DECISIONS

COUNCIL DECISION (EU) 2021/12

of 17 December 2020

on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the determination of goods not at risk

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 50(2) thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement') was concluded by the Union by means of Council Decision (EU) 2020/135 ([1]) on 30 January 2020 and entered into force on 1 February 2020.

(2) Article 166 of the Withdrawal Agreement empowers the Joint Committee established by Article 164 of the Withdrawal Agreement ('the Joint Committee') to adopt decisions in respect of all matters for which the Withdrawal Agreement so provides. The Protocol on Ireland/Northern Ireland ('the Protocol') forms an integral part of the Withdrawal Agreement.

(3) Article 5(1) of the Protocol provides for the application of customs duties applicable in Union law for goods brought into Northern Ireland which are considered at risk of subsequently being moved into the Union. Goods not at risk are subject to either no customs duties or those customs duties applicable in the United Kingdom.

(4) Under Article 5(2) of the Protocol, all goods brought into Northern Ireland are to be considered to be at risk of subsequently being moved into the Union. In order for goods brought into Northern Ireland to be considered 'not at risk' in this sense, it needs to be established that those goods will not be subject to commercial processing there and that they fulfil the criteria established by the Joint Committee.

(5) The criteria for goods not being subject to commercial processing should respect the fact that, under Article 4 of the Protocol, Northern Ireland forms part of the United Kingdom's customs territory. They should also reflect the commitment of the Parties to the Protocol that the implementation of the Protocol should impact as little as possible on the everyday life of communities in both Ireland and Northern Ireland.

(6) Goods brought into Northern Ireland may be considered not to be at risk of subsequently being moved into the Union where the tariff differential is zero, or where it is otherwise ensured that there is no incentive for economic operators to ship goods into Northern Ireland solely because of the applicable customs tariff.

(7) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee,

([1]) Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Joint Committee established by Article 164 of the Withdrawal Agreement as regards the determination of goods not at risk shall be based on the draft Decision of the Joint Committee attached to this Decision.

Article 2

The Decision of the Joint Committee shall be published in the *Official Journal of the European Union*.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 17 December 2020.

For the Council
The President
S. SCHULZE

DRAFT

DECISION No …/2020 OF THE JOINT COMMITTEE ESTABLISHED BY THE AGREEMENT ON THE WITHDRAWAL OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FROM THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY

of …

on the determination of goods not at risk

THE JOINT COMMITTEE

Having regard to the Protocol on Ireland/Northern Ireland to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, and in particular Article 5(2) thereof,

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter

This Decision sets out rules for implementing Article 5(2) of the Protocol on Ireland/Northern Ireland ("the Protocol") as regards:

(a) the conditions for considering that a good brought into Northern Ireland from outside the Union will not be subject to commercial processing in Northern Ireland;

(b) the criteria for considering that a good brought into Northern Ireland from outside the Union is not at risk of subsequently being moved into the Union.

Article 2

Non-commercial processing

A good shall not be considered to be subject to commercial processing where:

(a) the person who lodges a declaration for release for free circulation in respect of that good or on whose behalf such declaration is lodged ("importer") had a total annual turnover of less than GBP 500 000 in its most recent complete financial year; or

(b) the processing is in Northern Ireland and is for the sole purpose of:

  (i) the sale of food to an end-consumer in the United Kingdom;

  (ii) construction, where the processed goods form a permanent part of a structure that is constructed and located in Northern Ireland by the importer;

  (iii) direct provision to the recipient of health or care services by the importer in Northern Ireland;

  (iv) not-for-profit activities in Northern Ireland, where there is no subsequent sale of the processed good by the importer; or

  (v) the final use of animal feed on premises located in Northern Ireland by the importer.

