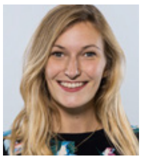
Dutch landscape – the ‘new’ EU exporter definition



Two years ago, the EU changed its definition of an ‘exporter’. But it provided for a transition period which allowed non-EU companies to be deemed an ‘exporter’ provided they appointed a customs representative. That period has now come to an end. Tim Hesselink, Eline Mooring and Ton Bendermacher look at how the ground lies in the Netherlands – and by extension, how it may be emerging elsewhere in the EU.

In July 2018, the European Union changed the definition of exporter in the EU customs legislation. As a result of this amendment, non-EU (established) companies are no longer entitled to act as exporter of record in the EU. However, the European Commission’s guidance on the definition of exporter did provide for a transitional period that allowed non-EU companies to be deemed to be exporters where they appointed an indirect customs representative established in the EU. This guidance has now been changed, and the transitional measure is no longer allowed for. As such, non-EU companies cannot be considered ‘EU exporters’ in law.

While some EU Member States directly followed the strict interpretation at the time of the amendment, many Member States offered the transitional measure.

The Netherlands, following other EU Member States, has recently announced that non-EU companies can no longer act as exporters from the Netherlands.[1] This article explains the new exporter definition from both a customs and an export control perspective.

EU EXPORTER DEFINITION

In July 2018, the definition of an ‘exporter’ found in the Union Customs Code (‘UCC’) and the UCC Delegated Act (‘UCC-DA’) was amended for customs purposes. Under Article 1(19) UCC-DA a person can only act as exporter if they are established in the EU and:

1. has the power to determine that the goods are to be brought outside the customs territory of the Union or,
2. is a party to the contract under which goods are to be taken out of that territory.

As can be seen, this definition makes explicit the requirement for the exporter to be established in the EU. The guidance document on the definition of exporter of the European Commission stresses that the change has been introduced to provide industry with greater flexibility.[2] At the same time, it allows the authorities to hold an EU-established company responsible in case of non-compliance with EU customs legislation.

AS A RESULT OF THE CHANGE, NON-EU ESTABLISHED COMPANIES CAN NO LONGER BE CONSIDERED AS EXPORTERS OF RECORD FOR CUSTOMS PURPOSES.

Because of the potential impact of the new exporter definition, the European Commission initially created a transitional period that allowed a non-EU established exporter to act as an exporter for customs purposes by appointing an indirect customs representative. In case of indirect representation, a customs agent (usually a customs broker or agent) files a declaration in his or her own name but on behalf of the stakeholder. Although in some EU Member States the new exporter definition was implemented right away, the Netherlands, together with some other Member States, made use of this transitional period. To date, it is therefore possible to export goods from the Netherlands while the exporter is not established in the EU.

But that is about to change. On 1 October 2019, the Dutch Customs authorities announced that non-EU companies may not be stated as the ‘exporter’ of goods in Box 2 of the export declaration after the 1 December 2019. This means that exporters for customs purposes can only be EU-established entities, having an EORI number. An exception has been made for the reexport of non-EU goods (please see box below, ‘Reexport of non-EU goods’).

To give businesses time to adjust their supply chains and systems, Dutch Customs announced, on 18 November 2019, the postponement of the implementation of the change – to 1 April 2020. According to the most recent announcement of Dutch Customs, the implementation deadline will be further postponed to the 15th day of the month following the month in which measures concerning Covid-19 are ended by the Dutch government. Implementation is now expected in the second half of 2020.

IMPACT ON CUSTOMS AND EXPORT CONTROLS

As a result of the change, non-EU established companies can no longer be considered as exporters of record for customs purposes. The new exporter definition requires the exporter to be a ‘person established in the customs territory of the Union’. This can be any person having its registered office, central headquarters, or a permanent business establishment in the customs territory of the EU. A permanent business establishment is defined as 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 partly carried out.[3]

Companies affected are typically non-EU-established traders, headquarters and procurement companies involved in export transactions from the EU. In addition, UK-established companies would, post-Brexit, no longer be able to act as exporters in the EU.

