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COVER NOTE

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Delegations will find attached document COM(2023) 123 final/2.

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EUROPEAN
COMMISSION

Brussels, 27.2.2023
COM(2023) 123 final/2

2023/0066 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in 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 a decision to be adopted, and recommendations and joint and unilateral declarations to be made

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The Commission proposes that the Council establishes the position to be taken on the Union's behalf in 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 ('the Withdrawal Agreement') on a decision to be adopted, and recommendations and joint and unilateral declarations to be made in relation to the Protocol on Ireland/Northern Ireland ('the Protocol').

2. CONTEXT OF THE PROPOSAL

2.1. 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 sets out the arrangements for the orderly withdrawal of the United Kingdom from the Union and Euratom. The Withdrawal Agreement entered into force on 1 February 2020. The Protocol forms an integral part thereof. As of 1 January 2021, its provisions have become applicable in their entirety.

2.2. The Joint Committee

The Joint Committee established under Article 164(1) of the Withdrawal Agreement comprises representatives of the Union and of the United Kingdom. It is co-chaired by the Union and the United Kingdom. Annex VIII to the Withdrawal Agreement lays down the rules of procedure of the Joint Committee. The Joint Committee meets at least once a year or at the request of the Union or the United Kingdom and it sets its meeting schedule and agenda by mutual consent.

The tasks of the Joint Committee are laid down in Article 164 of the Withdrawal Agreement and consist principally of:

- overseeing the implementation and application of the Agreement directly or through the work of the specialised committees reporting to it;
- adopting decisions and recommendations, including amendments to the Agreement in the cases provided therein;
- preventing problems and resolving disputes that may arise regarding the interpretation and application of the Agreement.

2.3. The overall context for the envisaged proposals for solutions

The Protocol addresses the unique circumstances on the island of Ireland in the framework of the withdrawal of the United Kingdom from the Union. It aims to maintain the necessary conditions for continued North-South cooperation, avoid a hard border between Ireland and Northern Ireland and protect the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations ('the 1998 Agreement') in all its dimensions, while also protecting the integrity of the Union's internal market and customs union. To that end, the Protocol makes certain provisions of Union law listed in Annexes 2 to 5 to the Protocol and related in particular to the Union's internal market for goods and the customs union, Value Added Tax (VAT) and excise, energy and State aid applicable to and in the United Kingdom in respect of Northern Ireland. Those provisions produce in the United Kingdom in respect of

Northern Ireland the same legal effects as those which they produce within the Union and its Member States.

Since the entry into force of the Withdrawal Agreement, a number of issues concerning the implementation of the Protocol have emerged. This has resulted in a lack of legal certainty and predictability for people and businesses in Northern Ireland, while also posing risks for the integrity of the Union's internal market for goods and the customs union.

The United Kingdom and the Union have therefore intensively worked to find joint solutions to address those implementation issues in a definitive way. In that context, it became clear that it was also necessary to address certain deficiencies in the Protocol and situations which were unforeseen when the Withdrawal Agreement was signed. This has resulted in a comprehensive set of solutions across various areas. These solutions, which are set out below, have been reached within the framework of the Withdrawal Agreement, in a spirit of good faith, taking the legitimate concerns of each side duly into account. They form part of a package of measures including proposals for autonomous Union acts, for instance on agri-food goods, medicines and Tariff Rate Quotas that seek to address in a definitive way issues related to the implementation of the Protocol.

These solutions respond to the everyday issues faced by people and businesses in Northern Ireland, protect the 1998 Agreement in all its parts, ensure the integrity of the Union's internal market for goods and customs union whilst also being consistent with the integral place of Northern Ireland within the United Kingdom's internal market.

2.4. The envisaged decisions and recommendations of the Joint Committee and declarations in the Joint Committee

The Joint Committee may inter alia change the tasks assigned to specialised committees and dissolve any of those committees pursuant to Article 164(5)(c) of the Withdrawal Agreement.

The Joint Committee is empowered to adopt decisions amending the Withdrawal Agreement, pursuant to Article 164(5)(d) of the Agreement, to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when the Withdrawal Agreement was signed, except in relation to Parts One, Four and Six of the Withdrawal Agreement and provided that such decisions do not amend the essential elements of the Agreement. The empowerment under Article 164(5)(d) is limited in time until the end of the fourth year following the end of the transition period, i.e., 31 December 2024.

