

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* HOME AFFAIRS

CUSTOMS DUTIES AND ASSOCIATED POWERS REQUIRED IN RESPECT OF BREXIT

The States are asked to decide:-

Whether, after consideration of the policy letter entitled “Customs Duties and Associated Powers Required in Respect of Brexit”, dated 29th May 2018, they are of the opinion:-

1. To introduce a flexible Bailiwick-wide legislative framework to facilitate the imposition of customs duties on imported and exported goods and associated requirements (as set out in paragraph 2.7 and 3.3).
2. To direct the Committee *for* Home Affairs to enter into negotiations regarding a customs arrangement with the UK, when required, and report back to the States with recommendations in relation to entering any such arrangements (as set out in paragraph 5.5).
3. To direct the preparation of the necessary legislation to give effect to the above Recommendations.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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CUSTOMS DUTIES AND ASSOCIATED POWERS REQUIRED IN RESPECT OF BREXIT

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

29th May 2018

Dear Sir

1 Executive Summary

1.1 The States of Deliberation have previously acknowledged the need to enact legislation to ensure that there is continuity and certainty during the Brexit process for both individuals and businesses. As the future shape of the UK and EU positions on customs and trading matters becomes clear a new legislative frame work will be critical for the Island's economy and businesses in order to maintain the free flow of goods.

1.2 This Policy Letter seeks approval from the States of Deliberation for the drafting of legislation:

(a) to ensure that there is continuity in the flow of goods to and from the Bailiwick, and

(b) to allow for the introduction of appropriate customs operations and procedures, including facilitating the charging of duty and the establishment of a customs tariff, in relation to the movement of goods,

both during and after the anticipated Transition Period, which is expected to form a key part of the anticipated Withdrawal Agreement. This is likely to involve the amendment and repeal of some existing legislative provisions.

1.3 The proposed legislation will provide a flexible framework which will facilitate the imposition of customs requirements on imported and exported goods, regardless of the outcome of the UK's negotiations with the EU and any future trade agreements.

- 1.4 It is not intended to pre-empt decisions on the Bailiwick's future customs arrangements or trade policy. This Policy Letter seeks approval for the drafting of primary legislation which will allow for the implementation of future decisions and agreements on such matters, either directly or through secondary and tertiary legislation.

2 Background

- 2.1 The States of Deliberation have so far considered three Policy Letters related to Brexit:

- the June 2016 Policy Letter¹ set out high level objectives for Guernsey's relationships with the UK and the EU. Appendix 1 included a history of Guernsey's relationship with the EU, including those relating to customs matters;
- the March 2017 Policy Letter² acknowledged the triggering of Article 50 of the Treaty on European Union in respect of Protocol 3; and
- the November 2017 Policy Letter³ provided an update and set out proposals for *Projets de Loi* dealing with the mechanics of withdrawal, international trade agreements, and powers to amend certain categories of legislation.

- 2.2 Customs import duties are charges on goods, generally applied, in proportion to their value ("*ad valorem*") when they are imported. These duties should not be viewed as revenue raising measures but as a part of a country's trade policy. They are different from indirect taxes such as goods and services taxes or excise duties. The UK has stated in its trade policy white papers that it seeks to become a champion for free trade and to push for greater liberalisation of markets as well as being a strong supporter of free and open trade. This stance shows that the UK will be seeking to use the tariff as a trade facilitation mechanism that provides protection where it is warranted but otherwise will seek to apply low rates where possible to stimulate trade. Should the UK be successful in negotiating trade deals in the future, then any subsequent Free Trade Agreements will also impact on tariff rates by reducing them as part of a reciprocal agreement with other countries. The WTO stance is also to seek the lowering of trade barriers including customs duties in order to achieve more open trading across the world.

- 2.3 As a small territory the Bailiwick has limited need for such measures but, because of the longstanding principle of free movement of goods with the UK, the Bailiwick applies the same trade policy as the UK so as not to undermine its

¹ Billet d'État XX of 2016, Article III (P 2016/19): <https://gov.gg/CHttpHandler.ashx?id=102958&p=0>

² Billet d'État VI of 2017, Article III (P 2017/11): <https://gov.gg/CHttpHandler.ashx?id=105987&p=0>

³ Billet d'État XXI of 2017, Article III (P 2017/84): <https://gov.gg/CHttpHandler.ashx?id=110188&p=0>

economy or distort the UK market. It is this principle that led to the agreement of Protocol 3 in 1972 and which means that the future customs regime and trade policy of the Bailiwick will be influenced by the terms of the UK's exit from the European Union ("EU") and its future economic partnerships.

