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From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 7.6.2018
amending Delegated Regulation (EU) 2015/2446 as regards the conditions
for a reduction of the level of the comprehensive guarantee and the
guarantee waiver

Delegations will find attached document C(2018) 3568 final.

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COMMISSION DELEGATED REGULATION (EU) .../...

of 7.6.2018

amending Delegated Regulation (EU) 2015/2446 as regards the conditions for a reduction of the level of the comprehensive guarantee and the guarantee waiver

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (Code), in consistency with the Treaty on the Functioning of the European Union (TFEU), delegates to the Commission the power to supplement certain non-essential elements of the Code, in accordance with Article 290 TFEU. The Commission has exercised these powers by adopting, on 28 July 2015, Commission Delegated Regulation (EU) 2015/2446 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. This Commission Delegated Regulation established provisions of general application to supplement the Code with a view to ensuring a clear and proper application of its provisions.

Following the first year of application of Delegated Regulation (EU) 2015/2446, its practical implementation has shown the need to adapt the provisions in Article 84 in order to allow more efficient and effective application of the basic rules established by the Code and better promote customs transactions in line with modern-day practices.

Several Member States and the representatives of trade organisations have been repeatedly drawing the attention of the Commission to the fact that a number of difficulties exist in relation to the practical application of the specific condition of sufficient financial resources in Article 84 of the Commission Delegated Regulation (EU) 2015/2446 and have urged the Commission to resolve the situation at the earliest possible occasion. The following reasons and relevant elements have been put forward:

It has been argued that the financial resources of the economic operator, currently mentioned as a stand-alone condition in Article 84 cannot be considered as representing the full picture of the capacity of that economic operator to pay the amount of customs debt and of other charges which is not covered by the guarantee. This condition in relation to the sufficient financial resources is limited to the liquidity and has been claimed to be too restrictive. Therefore it has been suggested that other assets, easily convertible, should also be taken into account in order to determine this capacity of the economic operator in this context of deciding on the reduction or on the guarantee waiver.

Moreover, it has been proven in practice that in specific cases the reference amount established in accordance with Article 90 of the Code for potential customs debts and other charges which may incur, could reach a very high level which would not be justified in terms of the probability of the actual incurrence of that customs debt (e.g. customs debt which may incur for the repair of a ship in temporary admission). Absence of the possibility to include this risk factor has proven too stringent.

Furthermore, in respect to the applications by an Authorised Economic Operator (AEO) for a guarantee reduction or for a waiver, the current requirements in Article 84 appear as being stricter than the modalities of the assessment of the criteria mentioned in Article 95 of the Code, and requiring double assessment compared to the non-AEOs which does not seem logical and somewhat contradicting.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Commission developed this Delegated Act in accordance with the Framework Agreement on relations between the European Parliament and the European Commission and with the Common Understanding of the European Parliament, Council and Commission on delegated acts. Member States and all other relevant stakeholders have been duly involved and constantly consulted during the preparatory work.

The Commission consulted Member States on the draft text of the proposal through meetings of the relevant expert group (Customs Code Expert Group). The business community was consulted through the relevant consultative stakeholder body (Trade Contact Group) in joint meetings with Member States experts.

The Commission has actively considered all comments received during this consultation exercise, and, to the greatest extent possible, included them in the present proposal, taking into account the following objective – it should provide sufficient grounds both for granting or refusing the request for the guarantee reduction or for a guarantee waiver, in case of potential customs debts.

All concerned parties have agreed that this amendment should:

- 1) address the situation where the condition to demonstrate sufficient financial resources is interpreted as limited to having the necessary liquidity available and thus appears too restrictive;
- 2) clarify the assessment of the condition on sufficient financial standing;
- 3) entail the introduction of the risk element in relation to the probability of incurrence of the customs debt, as regards the volume and type of customs related business activities of the economic operator and to the type of goods for which the guarantee is required;
- 4) provide the reassurance in respect to the legal provision established by Article 38 (5) of the Code that no re-examination of the AEO conditions will be done where they have already been assessed during the phase of the granting of the AEO status, and that the assessment of the capacity to pay the amount of the customs debt and of other charges not covered by the guarantee should be performed during the evaluation of the sufficient financial standing in the framework of granting an authorisation for a reduction of the level of the comprehensive guarantee or for the guarantee waiver.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The legal basis for this Regulation is contained in the delegations of power of Article 99 (c) of the Code.

Subsidiarity principle

As neither the Code nor the Delegated Regulation that the present Regulation amends were subject to a subsidiarity test it is not appropriate to carry out such a test on this Regulation. It should be noted that the Customs Union is an area without internal borders and is based on a harmonised and automated framework at Union level and an interdependence of Member States. Its smooth functioning therefore requires that any further relevant legal actions, particularly involving cross-border systems, are adopted at the level of the Union.

Proportionality principle

In terms of proportionality, this Regulation respects the limits of the empowerments granted by the co-legislators and concerns only elements to better adapt the existing legal provisions to the requirements of the day-to-day practice of customs authorities and economic operators and persons other than economic operators.

Content of proposal

After having thoroughly assessed the situation, the Commission has come to the understanding that the condition on 'sufficient financial resources' should be deleted from the text while the concept of the assessment of the financial standing should be further clarified in the legal text. Moreover, this assessment needs to take into account all elements relevant to the situation while keeping it flexible and fit for the particular situation. It is important that customs authorities can take into account the potential risks related to the incurrence of customs debts with respect to features of the business activity, specificity of the transaction and the type of goods for which the guarantee is required. Furthermore, it was felt important to clarify how the assessment of an application by an AEO in this respect, needs to be understood in light of the overlapping of criteria. In accordance with Article 38(5) of the Code, they should not be subject to duplication of assessment procedures. However it should be clarified that the specific simplifications an AEO may wish to benefit are subject to the authorization by the customs authorities and demand fulfilment of the specific requirements related to the requested simplification.