Under Article 5(2) of the Protocol, the Joint Committee may amend at any time its decisions adopted pursuant to that paragraph.

Under the fifth paragraph of Article 8 of the Protocol, the Joint Committee may review the application of that Article, taking into account Northern Ireland's integral place in the United Kingdom's internal market, and may adopt appropriate measures as necessary.

The envisaged Joint Committee Decision will become binding on the Parties in accordance with Article 166(2) of the Withdrawal Agreement. In accordance with Rule 9 of the Rules of Procedure, decisions adopted by the Joint Committee are to specify the date at which they take effect.

The envisaged Joint Committee Decision is not related to Parts One, Four and Six of the Withdrawal Agreement and does not amend the essential elements of the Agreement, as explained below under 3.2.1, 3.5.1 and 3.8.1.

The Joint Committee is empowered to make appropriate recommendations to the Union and the United Kingdom, pursuant to Article 166(1) of the Agreement. The envisaged

recommendations are to be made by mutual consent in accordance with Article 166(3) of the Withdrawal Agreement.

Moreover, the Parties to the Withdrawal Agreement can make declarations both jointly and unilaterally in the Joint Committee established by Article 164(1) of the Withdrawal Agreement.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Reference to the Protocol. Joint Declaration no. XX by the Union and the United Kingdom in the Joint Committee

It is appropriate for the Union and the United Kingdom to make a Joint Declaration in the Joint Committee to the effect that, reflecting the arrangements laid down in draft Decision of the Joint Committee attached in Annex 1 to this Proposal, the Protocol, as amended by that Joint Committee Decision, should now be known as the "Windsor Framework" and that, therefore, wherever relevant in their dealings under the Withdrawal Agreement, the Union and the United Kingdom will, consistent with the requirements of legal certainty, refer to the Protocol as amended as to the "Windsor Framework", and that they may in the same way refer to the Protocol as amended in their domestic legislation.

3.2. Article 6 of the Protocol

3.2.1. Amendment to Article 6(2) of the Protocol

Having regard to the specific circumstances of Northern Ireland, it is necessary and therefore proposed to amend Article 6(2) of the Protocol to provide that the Parties should use their best efforts to put in place facilitations to trade between Northern Ireland and other parts of the United Kingdom which include specific arrangements for the movement of goods within the United Kingdom's internal market, consistent with Northern Ireland's position as part of the customs territory of the United Kingdom in accordance with the Protocol, where the goods are destined for final consumption or final use in Northern Ireland and where the necessary safeguards are in place to protect the integrity of the Union's internal market and customs union. The purpose of the envisaged decision amending the Protocol is to address deficiencies and situations unforeseen when the Withdrawal Agreement was signed, which do not relate to Parts One, Four and Six of the Withdrawal Agreement. The envisaged change in Article 6(2) of the Protocol is a mere development of the first sentence thereof and hence does not amend an essential element of the Withdrawal Agreement.

3.2.2. Recommendation on market surveillance

In order to protect the integrity of the Union's internal market, it is proposed that enhanced cooperation in relation to market surveillance and enforcement activity between the United Kingdom and the Union, and between the United Kingdom and Member State authorities where appropriate, should underpin the specific arrangements envisaged under Article 6(2) of the Protocol. The cooperation could encompass knowledge-sharing, information exchange, work with operators and joint activity.

3.2.3. Union declaration taking note of the United Kingdom's Unilateral Declaration on market surveillance

The United Kingdom is expected to make a Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place as regards market surveillance and enforcement activities, in the context of the specific arrangements developed within the framework of the Protocol to facilitate the movement of goods within the United Kingdom's internal market.

The Union should take note of the United Kingdom's Unilateral Declaration, should this declaration be made.

3.2.4. Union declaration taking note of the United Kingdom's Unilateral Declaration on unfettered access

The United Kingdom is expected to make a Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place as regards the movement of goods from Northern Ireland to other parts of the United Kingdom.

The Union should take note of the United Kingdom's Unilateral Declaration, should this declaration be made.