- 2.4 The *Loi autorisant la perception d'Impôts sur les Marchandises Importées dans l'Île de Guernesey*⁴ (more commonly known as the Import Duties Act (Bailiwick of Guernsey)), when enacted, provided powers to make secondary legislation concerning the issuance of a tariff and collection of duties on imported goods, whilst ensuring such duties did not undercut those in the UK, nor tax items already subjected to the UK import duty and re-exported to the Bailiwick. Some of these provisions have since been repealed and replaced or superseded by requirements under the Union Customs Code, and the Law is generally outdated.
- 2.5 After consideration of the November 2017 Policy Letter, the States of Deliberation unanimously approved the Propositions which included approval for the drafting of a Bailiwick *Projet de Loi*, broadly equivalent in scope and content to the United Kingdom's European Union (Withdrawal) Bill, which will, amongst other matters, repeal the 1973 Law.
- 2.6 The 1973 Law currently gives legal effect to EU Regulations that are applicable to the Bailiwick under Protocol 3. It also provides the power to charge Community customs duty on goods imported into the Bailiwick from a place outside the European Community by adopting the EU common customs tariff. Both of these will come to an end on the repeal of the 1973 Law.
- 2.7 This Policy Letter therefore recommends a new legislative framework to deal with customs import and export matters, which previously fell within the scope of Protocol 3; this regime will underpin the States' Brexit negotiating objectives regarding the movement of and trade in goods, as detailed in the June 2016 Policy Letter. In addition, as the Import Duties Act (Bailiwick of Guernsey), 1932 will no longer be fit for purpose, it is recommended that the opportunity is taken to repeal it and to ensure that appropriate equivalent powers form part of the new legislative framework. Amendments to other legislative provisions are likely to be necessary.
- 2.8 The proposals are intended to be flexible enough to support customs operations both during the anticipated Transition Period and under any scenario thereafter.

⁴ *Loi autorisant la perception d'Impôts sur les Marchandises Importées dans l'Île de Guernesey*: <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=96374&p=0>

3 Proposed UK Customs Bill

- 3.1 In November 2017, the UK Government published the Taxation (Cross-Border Trade) Bill (“the UK Customs Bill”) which, as at the date of this Policy Letter, is progressing through Parliament.
- 3.2 The UK Customs Bill will establish a customs framework to deal with import and export matters which previously fell under the Union Customs Code. The approach taken by the UK Customs Bill is to provide sufficient flexibility for a number of outcomes, including a “no deal” scenario. Given the intention to ensure as seamless a transition as possible from EU trading rules to UK based ones, Parts 1 and 2 of the UK Customs Bill, which provide for a new standalone customs regime, are based upon EU law.
- 3.3 The Bailiwick legislation being proposed seeks to follow a broadly similar approach to that of the UK, and the UK Customs Bill will be considered during the drafting process to provide the level of consistency required whilst ensuring the appropriate flexibility to account for varying outcomes.

4 Legislative requirements

- 4.1 For the reasons set out above, a new customs regime must be in place by 29 March 2019, whatever the outcome of Brexit negotiations between the UK and the EU, and whatever the Bailiwick’s future customs arrangements. It must allow sufficient flexibility to give effect to a range of potential outcomes, from the expected Transition Period to a no deal situation.
- 4.2 The proposed legislation will provide a new standalone customs framework which will operate in a similar way to the current regime, whilst modernising it and including the required further powers. Whilst unconnected with other customs regimes, it is also intended to function within any negotiated customs union with jurisdictions such as Jersey or the United Kingdom.
- 4.3 The proposed legislative powers will enable the Bailiwick to create a customs regime which, amongst other things, will allow the Bailiwick to enact secondary or tertiary legislation (including regulations and orders) to:
 - 1. **Charge import duty on goods**
At present, import duty may be charged on imported goods that arrive from a place outside the Bailiwick; however, this power is only relevant to goods that arrive from outside the EU. In future, the new framework will replicate the power to charge import duty on imported goods but will be applied depending on any potential customs arrangements into which the Bailiwick might enter. This may include charging import duty on goods from the EU.

2. **Establish a new customs tariff to classify imported goods, establish the amount of import duty liable and apply applicable customs measures**

Although the EU common customs tariff is currently recognised in relation to imported goods, the proposed legislation will allow the Bailiwick to dictate which tariff is applied. This would continue to be the current EU common customs tariff throughout the Implementation Period but is likely to be the new UK tariff thereafter. A power will be needed to implement any Regulations necessary to apply trade measures through the new tariff, i.e. trade remedies, tariff quotas, tariff related import controls etc.

