The non-EU established exporter of dual-use goods

By: J. Groenendijk LL.M
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List of abbreviations


Dual-use regulation  Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items

ECCN  Export Control Classification Number

ECJ  European Court of Justice

EU  European Union

EC Treaty  Treaty on European Union

EU Treaty  Consolidated version of the Treaty on the Functioning of the European Union

SAD  Single Administrative Document


1 Subject and problem definition

1.1 Introduction to subject

Due to globalisation and growing awareness of the possibilities to benefit from low corporate income tax rates and diverging taxation rules in various countries, supply chains have become more and more complex. In a modern supply chain, many parties, both related and non-related, are involved, and each party has different functions. The subject of this thesis is an example of the presupposition that EU customs and trade related legislation cannot always keep up with these changes and does not always cover ‘new’ situations.

In my daily practice I often come across non-EU supply chain structures. For these non-EU companies, as much as for other companies, it is important to be compliant with EU customs and EU foreign trade related legislation.

For those who are not familiar with the dual-use regime, dual-use items are goods, software and technology, which can be used for both civil and military purposes, meaning that these items can potentially be used to create explosive or non-explosive weapons (e.g. biological weapons) or can assist in any way in the manufacture of nuclear weapons or other nuclear explosive devices. The export of these goods is controlled and usually an export authorisation is required.

Especially in the field of export controls (dual-use), companies cannot afford to make ‘mistakes’, as these can lead to serious consequences. But what happens if the legislation is not clear and does not provide proper guidance? In a field such as export controls, where companies can be severely punished in case of errors, legislation should in my view be clear and practical consequences should be predictable for the economic operators concerned.

In practice, companies will often contact authorities to discuss and try to reach agreements regarding their specific situations which have not been foreseen by legislation.1 Often, a practical and workable solution will be found. However, these procedures can take time, and time is money. In order to make sure companies know what to expect and to allow them to be able to be aware of their responsibilities, legislation should be clear and unambiguous. This also applies for non-EU established companies operating in the EU.

1.2 Problem definition

In this thesis I will discuss a problem that may arise where non-EU established companies are introduced in a supply chain.

Any exporter of dual-use goods (to be explained later on) needs to apply for an export authorisation. However, only EU established companies can apply for such authorisations. In specific situations, it may occur, at least according to my understanding of the ‘exporter’ definition in the dual-use regulation, that a non-EU company may be considered as the ‘exporter’ for export controls purposes. Which party should apply for an export authorisation in this situation? In which EU Member State should the export authorisation be obtained? And is such a solution ‘fair’ considering the liability the export authorisation holder assumes (high fines, possible criminal charges)? Will the actual exporter, the non-EU entity, also be liable?

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1 Not in every EU Member State it is possible to reach agreements with the authorities regarding the export of dual-use items.
In this thesis I will explain the purpose of the EU export controls system and will give a general overview of how the Dual-use regulation works out in the EU (chapter 2). I will address the definition of ‘exporter’ in both the Community Customs Code and the Union Customs Code (chapter 3). In chapter 4 I will analyse the ‘exporter’ definition for export controls purposes, and I will explain in how far the definition for customs purposes can or cannot (or should or should not) be linked to the ‘exporter’ definition for export controls purposes. I will set out which practical solutions are currently being applied and I will comment on whether these solutions are in fact feasible. Finally, in chapter 5, I will give a conclusion.
2 EU export controls

2.1 General

After the Second World War, the Cold War and other continuous conflicts, the international community started to join efforts in order to maintain international security. Various guidelines were set up and agreements were concluded, aimed at reducing and regulating the production, use and sale of certain weapons (non-proliferation). In various international groups, it was agreed to also control dual-use goods.

In the EU, controls of dual-use goods are governed by the Dual-use regulation. This regulation implements international commitments of the EU under some specific multilateral export control regimes, such as the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement. This thesis will focus mainly on the EU Dual-use regulation.

2.2 The scope of the Dual-use regulation

2.2.1 Dual-use items

The Dual-use regulation sets up a community regime for the control of exports, transfer, brokering and transit of dual-use items. In the Dual-use regulation, dual-use items are defined as items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices. This thesis only covers goods, and not software and technology. I am going to focus mostly on dual use goods in the framework of supply chain transactions involving a non-EU established entity.

Annex I of the Dual-use regulation includes a list covering all goods that are subject to export controls: if a good is mentioned in the list, it is subject to export controls, and cannot be exported without an export authorisation. All dual-use goods are classified in one of the 10 categories of Annex 1. These categories are as follows.

Category 0 Nuclear materials, facilities and equipment
Category 1 Special materials and related equipments
Category 2 Materials Processing
Category 3 Electronics

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5 Article 1 of the Dual-use regulation.

6 Article 2(1) of the Dual-use regulation.
Category 4 Computers
Category 5 Telecommunications and “information security”
Category 6 Sensors and lasers
Category 7 Navigation and avionics
Category 8 Marine
Category 9 Aerospace and Propulsion.

Each dual-use item can be classified under a number – the ECCN number (Export Control Classification Number). In order to know whether a product is a dual-use good, a company would have to classify its product for export controls purposes to see whether it is included in Annex I.

Also goods not covered by Annex I, may be subject to export controls under the Dual-use regulation. An authorisation is required if the exporter has been informed by the competent authorities of the Member State in which he is established, that the items in question are or may be intended for use in connection with biological weapons, nuclear explosive devices or military goods. An authorisation may also be required for exports of dual-use goods which are not listed in Annex I, to countries subject to arms embargoes. Furthermore, if the exporter knows that the product he is about to export (a good not listed in Annex I) may be used or intended for military purposes, the exporter has to apply for an export authorisation. The Member States may adopt national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I.

2.2.2 Export and export authorisations

The export of dual-use goods is subject to export controls. In Article 2(2) of the Dual-use regulation, export of goods is defined as an export procedure within the meaning of Article 161 Community Customs Code (“CCC”), i.e. goods leaving the customs territory of the Community (and Helgoland), and re-export within the meaning of Article 182 CCC, not including goods in transit.

For almost all dual-use goods, a community general export authorisation is required. This authorisation (No EU001) can be used for exports of dual-use items to Australia, Canada, Japan, New Zealand, Norway, Switzerland and the US. This general authorisation is not available for certain specified, clearly dangerous goods such as uranium, pathogens (viruses), and genetically modified organism – other types of license are required for exports of these goods.

For exports of dual-use goods to other destinations, other types of export authorisations are required. Such authorisations will be granted by the authorities of the Member States, after they have assessed the destination, the end-use and end-user of the dual-use goods.