3.3. Article 8 of the Protocol: Establishment of an enhanced coordination mechanism related to the functioning of the Protocol in the areas of VAT and excise

The Joint Committee may inter alia change the tasks assigned to specialised committees and dissolve any of those committees pursuant to Article 164(5)(c) of the Withdrawal Agreement.

Pursuant to the fourth paragraph of Article 8 of the Protocol, the Joint Committee is to regularly discuss the implementation of that Article, including as concerns the reductions and exemptions provided for in the provisions referred to in the first paragraph of the same Article, and is, where appropriate, to adopt measures for its proper application, as necessary.

Under the fifth paragraph of Article 8 of the Protocol, the Joint Committee may review the application of this Article, taking into account Northern Ireland's integral place in the United Kingdom's internal market, and may adopt appropriate measures as necessary.

To ensure the effectiveness of Article 8 of the Protocol, and in particular to take account of Northern Ireland's integral place in the United Kingdom's internal market, the Union and the United Kingdom should assess in a structured manner any issues arising from the implementation and application of Article 8, including in particular the potential impact on Northern Ireland of any future policy and regulatory initiatives in the Union and the United Kingdom in the areas of VAT and excise concerning goods.

It is therefore appropriate for the Joint Committee to provide for special meetings of the Specialised Committee on the implementation of the Protocol to be held as an enhanced coordination mechanism to allow the Union and the United Kingdom to identify and discuss any issues relating to the functioning of the Protocol in the areas of VAT and excise and propose appropriate action, as necessary.

3.4. Article 10 of the Protocol

Article 10(1) of the Protocol, read in conjunction with Annex 5 to the Protocol makes certain provisions of Union law regarding State aid control applicable to the United Kingdom in respect of measures which affect the trade between Northern Ireland and the Union which is subject to the Protocol. On 17 December 2020, the Union made a unilateral declaration in the Joint Committee to clarify the scope of application of Article 10(1) of the Protocol.

In order to further clarify the scope of application of Article 10(1) of the Protocol, it is appropriate for the Union and the United Kingdom to set out a common understanding on the conditions for State aid granted by the United Kingdom authorities to be within scope of Article 10(1) of the Protocol, notably as regards the genuine and direct link to Northern Ireland. It is therefore appropriate for the Union and the United Kingdom to make a Joint Declaration in the Joint Committee to that effect.

3.5. Article 13(3) of the Protocol

3.5.1. Amendment to Article 13(3) of the Protocol

The Protocol provides for the rules relating to the Union's internal market for goods and customs union, VAT and excise, energy, and State aid to apply in and to the United Kingdom in respect of Northern Ireland. To that effect, Annexes 2 to 5 to the Protocol, which are referred to in Articles 5(4), and Articles 8 to 10(1) thereof, contain a list of provisions of Union law, which apply to and in the United Kingdom in respect of Northern Ireland. Article 13(3) of the Protocol provides that where the Protocol makes reference to a Union act, such reference is to be read as referring to that Union act as amended or replaced.

In order to address a situation where a specific Union act amending or replacing an act listed in the Annexes to the Protocol significantly changes the content or the scope of that act as applicable before being amended or replaced and where the application in Northern Ireland of the Union act as thus amended or replaced would have a significant impact specific on everyday life of communities in Northern Ireland in a way that is liable to persist, it is appropriate to establish an emergency brake mechanism. It is proposed to establish this mechanism by inserting a new paragraph 3a into Article 13 of the Protocol.

That mechanism could be triggered, in the most exceptional circumstances and as a last resort, by 30 Members of the Legislative Assembly in Northern Ireland from at least two parties (and excluding the Speaker and Deputy Speakers). The United Kingdom's envisaged unilateral declaration on involvement of the institutions of the 1998 Agreement, which would be annexed to the Joint Committee Decision, is to set out the internal procedure within the United Kingdom, in order for the latter to notify the Union in accordance with the envisaged new paragraph 3a of Article 13 of the Protocol. The mechanism would be able to be used in relation to amendments to or replacements of certain well-defined categories of acts referred to in the Protocol (i.e. those referred to in the first indent of heading 1 and headings 7 to 47 of Annex 2 to the Protocol, and the third subparagraph of Article 5(1) thereof). Where the notification has been made by the United Kingdom to the Union, the Union act as amended or replaced by the specific Union act, in whole or in part, as the case may be, would not apply to and in the United Kingdom in respect of Northern Ireland. The Union act as amended or replaced by the specific Union act could be added to the relevant Annex to the Protocol in accordance with the procedure provided for in Article 13(4) thereof.

