has determined that the goods are to be taken out of the customs territory of the Union" refers to a factual element that the power has been exercised: e.g. by assuming the role of exporter, the person has also assumed to take his or her right to determine the export of the goods. The agreement between the parties to assign to one of them the power to determine that the goods are to be exported may take any form provided for in the civil law of the Member State concerned.

Examples:

- where there is a direct sale from a company established in the customs territory of the EU to a buyer established outside the customs territory of the EU, or
- where the price of an export sale is payable only upon exchange of the bill of lading drawn by the seller for carriage outside the customs territory of the EU, or

- contracts with incoterm 'ex works' or similar, where the power for determining that the goods are to be brought to a destination outside the customs territory of the EU lies with a person established outside the Union pursuant to the contract on which the export is based (e.g. buyer), but this person decides to empower a person established in the EU to determine that the goods are to be taken to a destination outside the Union. This means that a person other than the seller may act as exporter under the condition that, for instance, the buyer has empowered that person to do so. The business partners involved have the flexibility to designate the person who has to act as exporter, as long as that person complies with the definition of 'exporter'.

4. THE CONCEPT OF "PARTY TO THE CONTRACT UNDER WHICH THE GOODS ARE TO BE TAKEN OUT OF THE CUSTOMS TERRITORY OF THE UNION"

In cases of exports where Article 1(19)(b)(i) does not apply, the business partners concerned must make contractual or business arrangements in order to designate who will act as exporter, provided the person designated is established in the customs territory of the EU.

A carrier, a freight forwarder or any other party may act as exporter as long as that person complies with the definition of 'exporter' and agrees to take on this role.

Annex B | FENEX and EvoFenedex Contract Model



Acting as exporter within the meaning of article 1 (19)(b)(ii) of Delegated Regulation (EU) 2015/2446 as modified by the Delegated Regulation (EU) 2018/1063

The undersigned:

1. Client

Click or tick to enter full company name Chamber of Commerce, with registered office and place of business at Click or tick to enter town/city., Click or tick to enter country., at Click or tick to enter street name. number Click or tick to enter property number., registered with the Chamber of Commerce in Click or tick to enter town/city., Click or tick to enter country. under number Click or tick to enter Chamber of Commerce number., operating under tax registration number Click or tick to enter tax registration number., and EORI number Click or tick to enter EORI number., duly represented by Select an item. Click or tick to enter full name (inc. initials)., in the position of Click or tick to enter position.,, hereinafter referred to as Forwarding Agent,

and

2. Forwarding Agent

Click or tick to enter full company name Chamber of Commerce, with registered office and place of business at Click or tick to enter town/city., Click or tick to enter country., at Click or tick to enter street name. number Click or tick to enter property number., registered with the Chamber of Commerce in Click or tick to enter town/city., Click or tick to enter country. under number Click or tick to enter Chamber of Commerce number., operating under tax registration number Click or tick to enter tax registration number., and EORI number Click or tick to enter EORI number., duly represented by Select an item. Click or tick to enter full name (inc. initials)., in the position of Click or tick to enter position.,, hereinafter referred to as Forwarding Agent,

hereinafter referred to jointly as Parties, and each separately as Party,

take into account that

- A. The Client wishes to transport goods outside of the customs territory of the European Union;
- B. The Client does not meet the requirements set out in article 1 paragraph 19 sub b of the Delegated Regulation (EU) 2015/2446 as modified by the Delegated Regulation (EU) 2018/1063, annexed to the Union Customs Code.¹ As the Client is unable to fulfil the role of exporter, to this end it is forced to appoint a third party that can fulfil the role on its behalf;
- C. The Forwarding Agent is a service provider which is involved, among other activities, in dealing with customs declarations and customs formalities on behalf of other parties;

¹ Article 1 paragraph 19 Delegated Regulation (EU): " exporter: a) a private individual carrying goods that shall leave the customs territory of the EU, when these goods are part of his personal luggage; b) in other cases, when a) does not apply: i) a person established in the customs territory of the EU who has the authority to decide and has decided that the goods shall leave that customs territory; ii) when i) does not apply, any person established in the EU customs territory who is a party to the agreement under which goods shall leave that customs territory;".