Based on the new exporter definition, parties are contractually free to choose any person established in the EU to act as an exporter. This person does not necessarily have to be a party in the sales chain. Please note that the party contractually assigned as exporter assumes responsibility for the accuracy of the export declaration provided to the customs authorities, including regulatory aspects from an export controls and sanctions point of view. It is for this reason that logistics service providers (customs agents, shipbrokers, carriers, etc.) are, generally speaking, not often willing to take on the role of exporter due to the (financial) risks involved, in particular where dual-use items are involved.

So how could this affect non-EU companies? If you are a non-EU company shipping under the

REEXPORT OF NON-EU GOODS

The guidance document explicitly states that the requirement for the exporter to be established in the customs territory of the EU does not apply to the reexport of non-controlled goods.

This means that a non-EU company can still be exporter for the reexport of non-EU goods from the Netherlands. A non-EU company that sources non-EU goods (in or outside the EU), which are destined for transit and stored in a customs bonded warehouse in Rotterdam (the Netherlands) can continue to be mentioned as exporter in Box 2 of the export declaration.

Incoterm EXW (Ex Works) from the Netherlands or are having export declarations submitted on behalf of your non-EU company that is only registered for VAT within the Netherlands, this could significantly affect your supply chain. A potential solution is to agree with the EU supplier to change the EXW Incoterm to FCA (Free Carrier). Also, if you are a UK-based company exporting and acting as an exporter of record from the Netherlands this could impact your company as from 1 January 2021 (when the Transition Period ends and the full effects of Brexit set in).

Listed below are a number of possible scenarios that would permit exports (of non-controlled, i.e., dual-use or military) goods.

- Where the EU-based supplier of the goods to be exported is designated as the exporter (e.g., by changing the EXW Incoterm to FCA)
- If a logistics service provider (such as the carrier or freight forwarder, if willing) is appointed as exporter (and requisite contractual arrangements are in place)
- In the case of multinational companies, where an affiliated entity or branch established in the Netherlands is designated as exporter (e.g., a group entity)
- By setting up a new entity established in the EU (though this may have other tax consequences such as corporate tax, VAT, etc.)
- Through the use of a permanent business establishment for customs purposes (see requirements above).

Export controls

While the EU regulations on the export of controlled goods include their own definitions ('export', 'exporter', etc.), the customs aspects that affect the export of controlled items need to be taken into account in light of the end of the transition period.

Dual-use items

A company requires an export licence to (re)export any controlled dual-use items to countries outside the EU. This licence requirement does, however, not apply to dual-use items in transit. According to the EU dual-use regulation (no. 428/2009), it is the exporter that can apply for an export licence. The definition of exporter in the dual-use regulation reads as follows:

'"exporter" shall mean any natural or legal person or partnership:

1. 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.
2. Who 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.'

Where the benefit of a right to dispose of the dual-use item 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. An export licence is granted by the competent authorities of the EU Member State in which the exporter is established.[4] This implies in practice that the exporter for export controls purposes can (also) only be an EU-established company.

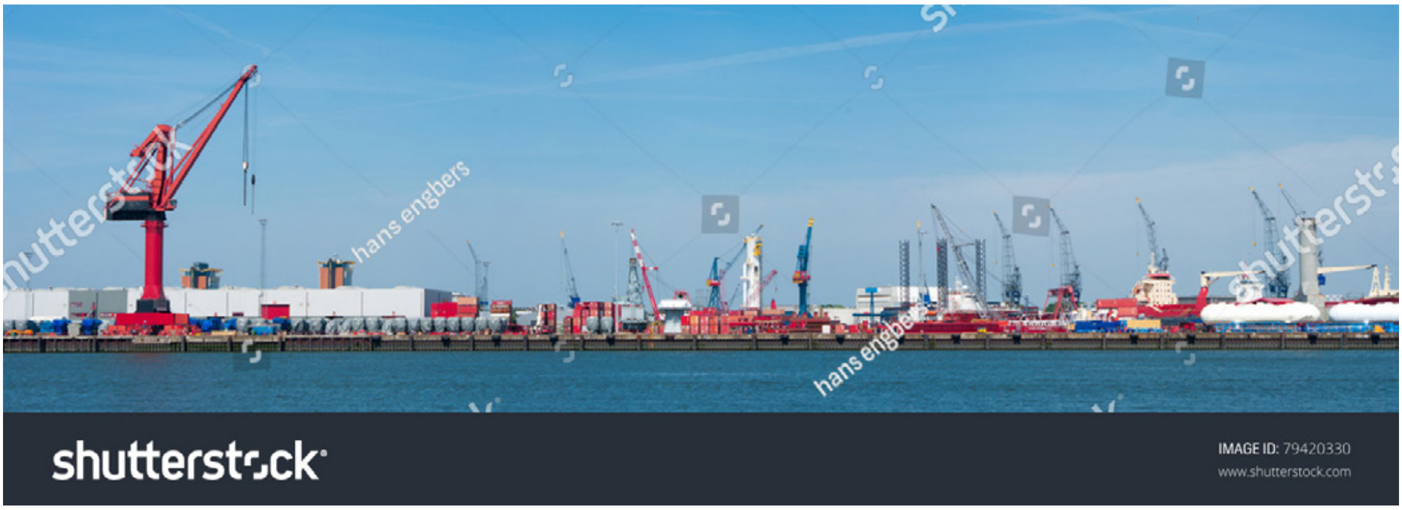
One can therefore argue that from a dual-use perspective, the requirement to be an EU-established exporter already existed. UK-established companies would thus, after Brexit, no longer be able to act as EU exporters of dual-use items, and they should thus take appropriate actions.

