



German customs authority comments on the term “exporter”

05 | 2019

1 Background

From the outset, the definition of “exporter” in Art. 1 No. 19 of the UCC-DA has led to ongoing practical problems, especially as regards commercial exports. The EU Commission’s guidelines were intended to provide clarity, but are not binding. As a consequence, the Member States have interpreted the term “exporter” differently. Further, the exporter, from a customs perspective, and the exporter, within the meaning of the national VAT law, are not necessarily identical. Due to the fact that it is only the exporter who receives an export certificate from the customs authorities, the retention of proof of export is made more difficult for companies wishing to invoice VAT-exempt export deliveries. In order to give Community traders more flexibility in choosing the person of the exporter, the EU Commission has adapted the term “exporter” with effect from 31.07.2018 (Regulation (EU) of 16.05.2018, OJ No. L 192/1 of 30.07.2018). Almost one year later, the German customs authority has just now updated the Regulation “Export procedure and re-export” (A 0610). As the new version makes clear, the customs authority’s understanding of the term “exporter” has fundamentally changed.

2 Union legislation

According to the original regulation in Art. 1 para 19 lit b of the UCC-DA, the exporter was the person established in the customs territory of the Union, who was the contractual partner of the consignee in the third country and who had the power to determine that the goods were to be taken to a point of destination outside the customs territory. However, the new regulation defines the exporter only as the person who has the power to determine and has actually determined that the goods are to be taken to a point of destination outside the customs territory. It remains the case that this person must



Dobrinka Atanasova
Lawyer

+49 (0) 89 217 50 12-55
dobrinka.atansova@kmlz.de

be established within the Union customs territory. If these requirements are not met, then the person established within the Union customs territory is deemed to be the exporter. At the same time, this person is a contracting party as regards the taking out of goods from the customs territory. Consequently, the exporter is no longer required to be a contractual partner of the consignee in the third country. The new definition is therefore less restrictive. It is intended to limit the requirements to be met by the exporter to those, which are essential to the export procedure.

3 Amendment of the German Administrative Rules

In the past, the German customs authorities applied the EU regulations, in principle, to exports, which were not subject to authorization. In these cases, they always demanded an export contract with a person resident in the Union. This is the contract which includes the delivery of goods to a third country. In the absence of such a contract, the German customs authorities applied the foreign trade law definition of the exporter in accordance with Art. 2 para 3 lit i, second sentence, of the EC Dual Use Regulation in order to “fill in the gaps”. Accordingly, the actual determination concerning the dispatch of the goods from the customs territory was, in any event, necessary. In the case of exports subject to authorization, however, only the foreign trade provisions of Art. 2 para 3 lit i sentence 2 of the EC Dual-Use Regulation and Art. 2 para 2 of the Foreign Trade and Payments Act were regarded as special provisions.

In the future, the German customs authorities will only apply the Union law provisions. Any application of provisions in accordance with the Foreign Trade and Payments Act will no longer be taken into consideration. However, these provisions remain relevant as regards the determination of the exporter from a foreign trade law perspective. This may result in the fact that the exporter from a customs perspective and the exporter from a foreign trade law perspective are not identical. Another significant change is that the exporter status will depend on the will of the parties. The parties involved can determine who will be responsible for deciding on the export and will make the essential arrangements for this. This can be done by controlling the transport process and submitting the export declaration or by giving the order to submit the export declaration. The parties are also free to transfer this power to decide to third parties. Now, a freight forwarder can also act as an exporter. If a customs declaration is made by or on behalf of the exporter, the customs authorities will, in future, generally assume that the declared exporter holds the power to decide. An examination of the exporter's status, on the basis of proof of ownership or other contractual agreements, does not normally take place. Furthermore, in accordance with the new regulation, the party to the contract for the take out of goods from the customs territory may also be the exporter. This contract is not necessarily the export contract. A forwarding or freight contract is also possible. In this case, a forwarding agent can also act as an exporter. This regulation could become relevant in cases where the final customer picks up the goods. In these cases, the seller, who is resident in the Union, cannot in principle, make decisions concerning the take out of the goods.

4 Consequences for the practice

The new definition of exporter provides more legal certainty and flexibility to companies. With an appropriate contractual agreement, anyone involved in the export process can, in principle, be an exporter. This also makes it easier to keep proof of export for VAT purposes. This opens up a new field of business for forwarding agents. However, as a result, they also assume the customs duties of an exporter. On the other hand, from a foreign trade law perspective, the obligations under foreign trade law remain with the exporter. Affected companies may not transfer their foreign trade law status as exporters to third parties. For this reason, detailed controls by the customs authorities are to be expected in the instance of high-risk exports.