Exporting from the EU after Brexit: changing definitions and consequences for FTA eligibility

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With a high likelihood of a border existing between the United Kingdom (UK) and European Union (EU) post Brexit, the subject of who can be an importer and exporter has been critical for businesses. This is amplified by the EU free trade agreements (FTAs) approved exporter status.

This article sets out the practical implications of the definition of 'exporter' for UK businesses exporting from the EU and taking advantage of EU FTAs in a post-Brexit scenario.

The definition of exporter under the Union Customs Code (UCC) has been analysed in previous TradeWatch issues from a technical perspective.[1] Since then, on 30 July 2018, the European Commission (EC) published amendments to the Delegated Act of the Union Customs Code (UCC DA) introducing a new definition of exporter in the EU. In addition, the EC revised its *Guidance Document on the Definition of Exporter* (the Guidance).

According to the amended definition mentioned in Art. 1(19) of the UCC DA, an exporter must fulfill certain conditions. The exporter must be established in the territory of the EU (i.e., have a fixed place of business, where both the necessary human and technical resources are permanently present through which the customs-related operations are carried out). It must also either:

- Have the power to determine that the goods are to be taken out of the EU

  Or

- Be a party to a contract under which the goods are to be taken out of the EU

The Guidance stipulates that the determination of whether a person has the power to decide that the goods are to be taken outside the customs territory should be made based on the supply chain. If this condition is not met, an EU- established person or entity can be made party to the contractual arrangements to act as the exporter.

The latter condition is aimed at providing greater flexibility in designating an EU-based person as the exporter. In other words, it is no longer required to have the power to determine that goods are taken out of the EU or to hold the contract with the consignee. In practice, this means that companies or corporate groups with EU-established entities (from a customs perspective) seem to have greater flexibility in terms of designating the exporter role within their supply chains. These companies or corporate groups, therefore, in principle face diminished risk of not being able to export from theEU after the UK officially leaves the EU.

[1] See 'Union Customs Code becomes fully applicable as of 1 May 2016' in the March 2016 issue of TradeWatch.

Considerations for UK companies post Brexit

Brexit triggers a supply chain review for some UK companies or corporate groups that may not have enough EU customs presence to designate an EU exporter within their supply chains. They could, therefore, be at greater risk in terms of exporting goods from the EU after Brexit.

The Guidance mentions that carriers, freight forwarders or any other party may act as an exporter, so long as that person meets the definition of exporter and agrees to take on this role. In practice, however, many of these entities appear to be reluctant to take on these roles and responsibilities. The Guidance further mentions that during the UCC transitional period, a work-around should be available. In practice, this means it would be possible for a non-EU established entity to act as the exporter. This can be achieved by appointing an indirect customs representative (i.e., the non-EU exporter is mentioned in box 2 of the export declaration and the indirect customs representative is mentioned in box 14 of the export declaration). The UCC transitional period ends as soon as the Automated Export System (AES, one of the so-called 'UCC IT systems') has been implemented. It is unlikely that this system will be implemented before the end of 2020.

Most EU member states seem to follow the Guidance, allowing a non-established entity to be named as the exporter (e.g., the Netherlands). However, other member states have a stricter stance and only allow EU-established entities to act as exporter (e.g., Italy and Belgium). In practice, this could result in clients having disparate supply chains across the EU, a situation that is generally undesirable. If this is the case, it may be preferable for businesses to preempt this change and move immediately to use of an EU-established exporter.

Similarly, it is possible that the UK would apply the same exporter definition as stated in the EU law post Brexit. As such, the analysis above is also relevant to non-UK established businesses exporting from the UK.

Evidencing EU preferential origin

Another aspect that non-established exporters from the EU will have to consider in the future is their ability to substantiate the preferential origin of their goods.

In general, current EU FTAs provide for two ways to prove origin:

- Invoice declarations
- Certificates of origin (typically in the EUR1 format).

The appropriate proof of origin depends on the text of the relevant FTA

Invoice declarations (i.e., a signed statement on the invoice indicating the origin of the goods) can be used by any exporters for consignments with a value under EUR6,000 (approximately USD6,758) and by approved exporters for all other consignments. These declarations are often favored by exporters as they can be certified internally and included in existing documents (i.e., the invoice). Conversely, a certificate of origin is a separate document issued by a chamber of commerce certifying the origin of the goods. There are several acceptable formats for these certificates; however, the standard EU format is the EUR1 document. Businesses tend to dislike these, however, as they are not always readily available and they entail per- transaction costs.

Whilst the EUR1 document has long been the standard proof of origin, there is a growing trend within EU FTAs toward approved exporter status. For example, the EU-South Korea FTA only recognises proof made by approved exporters (i.e., EUR1 is not valid). In practice, this means that for consignments worth more than EUR6,000, exporters must hold approved exporter status to prove EU origin. Similar provisions are in place for EU FTAs with Canada and Japan.