The purpose of the envisaged amendment to the Protocol is to address deficiencies and situations unforeseen when the Withdrawal Agreement was signed, which do not relate to Parts One, Four and Six of the Withdrawal Agreement.

The envisaged amendment does not amount to a change of the essential elements of the Withdrawal Agreement given the following:

- The envisaged new paragraph 3a of Article 13 of the Protocol provides for well-defined and narrow triggering conditions for the United Kingdom to make the notification referred to in the first subparagraph of paragraph 3a. Those conditions are defined in the third sub-paragraph of the envisaged new paragraph 3a of Article 13 of the Protocol (content or scope of the Union act as amended or replaced by a specific Union act significantly differs, in whole or in part, from the content or scope of the Union act as applicable before being amended or replaced and the application of that act would have a significant impact specific to everyday life of communities in Northern Ireland in a way that is liable to persist). In particular, the condition that content or scope of the Union act as amended or replaced by a specific Union act significantly differs,

in whole or in part, from the content or scope of the Union act as applicable before being amended or replaced refers to a situation in which the Union act as amended or replaced by a specific Union act comes close to the situation of a new Union act falling within the scope of the Protocol, which is anyway governed by Article 13(4) thereof.

- The conditions set out in the third subparagraph of the envisaged new paragraph 3a of Article 13 of the Protocol are subject to dispute settlement.
- In line with paragraph 1 of the United Kingdom's unilateral declaration on involvement of the institutions of the 1998 Agreement, a notification to the United Kingdom by thirty Members of the Legislative Assembly in Northern Ireland from at least two parties of their wish that the emergency brake mechanism should be applied, is to be made only "in the most exceptional circumstances and as a last resort, having used every other available mechanism".
- Compliance with each of the conditions as set out in paragraph 1 of the United Kingdom's unilateral declaration on involvement of the institutions of the 1998 Agreement is also subject to dispute settlement through the good faith provision of the Withdrawal Agreement and, in the Joint declaration concerning Article 13(3a), the Union and the United Kingdom recognise that for a notification under Article 13(3a) of the Protocol to be made in good faith in accordance with Article 5 of the Withdrawal Agreement, it needs to be made under each of the conditions set out in paragraph 1 of the United Kingdom's Unilateral Declaration on involvement of the institutions of the 1998 Agreement.
- Swift compliance with a ruling of the arbitration panel is ensured, i.e., when making the notification in accordance with the envisaged new paragraph 3a of Article 13 of the Protocol that the United Kingdom has failed to comply with either the conditions for such notification set out in the third subparagraph of that paragraph or with its good faith obligations under Article 5 of the Withdrawal Agreement, as explained in points 3.5.2 and 3.5.3 below.
- The scope of the envisaged new paragraph 3a of Article 13 of the Protocol is limited. It can apply to well-defined parts of Annex 2 to the Protocol and the third subparagraph of Article 5(1) thereof.

3.5.2. Recommendation on Article 13(3a) of the Protocol

Where the United Kingdom has made the notification in accordance with the envisaged new paragraph 3a of Article 13 of the Protocol and where an arbitration panel has ruled that the United Kingdom has failed to comply with the conditions for making such notification, it is appropriate for the Joint Committee to recommend that swift compliance with that ruling should be achieved.

3.5.3. Joint declaration concerning Article 13(3a) and the United Kingdom's draft unilateral declaration on involvement of the institutions of the 1998 Agreement

In the envisaged Joint Declaration in the Joint Committee, the Union and the United Kingdom acknowledge that the United Kingdom's notification under the newly envisaged new paragraph 3a of Article 13 of the Protocol needs to be made under each of the conditions of paragraph 1 of the United Kingdom's draft unilateral declaration on involvement of the institutions of the 1998 Agreement for it to be made in accordance with Article 5 of the

Withdrawal Agreement. It is also appropriate to clarify that where an arbitration panel has ruled that the United Kingdom failed to comply with Article 5 of the Withdrawal Agreement in relation to such notification, swift compliance with the ruling of the arbitration panel should be achieved.