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7 Article 4(1) and Article 4(3) of the Dual-use regulation.
8 Article 4(2) of the Dual-use regulation. This authorisation requirement also relates to dual-use items. Exports of regular goods solely for civil use may also be prohibited under certain embargoes, however this will be governed by separate EU Regulations.
9 Article 4(4) of the Dual-use regulation.
10 Article 4(5) and Article 8 of the Dual-use regulation.
12 The equivalent under the UCC, is Article 269 of the UCC.
13 The equivalent under the UCC, is Article 270 of the UCC.
14 Article 9(1) read in conjunction with Annex II, part 3, of the Dual-use regulation.
15 Annex III and onwards, of the Dual-use regulation.
The person who should apply for an export authorisation is the exporter.\textsuperscript{16} Article 9(2) of the Dual-use regulation states that the exporter should apply for an export authorisation in the Member State where the exporter is established.\textsuperscript{17} In this thesis I will discuss the definition of exporter for export controls purposes, in specific supply chains in which a non-EU entity is involved.

### 2.2.3 Liability and penalties for non-compliance

The enforcement of the Dual-use regulation is regulated on a national level: based on Article 24 of the Dual-use regulation, “each Member State shall take appropriate measures to ensure proper enforcements of all the provisions of this Regulation. In particular, it shall lay down the penalties applicable to infringements of the provisions of [the Dual-use regulation] or of those adopted for its implementation. Those penalties must be effective, proportionate and dissuasive”. In practice, the administrative and criminal penalties applied by the Member States vary considerably.\textsuperscript{18}

In the Netherlands, for instance, in case of a violation with intent, the penalty imposed can be imprisonment for a maximum of 6 years, community service, or a monetary penalty of a maximum of EUR 81,000. For a violation without intent, the penalty can be imprisonment for a maximum of 1 year, community service, or a monetary fine of a maximum of EUR 20,250. These penalties apply per violation.\textsuperscript{19}

In the UK, penalties can vary depending on the nature of the offence. Penalties range from revocation of an export authorisation, seizure of goods, issuing of compound penalty fine, or imprisonment for up to 10 years.\textsuperscript{20} Historically, the fines that were applied in the UK have ranged from GBP 1,000 to GBP 575,000.\textsuperscript{21}

Companies exporting from the EU may also be confronted with penalties enforced by the US government, if the extra-territorial export controls laws of the US are breached. Penalties for violating the US Export Administration Regulation can be a criminal penalty of a maximum of USD 1 mln per violation, or imprisonment of up to twenty years, or an administrative penalty of a maximum of USD 10,000 per violation or USD 100,000 per violation for items involving national security.\textsuperscript{22} The fine against ING Bank NV for USD 619 million is the largest fine.\textsuperscript{23}

\textsuperscript{16} This follows from the Dual-use regulation only indirectly. For instance, Article 2(8) of the Dual-use regulation states that an “individual export authorisation shall mean an authorisation granted to one specific exporter [...]”, and Article 9(2), third paragraph, of the Dual-use regulation states: “Exporters shall supply the competent authorities with all relevant information required for their applications for individual and global export authorisation [...]”. Especially the phrase “required for their applications” leads me to conclude that it is the exporter who should apply for export authorisations.

\textsuperscript{17} The first section of Article 9(2) Dual-use regulation does not clearly state that it is the exporter who should apply for the export authorisation. This is expressed however in section 3 of that Article: “Exporter shall supply the competent authorities with all relevant information required for their applications [...].”

\textsuperscript{18} This is due to the actual penalties applied in national laws, but also because of differences in interpretation and application of concepts in penal law, such as attempt, negligence and intent (Sibylle Bauer, Penalties for export control offences for dual-use and export control law: a comparative overview of six countries, p. 4).

\textsuperscript{19} In the Netherlands, a violation of the Dual-use regulation is an economic offence (covered by the “Wet economische delicten”. The penalties are to be found in Article 6(1) read in combination with Article 1 (1°) of the Dutch Economic Offences Act/Wet economische delicten.


\textsuperscript{21} Sibylle Bauer, Penalties for export control offences for dual-use and export control law: a comparative overview of six countries, p. 11.

\textsuperscript{22} Section 11 of the US Export Administration Act of 1979.

\textsuperscript{23} It was a settlement between ING Bank NV and the US Department of Justice.
ever in connection with export control infringements of the US Export Administration Regulation. ING Bank NV was charged with violating US economic sanctions and with violating New York state laws by illegally moving billions of dollars through the US financial system on behalf of Cuban and Iranian entities.

Besides (criminal) penalties, businesses can also be confronted with reputational damage, negative publicity, blacklisting by governments, seizures, holds, delays, revocations of (customs) licenses and authorisations, loss of contracts, etc.

In principle any company or person who violates the Dual-use regulation, i.e. anyone who exports dual-use goods without an export authorisation, can be held liable. That means that also non-EU residential persons or non-EU established persons can be held liable in the EU, where they export dual-use goods from the EU territory.24 This is laid down in the International principle of territoriality. As a result, also non-EU companies can face EU administrative or criminal charges. Where persons are concerned, and an EU Member State wants to carry out criminal proceedings or carry out a sentence, with respect to a person resident in another country, the rules of extradition would apply. Extradition is regulated by treaties.25 The US take an extraterritorial approach where export controls are concerned. This means that the US authorities will also hold companies criminally liable if they infringe the US regulations when exporting from non-US territory.

It goes without saying that it is relevant for companies to comply with export controls legislation. Considering the stakes (the high fines or even criminal prosecution), exporting companies and other economic operators in the supply chain involving dual-use goods, should be aware of their liability in this respect.

24 Danielle Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, Utrecht law review, volume 9, issue 4 (September) 2013, p. 72
3 The exporter for customs purposes

3.1 Introduction: non-EU established exporter?

To get a full picture of the definition(s) of ‘exporter’, I will touch upon the definitions for customs purposes and for export controls purposes. I will specifically try to answer the question who should be the ‘exporter’ in a situation where a non-EU established entity is the owner or the seller of the goods when the goods are exported. A non-EU entity may for instance be the seller of the goods from an EU destination, in the following examples.

3.1.1 Inventory in the EU

In this scenario, a non-EU entity ships inventory (dual-use goods) to the EU, where it is stored in a warehouse, owned by an EU warehouse keeper. The non-EU entity sells the dual-use goods to a 3rd party customer, and the goods are shipped to a non-EU destination. In this scenario, the non-EU seller may end up being the exporter.26

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26 For the purpose of export controls, it is not relevant whether the goods are stored in a customs warehouse (as T1 goods) (suspensive arrangement according to Article 84(1)(b) CCC) or in a normal warehouse (as goods in free circulation), because the Dual-use regulation applies to both export and re-export.
3.1.2 Toll manufacturing

In this scenario, a non-EU established entity purchases raw materials from a supplier (either EU or non-EU established). The raw materials are shipped to an EU manufacturer, who processes these raw materials to manufacture a final product. The manufacturer under e.g. a tolling manufacturing agreement receives a fee from the non-EU entity for its manufacturing services (a tolling fee). During the manufacturing process, the non-EU entity remains the owner of the inventory and as such, it is also the owner of the final products, which are then sold to customers in third countries (either directly or via a sales company which is generally established in the third country of the customer).