Buyer's initials:

Forwarding Agent's initials:

Seller's initials:

1/4

- D. The Client commissions the Forwarding Agent to act as exporter on its behalf, at its expense and risk;
- E. The Forwarding Agent is prepared to accept the assignment as exporter, at the Client's expense and risk and within the meaning of article 1 paragraph 19 sub b under ii of the Delegated Regulation (EU) 2015/2446 as modified by the Delegated Regulation (EU) 2018/1063, annexed to the Union Customs Code;
- F. The Parties wish to set out in writing the conditions under which the Forwarding Agent shall act as exporter on behalf of the Client;

The Parties declare that they have reached the following agreements:

Article 1. Nature of the agreement

- 1. The Client instructs the Forwarding Agent to act on its behalf as exporter, at the Client's expense and risk, within the meaning of article 1 paragraph 19 sub b under ii of the Delegated Regulation (EU) 2015/2446 as modified by the Delegated Regulation (EU) 2018/1063 annexed to the Union Customs Code (Regulation (EU) no. 952/2013), at the agreed price.
- 2. This assignment applies to consignments of goods presented to the Forwarding Agent by the Client or on its behalf by third parties, in writing which includes electronically, and includes all activities and communications that have to be performed by the exporter in relation to the customs procedure for export, pursuant to the Union Customs Code, as referred to in article 1 paragraph 19 of the Delegated Regulation.
- 3. The Client must ensure independently and on its own initiative that the export of the goods is not restricted, subject to ~~conditions~~ or prohibited pursuant to applicable international, EU or national legislation, including but not limited to: export control and/or sanction regulations and product regulations. The Client shall inform the Forwarding Agent of the results of this investigation in writing, no later than at the time of the assignment being given in respect of the goods to be exported. The Client is obliged to provide the Forwarding Agent with all requisite information and documentation (including, but not limited to, export licences, goods classification, destination, addressee, end user and end use), that is required to be able to carry out the assignment in accordance with the applicable legislation. The Client guarantees that this information and documentation is correct, entirely valid, genuine and in no way whatsoever, misleading.
- 4. The Forwarding Agent is at all times – irrespective of the reason – entitled to refuse the Client's individual assignments, stating the reasons for this.

Article 2. Liability and Collateral

- 1. Insofar as the provisions in this article do not stipulate otherwise, article 11 of the Dutch Forwarding Conditions applies to the liability of the Parties.
- 2. By way of derogation from article 11.2, the Forwarding Agent is not liable for any damage suffered by the Client, except in the case of intent or wilful recklessness on the part of the Forwarding Agent.
- 3. By way of derogation from article 11 paragraph 7, damage expressly includes all damage – including but not limited to material damage, immaterial damage, consequential damage, fines, interest, costs and other loss relating to inspections, enforcement, investigation and prosecution, negative publicity, loss of profit, as well as penalties and forfeitures, including consequences due to acting as exporter in accordance with this agreement, non-clearance or

Buyer's initials:

Forwarding Agent's initials:

Seller's initials:

2/4



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tardy clearance of customs documents and claims on account of product liability and/or intellectual property rights – that the Forwarding Agent suffers directly or indirectly as a result of (amongst other things) the Client failing to comply with any obligation pursuant to the Agreement or pursuant to applicable national and/or international legislation, as a result of any incident within the Client's scope of risk, as well as a result of the fault or negligence in general of the Client and/or its employees and/or third parties called in or engaged by the Client, irrespective of whether the damage ensues from claims by the government or third parties.

4. The Client shall indemnify the Forwarding Agent at all times from third party claims, including employees of both the Forwarding Agent and the Client, relating to or ensuing from the damage referred to in the previous paragraph.
5. If and insofar as the Forwarding Agent, its employees or third parties engaged by it within the scope of this agreement is/are held liable or prosecuted by any government, the Client is obliged to cooperate fully with the Forwarding Agent, its employees or third parties engaged by it within the scope of this agreement and provide all cooperation, information and documents that are or may be of importance within the scope of the liability claims or prosecution, including, but not limited to, substantiation, defence or the provision of information.
6. On behalf of the Forwarding Agent, the Client will provide a bank guarantee amounting to at least € Click or tick to enter the amount. This bank guarantee serves as collateral for the benefit of the Forwarding Agent in respect of the Client's liability that ensues from this agreement and the Dutch Forwarding Conditions governing this agreement.

Article 3. Duration and termination of the agreement

1. This agreement applies as from the date it is signed and is valid for an indefinite period of time.
2. Either of the Parties can give notice of termination of this agreement by registered letter, on the first day of the month, taking into account a notice period of at least 1 month.
3. The provisions in this agreement, insofar as they are relevant in relation to the fulfilment of obligations required by the authorities and in respect of the Client's liability vis-a-vis the Forwarding Agent, shall continue to apply even after termination of the agreement.

Article 4. Applicable General Terms and Conditions

1. The Dutch Forwarding Conditions apply to this agreement in the version applicable at the time of signature of this agreement. The Dutch Forwarding Conditions are appended to this agreement and form an integral part of it (appendix A, also see www.fenex.nl/fenex-voorwaarden).
2. By signing this agreement, the Client declares that it explicitly and irrevocably accepts the applicability of the Dutch Forwarding Conditions and that it has received the aforementioned appendix, dated Click or tick to enter a date.:

..... (signature)

Click or tick to enter full name.