3.6. Article 14 of the Protocol. Joint Declaration nr. XX by the Union and the United Kingdom in the Joint Committee

In the envisaged Joint Declaration in the Joint Committee, the Union and the United Kingdom state that they will make full use of the joint bodies established by the Withdrawal Agreement (Joint Committee, Specialised Committees and Joint Consultative Working Group) to oversee the implementation of the Withdrawal Agreement. In this context, the Specialised Committee on the implementation of the Protocol may allow for exchanges of views on any future legislation of the United Kingdom regarding goods of relevance to the operation of the Protocol. To this end, the Specialised Committee may convene in a specific composition, namely the Special Body on Goods, to assess the potential impact of that future legislation in Northern Ireland, anticipate and discuss any practical difficulties at stake. The Union and the United Kingdom should also commit to resolving any issues related to the operation of the Protocol in the best and most expeditious way possible. They should therefore use the joint bodies to address any issues that may arise in the implementation of the Protocol, which can be subject to dialogue in the joint bodies at the request of the Parties.

3.7. Article 18 of the Protocol

The United Kingdom is expected to make a Unilateral Declaration in the Joint Committee concerning the democratic consent mechanism in Article 18 of the Protocol on Northern Ireland/Ireland. The Union should take note of the United Kingdom's declaration, recalling the tasks of the Joint Committee under Article 164 of the Withdrawal Agreement, should this declaration be made.

3.8. Annex 3 to the Protocol

3.8.1. Amendment to Annex 3 to the Protocol

Annex 3 to the Protocol, which is referred to in Article 8 of the Protocol, contains the list of provisions of Union law in the area of VAT and excise, which apply to and in the United Kingdom in respect of Northern Ireland concerning goods. The fifth paragraph of Article 8 of the Protocol provides that the Joint Committee may review the application of the Article, taking into account Northern Ireland's integral place in the United Kingdom's internal market, and may adopt appropriate measures as necessary.

Having regard to the specific circumstances of Northern Ireland, including its integral place in the United Kingdom's internal market, certain amendments to Annex 3 to the Protocol should be made. These amendments should not lead to fiscal fraud risks or to any potential distortion of competition. Their implementation in Northern Ireland, and in particular the implementation of the special scheme for distance sales of goods imported from third territories or third countries, should neither create risks to the Union's internal market, and the United Kingdom's internal market, nor create undue burdens for businesses operating in Northern Ireland. In order to clarify the scope of application of certain acts already listed in Annex 3 to the Protocol, two notes should be added to that Annex.

These notes cover, with regard to VAT, the possibilities for the United Kingdom in respect of Northern Ireland to apply reduced VAT rates on goods supplied and installed in immovable property located in Northern Ireland by taxable persons and to apply reduced VAT rates and exemptions with deductibility to a higher number of categories of supplies than provided for in Directive 2006/112/EC. Also, the United Kingdom in respect of Northern Ireland will not

be required to apply the special VAT scheme for small enterprises, as amended by Council Directive (EU) 2020/285, which is to apply from 1 January 2025, provided that the Union threshold on the annual turnover for exempt supplies of goods and services is respected should the United Kingdom apply a similar exemption scheme. Finally, the United Kingdom in respect of Northern Ireland shall not be required to apply the special scheme for distance sales of goods imported from third territories or third countries as set out in Directive 2006/112/EC, as regards distance sales of goods from other parts of the United Kingdom to Northern Ireland, provided that the goods are subject to final consumption in Northern Ireland and that value added tax has been charged in the United Kingdom.

With regard to excise, only alcohol taxation is proposed to be covered by the notes. The United Kingdom in respect of Northern Ireland may apply a different duty structure, including a draught relief on alcoholic beverages sold for immediate consumption in hospitality venues, provided that the EU duty minima rates are always respected and that there is no discrimination against Union products. In addition, the United Kingdom in respect of Northern Ireland will not be required to apply the Union provisions on independent small producers of alcohol, but may apply its own national scheme, provided that the Union duty minima rates and the Union annual production thresholds for independent small producers are respected and that both Parties exclude the automatic mutual recognition of such producers.