3.2 Community Customs Code

Article 788 of the Community Customs Code Implementing Provisions (“CCIP”)

27 gives a definition of the ‘exporter’. I will first discuss the purpose of that definition. After that I will analyse the definition and explain who could be considered the ‘exporter’ under the CCC, in the scenarios mentioned in sections 3.1.1 and 3.1.2.

3.2.1 The purpose of the ‘exporter’ definition under the CCC

Some take the view that the purpose of a definition of the exporter, is to determine the customs office where the export declaration must be lodged and the goods must be presented to customs (i.e. in the Member State where the exporter is established). While I

agree with that, I think this is not the sole purpose of the ‘exporter’ definition. Article 161(5) CCC reads as follows:

5. The export declaration must be lodged at the customs office responsible for supervising the place where the exporter is established or where the goods are packed or loaded for export shipment. Derogations shall be determined in accordance with the committee procedure.

I think it clearly follows from this article that the export declarations can also be lodged in the Member State where the goods are packed or loaded for export shipment. This is not necessarily the Member State where the exporter is established. This also clearly follows from the Guidelines on export and exit published by the Directorate-General Taxation and Customs Union.28 These guidelines state that the export declaration can be lodged in the Member State where the goods are packed or loaded for export shipments, and explains when goods are “packed for export”.

In my view another important purpose of the ‘exporter’ definition, besides the use of the definition to determine where the export declaration can be lodged, is to determine who is responsible for the export formalities and who is liable for correctly lodging the export declaration. This follows directly from the EU customs legislation: Annex 37 of the CCIP.

Annex 37 of the CCIP entails the Single Administrative Document explanatory notes. In Box 2 of the export declaration, the consignor/exporter should be mentioned. Based on Annex 37 CCIP, “For the purposes of the Annex, the definition of ‘exporter’ is that given in the Community customs legislation. In this context, ‘consignor’ refers to an operator that acts as an exporter in the cases referred to in Article 206, third subparagraph”.

I therefore believe that Article 788 CCIP determines who should be mentioned as ‘exporter’ in box 2 of the export declaration (for which an SAD is used). The export declaration is always filed on behalf of the exporter mentioned in box 2: either if the exporter is also the declarant, or if a direct or indirect representative files the export declaration – this is always done on behalf of the exporter.29

As regards the term ‘consignor’, it is important to mention that the term ‘exporter’ and ‘consignor’ in the context of who should be mentioned in box 2, are not interchangeable; the consignor and the exporter are not the same person. As mentioned, in the context of box 2 of the export declaration, ‘consignor’ refers to an operator that acts as an exporter in the cases referred to in Article 206, third subparagraph, CCIP. This article explains in which cases a Single Administrative Document shall be used. The third subparagraph reads as follows:

It shall also be used in trade in Community goods between parts of the customs territory of the Community to which the provisions of Council Directive 77/388/EEC apply and parts of that territory where those provisions do not apply, or in trade between parts of that territory where those provisions do not apply.

This article prescribes that an SAD should be used for exports of Community goods to parts of the customs territory where the Sixth Directive30 does not apply, i.e. parts of the customs

29 Article 5(2) CCC.
territory which are not part of the fiscal territory of the EU (for instance the Canary Islands).\footnote{The Canary Islands are part of the customs territory of the European Union but are not part of the fiscal territory of the EU.} Considering that transports to these parts of the customs territory are not actual “exports”, the consignor should be mentioned in box 2 of the export declaration. In case of exports to third countries however, it should always be the exporter that is mentioned in box 2 of the export declaration, and not a consignor of any sorts.

As a conclusion I take the view that the ‘exporter’ definition of Article 788 CCIP also serves to determine which entity/person should be mentioned in box 2 of the declaration for exports to third countries.

3.2.2. The ‘exporter’ definition

In the EU customs legislation, Article 788 CCIP gives a definition of the ‘exporter’:

1. The exporter, within the meaning of Article 161 (5) of the Code, shall be considered to be the person on whose behalf the export declaration is made and who is the owner of the goods or has a similar right of disposal over them at the time when the declaration is accepted.
2. Where ownership or a similar right of disposal over the goods 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.

Taking into account that the ‘exporter’ definition of Article 788 CCIP can be used to determine the country where the export declaration should be lodged, it may be concluded that it was the intention of the legislator that the exporter is an EU established entity. The same would apply for the purpose of defining who is responsible for export formalities: it makes sense that the legislator would want to make it possible for the local customs authorities to check the records of the exporting company. However, based on the fact that an export declaration can also be lodged in the country where the goods are packed and shipped for export, and any person can be indirectly represented in customs matters\footnote{Article 5(1) CCC.} (making the indirect representative of a non-EU entity the declarant for customs purposes), I take the view that it cannot follow from the legislation that it was the purpose of the legislator to always assign an EU entity as the exporter. The authorities need an entity/person to hold liable for the payment of the customs debt. An indirect representative (acting on behalf of a non-EU entity) can always be held liable, making it possible for non-EU entities to import/export in the EU.

Furthermore, based on a literal interpretation of the first section of Article 788 CCIP, the below analysis leads me to conclude that it would be possible for a non-EU established entity to be the exporter, where that non-EU entity is the owner of the goods at the time the export declaration is accepted.

Article 788(1) CCIP states that:

- “The exporter […] shall be considered to be the person on whose behalf the export declaration is made […]”. This can be an EU entity, if the EU seller is the declarant or if the EU seller is directly represented, in which case the export declaration is made on behalf of the EU seller. However this can also be a non-EU entity, if the export
declaration is made by an indirect representative: such representative makes the declaration in its own name, but on behalf of the non-EU seller.33 34

- “[…] and who is the owner of the goods […]”. The owner of the goods is the non-EU entity.

In my interpretation, it can now already be concluded that the non-EU entity is the exporter for customs purposes.35 However, some Member States also give particular weight to the third part of Article 788(1) CCIP:

- “[…] or has a similar right of disposal over them at the time when the declaration is accepted.” It is sometimes interpreted as such that any person who ships the goods, this can be a warehouse keeper for instance, has the right to dispose of the goods and therefore can be considered the exporter for customs purposes.

Even though that interpretation of “the right to dispose” may be very helpful in practice, I believe that this will not hold if one interprets the article literally. In the examples mentioned above in sections 3.1.1 and 3.1.2, the warehouse keeper or the toll manufacturer do not have a “similar right of disposal over [the goods]”, because they do not have the same rights/similar rights of disposal an owner would have. The toll manufacturer can transport the goods or have them transported to a non-EU destination, but does not have the power to decide when and to where the goods should be transported. It therefore does not have a similar right of disposal which accrues to the owner of the goods.

