

# **EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION WITHIN THE SCOPE OF THE UK/EU WITHDRAWAL AGREEMENT AND NORTHERN IRELAND PROTOCOL**

C(2022)9254

Commission Delegated Regulation (EU) .../... of 14.12.2022 amending Delegated Regulation (EU) 2015/2446 as regards extending the possibilities for making customs declarations orally or by any other act deemed to be a customs declaration, the invalidation of declarations in specific cases, and specifying the exchange of information for entry summary declarations

Submitted by HM Revenue and Customs

7 February 2023

## **SUBJECT MATTER**

Delegated Regulation (EU) 2015/2446 establishes provisions of general application to supplement the Union Customs Code (UCC) to ensure its clear and proper application, and the EU is updating this Delegated Regulation to take account of developments in legislation and of the deployment of the UCC's IT systems and to clarify the application of certain customs formalities.

The amendments to Delegated Regulation (EU) 2015/2446 aim to update certain rules in the existing Delegated Regulation to reflect the latest developments in relation to the filing of entry summary declarations in the context of releases 2 and 3 of the EU's Import Control System-2 (ICS2), expand the circumstances in which oral and 'by conduct' (i.e., deemed) declarations apply to packings, and introduce the possibility for customs authorities to repay customs duties to the declarant/debtor in specific situations when goods were delivered free of charge to charitable or philanthropic organisations.

EU rules for the movement of goods (under the UCC) apply to and in the UK in respect of Northern Ireland (NI) under Article 5 of the Northern Ireland Protocol. Therefore, the EU's amendments will take effect in NI by virtue of Article 13(3) of the Protocol.

## **SCRUTINY HISTORY**

No recent relevant scrutiny history has been identified.

## **MINISTERIAL RESPONSIBILITY**

The Chancellor of the Exchequer has responsibility for UK policy on European Union monetary and economic issues.

The Financial Secretary to the Treasury has responsibility for tax and customs policy.

The Secretary of State for Foreign, Commonwealth and Development Affairs is responsible for overall UK policy towards the EU.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

Customs issues are an excepted matter under the Northern Ireland Act 1998.

## **LEGAL AND PROCEDURAL ISSUES**

### **i. Legal Base:**

Article 290 Treaty on the Functioning of the European Union (TFEU) provides that a legislative act may delegate to the Commission the power to supplement or amend certain non-essential elements of the legislative act. The UCC delegates to the Commission certain powers, in accordance with Article 290 TFEU, to adopt delegated regulations. The Commission exercised these powers by adopting Commission Delegated Regulation (EU) 2015/2446.

The legal basis for the proposed Delegated Regulation, which amends Commission Delegated Regulation (EU) 2015/2446, is Articles 131, 160 and 175 of the UCC.

The procedure that the Commission is required to follow for delegated acts is set out in Article 284 of the UCC.

### **ii. Voting Procedure:**

The European Parliament and/or Council may object to a delegated act within two months of notification of the act, which will prevent it from coming into force. To exercise their right of objection, a majority in the European Parliament is necessary, or a qualified majority in the Council.

### **iii. Timetable for adoption and implementation:**

The EU Commission adopted this delegated act on 14 December 2022. Article 284(4) of the UCC provides that as soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council. There is an objection period of 2 months (which may be extended by 2 months by the European Parliament or the Council).

If no objection is raised, the delegated act will be published in the Official Journal of the European Union. Article 2 of the proposed delegated act provides that it will enter into force on the twentieth day following that of its publication.

The regulation is directly effective and so will be incorporated into UK domestic law through section 7A of the European Union (Withdrawal) Act 2018.

## **POLICY IMPLICATIONS**

- The EU outlines that Delegated Regulation (EU) 2015/2446 establishes provisions of general application to supplement the UCC to ensure its clear and proper application, and through operation of the Northern Ireland Protocol these EU rules apply to goods entering or exiting Northern Ireland.
- The amendments to Delegated Regulation (EU) 2015/2446 aim to update certain rules in the existing Delegated Regulation to reflect the latest developments in relation to

the filing of entry summary declarations in the context of releases 2 and 3 of ICS2, expand the circumstances in which oral and 'by conduct' (i.e., deemed) declarations apply to empty packings and packings which bear indelible markings in certain circumstances, and introduce the possibility for customs authorities to repay customs duties to the declarant/debtor in specific situations when goods were delivered free of charge to charitable or philanthropic organisations.