The envisaged Joint Committee Decision also provides for the possibility to add further notes to Annex 3 to the Protocol in the future, provided that such notes specify the manner in which the Union acts listed in Annex 3 apply to and in the United Kingdom in respect of Northern Ireland. The purpose of the provisions of the envisaged decision amending the Protocol is to address deficiencies and situations unforeseen when the Withdrawal Agreement was signed, which do not relate to Parts One, Four and Six of the Withdrawal Agreement. The envisaged amendments to Annex 3 to the Protocol, by merely specifying the manner in which the Union acts listed in Annex 3 apply to and in the United Kingdom in respect of Northern Ireland and by providing for the possibility to add further notes of the same nature do not amount to amending an essential element of the Withdrawal Agreement.

3.8.2. Declaration on the VAT regime for goods not being at risk for the Union's internal market and on the VAT arrangements for cross border refunds

By the envisaged Joint Declaration in the Joint Committee, the Union and the United Kingdom state their intention to examine the possibility to adopt a Joint Committee Decision, based on the amendment to Annex 3 to the Protocol introduced by the provisions of the Joint Committee Decision referred to in Section 3.8.1 above, providing that the Union rules on VAT rates do not apply to certain goods that by their nature and by the conditions under which they are supplied would be subject to final consumption in Northern Ireland and where the application of different rates would not lead to a negative impact on the Union's internal market in the form of fiscal fraud risks or potential distortion of competition. The list should be subject to evaluation and review on a regular basis.

The Union and the United Kingdom also intend to evaluate the current VAT arrangements for cross border refunds under the applicable Union legislation and examine the need to adopt, if appropriate, a Joint Committee Decision whereby any necessary adjustments would be laid down or refund arrangements would be limited to the application of Union legislation for refunds regarding third countries. Such evaluation should take account of the administrative burden on taxable persons as well as administrative costs for tax administrations.

3.9. Article 5(2) of the Protocol: Determination of goods not at risk

3.9.1. Replacing Joint Committee Decision No 4/2020 on the determination of goods not at risk

Decision No 4/2020 of the Joint Committee of 17 December 2020 on the determination of goods not at risk sets out the criteria for goods to be considered not at risk of subsequently being moved into the Union and therefore not being subject to Union customs duties, in line with Article 5(1) of the Protocol. The envisaged Decision of the Joint Committee will expand the scope of the traders eligible for moving goods not at risk from other parts of the United Kingdom to Northern Ireland. First, the envisaged Decision establishes new conditions for considering that goods are not subject to commercial processing including by increasing the annual turnover threshold for operators in order to consider that the processing of goods by those operators does not qualify as commercial processing, irrespective of their sector of activity. Second, operators established in other parts of the United Kingdom will be allowed to adhere to the trusted trader scheme underpinning the arrangements for moving goods not at risk.

The specific conditions for the authorisation of trusted traders should be set out in greater detail, thereby ensuring that the customs facilitations afforded to trusted traders and authorised carriers when moving goods not at risk from other parts of the United Kingdom to Northern Ireland, which are to be laid down in targeted amendments to the relevant Union acts will be accompanied by stronger safeguards.

The Joint Committee Decision will also set out rules for defining the conditions under which goods sent in parcels from other parts of the United Kingdom to Northern Ireland can be considered as being not at risk: those parcels will have to be delivered to private individuals residing in Northern Ireland and they will have to be brought into Northern Ireland by authorised carriers, who will provide data about items in the parcels to the relevant United Kingdom competent authority prior to the delivery of the parcel, where the parcel is sent from a business in the United Kingdom to a private individual residing in Northern Ireland.

The customs facilitations afforded to trusted traders and authorised carriers when moving goods not at risk from other parts of the United Kingdom to Northern Ireland are to be laid down in targeted amendments to the relevant Union acts. The main provisions of the Section of the Joint Committee Decision dealing with determining goods not at risk will become applicable gradually in two steps, triggered by declarations of the Union to the effect that the United Kingdom has met all the required pre-conditions and by declarations of the United Kingdom relating to the readiness of operators to comply with relevant obligations.

3.9.2. Union declaration taking note of the United Kingdom's Unilateral Declaration on strengthening enforcement action concerning goods moved in parcels from another part of the United Kingdom to Northern Ireland

The United Kingdom is expected to make a Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place to strengthen enforcement action concerning goods moved in parcels from another part of the United Kingdom to Northern Ireland.