Furthermore, the SAD Guidelines issued by the European Commission36, give the example that a ‘similar right of disposal’ might arise in the case of inward processing, for instance in the situation where an EU company declares goods for re-export to the owner of the goods in a non-EU country after inward processing. In that case the EU processing entity has a right of disposal over the goods and is considered the exporter. Another example is an A-B-C transaction where A transports the goods to a non-EU destination. In that case A can act as exporter if the owner of the goods (B) expressly gave it a right of disposal over the goods. This illustrates that there needs to be more than the mere arranging of transport to have a ‘similar right of disposal’.

However, while interpreting Article 788 CCIP, one should take into account that the EU Member States may use different interpretations of ‘ownership’ and the ‘right to dispose of goods’, related to the differences of these definitions in the local civil law of the Member States.37 As such, as already mentioned above, Article 788 CCIP is explained differently by the local customs authorities of the Member States. I take the view that the word “ownership”

33 A non-EU entity cannot act as declarant (Article 64(1) and 64(2)(b) CCC), but can be indirectly represented in his dealings with the customs authorities (Article 5(1) and Article 5(2) CCC). Where an indirect representative makes the customs declarations, it does this on behalf of the non-EU entity (Article 5(2) CCC).
34 The UCC equivalent of Article 64 CCC, is Article 170 UCC.
35 This is applied in practice. Box 2 would then mention the name of the non-EU exporter, and the EU address from which the goods are shipped. That address then determines the country where the export declaration should be lodged. Many EU Member States allow this. Some Member States require the non-EU exporter to be fiscally represented by a local entity, which is odd in my opinion, because fiscal representation is not a known principle in customs legislation. Customs legislation only knows direct and indirect representation.
36 SAD Guidelines, TAXUD/1619/08 rev. 3.4, November 2013, p. 5 and 6.
37 Michael Tervooren, Der Ausführerbegriff in der Exportkontrolle, p. 83 and onwards. Herr Doktor Michael Tervooren explains the English, German and French grammatical explanation of Article 788(1) CCIP, and explains the relation to civil law and the meaning of the terms ‘ownership’, ‘propriétaire’ and ‘Eigentümer’.
and the phrase “similar right to dispose”, relate to economic ownership or situations where a person was expressly given the right to dispose of the goods. Mere possession of the goods should not be a factor in the decision on who is the exporter.\footnote{I also refer to Michael Tervooren, Der Ausführerbegriff in der Exportkontrolle, p. 116 and 117.}

In my view, Article 788(2) CCIP does not apply in the scenarios mentioned in sections 3.1.1 and 3.1.2 of this thesis, because in these supply chains, there is in fact no EU established contracting party: the toll manufacturer or the warehouse keeper never become the owner of the goods.

In my view Article 788(2) CCIP is only written for transactions where the buyer (a non-EU entity) picks up the goods in the EU.\footnote{i.e. where parties decide to use the Incoterm ‘ex works’ which means that the buyer picks up the goods at the seller’s premises or another agreed upon location (for instance the toll manufacturer’s premises or the location of the warehouse where the goods are stored).} In that case the contracting party established in the EU, of the contract on which the export is based, would indeed be the selling EU entity, which would then be considered the exporter for customs purposes.

Even though there are different interpretations of Article 788(1) CCIP and some Member States take a practical approach as regards its application, I believe that the non-EU entity, in the situations described in section 3.1.1 and 3.1.2 has the legal right to be considered the exporter.\footnote{This may be relevant for applying the VAT exemption (or zero rate) for export sales: the exporting company needs to provide proof that he is allowed to apply the zero rate upon export. It is easy to refer to the export declaration in this respect (however, other documentation showing that the goods have actually been brought to a non-EU destination may also be necessary).}

### 3.3. Union Customs Code

#### 3.3.1 The purpose of the ‘exporter’ definition under the UCC


As opposed to the CCC, the UCC has a general ‘exporter’ definition which is mentioned right at the beginning of the UCC-DR, together with all the other definitions. This leads me to conclude that the ‘exporter’ definition applies throughout the UCC and does not have the sole purpose of determining the country where the export declaration should be lodged and which authority is competent (as some state is the case in the CCC, but in which regard I take a different view, I refer to section 3.2.1).

Annex B, Title II, to the UCC-DR gives an explanation on how box 2 of the export declaration should be completed (just like Annex 37 CCIP does under the CCC). Annex B, Title II, states that “The exporter is the person defined in Article 1(19).” This means that one of the purposes of the ‘exporter’ definition is to determine who should be mentioned in box 2 of the export declaration.\footnote{The term ‘exporter’ is furthermore mentioned throughout the UCC-IR. I assume the definition of Article 1(19) UCC-DR will apply in those cases. Note that the ‘exporter’ definition in the context of origin is different and is separately defined in the UCC-DR.}
There seems to be no equivalent under the UCC of Article 161(5) CCC, i.e. there is no article stating where the export declaration should be lodged. The primary purpose of the ‘exporter’ definition is therefore to give a general definition that is applicable throughout the UCC and to determine who is mentioned in box 2 of the export declaration.

3.3.2 The ‘exporter’ definition

The new definition will be as follows:

'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.

Under the UCC, it seems that it is the purpose that the exporter is always an EU established entity. Even though the phrase under (c) suggests otherwise and should cover all "other cases", this definition seems to contain a gap. Part (a) first mentions the situation where there is an export contract. The concept of the EU contracting party is also mentioned in this part of the definition. Different to the definition under Article 788 CCIP, it is now mentioned that the exporter is a person established in the EU. Part (b) regards goods exported by private individuals. Part (c) mentions the "other cases". According to part (c) of the definition, in cases other than mentioned in part (a) and (b), the person established in the EU who has the power to determine that the goods are brought to a destination outside the EU, is the exporter. This part could apply if an EU established person for instance leases or donates goods, or transfers its own stock to a non-EU destination, instead of selling the goods.

However, according to this definition, who is considered the exporter if a non-EU established entity transfers its own goods to a non-EU destination or is the party to the export contract (and there is no other EU party in the supply chain)?

In my view, part (a) of the definition cannot apply in these scenarios, because there is no EU established entity that holds the contract with the third party and has the power for determining that the goods are brought to a non-EU destination. After all, the person who has the contract with the customer in the third country and decides that the goods will be exported, in the scenarios mentioned in sections 3.1.1 and 3.1.2, is the non-EU entity.

Part (c) of the definition may be interpreted in several ways. It may be interpreted as such that a warehouse keeper or the toll manufacturer have "the power for determining that the goods are to be brought to a destination outside the customs territory of the Union". Unlike the CCC, this definition does not mention that the person who has the power to determine the sending of the goods to a non-EU destination, needs to have a similar right of disposal as an owner would have. As such it could be said that any person who can ship the goods (even a truck driver for instance) can be the exporter based on this article (in so far as it is established in the EU for customs purposes).