3. **Charge export duty on goods**

The new legislation should make provision for establishing an export duty on goods from the Bailiwick. The provision for export duty already exists in the Union Customs Code which the Bailiwick is obliged to apply, insofar as Protocol 3 applies. This provision has also been included in the UK Customs Bill. The legislation will not, itself, establish an export duty but will provide the power to do so if necessary. Should an export duty be required for the purposes of any future customs territory of which the Bailiwick forms part, this will allow for such a regime to be implemented quickly. Her Majesty's Revenue and Customs have stated that it has no plans to introduce an export duty but have still included the provision when they negotiated the Union Customs Code. A country may, for example, impose an export tariff to ensure adequate supply of necessary goods within that country, for example during a time of a particular commodity crisis; the EU has not imposed any export duty since the wheat tariffs of the late 1990s.

4. **Implement arrangements to establish a customs territory between the Bailiwick and another territory or country**

The Bailiwick requires the ability to enter into agreements with other jurisdictions in order to establish a customs territory where applicable. Such arrangements could provide that no duty is charged by reference to movements of goods between the Bailiwick and the agreed territories or countries and that the same, or substantially the same, rules for charging duty on imports of goods from outside the agreed customs territory apply. Section 5.5 of this Policy Letter asks the States to consider directing the Committee *for* Home Affairs to enter into negotiations regarding a customs arrangement with the UK when required and report back to the States, with recommendations in relation to entering into such arrangements. In any case the States will be asked to approve any new customs arrangements, before they are agreed by or take effect in the Bailiwick.

5. **Establish a method for determining the valuation or other measurement, and origin, of goods**

Where the value of goods imported is a requirement for applying certain tariffs *ad valorem*, i.e. a percentage of the value of the goods, a statutory valuation method is required. Similarly, if a duty is imposed based on volume or any other measurement of the goods, it may be necessary to set out a statutory method for determining this measurement. Establishing the origin of goods is an essential requirement for ensuring the correct tariff rates are used or for deciding whether sanctions must be enforced. The rates applied will take account of any trade agreements, embargoes or protection measures in place on goods from origin countries. There are two main categories for establishing origin:

- goods wholly obtained or produced in a single country
- goods involving materials from more than one country

The second category is more complex and requires consideration of various criteria. The origins of the materials, the country in which the substantial production phase took place or the value the processing in each country has added to the product may all need to be considered.

6. **Apply relief from duty in certain circumstances**

A power to apply relief from duty is required for goods imported for certain reasons, most often for a temporary period e.g. goods returned to a manufacturer for repair which are then sent back to the owner.

7. **Allow imported goods to be entered for special customs procedures**

The Union Customs Code saw an update to the area previously known as “Customs Procedures with Economic Impact” which are now known as “Special Procedures”. This covers four types of procedure, namely processing, storage, transit and specific use, all of which require financial guarantees to be in place. These procedures are in use internationally by customs authorities and include matters such as customs warehousing for goods liable to import duty⁵, end use, temporary admission and inward or outward processing. Entry into a new customs agreement with another territory following the UK’s withdrawal from the EU would benefit from having a legislative basis for the application of any such procedures locally.

8. **Comply with other obligations that may result as a consequence of concluding customs arrangements with another territory or country**

⁵ Legislation already exists for the deposit of goods in approved warehouses without payment of excise duty. This ensures that goods can be deposited in approved warehouses without payment of import duty which might become a greater need after Brexit. This may be achieved through existing legislation or part of the new legislation.

General enabling provisions will ensure that the States can quickly enact any Regulations or provisions necessary to facilitate the operation of any such arrangements.

9. **Safety and Security**

Under the current Union Customs Code, security measures in place for all modes of transport crossing the border into the EU require that a pre-arrival safety and security declaration is logged by the carrier within defined timelines. On receiving this declaration, the relevant authority carries out a risk analysis for safety and security purposes. This is based on agreed EU-wide risk profiles. Where a risk is identified, the customs office will take appropriate action. No Bailiwick (or indeed Channel Island) port is currently designated as an EU “Office of First Entry” for these purposes. Due to the location and size of the Bailiwick, it is extremely rare to receive goods directly from outside the European Union by aircraft or vessel. There is a potential for the safety and security zone, currently EU-wide, to shrink post Brexit meaning the Bailiwick may receive such cargo regularly. A provision is therefore required to enact or make the necessary legislation to comply with such obligations, whether that is under a new safety and security zone or to address the current limitations of Bailiwick ports.