In similar vein to the situation as described for customs purposes, non-EU established exporters of dual-use items can appoint a representative for export control purposes (for example a group entity or a logistics service provider) but only where an appropriate due-diligence framework is established within that entity, for example, as might be prescribed by an internal compliance programme ('ICP'). The Dutch export control authorities pay close attention to whether such steps have been taken prior to granting an export licence.

Military goods

As specified in the EU Common Military List, a notification or a licence is required for the export, transfer and transit of military goods from or through the Netherlands (and all EU Member States.)

According to the provisions of the Dutch Strategic Goods Implementing Order (*Uitvoeringsregeling Strategische Goederen*), the person who can



apply for the export licence for military goods, is the so-called 'authorised person' (*beschikkingsbevoegde*). Because arms export policy is regarded under the European Common Foreign and Security Policy as a national competence,[5] the Netherlands can provide its own definition of the *beschikkingsbevoegde*, which is as follows:

1. [the person] in whose name a customs declaration is made at export, 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 who is authorised to decide that the product is to be sent to a destination outside the Netherlands. Where no export contract has been concluded or where the contract holder is not acting for himself, the one competent to decide is understood to mean the person authorised to decide to send the product to a destination outside the Netherlands;

2. [the person] who decides to send software or technology by electronic means including fax machine, telephone and electronic mail or by any other electronic means or to make it otherwise available to a destination outside the Netherlands.

Based on the Strategic Goods Implementing Order, generally speaking, only a Dutch legal entity can apply for an export licence for military goods. Due to the nature of military goods, the use of representatives is not widespread. Indeed, representation of a company not established in the Netherlands by a Dutch group entity or a branch (no letterbox company) is on a case-by-case basis and under strict requirements laid out by the Dutch export control authorities.

WHAT TO DO NOW?

Companies exporting from the Netherlands that are not established in the EU should now find alternative means for ensuring an uninterrupted flow of exports from the bloc, including, for example, amending Incoterms or setting up an EU legal entity (or a 'permanent business establishment') for customs purposes. The export of dual-use and military goods requires particularly careful consideration. Non-EU companies may also consider appointing parties established in the EU to act as the exporter by means of contractual arrangements. This requires setting up an appropriate due-diligence framework, for example laid down in an ICP. In addition, the current set up and programming of the export declarations now needs to be amended.

Last, but not least, other EU Member States – including Germany, France, Italy, Hungary, Spain, Latvia, Lithuania and the Czech Republic – have already imposed the above exporter definition or announced plans to do so. Non-EU (established) companies (also) exporting from these countries should consider an EU-wide approach in looking at the impact on their supply chain and take necessary actions.

LINKS AND NOTES

1. This article is written following the announcement from the Dutch government that non-EU companies can no longer act as exporter from the Netherlands. It should be noted that the content of this article also applies to other EU Member States that implemented the new exporter definition.
2. You can consult the guidance document through the following link: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_code/guidance_definition_exporter_en.pdf
3. See Article 5(32) UCC.
4. Article 9(2) of the dual-use regulation stipulates that the licence shall be granted by the competent authorities of the Member State where the exporter is established.
5. Article 346 of the Treaty on the functioning of the EU.

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