43 Article 1(19) UCC-DR.
44 However, it is very interesting that the French language version of the UCC-DR uses the wording "est habilitée à décider", which literally means "has the capacity to decide". It could be argued (and some do) that the English word "determine" is not related to the ownership of the goods per sé, while "decider" implies that a certain extent of power is required to decide that the goods are transported to a non-EU destination. That certain extent of power would be the ownership over the goods. The same
I take the view that the warehouse keeper/toll manufacturer do not determine that the goods are sent to non-EU destination – it is the owner of the goods (a non-EU entity) who has this power. As such I believe that the new definition shows a gap, because it does not cover situations where a non-EU entity is the owner of the goods when they are exported, and where the non-EU entity also has the power to determine that the goods are transported to a non-EU destination. In my view the UCC definition is even more unclear than the current definition under the Community Customs Code. After all, in the Community Customs Code, following a literal interpretation, it would be possible for a non-EU established entity to be the exporter for customs purposes.

3.3.3 ‘Establishment’ and ‘permanent establishment’ under the UCC

On a side note, as regards the presupposition that the exporter should be established in the EU, it should be assessed what being established means under the UCC. While the CCC did not include a definition of ‘being established’, the UCC does. Article 5(31) UCC states the following:

"person established in the customs territory of the Union" means:
(a) in the case of a natural person, any person who has his or her habitual residence in the customs territory of the Union;
(b) in the case of a legal person or an association of persons, any person having its registered office, central headquarters or a permanent business establishment in the customs territory of the Union.

Being established does not mean that a company should have its legal seat within the EU. A company can also be considered established in the EU if it has a permanent business establishment in the customs territory of the Union. This is also defined in the UCC, in Article 5(32):

"permanent business establishment" means 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;

This definition may lead to a lot of discussions and possibly also to case law of the ECJ. One of the questions one might ask is whether a customs agent who files customs declarations on behalf of a non-EU person, could be considered a ‘permanent business establishment’ of the non-EU entity. If yes, this would mean that the non-EU exporter turns out to be established in the EU and can be mentioned as exporter in box 2 of the export declaration.
while being indirectly represented by the customs agent.\textsuperscript{46} It remains to be seen how the definition will be interpreted in practice.\textsuperscript{47}

4 \hspace{1em} \textbf{Analysis ‘exporter’ definition for export controls purposes}

Below I will analyse the ‘exporter’ definition for export controls purposes more closely. I will explain the legal basis of the Dual-use regulation and the competency of the EU and the Member States (can Member States use their own interpretation of the ‘exporter’ definition?). I will also touch upon the question in how far the customs definition can be used to determine who is the exporter for export controls purposes. I will discuss several practical solutions and assess whether these solutions are feasible, especially from the view of legal certainty/fairness, specifically from a criminal law perspective.

4.1 \hspace{1em} \textbf{Legal basis of the Dual-use regulation}

The legal basis of the Dual-use regulation lies in Article 207 of the Treaty on the functioning of the European Union (the “EU Treaty”).\textsuperscript{48} This article reads as follows:

\begin{quote}
1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.
2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.
\end{quote}

There is a common EU policy with respect to trade measures and export policy. From Articles 346 and 347 of the EU Treaty one may conclude that Member States are still competent to decide to take measures related to security, production of or trade in arms, or measures to take in the event of threat of war, or to carry out obligations it has accepted for the purpose of maintaining peace and international security.\textsuperscript{49}

In the European Court of Justice (“ECJ”) Cases Werner and Leifer\textsuperscript{50}, it was decided by the ECJ that solely the Community (now the Union) is competent to take measures related to

\textsuperscript{46} I believe that for customs purposes this would be a very charming solution to deal with the new ‘exporter’ definition, because if a non-EU company is considered to have a permanent establishment, it can be considered established in the EU, and therefore can act as exporter. It is interesting that in the discussions that are currently going on about the new ‘exporter’ definition and how to interpret this, I have not yet seen this argument. It could be that multinational companies or Principal companies are reluctant to be considered to have a permanent establishment for customs purposes, because of the possible consequences this could have for direct taxes and VAT. Perhaps the company could also be considered to have a permanent established for corporate income tax purposes or a fixed establishment for VAT purposes, which is generally not something companies pursue.

\textsuperscript{47} While very interesting, this topic is out of scope of the purpose of this thesis (to analyse the ‘exporter’ definition for export controls purposes) and as I will explain later, the question of being established for customs purposes in the end will not influence the determination of the ‘exporter’ for export controls purposes in my view. Therefore I will not comment on this further.

\textsuperscript{48} Previously laid down in Article 133 of the EC Treaty (Nice consolidated version) and Article 113 of the EC Treaty (Maastricht consolidated version).

\textsuperscript{49} Michael Tervooren, Der Ausführerbegriff in der Exportkontrolle, p. 37 and 38.

\textsuperscript{50} ECJ 17 October 1995, Case C-70/94 (Fritz Werner) and ECJ 17 October 1995, Case C-83/94 (Peter Leifer).
trade politics and security. In the Werner case, the referring Court asked whether Article 113 EC Treaty (now Article 207 EU Treaty) solely concerns measures which pursue commercial objectives, or whether it also covers commercial measures having foreign policy and security objectives. The ECJ answered that a measure whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives. The ECJ notes that national measures of commercial policy are only permissible if they are specifically authorised by the Community.

4.2 Autonomous and uniform interpretation

As mentioned in the section above, the EU Member States in principle have no competence as regards export control measures. Based on Article 207 of the EU Treaty, the common commercial policy shall be based on ‘uniform principles’. This implies that Union law, i.e. the Dual-use regulation, should be uniformly applied throughout the EU Member States. As such the notion of ‘exporter’ in the Dual-use regulation should be given an autonomous and uniform interpretation throughout the European Union. This concept is mentioned in many ECJ cases: “The need for the uniform application of EU law requires that the terms of a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question”. Any definitions of ‘exporter’ in local law of the Member States are therefore irrelevant. In my view, if a definition should have an autonomous and uniform interpretation, it should also be clear from the legal provision what that uniform interpretation would or should be. But it is not. It is in any case clear that the definition should be uniform and that it is not right that interpretations of the ‘exporter’ definition differ per Member State.

4.3 The exporter for export controls purposes

The definition of ‘exporter’ for EU export controls purposes is given in Article 2(3)(i) of the Dual-use regulation. This article states the following:

‘exporter’ shall mean any natural or legal person or partnership:
(i) 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.

In addition to that, the last paragraph of this article states:

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51 ECJ 17 October 1995, Case C-70/94 (Fritz Werner), paragraph 7.
52 Idem, paragraph 10.
53 Idem, paragraph 12, and ECJ 17 October 1995, Case C-83/94 (Peter Leifer), paragraph 12.
54 Only if specifically granted to the Member States, they have their own competence. I refer for instance to Article 4(5) and Article 8 of the Dual-use regulation, which state that Member States may impose authorisation requirements on the export of dual-use items not listed in Annex I, for reasons of public security or human rights considerations, or if the exporter has grounds for suspecting that the items may be intended for use in connection with chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.
55 For instance, ECJ 18 January 1984, Case 327/82 (Ekro), paragraph 11, and ECJ 19 September 2000, Case C-287/98 (Linster), paragraph 43.
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 contract party established in the Community.

