

UCC Implementation: Joint Industry Statement on the Definition of Exporter

Brussels, 09 November 2016

Introduction

The undersigned associations very much appreciate the efforts by the Commission to provide additional clarification and guidance to economic operators and Member States in relation to potential concerns in the new Customs legislation as entered into force on 1st of May, 2016.

Our associations perceive increasing risks of diverging interpretations of the definition of the “exporter” included in article 1 (19) of the UCC Delegated Act (Commission Delegated Regulation (EU) 2015/2446, hereinafter the “DA”). We are concerned that such different interpretations could lead to a serious lack of legal certainty and additional administrative burden for industry. We strongly believe the Commission should consider redrafting the wording in the above-mentioned definition.

Please find below more details:

I. Powers of the Exporter

- i. In the current definition of exporter in the DA, the Commission intends to express that at all times the exporter should be established in the customs territory of the Union. However, the wording (article 1 (19) DA): “... *has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union...*” is contradicting this principle.

According qualified legal advice, the natural or legal person who has the power for determining that the goods are to be brought to a destination outside the customs territory of the Union is the customer (or: buyer). The customer is located outside the customs territory of the Union, in case of an export from the EU.

The natural or legal person based in the customs territory of the EU (exporting the good from the EU to a third country) has, depending on the Incoterm used, the power for sending the goods outside the EU, i.e. he/she instructs (gives the order to) a forwarder. However, he/she has no power for determining that the goods are brought outside the

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EU. The bringing of the goods outside the EU happens based on the order by the customer/buyer.

- ii. In addition, Art 1 (19) DA can give rise to issues for EU exporters regarding the proof of export for tax purposes. Customs endorse a flow back of the copy of the export declaration¹ when the goods leave the EU, as proof of export for VAT purposes.

In case no exporter can be identified in the EU, an indirect representation by a service provider will be necessary. In this case the proof of export is not being sent to the person from whose premises the goods left but to a third party, with the risk that the person from whose premises the goods left, cannot use the copy of the export declaration for tax purposes.

The current text may lead to multiple interpretations and undesired usage of indirect representation. It is even doubtful whether Member States will use the Guidance Documents as leading instruments to clarify multiple situations.

Since the definition is included in the DA we believe that a small alteration of the DA may contribute to an improved definition with more clarity on this subject, as such decreasing room for interpretation or mixed explanations. Article 2.3.(i) of EC Regulation 428/2009 offers an appropriate definition of exporter as follows, which clarifies that the exporter has the power for determining the sending of the item out of the EU. As such it could be borrowed for amending the UCC DA (emphasis added):

Article 2.3. (i) EC Rec 428/2009

“‘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 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. Case: a person outside the EU holds the rights to dispose of the goods

Art. 1 (19) of the UCC DA does not include any provisions for when the right to dispose of a given good belongs to a person established outside the EU pursuant to the contract or agreed Incoterms on which the export is based (e.g. “EXW”). Who should be considered the exporter in such case? We believe that the DA should be amended to cover also the above circumstance.

Article 2.3.(i) of EC Reg 428/2009 provides an appropriate fallback solution in cases the right to dispose of a good belongs to a person established outside the EU pursuant to the contract on which the export is based, as follows:

¹ The electronic declaration applies mutatis mutandis.

“Where the benefit of a right to dispose of the dual-use² item belongs to a person established outside the Community pursuant to the contract on which the export is based, the exporter shall be the contracting party established in the Community;

The above proposed solution would also bear the advantage that the definition of exporter would not be different between dual use (export control) and Customs regulations, which we consider to be of the utmost importance easier for exporters.

III. Conclusions

ESIA and DIGITALEUROPE appreciate the good cooperation with the European Commission concerning the application of the UCC and related legislative acts.

Although we understand the Commission’s efforts to keep legal texts stable, we strongly believe that the only effective solution to the above described issues related to the definition of exporter is to amend the text of Art 19 DA. We would highly appreciate when the Commission will consider our proposal to adjust article 1 (19) of EC Reg 2015/2446 as described above.

We would also like to emphasize the importance of the definitions in the UCC DA and in the dual use export control Regulation to be aligned.

About ESIA

The European Semiconductor Industry Association (ESIA) is the voice of the Semiconductor Industry in Europe. Its mission is to represent and promote the common interests of the Europe-based semiconductor industry towards the European Institutions and stakeholders in order to ensure a sustainable business environment and foster its global competitiveness. As a provider of key enabling technologies the industry creates innovative solutions for industrial development, contributing to economic growth and responding to major societal challenges. Being ranked as the most R&D intensive sector by the European Commission, the European Semiconductor ecosystem supports approx. 200.000 jobs directly and up to 1.000.000 induced jobs in systems, applications and services in Europe. Overall, micro- and nano-electronics enable the generation of at least 10% of GDP in Europe and the world.

Website: <http://www.eusemiconductors.eu/esia/home>

About DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants a European Union that nurtures and supports digital technology industries, and that prospers from the jobs we provide, the innovation and economic benefits we deliver and the societal challenges we address.

Our mission is to foster, on behalf of our members, a business, policy and regulatory environment in Europe that best realises our vision. We will achieve this by working as positive partners with the European Institutions and other European and global bodies and, through our national trade associations, the member states of Europe.

² Dual Use could be replaced in the UCC DA by e.g. “exported good”.