Buyer's initials:

Forwarding Agent's initials:

Seller's initials:

3/4



Article 5. Period of limitation

1. By way of derogation from article 20 paragraph 1 of the Dutch Forwarding Conditions, the period of limitation of all claims vis-a-vis the Client shall be 5 years.

Article 6. Choice of law and arbitration

1. This agreement shall be governed by Dutch law.
2. All disputes that arise from or that are connected with this agreement and the assignments to be given in this context, shall be settled exclusively by arbitration in accordance with the FENEX Rules of Arbitration in the Forwarding Agent's place of establishment.

Agreed upon and signed in duplicate in Click or tick to enter town/city. on Click or tick to enter date.,

Client, legally represented by:

Click or tick to enter full name.

Click or tick to enter position.

Click or tick to enter date., Click or tick to enter town/city.

Signature (and stamp):

Forwarding Agent, represented by:

Click or tick to enter full name.

Click or tick to enter position.

Click or tick to enter date., Click or tick to enter town/city.

Signature (and stamp):

Although this model agreement has been set up with utmost care by FENEX and evofenedex, FENEX and evofenedex cannot guarantee that the model agreement and/or stipulations contained herein are free of errors, imperfections or omissions.

Neither FENEX nor evofenedex is liable for any damage, whatever the nature, arising from or in connection with the use of this model agreement. The use of this model agreement is at the own risk.

The model agreement is exclusively meant for general use. The model agreement is explicitly not suited or meant as a legal or other professional advice for a specific need of the user. No rights can be derived from the use of this model agreement.

EUROPEAN COMMISSION

PROVISIONS IMPLEMENTING

**THE COMMUNITY
CUSTOMS CODE**

Position on 1.11.1994



EN

Annex D | The Community Customs Code [Position on 1.11.1994 – Page 53]

The consolidated version below is supplied by the Commission for information only; it confers no rights and imposes no obligations separate from those conferred or imposed by the acts formally adopted and published, which continue to be the only authentic ones.

exceptional cases where they prove necessary following controls on cabin baggage.

3. Any controls and any formalities applicable to baggage arriving at a Community airport on board a scheduled or charter flight from a non-Community airport and transferred, at that Community airport, to a tourist or business aircraft proceeding on an intra-Community flight shall be carried out at the airport of arrival of the scheduled or charter flight.

4. Any controls and any formalities applicable to baggage loaded at a Community airport onto a tourist or business aircraft proceeding on an intra-Community flight for transfer, at another Community airport, to a scheduled or charter flight whose destination is a non-Community airport, shall be carried out at the airport of departure of the scheduled or charter flight.

5. The Member States may carry out controls at the international Community airport where the transfer of hold baggage takes place on baggage:

— coming from a non-Community airport and transferred in an international Community airport to an aircraft bound for an international airport in the same national territory,

— having been loaded on an aircraft in an international airport for transfer in another international airport in the same national territory to an aircraft bound for a non-Community airport.

Article 195

Member States shall take the necessary measures to ensure that:

on arrival, persons cannot transfer goods before controls have been carried out on the cabin baggage not covered by Article 1 of Council Regulation (EEC) No 3925/91 (1),

on departure, persons cannot transfer goods after controls have been carried out on the cabin baggage not covered by Article 1 of Council Regulation (EEC) No 3925/91,

on arrival, the appropriate arrangements have been made to prevent any transfer of goods before controls have been carried out on the hold baggage not covered by Article 1 of Council Regulation (EEC) No 3925/91,

on departure, the appropriate arrangements have been made to prevent any transfer of goods after controls have been carried out on the hold baggage not covered by Article 1 of Council Regulation (EEC) No 3925/91.

No L 374, 31.12.1991, p. 4

Article 196

Hold baggage registered in a Community airport shall be identified by a tag affixed in the airport concerned. A specimen tag and the technical characteristics are shown in Annex 30.

Article 197

Each Member State shall provide the Commission with a list of airports corresponding to the definition of 'international Community airport' given in Article 190 (b). The Commission shall publish this list in the *Official Journal of the European Communities*, C Series.

TITLE VII

CUSTOMS DECLARATIONS — NORMAL PROCEDURE

CHAPTER I

Customs declarations in writing

Section 1

General provisions

Article 198

1. Where a customs declaration covers two or more articles, the particulars relating to each article shall be regarded as constituting a separate declaration.

2. Component parts of industrial plant coming under a single CN Code shall be regarded as constituting a single item of goods.

Article 199

'1.'[1] Without prejudice to the possible application of penal provisions, the lodging with a customs office of a declaration signed by the declarant or his representative shall render him responsible under the provisions in force for:

- the accuracy of the information given in the declaration,
- the authenticity of the documents attached,
- and
- compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.