Article 3

Criteria for considering goods not to be at risk of subsequently being moved into the Union

1. A good shall be considered not to be at risk of subsequently being moved into the Union, where it is not considered to be subject to commercial processing in accordance with Article 2, and where:

(a) in the case of goods brought into Northern Ireland from another part of the United Kingdom by direct transport,

(i) the duty payable according to the Union Common Customs Tariff is equal to zero, or

(ii) the importer has been authorised in accordance with Articles 5 to 7 of this Decision to bring that good into Northern Ireland for its sale to, or final use by, end-consumers located in the United Kingdom, including where that good has been subject to non-commercial processing in accordance with Article 2 before its sale to, or final use by, end-consumers;

(b) in the case of goods brought into Northern Ireland by direct transport other than from the Union or another part of the United Kingdom,

(i) the duty payable according to the Union Common Customs Tariff is equal to or less than the duty payable according to the customs tariff of the United Kingdom, or

(ii) the importer has been authorised in accordance with Articles 5 to 7 of this decision to bring that good into Northern Ireland for its sale to, or final use by, end-consumers located in Northern Ireland (including where that good has been subject to non-commercial processing in accordance with Article 2 before its sale to, or final use by, end-consumers), and the difference between the duty payable according to the Union Common Customs Tariff and the duty payable according to the customs tariff of the United Kingdom is lower than 3 % of the customs value of the good.

2. Paragraphs 1(a)(ii) and 1(b)(ii) shall not apply to goods subject to trade defence measures adopted by the Union.

Article 4

Determination of the applicable duties

For the purposes of Article 3(1)(a)(i) and 3(1)(b), the following rules shall apply:

(a) the duty payable according to the Union Common Customs Tariff to a good shall be determined in accordance with the rules set out in the Union customs legislation;

(b) the duty payable according to the customs tariff of the United Kingdom to a good shall be determined in accordance with the rules set out in the customs legislation of the United Kingdom.

Article 5

Authorisation for the purposes in Article 3

1. For the purposes of Articles 3(1)(a)(ii) and 3(1)(b)(ii), an application for an authorisation to bring goods into Northern Ireland by direct transport for sale to, or final use by, end-consumers shall be submitted to the competent authority of the United Kingdom.

2. The application for the authorisation referred to in paragraph 1 shall contain information on the applicant's business activities, on the goods typically brought into Northern Ireland, as well as a description of the type of records, systems and controls put in place by the applicant to ensure that the goods covered by the authorisation are properly declared for customs purposes and evidence can be provided to support the undertaking in Article 6(b). The trader shall keep the evidence, e.g. invoices, for the past five years and shall provide it to the competent authorities upon their request. The data requirements of the application are set out in detail in the Annex to this Decision.

3. The authorisation shall at least indicate the following:

(a) the name of the person to whom the authorisation has been granted ("authorisation holder");

(b) a single reference number attributed by the competent customs authority to the decision ("authorisation reference number");

(c) the authority having granted the authorisation;

(d) the date of taking effect of the authorisation.

4. The provisions of Union customs legislation on decisions relating to the application of the customs legislation shall apply to applications and authorisations referred to in this Article, including as regards monitoring.

5. In cases where the competent customs authority of the United Kingdom observes deliberate mis-use of an authorisation or breaches of conditions for an authorisation set out in this Decision the authority shall suspend or revoke the authorisation.

Article 6

General conditions for authorisation

For the purposes of Articles 3(1)(a)(ii) and 3(1)(b)(ii), an authorisation may be granted to applicants who:

(a) meet the following establishment criteria:

(i) they are established in Northern Ireland or they have a fixed place of business in Northern Ireland

— where human and technical resources are permanently present; and

— from where goods are sold to, or provided for final use by, end-consumers; and

— where customs, commercial and transport records and information are available or accessible in Northern Ireland, and

(ii) in case they are not established in Northern Ireland, their customs-related operations are carried out in the United Kingdom and they have an indirect customs representative in Northern Ireland;

(b) undertake to bring goods into Northern Ireland solely for sale to, or final use by, end-consumers, including where those goods have been subject to non-commercial processing in accordance with Article 2 before their sale to, or final use by, end-consumers; and, in the case of a sale to end-consumers in Northern Ireland, undertake that the sale will be from one or several physical outlets in Northern Ireland from which physical direct sales are made to end-consumers.