Actions businesses can take

There are several solutions to the issues outlined in this article, all of them requiring proactive, immediate to short-term action by non-established businesses.

The solution with the least lead time is setting up an indirect representation arrangement with a freight forwarder. As many traders already have long-standing relationships with freight agents, these new contacts should not be challenging to negotiate, although they may entail higher costs due to the increased liability for the freight forwarder. As explained above, however, this is a temporary solution due to the transitional nature of current EU legislation.

In the long run, to tackle the exporter and approved exporter challenges together, businesses can consider the same entity to be the exporter and hold the approved exporter status. Since the origin declaration does not necessarily need to be stated on the invoice, the approved exporter does not need to be the entity issuing the invoice.

It is apparent in EU law that an entity acting as an approved exporter must be established in the customs territory of the EU, mirroring the wider definition of exporter. The implication for a UK entity currently making origin declarations under its approved exporter authorisation is that it would no longer be able to continue to do so. Businesses will need to consider alternative ways to evidence origin, such as obtaining EUR1. However, for the EU FTAs that only recognise origin declaration made by an approved exporter, EUR1 would not be an option. In this case, the business can consider whether another entity with approved exporter status may act as exporter of record instead. For example, in Germany, the process of getting approved exporter status (from filing until approval) is approximately three to six weeks, which can be extended if customs decides to perform an audit during the approval process.

Groups with existing EU-established entities could route transactions through these entities and have them act as Exporters of Record from the EU. Though this would not require exporters to set up additional entities, their current supply chains would have to be reorganised and there is a possibility of increased administrative burdens as well. Additionally, depending on individual corporate structures, restructuring exports in this way could require lengthy internal negotiations.

Furthermore, businesses could establish themselves (or a subsidiary) in the EU (or in the UK post Brexit) for customs purposes. Such an establishment would need the appropriate human and technical resources to qualify as an EU entity. However, such an arrangement may not be desirable as it may constitute a permanent establishment (PE) risk for direct tax purposes. The PE risk is an example of why it is key to have a holistic view when considering indirect tax developments, such as a change in the definition of exporter.

Often, new developments in EU law begin as customs or VAT conversations and end up as wider business discussions. The implications of Brexit and businesses' ability to evidence EU origin highlights just how important it is to address the indirect tax developments in a timely manner.

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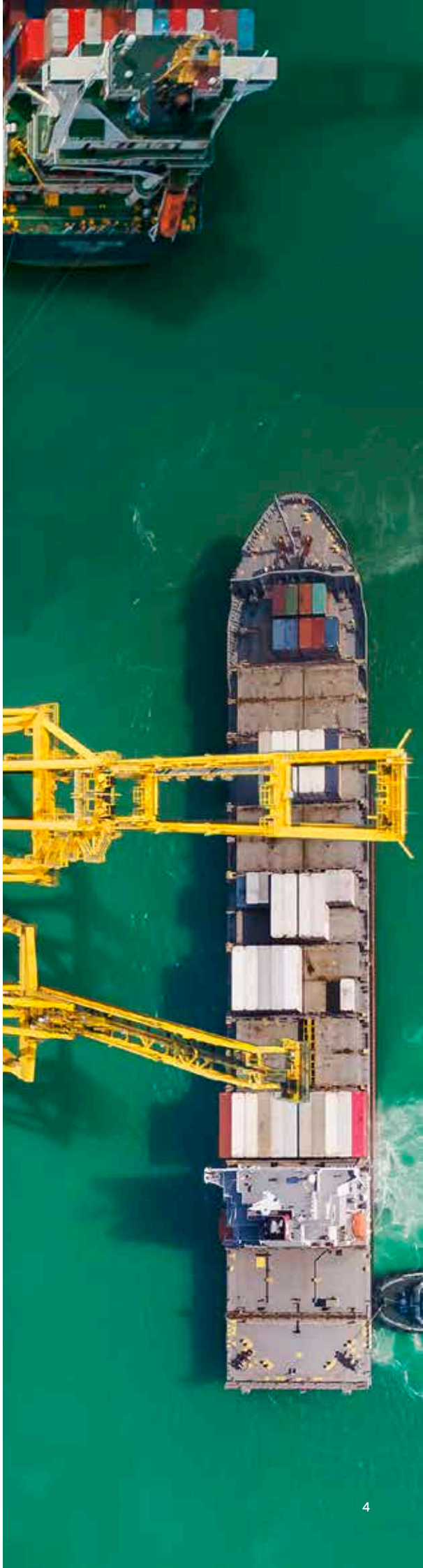

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