'2. Where the declarant uses data-processing systems to produce his customs declarations, the customs

ANNEX E – Overview Customs Authorizations for restricted goods (issued by VGEM/CDIU)¹⁴⁴

Type of application	For what?	Application form
Drug precursors Cat. 1	To import and export Cat. 1 substances, hold or trade in these substances within the EU, and conduct intermediary activities involving these substances.	Explanatory notes
Consent for weapons and ammunition	For the entry, exit or transit of category II and III weapons, ammunition and parts thereof, in the Netherlands. These are not intended for public services or the armed forces.	Application form Explanatory notes
Export of dual use goods	To export certain dual use goods to specific destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Goods covered by (EU) regulation 2019/125 (torture devices)	To import, export or transit torture devices to and from EU countries. A prohibition applies in some situations.	Application form (in Dutch) Explanatory notes (in Dutch)
Goods covered by (EU) regulation 2019/125 (torture devices) - General	To export torture devices or medicines for example, suitable for use as capital punishment, to certain destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Export, transit or transfer of military goods	To supply goods included in the common EU list of military goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of drug precursors	To export registered substances, with the exception of any exemptions.	Explanatory notes (in Dutch)
Registration of Cat. 2	To trade, export or import Cat. 2 substances or conduct intermediary activities with such substances, with exemption. Also when using a Cat. 2A substance and holding more than 100 litres.	Explanatory notes (in Dutch)
Registration of Cat. 3	To export Cat. 3 substances from the EU.	Explanatory notes (in Dutch)
Export and re-export of Annex II goods to Russia.	To export and re-export certain goods for the oil and gas industry to Russia.	Application form (in Dutch) Explanatory notes
Goods subject to sanctions	To export or transit goods which require a permit according to national or international sanction legislation. Also all other operations using these goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of dual use goods	To export dual use goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export or transit of military goods	To export or transit goods included in the common EU list of military goods.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of firearms, parts and essential components for firearms and ammunition	For the final export of certain firearms and ammunition from the EU.	Application form (in Dutch) Explanatory notes (in Dutch)
Classification request	In case you have doubts regarding the permit obligation, the exemption obligation, the possible embargo on goods to be exported, or the final use of non-permit goods.	Application form (in Dutch) Explanatory notes
Procedures for dual use goods	To export certain goods for dual use – not included in Annex I of directive 428/2009 – to certain destinations.	Application form (in Dutch) Explanatory notes (in Dutch)
Export of cultural property	To export cultural property from the EU.	Application form (in Dutch) Explanatory notes (in Dutch)
Temporary export of specific cultural property	For multiple, temporary export of 1 or more cultural property goods from the EU. This concerns cultural property temporarily used or exhibited in another country.	Application form (in Dutch) Explanatory notes (in Dutch)

¹⁴⁴<https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/customs/authorisations/customs-authorisations/overview-of-customs-authorisations/overview-customs-authorisations#vgem>

ANNEX F – Open-ended survey and qualitative one-to-one interview questions

First Wave of Interviews

- What was in the main driver towards a change in the regulation, resulting in a revision in the definition of the Exporter (as per (EU) Reg 2018/1063)?
- Who are the main stakeholders involved and/or impacted by the revised definition?
- Do you consider that the revised definition brings significant changes to what has been proposed in its very first definition (published in the CCC)?
- In Export, what are the main differences between the roles and responsibilities of the parties involved? What are the checks performed by Customs to these parties, during clearance and post-clearance? What is the frequency of these checks?
- How did Business and Trade react towards this change in the regulation?
- For forwarding agents reluctant to accept the additional role of the exporter, what are their claims? Are these claims legitimate/fair?
- Do you consider that the revised definition of Exporter has closed the gaps presented in the past definitions?
- Do you consider that the revised definition provides more flexibility to businesses in choosing the person who may act as exporter for customs purposes (as a broader range of options has been allowed)?
- Do you foresee that this revised regulation would trigger a business opportunity to forwarding agents, which could, additionally to their own role, act as exporters? If yes, what would be typical checks to be performed (i.e.: due diligence)? And would you have an estimation in the rate of forwarding agents willing to take this role?
- What is being the most frequent alternatives, these non-EU established exporters are taking towards this change in the regulation, to avoid disruption in their SC and keep bringing Union goods out of the customs territory of the EU via export?

Second Wave of Interviews

- What is the portion of non-EU established business impacted by the change in the regulation?
- If the above number is complex to be defined, how would you consider measuring (quantitatively) the scope of entities impacted?
- The substantial change brought by Regulation 2018/1063 is in fact the elimination of the possibility to make use of Indirect representation on Export side for those non-EU

established entities. The UCC appoints in fact little to the Exporter in terms of responsibilities/liabilities (relevancy is only on statistical purposes). Why then create a further restriction to a non-EU established party willing to act as the exporter?

- What are the exact customs and non-customs related implications for those parties willing to take the role of exporters?

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