The definition is slightly different from the definition for customs purposes in the CCC. It is more extensive and introduces that the exporter 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 Union (in that sense the definition for export controls purposes is more like the definition under the UCC). If no contract is concluded, for instance if a company transfers its own goods to a non-EU destination, the exporter is the person who determines that the goods are exported.

The second part of the second sentence ("[…] if the holder of the export contract does not act on its own behalf […]") regards situations where a commissioner or agent sells goods on behalf of a principal. In this case the commissioner/agent may be party to the export contract, but the commissioner/agent does not act on his own behalf. In that case, the principal would be considered the exporter for export controls purposes, considering that the principal ultimately determines that the goods are sent to a non-EU destination.

The last sentence of Article 2(3)(i) of the Dual-use regulation is similar to Article 788(2) CCIP and in my view applies to "pick up transactions", where a non-EU buyer picks up goods in the EU; in that case the EU seller is considered the exporter for export controls purposes.

4.3.1 The non-EU exporter?

In the scenarios described in sections 3.1.1 and 3.1.2 (the mere holding of inventory in the EU by a non-EU established entity and the supply chain including a toll manufacturer where a non-EU entity remains the owner of the goods and is the seller of the goods when they are exported), I believe that only the first part of the ‘exporter’ definition of the Dual-use regulation applies. This is because there is no agent or commissioner or pick-up transaction. I will therefore only assess the first part of the definition.

Also for export controls purposes, the exporter can in my view, following a literal interpretation of the ‘exporter’ definition, be a non-EU established entity. For instance where a non-EU entity transfers its inventory which is located in the EU, to a non-EU location (either a supply or a transfer of own goods), or in an operating model where a non-EU entity makes use of a toll manufacturer in the EU and subsequently sells the goods to a non-EU customer.

Article 2(3)(i) Dual-use regulation states that:

- “exporter’ shall mean any natural or legal person or partnership: on whose behalf an export declaration is made […]”. Under the CCC, the person on whose behalf an export declaration is made, can be the non-EU entity.

- “[…] 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.” This would in the scenarios in sections 3.1.1 and 3.1.2 be the non-EU seller.

Based on this interpretation I would conclude that the non-EU entity can technically, at least as long as the CCC is applicable, be the exporter for export controls purposes. The last sentence of Article 2(3)(i) Dual-use regulation in my view does not apply to these scenarios, because there is no EU contracting party in the supply chain: the EU supplier of raw
materials cannot be considered a contracting party pursuant to the contract on which the export is based, because that EU supplier has nothing to do with the finished goods that are exported. The manufacturer, who merely provides a service to the actual seller of the goods, is also not a contracting party: it is not in any way engaged in the selling of the goods for exportation to third countries.

With respect to the phrase “ [...] has the power for determining the sending of the item out of the [EU]” it is interesting to take note of the French language version of the Dual-use regulation. The French wording is as follows: “est habilitée à décider de l’envoi du produit hors du territoire douanier de la Communauté”. The phrase “est habilitée à décider” literally means “has the capacity to decide”. It may be argued that the word “determine” does not necessarily imply that the person who determines that the goods are sent to a non-EU destination needs to be the owner of the goods. However the term “decide” rather implies ownership of the goods, considering that only an owner decides to whom he sells his products and ultimately to where the goods are shipped. The same applies for the Dutch wording, which reads: “ [...] die het recht heeft te beslissen [...]”. This also literally means “to decide”, rather than “to determine” (which I would translate to Dutch as “bepalen”).

As a conclusion: based on a literal interpretation of the definition of exporter in the Dual-use regulation, a non-EU entity can be considered the exporter for export controls purposes. However, where for customs purposes a non-EU exporter can be indirectly represented in its dealings with the customs authorities (for instance the filing of the export declaration), a problem arises in export controls, because a non-EU established entity cannot apply for export authorisations.56 57

An oddity in Article 2(3) Dual-use regulation, is that this provision seems to assume that the person on whose behalf an export declaration is made (i.e. the exporter for customs purposes), is the person who holds the contract with the consignee in the third country and has the power to determine the sending of the goods to a non-EU destination. I conclude this from the fact that the regulation says: “[...] that is to say [...]”.

This will lead to a very strange situation under the UCC. Under the UCC it is probably intended that export declarations can only be made on behalf of EU entities, even though a non-EU entity is the owner of the goods and the seller of the goods when the goods are exported. The ‘exporter’ definition for export controls purposes however prescribes that the exporter is the person on whose behalf the export declaration is made (under the UCC probably an EU entity), and in this definition it is assumed that that is the same person who holds the contract with the consignee in the third country and has the power to determine the sending of the goods to a non-EU destination. I conclude this from the fact that the regulation says: “[...] that is to say [...]”.

56 Article 9(2) of the Dual-use regulation.
57 Assuming that “established” means the legal seat of a company. This is in any case the interpretation that is followed by the authorities that issue export authorisations. This is not likely to change under the UCC (where it will be possible to have a customs permanent establishment), because customs legislation is generally considered a different set of legislation than the export controls legislation, and the Dual-use regulation of course already existed before the UCC and the UCC-DR and UCC-IR enter into force/become applicable.
58 In Dutch: “[...] d.w.z. [...]”, and in German: “[...] d.h. [...]”. Another odd thing in my view is that abbreviations were used in these language versions of the Dual-use regulation.
59 The definition says: “the person on whose behalf the export declaration is made, that is to say [...]”. Or in Dutch, it says: “[...] d.w.z. [...]”.


the fact that the ‘exporter’ definition does not seem to agree with the fact that only EU established exporters can apply for export authorisations.

4.4 Can the customs definition be used?

One of the questions to be asked when determining who is the exporter for export controls purposes, is in how far the exporter definition of the CCC can be used. Considering the fact that the definition of ‘export’ in the Dual-use regulation refers to Article 161 CCC, one may assume that for the definition of ‘exporter’, there is also a linkage with the CCC. Furthermore, the fact that:

- the first part of the ‘exporter’ definition in the Dual-use regulation refers to the person on whose behalf the export declaration is filed,
- and the person on whose behalf the export declaration is filed is mentioned in box 2 of the export declaration,
- and the explanatory notes for completing the export declaration refer to the use of the ‘exporter’ definition of the customs legislation
- and this will be the same under the UCC,

leads me to conclude that the exporter definition of Article 788 CCIP (under the CCC) and Article 1(19) UCC-DR (under the UCC) does play a role in determining who is the exporter for export controls purposes.