- Art 112a applies only in the case of transport by rail and imposes an obligation on a person who has failed to provide particulars needed for an entry summary declaration (ENS) to the person who has to lodge it, to provide those particulars to the customs office of first entry. Art 112a is similar to, and consistent with, provisions already in the Delegated Act allowing for multi-filing in different cases. The context for this provision (and similar provisions already in the Delegated Act) is the deployment of EU's Import Control System-2. HMRC is on track with delivering its part of the new system and these amendments do not cause concerns for HMRC operations.
- Art 113a(4) imposes a new obligation on 'third country postal operators' to submit particulars required for an entry summary declaration (ENS) to the customs office of first entry in circumstances where they have not made those particulars available to the carrier responsible for lodging the ENS. As above, the context for this is ICS2 implementation, which provides that the postal operators of the third country should provide the necessary information for goods destined for or passing by the EU, to the postal operator within the EU or the carrier or submit that information themselves. Current arrangements outline that a ENS is not currently required for goods moving in parcels on movements from GB-NI. As a result, obligations to provide certain particulars of an ENS (including the new obligation on third country postal operators) will not apply on such movements.
- The amendments to Arts 136, 138, 139 and 141 expand the circumstances in which oral and 'by conduct' (i.e., deemed) declarations to free circulation and temporary admission, transit or re-export apply to empty or filled packings which bear indelible markings identifying persons established in the EU and allow deemed declarations for pallets and containers. These proposals are broadly consistent with the Taxation (Cross-border Trade) Act 2018 (TCTA) and the conditions in GB with some small differences:
  - In GB, pallets and containers are not permitted to be declared for the free circulation procedure by conduct. They can be declared orally for the free circulation procedure or, more commonly, declared orally or by conduct for the temporary admission procedure. As pallets and containers move frequently in and out of GB and other customs areas, they are unlikely to ever enter and intend to remain in free circulation. Accordingly, addressing this divergence is likely to have limited to no impact on trade and so there is no reason to address it.
  - In GB, while filled or empty packaging can usually be declared by conduct, packaging which is, or purported to be, both imported and exported empty is excluded. HMRC developed policy on packaging movements in conjunction

with industry and is not aware of any commercial reasons for the divergent movements, and so has no plans to address this divergence. HMRC has designed this policy as such to mitigate abuse and potential smuggling. It is unlikely, in compliant scenarios, that packaging will be imported and intended for reexport (or vice versa) empty. Accordingly, HMRC is content with the divergence.

- We also note that there is no reference to “indelible marking” on packaging in UK legislation. However, HMRC does not consider this raises any concerns as this does not impact on operational processes.
- Art 148(4)(f) adds a specific circumstance in which a customs declaration can be invalidated (withdrawn), and therefore a claim for repayment of duty can be made, where goods are delivered free of charge to charitable and philanthropic organisations, when certain conditions have been met. There are some divergences between this amendment and GB operations. Where a declaration has been accepted (goods in free circulation) and duty on the goods have been paid, both GB and EU rules provide a general time limit of 90 days after acceptance for the declaration to be invalidated, which triggers repayment for the goods. The EU rules provide specific circumstances (for example how the goods are used) in which invalidation is permitted, while in UK legislation the circumstances are not specified, and it is at the discretion of a HMRC officer to authorise a withdrawal request. The EU rules do provide some limited instances, such as this, where the invalidation process time limit is longer than 90 days and this process is not replicated in UK legislation. HMRC is content that the 90 days is sufficient to invalidate a declaration in GB. HMRC is exploring whether in exceptional circumstances to allow invalidation after 90 days. Accordingly, this new process will require HMRC to develop a new operational process for invalidation and triggering repayments for affected Northern Ireland charitable and philanthropic organisations. HMRC, together with other government departments, is considering whether there is a case for a similar measure in GB.

## **CONSULTATION**

The Commission carried out a consultation with their Member States on the draft provisions.

There has been no UK consultation on this change.

## **FINANCIAL IMPLICATIONS**

These Regulations are not expected to have any significant economic impacts or business impacts. There are some additional costs for HMRC in implementing these changes which are factored into existing arrangements for Northern Ireland, for example, updating guidance to traders.

A handwritten signature in blue ink that reads "Victoria Athony". The signature is written in a cursive, flowing style.

**VICTORIA ATKINS MP**

Financial Secretary to the Treasury

HM Treasury