

# Customs and International Trade

## News Flash



### **New definition of exporter announced in amendments to the Delegated Act**

30 July 2018 the Commission published a Regulation (2018/1063) containing amendments and corrections to the Delegated Act of the Union Customs Code (DA). Most amendments are from an administrative nature or are corrections in relation to the wording of articles.

There is however one major change, the definition of exporter. In this news flash we will elaborate on this amendment and address the consequences.

#### ***New definition***

In article 1 (19) of the DA the following definition of exporter **was** included:  
*'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.*

This definition was problematic and too restrictive according to the Commission and thus it is replaced. The new definition is as follows:

*'exporter' means:*

- (a) a private individual carrying goods to be taken out of the customs territory of the Union where these goods are contained in the private individual's personal baggage;*
- (b) in other cases, where (a) does not apply:*
  - (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.*

In the old article 1 (19) of the DA the ground rule for the definition of exporter was laid down under (a) and in addition to this ground rule there was an extension of this definition under (c). In the new article 1 (19) of the DA this extension has become the ground rule for the definition of exporter under (b)(i) and a new extension to this ground rule has been included under (b)(ii).

With the amended definition also the Guidance has been updated (Export - Annex A on the definition of exporter).

### ***Consequences***

We focus on the situation where (a) does not apply (i.e. there is no private individual). Based on the new definition in the DA an exporter has to be established in the EU. This is nothing new compared to the old definition.

The difference between the new and the old definition is that, if there is no 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, 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. This was not possible under the old definition, where 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 Union.

Under the new definition, it is sufficient to be a party to the contract under which goods are to be taken out of the customs territory.

In the amended Guidance there is more information on the concept of a party to the contract under which the goods are to be taken out of the customs territory of the Union. In case 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.

Although this was already possible in some EU Member States, there were also Member States where it was not possible to appoint a person who is a party to the contract under which goods are to be taken out of the EU as exporter (e.g. carrier or freight forwarder). Now this is included in the new definition of exporter, this can be an extension compared to the old definition in some Member States.

### ***Who can be exporter?***

Based on the new definition of exporter and the amended Guidance the exporter has to be established in the EU. Only a person established in the EU can appear in Box 2 of an export declaration. If this cannot be the owner or a party involved in the transaction on the basis of which the goods are exported because not established in the EU, this can also be a logistics service provider or customs broker, if they comply with the definition of exporter and agree to take this role.

However, based on the Guidance during the transitional period (until the deployment of the Automated Export System – currently planned for 2023), the exporter, mentioned in Box 2 of an export declaration can still be a non-EU company. That means that a non-EU company can still be the exporter using indirect representation up to 2023.

### ***Guidance***

This Guidance is not binding for the customs authorities in the Member States and as such they do not have to comply with it. Therefore, it could be that in some Member States the customs authorities demand that the exporter is already an EU company. In addition where in the previous Guidance explicitly was mentioned that during the transition period a non-EU company could still be the exporter, in the current version it is only implied.

In some Member States this can also lead to a change in how the authorities view the definition of exporter.

The positive however is that in the new definition the scope of companies that can act as exporter has widened. This might present opportunities in those Member States that do not follow the Guidance, but are strict in applying the legislation.

### **VAT**

In case a Member State would not accept a non-EU company as exporter this could be problematic in relation to the 0% VAT rate at export. Since, in some Member States the export declaration is the only proof accepted in relation to the 0% VAT rate at export. In case a non-EU company then would export goods, it can no longer be mentioned in the export declaration. How does a non-EU company then prove that the export declaration is linked to the export transaction it applies the 0% VAT rate on?

In that case we suggest to include the non-EU company in box 44 of the export declaration as the exporter. To be able to have a link between the non-EU company and the export.

### **Take away**

Currently it seems still possible for non-EU companies to act as an exporter with the use of indirect customs representation during the transitional period. This is however based on the interpretation of the Guidance document and this could be viewed differently per Member State.

As such it is important to investigate in the Member States you export from how this change in legislation and Guidance will be interpreted and what the consequences in the Member States will be for you to be able to take appropriate action.

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