However in my view the ‘exporter’ definition for customs purposes can only be used if there is an export contract, and if the export declaration is indeed made on behalf of that person. This is because the Dual-use regulation assumes that the person on whose behalf the export declaration is made, is the same person as the one who holds the contract with the consignee in the third country and who has the power for determining the sending of the items outside the territory of the EU. Again, I note that this conclusion is only applicable where the first part of the ‘exporter’ definition applies (i.e. there is no agent/commissioner and there is no pick up transaction).

The section below shows an example of a situation that may occur under the UCC.

4.4.1 Example under CCC and under UCC

A non-EU entity holds inventory (dual-use goods) in a warehouse in the EU. The non-EU entity decides to sell his inventory to a customer in a third country. The warehouse keeper arranges the transport of the goods from the warehouse to the third country customer. Based on the UCC, in this case it could be decided that the warehouse keeper, who arranges the transport of the goods, is considered the ‘exporter’ for customs purposes. This would be based on the interpretation of Article 1(19)(c) UCC-DR where one assumes that the transporter has the power for determining that the goods are to be brought to a destination outside the EU customs territory, even though there is a sales contract (but concluded by a non-EU entity) and the transporter is never the owner of the goods. The result would be that the warehouse keeper is the exporter for customs purposes. The question is whether that entity can also be the exporter for export controls purposes.

Based on Article 2(3) of the Dual-use regulation, the exporter is the person on whose behalf the export declaration is made (e.g. the warehouse keeper), that is to say, the person who holds the contract with the consignee (which is not the warehouse keeper). We would then have to revert to the second part of the definition: 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. In fact, an export contract was concluded, so this part of the definition should not be applicable. The last sentence of the ‘exporter’ provision also does not apply, because there is in fact no EU contracting party that can act as exporter instead of the non-EU contracting party. This leaves us, under the UCC, with no exporter for export controls purposes. For practical purposes, one might say that the warehouse keeper, who has (as some may interpret the provision), the power to determine the sending of the item out the customs territory, should be the ‘exporter’ for export controls purposes and the party to obtain the export authorisation.

Another conclusion might be that the non-EU entity simply cannot export its goods from the EU.

The below flow chart shows that under the CCC and under the UCC, the outcome would be the same: a practical approach needs to be sought as regards the determination of which entity should apply for export authorisations, or the non-EU entity cannot export its dual use goods.
4.5. Feasibility of practical solutions

As mentioned above, Article 9(2) of the Dual-use regulation states that an export authorisation can only be granted by the competent authorities of the Member State where the exporter is established. The Dual-use regulation does not have a definition of ‘being established’, however, generally this is interpreted as the place where the company has its legal seat.

A non-EU established exporter is therefore not able to obtain an export authorisation in the EU. There is a practical solution to this problem. For instance, if a toll manufacturer is related to the non-EU entity, a possible solution would be that the toll manufacturer would hold the export authorisations of the goods owned by the non-EU entity that are exported from the EU. The export authorisation would then be granted by the authorities where the toll
manufacturer is established. In that scenario the toll manufacturer would also assume the liability that comes with holding such authorisations. The situation is however more difficult, where the toll manufacturer is not related to the exporting non-EU entity.\(^{60}\) Or for instance in the scenario, where the only EU established entity that has something to do with the goods to be exported, is a warehouse keeper (a third party service provider).

### 4.5.1 Legal certainty

Legal certainty is a general principal in EU law. This principle means that the law must be certain, meaning clear and precise, and the legal implications must be foreseeable. This means that from these rules, individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly.\(^{61}\) It should be clear from the legislation who is the exporter and it should be clear to economic operators what their obligations are in this respect, especially taking into account the severe consequences they may face in case of non-compliance. In that respect, I think it should not be necessary to seek for a “practical solution” in the first place, but the legislation should simply be clear enough. I will however comment on the “practical solution”, where a warehouse keeper, toll manufacturer or customs agent acts as exporter for export controls purposes and is the holder of export authorisations.

### 4.5.2 Mere possession of goods as a factor to determine the exporter for export controls purposes

Further to the practical solutions mentioned above, or based on a very free interpretation, in my view, of the phrases “similar right of disposal over [the goods]”\(^{62}\), or “power for determining sending of the item out of the customs territory of the Community”\(^{63}\), mere possession of goods to be exported could be a factor in determining who is the exporter. In that scenario, the warehouse keeper, or a customs agent/freight forwarder, could be considered the exporter for export controls purposes. In my view, this is not fair, because this person merely provides a service to the actual exporter (the owner and seller of the goods, which may be a non-EU entity) and helps him transport the goods to the non-EU destination. A warehouse keeper or a customs agent does not typically know the end-use or the end-user of the goods, which is critical from an export controls point of view.\(^{64}\) As such I take the view that a customs agent/warehouse keeper should never be the ‘exporter’ for export controls purposes, unless it takes ownership to the goods and is an actual EU contracting party.\(^{65}\)

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\(^{60}\) Structures with third party toll manufacturers do exist but it is more likely that the toll manufacturer is related to the entity who owns the raw materials and the finished goods.

\(^{61}\) ECJ 9 July 1981, Case 169/80 (Gondrand and Garancini), paragraph 17, and for instance ECJ 13 February 1996, Case C-143/94 (Van Es Douane Agenten BV), paragraph 27.

\(^{62}\) Article 788(1) CCIP.

\(^{63}\) Article 1(19) UCC-DR, and Article 2(3) of the Dual-use regulation.

\(^{64}\) Also stated by Michael Tervooren, Der Ausführerbegriff in der Exportkontrolle, p. 114.

\(^{65}\) This also follows from a German case, the Ville de Virgo case (District Court of Stuttgart, Case 10KLs 141 Js 29271/03 of 28 May 2004, not published but explained in Anna Wetter, Enforcing European Union law on exports of Dual-use goods, p. 90 and onwards). In the Ville de Virgo case, Mr Truppel (resident in Germany), made use of a simplified export procedure through a customs agent (Delta-Trading GmbH). As a result, Delta-Trading GmbH was mentioned on the export declaration as the exporter. The export of the goods was found to be a violation of the Dual-use regulation, and both Delta-Trading and Mr Truppel (then considered to be the actual exporter of the goods) were held liable and were criminally Of course, in this case, fraud was involved (on the export documentation provided, it showed Delta-Trading as the seller of the goods, which was in fact not the case, and both Mr Truppel and Delta-Trading knew that it concerned an illegal export). However I do think the case illustrates that even though a customs agent takes care of the sending of the goods outside the EU, it should not be the exporter for export controls purposes, and that both the holder of the export
If a customs agent accepts to be the exporter for export controls purposes and holds authorisations for exports of dual-use goods owned and sold by a non-EU entity, it enters into a great risk. If the export of the goods turns out to be illegal, it will be held liable (probably also the actual exporter – the non-EU entity – can and will be held liable). If there are contracts and bank guarantees in place between the exporter and the customs agent/warehouse keeper, the latter may accept such a risk. However, ultimately, if it does go wrong, the customs agent or warehouse keeper may face other types of penalties, such as revocation of customs related licenses and authorisations, AEO status and blacklisting.