4. BUDGETARY IMPLICATIONS

Since this regulation is only intended to better adapt the current legal rules of Delegated Regulation (EU) 2015/2446 to their intended objectives and since no substantial changes are foreseen, no direct budgetary implications arise from this Regulation.

The conditions for granting the guarantee waiver or other guarantee reductions under this Article are such so as to demonstrate that the debtor itself provides for a high level of certainty that the customs debt will be paid. This amendment will not change the situation in this respect.

COMMISSION DELEGATED REGULATION (EU) .../...

of 7.6.2018

amending Delegated Regulation (EU) 2015/2446 as regards the conditions for a reduction of the level of the comprehensive guarantee and the guarantee waiver

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code¹, and in particular Article 99 (c) thereof,

Whereas:

- (1) Article 95(1) of the Regulation (EU) No 952/2013 lays down the conditions that must be satisfied by an economic operator to be authorised to provide a comprehensive guarantee to secure the payment of the customs debt and of other charges. Article 95(2) of the Regulation (EU) No 952/2013 lays down further criteria, which the economic operators must fulfil in order to be authorised to provide such a comprehensive guarantee with a reduced amount or to have a guarantee waiver in relation to customs debts and other charges which may be incurred. One of those criteria is the criterion of financial solvency². This criterion is deemed to be proven where the applicant has good financial standing, which enables him to fulfil his commitments with due regard to the characteristics of the type of business activity concerned.
- (2) In the context of an application for the reduction of the comprehensive guarantee or for a guarantee waiver, customs administrations need to assess if the applicant has the capacity of paying the amount of the customs debt and of other charges should this become necessary.
- (3) Article 84 of Delegated Regulation (EU) 2015/2446 lays down the conditions to be fulfilled by an economic operator in order to be authorised to use a comprehensive guarantee with a reduced amount or a guarantee waiver. In addition to the other conditions established on the basis of the criterion on financial solvency, it requires the applicant to demonstrate that he has sufficient financial resources to meet his obligations in relation to the amount of the customs debt and of other charges which may be incurred and which are not covered by the guarantee. However, practical experience from the implementation of Regulation (EU) No 952/2013 and of Delegated Regulation (EU) 2015/2446 shows that this condition is too restrictive as it is interpreted as limited to having the necessary liquidity available. Liquidity does not always represent the sole capacity of an economic operator to pay the amount of customs debt or other charges which is not covered by the guarantee. Other elements such as assets easily convertible could also be taken into account. Therefore it is necessary to take the liquidity element out as a stand-alone condition and provide for clarification so that the assessment of the capacity of the operator to meet his

¹ OJ L 269, 10.10.2013, p. 1.

² Article 39(c) of Regulation (EU) No 952/2013

obligations to pay the amount of the customs debt and of other charges not covered by the guarantee is integrated in the assessment of the financial standing of the applicant.

- (4) At the same time and in order to ensure uniform application of these rules, it is necessary to clarify that the assessment of the condition on 'sufficient financial standing' in relation to the capacity of the economic operator to pay the amount of the customs debt and of other charges that may be incurred and that are not covered by the guarantee is specific to the evaluation of the applications for a comprehensive guarantee with a reduced amount or a guarantee waiver (simplification). This is necessary to define the limits of this assessment in the framework of the comprehensive guarantees with all levels of reduction.
- (5) In situations where the reference amount established in accordance with Article 155 of the Commission Implementing Regulation (EU) 2015/2447³ would be disproportionate in relation to the amounts of the potential customs debts which are likely to be incurred, it is necessary to foresee the possibility for the customs authorities to take into account the risk of incurrence of the customs debt, at their discretion, in order to decide on the level of reduction.
- (6) It is necessary to clarify as well that AEOs should not be subject to duplication of assessment procedures in accordance with Article 38(5) of Regulation (EU) No 952/2013 while it remains possible for customs authorities, before granting specific simplifications AEO's may wish to benefit from, to check compliance with the specific requirements for that simplification.

HAS ADOPTED THIS REGULATION:

Article 1

Article 84 of Delegated Regulation (EU) 2015/2446 is amended as follows:

- (1) in paragraph 1, point (f) is deleted;
- (2) in paragraph 2, point (g) is deleted;
- (3) in paragraph 3, point (l) is deleted;
- (4) the following paragraphs 3a and 3b are inserted:

"3a. When verifying if the applicant has sufficient financial standing for the purpose of granting of an authorisation to use a comprehensive guarantee with a reduced amount or a guarantee waiver as required by paragraphs 1(e), 2(f) and 3(k), the customs authorities shall take into account the ability of the applicant to fulfil his obligations of paying his customs debts and other charges which may be incurred, not covered by that guarantee.

If justified, the customs authorities may take into account the risk of incurrence of those customs debts and of other charges having regard to the type and volume of the customs related business activities of the applicant and to the type of goods for which the guarantee is required.

3b. When the condition on sufficient financial standing has already been assessed as a modality for the application of the criterion referred to in Article 39(c) of the Code, the customs authorities shall verify only if the financial standing of the applicant justifies the granting of an authorisation to use a comprehensive guarantee with a reduced amount or a guarantee waiver."

³ OJ L 343, 29.12.2015, p. 558.

(5) paragraph 4 is replaced by the following paragraph:

"4. Where the applicant has been established for less than three years, the fulfilment of the conditions laid down in points (d) and (e) of paragraph 1, in points (e) and (f) of paragraph 2 and in points (j) and (k) of paragraph 3 shall be checked on the basis of available records and information."

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 7.6.2018

For the Commission
The President
Jean-Claude JUNCKER