In our February 2016 Indirect Tax Update we informed you about upcoming changes under the new EU Customs Code around the definition of ‘exporter’ and the potential implications on non-EU entities. As explained in that Update, the new rules coming into force as of 1 May 2016 indicate that non-EU entities can no longer act as exporter as an EU establishment seems to be a mandatory. The European Commission has been made aware of the concerns that have arisen from the new regulation, and announced that a clarifying guideline may be expected by end of March.

We have now learned that the European Commission is still discussing this topic, so that the publication of said guideline is postponed. However we are able to share the key messages of the latest draft version of this guideline to provide you with the current state of play, which – of course – might still be subject to changes until the final guideline will be published.

Another topic currently discussed are questions around the ‘last sale for export’ rule. This rule replaces the current possibility to determine, under certain conditions, the customs value based on a previous transaction, and states that decisive sale is the one occurring immediately before the goods were brought into the EU customs territory. Especially for chain transactions it has been questioned under which conditions such “last sale” is given. In this respect we provide you with a most recent update, too.
Definition of ‘exporter’

Article 1 (19) of the UCC Delegated Act provides for two commercial export cases where a person can be considered to be an exporter. The conditions are as follows:

<table>
<thead>
<tr>
<th>Article 1 (19) a)</th>
<th>Article 1 (19) c)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(“base case”)</td>
<td>(“other case”)</td>
</tr>
<tr>
<td>Established in the EU customs territory</td>
<td>Established in the EU customs territory</td>
</tr>
</tbody>
</table>
| Contract with the consignee in the third country at the time the export declaration is accepted | ./.
| Power to determine that the goods are to be brought outside the EU | Power to determine that the goods are to be brought outside the EU |

The draft guideline confirms that for all commercial exports the exporter must

- have the power to determine that the goods are to be brought outside the EU; and
- be established in the customs territory of the European Union.

In this respect, being “established” means that the exporter is a person having in the EU

- a registered office;
- headquarters; or
- a permanent business establishment, i.e. a fixed place of business where
  - technical and human resources are permanently present and
  - through which person's customs related operations are wholly or partially carried out.

Accordingly, and as already suggested by the literal reading of the UCC wording, in absence of such establishment e.g. Swiss-based entities may no longer act as exporter out of the EU.

In its draft guideline, however, the EU Commission then states that non-EU established persons thus must (and may!) use indirect customs representation in order to export goods out of the EU. In this case an EU established indirect representative would act as a declarant and as the holder of the export procedure. Consequently, the name of the indirect representative should be put in box 14 of the export declaration, and the name of the non-EU person as consignor in box 2.

The draft guideline further contains a sample scenario that, in addition to the indirect representation, provides for a second alternative how non-EU established persons may continue exporting goods out of the EU. The scenario is illustrated in the following chart:
The Swiss principal is the seller of the goods and uses
a (contract) manufacturer in Belgium; and
an assembler / distribution centre operated by French established entities before the goods are shipped and sold to a U.S. based customer.
The Belgian manufacturer and the French assembler do not issue sales invoices. They are only responsible for production and delivery of the goods.
The French distribution centre manages the inventory for the Swiss principal.
The transport is organized and the sales invoice issued by the Swiss principal.

For this sample scenario, the draft guideline concludes that
The Swiss principal is not established in the EU and may therefore not be an exporter under Article 1 (19) (a) or (c) UCC DA.
The Swiss principal may, however, have the export declaration lodged on its behalf by a representative established in the EU in the name of that representative (indirect representation).
Alternatively, the Swiss principal may choose to appoint the Belgian (contract) manufacturer, the French assembler, the French distribution center or a third EU-established person to decide on the distribution of the goods.
Then these persons would be exporter to be put in box 2 of the export declaration.

Preliminary conclusion on 'exporter'

Unless the draft undergoes major changes in this respect before its final publication, Swiss-based entities will continue to be able to export goods out of the EU. However, certain adjustments on current operational procedures might be required in order to meet the new conditions, such as e.g.
- Appointment of indirect representatives or delegation of power to decide on movements of goods out of the EU and corresponding documentation for legal, customs and VAT purposes;
- Amendments in customs simplifications and FTA licenses;
- Alignment with corporate income tax / transfer pricing to address implications of making toller, warehouse or Sales Co. responsible for exports;
- Adjustment of transaction / documentation processes, and systems where necessary;
- Evaluation for need of adjustment to any other type of licenses or approvals.

Currently, we have not yet reliable information about the timing for the publication of the European Commission's final publication of the guideline. According to previous communication, the European Commission intends to clarify this issue before the UCC is coming into force on 1 May 2016. We therefore expect the publication in the upcoming weeks, and recommend to closely monitor any further developments in this regard. For Swiss entities it is, however, already now time to evaluate alternative scenarios and corresponding impacts on affected export transactions out of the EU.
Mid-March the Customs Code Expert Group of the European Commission met to discuss questions around various customs valuation topics. We have learned that in course of that meeting the Expert Group confirmed that it is not the intention to take domestic sales, i.e. sales taking place when the goods have already entered the EU customs territory or sales in the internal market, into account for the determination of the transaction value.

The Expert Group also pointed out that the UCC specifically mentions “sale for export to the customs territory of the Union”, which would exclude the possibility of considering domestic sales. Instead, such text would imply the need of remaining as close as possible to the value at the time of introduction of the goods into the customs territory.

According to our understanding, the European Commission does currently not (yet) plan to address this issue in a guideline similar to the ‘exporter’ definition. Furthermore, the ‘domestic sale’ criterion requires additional specification for businesses to clearly determine which transaction is decisive for customs valuation, especially in terms of factors such as e.g. title transfer, assumption of risk, conclusion of sales contracts etc.

Thus, for the time being, the above mentioned statement of the Expert Group may indeed provide an indication that the ‘last sale for export’ rule had not been drafted to include margins generated from subsequent sales in the customs value, but the required level of certainty is not yet given. Furthermore, companies should in detail review the structure of their import transactions with respect to parties involved, their place of establishment, intended sequence of customs procedures, etc., since the European customs authorities seem to apply a case by case evaluation. Again, we recommend to closely monitor any further developments in this regard.

**Contacts**

**Offices**

**Zurich**
Barbara Henzen  
Phone +41 58 286 62 14  
barbara.henzen@ch.ey.com

**Berne**
Lars Henschel  
Phone +41 58 286 63 12  
lars.henschel@ch.ey.com

**Geneva**
Susanne Gantenbein  
Phone +41 58 286 63 44  
susanne.gantenbein@ch.ey.com

**Locations**

Ernst & Young Ltd.  
Maagplatz 1  
CH-8005 Zurich

Ernst & Young Ltd.  
Belpstrasse 23  
CH-3001 Berne

Ernst & Young Ltd.  
59 Route de Chancy  
CH-1213 Geneva