Article 7

Specific conditions for authorisation

1. For the purposes of Articles 3(1)(a)(ii) and 3(1)(b)(ii), an authorisation to bring goods into Northern Ireland shall only be granted to applicants fulfilling the conditions set out in Article 6 and the following conditions:

(a) the applicant declares they will declare for release for free circulation goods brought into Northern Ireland in accordance with Article 3(1)(a)(ii) or 3(1)(b)(ii);

(b) the applicant must not have committed any serious infringement or repeated infringements of customs legislation and taxation rules and must not have any record of serious criminal offences relating to their economic activity;

(c) in respect of goods to be declared as not at risk, the applicant shall demonstrate that they have a high level of control of their operations and of the flow of goods, by means of a system of managing commercial and, where appropriate, transport records which allow appropriate controls and provision of evidence to support the undertaking in Article 6 (b).

2. Authorisations shall be granted only if the customs authority considers that it will be able to carry out controls without disproportionate administrative effort, including control of any evidence that the goods were sold to, or subject to final use by, end-consumers.

3. During the period ending two months after the entry into force of this Decision, an authorisation may be granted on a provisional basis if the applicant has submitted a complete application, complies with paragraph 1(b), and declares that they meet the other conditions for authorisation. The duration of the provisional authorisation shall be limited to four months after which a permanent authorisation must have been granted for the trader to remain authorised.

Article 8

Exchange of information on the application of Article 5(1) and (2) of the Protocol

1. Without prejudice to its obligations pursuant to Article 5(4) of the Protocol, read in conjunction with Regulation (EC) No 638/2004 of the European Parliament and of the Council [1] and Regulation (EC) No 471/2009 of the European Parliament and of the Council [2], the United Kingdom shall provide the Union with information on the application of Article 5(1) and (2) of the Protocol as well as of this Decision on a monthly basis. This information shall comprise volumes and values, in aggregated form and per consignment, as well as means of transport, relating to:

(a) goods brought into Northern Ireland in relation to which no customs duties were payable in accordance with the first subparagraph of Article 5(1) of the Protocol;

(b) goods brought into Northern Ireland in relation to which the customs duties payable were those applicable in the United Kingdom in accordance with the second subparagraph of Article 5(1) of the Protocol; and

(c) goods brought into Northern Ireland in relation to which the customs duties payable were in accordance with the Union Common Customs Tariff.

2. The United Kingdom shall provide the information referred to in paragraph 1 on the 15th working day of the following month for which the information is provided.

3. The information shall be provided using electronic data-processing techniques.

4. At the request of the Union representatives referred to in the {insert reference to JC decision on Union presence} and at least twice per year, the competent authorities of the United Kingdom shall provide information in aggregated and per authorisation form to these representatives on the authorisations granted pursuant to Articles 5 to 7, including numbers of accepted, rejected and revoked authorisations.

5. The regular transfer of information referred to above shall commence as soon as possible and no later than 15 April 2021. The first transfer of information shall cover information for the period from 1 January 2021 until the end of the month before the transfer.

Article 9

Review and termination

If either Party considers there is significant diversion of trade, or fraud or other illegal activities, that Party shall inform the other Party in the Joint Committee by 1 August 2023, and the Parties shall use their best endeavours to find a mutually satisfactory resolution of the matter. If the Parties do not find a mutually satisfactory resolution, Articles 3(1)(a)(ii), 3(1)(b)(ii) and 5 to 8 of this Decision shall cease to apply from 1 August 2024, unless the Joint Committee decides before 1 April 2024 to continue their application.

In case Articles 3(1)(a)(ii), 3(1)(b)(ii) and 5 to 8 of this Decision cease to apply in accordance with the first subparagraph, the Joint Committee shall amend this Decision by 1 August 2024 to make appropriate alternative provision applicable from 1 August 2024, having regard to the specific circumstances in Northern Ireland and fully respecting Northern Ireland's place in the United Kingdom's customs territory.