10. **Fees & Charges**

Under the current Union Customs Code, customs authorities may impose fees and penalties under certain conditions. Fees must not be imposed for conducting regular customs duties at customs premises during official opening hours but may be imposed for example where attendance is requested out of hours or at non-customs premises. Penalties may be imposed for failure to comply with customs legislation provided such penalties are deemed to be effective, proportionate and dissuasive. This enables civil penalties to be raised for non-compliance as opposed to criminal penalties. Current Bailiwick customs legislation however only allows for criminal penalties to be imposed by the Courts which is not suitable for ensuring proper practice and compliance by industry in some areas. The legislation will not, itself, establish fees and charges. It will nonetheless allow such a regime to be implemented more quickly under secondary or tertiary legislation, if necessary, setting out a civil penalty regime to encourage greater compliance with customs requirements.

11. **Procedures for Appeal or Review**

Under WTO agreements such as Article X of GATT 1994 and the Agreement on Trade Facilitation, there is a requirement for contracting parties to have judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review and correction of

administrative action relating to customs matters. This is further supported by other international sets of standards such as those issued by the World Customs Organisation whereby recommendations are for national legislation to provide a right of appeal in customs matters including the right for an initial appeal to customs followed by the right of further appeal to an independent authority and a final appeal to judicial authority. Current customs legislation allows for appeals in respect of seized goods and searches of person but does not cover any other areas. Provisions to enable a review and appeals framework and associated processes to be established in respect of administrative and non-criminal matters are therefore recommended.

12. Mutual Customs Assistance Arrangements

Customs cooperation and mutual administrative assistance is an important enhancement to modern day customs work and as such measures, recommended practices and standards now form part of international agreements and recommendations. The European Communities (Bailiwick of Guernsey) Law, 1973 enabled cooperation with other customs services for the purpose of implementing Community obligations, including giving effect to any reciprocal arrangements between member states (with or without other countries or territories) for securing administration of their laws or detecting or preventing customs fraud or evasion. This included the ability to share relevant information in accordance with such matters. Replacing this the ability to enter into or otherwise give effect to other agreements (whether on a regional, bilateral or multilateral basis) would enable a reciprocal flow of customs information between the parties to any customs agreement that may be subsequently entered into as well as enable cooperation agreements with other customs services elsewhere where there could be significant benefit to the Bailiwick of Guernsey.

13. Approvals & authorisations

In establishing the processes and requirements of a new customs framework, it may be necessary to include provisions whereby Customs approval or authorisations are needed before persons or businesses can carry out particular activities. This would allow Customs to ensure that individuals and businesses meet a prescribed standard. By way of example, these may include optional authorisations as Authorised Economic Operators ("AEOs") which provide operators with an internationally recognised quality mark indicating that they have met recognised standards of compliance, or approvals which are mandatory to benefit from simplified customs arrangements.

The new legislation will need to work in tandem with the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, which contains

provisions essential for the effective collection and enforcement of such duties. Consequential amendments may need to be made to that Law for this purpose. Amendments to other legislation may also be necessary.

- 4.4 The Committee *for* Home Affairs considers that it is essential that the drafting of legislation is agreed and prioritised. These proposals ensure that the States can quickly enact any necessary provisions as the future shape of the UK and EU positions on customs and trading matters become clear. Without new customs legislation, the ability for the frictionless import and export of goods may be significantly impaired to the detriment of the local economy and islanders.

5 Discussions with UK Government

- 5.1 Engagement at officer level with the UK Government (including HMRC and Department for International Trade) is continuing and a series of customs roundtables and ‘technical workshops’ have allowed identification and discussion of complex customs matters and possible outcomes. The States of Guernsey, along with the States of Jersey, have therefore formed a close working relationship with key Whitehall officials.
- 5.2 The Isle of Man has a different constitutional relationship with the UK regarding customs matters and has a longstanding common purse arrangement with the UK. This provides for the sharing of customs duties as well as indirect taxes such as VAT and excise duties. This means that, in respect of Brexit, the Crown Dependencies are in a different position and are having separate discussions with the UK Government on these detailed matters.
- 5.3 The final agreements between the Bailiwick and the UK will be dependent on future policy decisions. Therefore many of the discussions have been approached on the assumption that the Bailiwick may well conclude a customs agreement with the UK and apply the same, or substantially the same rules, for customs duty on imports of goods from outside that agreed customs union. The need to remain autonomous in all other matters, such as border controls and fiscal arrangements, has been maintained throughout discussions and acknowledged by UK officials.
- 5.4 The Bailiwick will need the ability to act swiftly as the UK and EU positions on customs become clear. Decisions on customs matters will need to be made quickly from time to time in order to progress any possible agreements with the UK.
- 5.5 The States are therefore asked to endorse that the Committee *for* Home Affairs be responsible for negotiating a customs arrangement with the UK when required and report back to the States with recommendations for such

arrangements. The States will be asked to approve any new Customs arrangements, before they are entered into by the Bailiwick.