Furthermore, based on Article 4 of the Dual-use regulation (the “catch-all clause”), an exporter is obligated to inform the authorities if he knows that the goods he wishes to export, even though those goods are not covered by Annex 1 of the Dual-use regulation, may be intended for specific uses mentioned in the regulation. In that case an export authorisation may be required. A customs agent or warehouse keeper transporting goods not covered by Annex 1 will have no sufficient knowledge of any such end-use and it is undoable for the customs agent/warehouse keeper to ask for the end-use and end-user of all the goods it transports on behalf of all of its clients. Possibly the non-EU entity (the exporter in my view), may take the opinion that he is not the exporter, or that its goods are held in a customs warehouse waiting for their re-export, and that therefore he did not feel the need to inform the customs authorities. In that case I believe that only the non-EU exporter should be held liable, and not the customs agent or warehouse keeper merely taking care of the transport of the goods. In either case I think this example also shows that the “exporter” definitions are multi-interpretable and can lead to risks, not only for economic operators but also from a security perspective.

4.5 No EU exporter, no export authorisation?

Another consequence that may be drawn from the applicable legislation, is that the non-EU owner and selling entity simply cannot export its dual-use goods. If the non-EU entity is the exporter and that entity cannot apply for export authorisations, or if no exporter can be determined whatsoever, this leaves us with nothing. This seems to be the conclusion of Michael Tervooren in his PhD thesis. He states that this is justified, because a non-EU entity cannot be the subject of inspection by the local authorities in the Member States who should issue the export authorisations, and cannot be criminally prosecuted by the Member States. Regarding the latter argument, I believe that if a violation of the Dual-use regulation takes place on the territory of one of the Member States, the authorities or public prosecutor of that Member State will be competent to hold the violator criminally liable or apply administrative sanctions, even though that violator is not established/resident in the respective Member State. This is laid down in the territoriality principle of public international law.

However the first argument for not giving out export authorisations to non-EU entities is potentially even more compelling. If a customs agent accepts to be the exporter for export controls purposes and holds authorisations and the actual exporter can be held liable (Anna Wetter, Enforcing European Union law on exports of Dual-use goods, p. 95).

66 He may come to this conclusion due to the multi-interpretable ‘exporter’ definitions.

67 It is sometimes under discussion whether goods held in a customs warehouse in the EU waiting for their re-export, are subject to export controls. I take the view that export controls do apply, considering that the Dual-use regulation clearly also covers re-export (Article 2(2)(ii) of the Dual-use regulation). This is even one of the points mentioned in the considerations of the Dual-use regulation: consideration 9 states: “Particular attention needs to be paid to issues of re-export and end-use”.

68 Michael Tervooren, Der Ausführerbegriff in der Exportkontrolle, p. 136.

69 Danielle Ireland-Piper, Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine, Utrecht law review, volume 9, issue 4 (September) 2013, p. 72.

70 For instance, in the Netherlands, this principle is laid down in Article 2 of the Dutch Criminal Code (Wetboek van Strafrecht): “De Nederlandse strafwet is toepasselijk op ieder die zich in Nederland aan
entities, the fact that the authorities cannot inspect the non-EU entity sufficiently, does seem valid. In that respect the non-EU companies exporting dual-use goods from the EU, are probably happy with a lenient and practical approach as regards the party who should apply for export authorisations, otherwise they would not be able to export the goods at all.

5 Conclusion

The ‘exporter’ definition in the Dual-use regulation shows a link with the ‘exporter’ definition for customs purposes, considering that it refers to “the person on whose behalf an export declaration is made”. This, and the fact that in the Dual-use regulation the exporter is considered to be the person who holds the contract with the consignee and has the power to determine the sending of the dual-use items out of the EU, leads me to conclude that under the CCC, it is technically possible for a non-EU entity to be the exporter for export controls purposes. Under the UCC it is unclear who should be considered the exporter for export controls purposes in situations where a non-EU entity owns the goods that are exported, holds the contract with the consignee in the third country and determines (or decides) that the goods are shipped to a non-EU destination.

Only EU entities can apply for export authorisations, which of course leads to practical difficulties. The definition of ‘establishment in the EU’ which applies when the UCC and its Delegated Regulation and Implementing Regulation become applicable, highly likely will not apply for export controls.

As a result, under the CCC (and under the UCC as of 1 May 2016), many non-EU exporters seek for a practical solution as regard obtaining export authorisations. The alternative is that the non-EU entity simply cannot export the dual-use goods.

A practical solution can be that a related entity (for instance the toll manufacturer) holds export authorisations regarding the dual-use goods that are exported, which are owned by the non-EU entity. If the entities are related to each other the entity holding the authorisation will probably accept the liability that comes with holding export authorisations. In my view this can be a good solution.

However in a situation where a non-EU entity simply holds inventory in the Netherlands and wants to export its inventory (dual-use goods), it is not that easy to find a solution. A warehouse keeper or a customs agent could hold the export authorisations, however is not likely to do that because of the liability he will assume being the holder of the authorisations. For that reason it would be quite costly for the non-EU owner of the goods wishing to export (the remuneration would be high). I think in that scenario the most sensible conclusion would be that the non-EU entity cannot export the dual-use goods. From a security perspective that seems to be justifiable. From a security perspective if may be unwanted if an entity that is not the exporter, holds the export authorisations. The customs agent/warehouse keeper in most cases will not know the precise end-destination, end-use and end-user of the goods it transports to a non-EU destination, which is critical. The export may seem safe and compliant with the Dual-use regulation, but what if the non-EU owner of the goods does not fully inform the customs agent/warehouse keeper or feels that it is not responsible? In that case the customs agent/warehouse keeper could still be held liable for not taking reasonable care, but, more importantly, dual-use goods can potentially be exported and used for prohibited activities, even though export authorisations are in place. This can potentially also happen if an (EU) exporter holds the export authorisations itself, but in that case it is easier to keep track of the export transactions. Therefore it is my opinion that where a non-EU entity

enig strafbaar feit schuldig maakt”. Inofficial translation: “The Dutch Criminal Act applies to any person who commits a criminal offence in the Netherlands”.

holds inventory in the EU and wishes to export these goods, and there is no related entity in
the EU that can hold the export authorisations, the export should not be possible.

In any case I think that the exporter definition for export controls should be more clear,
considering the fact that it is currently subject to different interpretations which should not be
possible. It is not wanted that the Dual-use regulation is explained differently in the various
Member States, and I also feel that the regulation should be sufficiently clear, not allowing for
the need for practical solutions which may differ per Member State.
**Literature list**


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**Websites**