---

[1] Regulation (EC) No 638/2004 of the European Parliament and of the Council of 31 March 2004 on Community statistics relating to the trading of goods between Member States and repealing Council Regulation (EEC) No 3330/91 (OJ L 102, 7.4.2004, p. 1).

[2] Regulation (EC) No 471/2009 of the European Parliament and of the Council of 6 May 2009 on Community statistics relating to external trade with non-member countries and repealing Council Regulation (EC) No 1172/95 (OJ L 152, 16.6.2009, p. 23).

Article 10

Entry into force

This Decision shall enter into force on 1 January 2021.

Done at …,

For the Joint Committee
The Co-chairs

ANNEX

Application for Authorisation to bring goods into Northern Ireland for end-consumers (referred to in Article 5 of the Decision)

Application information

1. Supporting documents

   Mandatory supporting documents and information to be provided by all applicants:

   Document of establishment/proof of a permanent business establishment

2. Other supporting documents and information to be provided by the applicant:

   Any other supporting document or information that is considered relevant for checking the applicant's compliance with the conditions referred to in Articles 6 and 7 of the Decision.

   Provide information on the type and, if applicable, the identification number and/or the date of issue of the supporting document(s) attached to the application. Indicate also the total number of the documents attached.

3. Date and signature of the applicant

   Applications made by using an electronic data-processing technique shall be authenticated by the person who lodges the application.

   Date on which the applicant has signed or otherwise authenticated the application.

   Details of the applicant

4. Applicant

   The applicant is the person who applies to the customs authorities for a decision.

   Enter the name and address of the person concerned.

5. Applicant identification number

   The applicant is the person who applies to the customs authorities for a decision.

   Enter the Economic Operators Registration and Identification number (EORI number), of the person concerned, as provided for in Article 1(18) of Commission Delegated Regulation (EU) 2015/2446 ([1]).

6. Legal status of the applicant

   The legal status as mentioned in the document of establishment.

7. VAT identification number(s)

   Where assigned, enter the VAT identification number.

8. Business activities

   Enter information on the business activity of the applicant. Please describe briefly your commercial activity and state your role in the supply chain (e.g. manufacturer of goods, importer, retailer, etc.). Please describe:

   — the intended use of the imported goods, including a description of the type of goods and whether they undergo any type of processing.

   — an estimation on the number of customs declarations for release for free circulation for the goods concerned to be made per year.

   — the type of records, systems and controls put in place to support the undertaking in Article 6(b).

9. Annual turnover

   For the purposes of Article 2 of the Decision, enter the annual turnover for the most recent complete financial year. If a newly established business, provide such records and information as relevant to enable an assessment of anticipated turnover e.g. latest cash flow, balance sheet and profit and loss forecasts, approved by the directors/partners/sole proprietor.

([1]) Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29.12.2015, p. 1).

10. Contact person responsible for the application

    The contact person shall be responsible for keeping contact with customs as regards the application.

    Enter the contact person's name and any of the following: telephone number, e- mail address (preferably of a functional mailbox)

11. Person in charge of the applicant company or exercising control over its management

    For the purposes of Article 7(b) of the Decision, enter the name(s) and full details of the person(s) concerned according to the legal establishment/form of the applicant company, in particular: director/manager of the company and board directors if any. Details should include: full name and address, and date of birth and National Identification Number.

    Dates, times, periods and places

12. Date of establishment

    With numbers – the day, month and year of establishment.

13. Address of establishment/address of residence

    The full address of the place where the person is established/resides, including the identifier of the country or territory.

14. Place where records are kept

    Enter full address of the location(s) where the applicant's records are kept or intended to be kept. The UN/LOCODE may replace the address, if it provides an unambiguous identification of the location concerned.

15. Place(s) of processing or use

    Please indicate the address of the place(s) where the goods will be processed, where applicable, and sold to the end-consumers.