6 Other engagement and consultation

- 6.1 The Committee *for* Home Affairs Brexit Sub-Group meets monthly to ensure that Home Affairs' officers engaged in work responding to Brexit are well briefed and aligned with States' strategy. This Group is chaired by the Vice President of Home Affairs, Deputy Prow and attended by senior officers from Home Affairs, the Guernsey Border Agency, External Relations and the Committee *for* Economic Development. Significant updates from this Group are reported to the Policy & Resources Committee's Brexit Group which meets fortnightly.
- 6.2 The Law Officers of the Crown have facilitated the review of current customs legislation, and the Committee *for* Home Affairs has identified the legislative proposals, as summarised in section 4, in conjunction with the Law Officers.
- 6.3 The Committee *for* Home Affairs has also consulted with the States of Alderney and Chief Pleas of Sark so that both islands are fully informed and engaged in this process.
- 6.4 The Policy & Resources Committee has endorsed this Policy Letter.

7 Compliance with Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees

- 7.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 7.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not be put into effect.
- 7.3 Rule 4(3) requires details on the financial implications of any Propositions for the States of Guernsey. The new legislative framework will be critical for the Island's economy and businesses in order to maintain the free flow of goods. However, the Propositions relating to that new framework merely mandate the preparation of what is effectively enabling legislation; and in any event, as noted at paragraph 2.2, the purpose of customs duties is not to raise revenue. The negotiation of a new customs arrangement with the UK when required by the Committee is subject to the separate approval of the States, as set out at

paragraph 5.5. As such, it is not considered that the Propositions have significant financial implications for the States of Guernsey.

- 7.4 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 7.5 In accordance with Rule 4(5), the Propositions contribute to the objectives of the States of Guernsey and relate to the duties of the Committee to support a strong and sustainable economy. The new legislative framework is fundamental to support sustainable public finances and the continued success of local industry. Brexit is one of the 23 policy priorities approved as part of the States of Guernsey Annual Budget for 2018⁶ (the priorities for the States' Policy & Resource Plan).
- 7.6 Also in accordance with Rule 4(5), in addition to the engagement referred to in section 5 and 6 the Committee has consulted with the States of Alderney, Chief Pleas of Sark, the Policy & Resources Committee and the Committee *for* Economic Development.

Yours faithfully

M M Lowe
President

R G Prow
Vice-President

R H Graham
M P Leadbeater
V S Oliver

⁶ Billet d'État XX of 2017 <https://gov.gg/CHttpHandler.ashx?id=110408&p=0> (p24) [also in <https://gov.gg/CHttpHandler.ashx?id=110312&p=0> (p5)] (as considered at the States Meeting of 8th November, 2017).

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

COMMITTEE *FOR* HOME AFFAIRS

CUSTOMS DUTIES AND ASSOCIATED POWERS REQUIRED IN RESPECT OF BREXIT

The President
Policy & Resources Committee
Sir Charles Frossard House
La Charroterie
St Peter Port

7th June 2018

Dear Sir,

Preferred date for consideration by the States of Deliberation

In accordance with Rule 4(2) of the Rules of Procedure of the States of Deliberation and their Committees, the Committee *for* Home Affairs requests that the 'Customs Duties and Associated Powers Required In Respect of Brexit' Policy Letter be considered at the States' meeting to be held on 18th July 2018.

The above referenced Policy Letter seeks approval of the States to draft a new law relating to customs and trade in order to provide a flexible framework to facilitate customs requirements on imported and exported goods and to direct the Committee *for* Home Affairs to negotiate a customs arrangement with the UK, when required, and report back to the States with recommendations for such arrangements. This Policy Letter is part of the Bailiwick of Guernsey's steps to meet the requirements brought to the Bailiwick by Brexit.

Yours faithfully,

M M Lowe
President

R G Prow
Vice President

R H Graham
M P Leadbeater
V S Oliver