The Union should take note of the United Kingdom's Unilateral Declaration, should this declaration be made.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[1].

4.1.2. Application to the present case

The Joint Committee is a body set up by an agreement, namely the Withdrawal Agreement.

The Decision and Recommendations which the Joint Committee is called upon to adopt constitute acts having legal effects, within the meaning of Article 218(9) TFEU. The envisaged Decision will be binding on the Parties in accordance with Article 166(2) of the Withdrawal Agreement.

The Joint Declarations which the Parties envisage to make in the Joint Committee will be made by mutual consent. Furthermore, the Union can make unilateral declarations in the Joint Committee.

The envisaged acts of the Joint Committee do not supplement or amend the institutional framework of the Withdrawal Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The decision, recommendations and declarations relate to the Protocol, which forms an integral part of the Withdrawal Agreement, which was concluded on the basis of Article 50(2) of the Treaty on European Union (TEU).

Therefore, the substantive legal basis of the proposed decision is Article 50(2) TEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 50(2) TEU, in conjunction with Article 218(9) TFEU.

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[1] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

5. PUBLICATION OF THE ENVISAGED ACTS AND DECLARATIONS

In the interest of legal certainty and transparency, it is appropriate to publish the decisions, recommendations and declarations in the *Official Journal of the European Union* after they have been adopted or made, respectively.

2023/0066 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in 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 a decision to be adopted, and recommendations and joint and unilateral declarations to be made

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 Council Decision (EU) 2020/135[2] that entered into force on 1 February 2020.

(2) Article 164(5)(d) of the Withdrawal Agreement empowers the Joint Committee to adopt decisions amending that Agreement, provided that such amendments are necessary to correct errors, to address omissions or other deficiencies, or to address situations unforeseen when the Agreement was signed, except in relation to Parts One, Four and Six of the Withdrawal Agreement and provided that such decisions do not amend the essential elements of that Agreement.

(3) Article 166(1) of the Withdrawal Agreement empowers the Joint Committee to adopt decisions in respect of all matters for which the Agreement so provides and to make appropriate recommendations to the Union and the United Kingdom. Pursuant to Article 166(2) of the Withdrawal Agreement, the decisions adopted by the Joint Committee are binding on the Union and the United Kingdom, and the Union and the United Kingdom must implement those decisions, which have the same legal effect as the Withdrawal Agreement. Article 166(3) of the Withdrawal Agreement provides that recommendations are to be made by mutual consent.

(4) In accordance with Article 182 of the Withdrawal Agreement, the Protocol on Ireland/Northern Ireland ('the Protocol') forms an integral part of that Agreement.

(5) It is appropriate for the Union and the United Kingdom to make a Joint Declaration in the Joint Committee to the effect that, wherever relevant in their dealings under the Withdrawal Agreement, they will, consistent with the requirements of legal certainty,

[2] 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).

refer to the Protocol as amended as to the "Windsor Framework", and that they may in the same way refer to the Protocol as amended in their domestic legislation.

(6) Having regard to the specific circumstances of Northern Ireland, it is necessary to provide that the Union and the United Kingdom should use their best efforts to ensure that the facilitations to trade between Northern Ireland and other parts of the United Kingdom should include specific arrangements for the movement of goods within the United Kingdom's internal market, consistent with Northern Ireland's position as part of the customs territory of the United Kingdom in accordance with this Protocol, where the goods are destined for final consumption or final use in Northern Ireland and where the necessary safeguards are in place to protect the integrity of the Union's internal market and customs union. Consequently, the Protocol should be amended accordingly.

(7) The Union should take note of the United Kingdom's Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place as regards the movement of goods from Northern Ireland to other parts of the United Kingdom.

(8) The Union should take note of the United Kingdom's Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place as regards market surveillance and enforcement activities.

(9) It is necessary to ensure enhanced cooperation between the United Kingdom and the Union, and between the United Kingdom and Member State authorities where appropriate, to underpin the envisaged specific arrangements with effective market surveillance and enforcement activity. The Joint Committee should therefore make a recommendation providing for such enhanced cooperation and setting out that the cooperation could encompass knowledge-sharing, information exchange, work with operators and joint activity.

(10) Having regard to the specific circumstances of Northern Ireland, including its integral place in the United Kingdom's internal market, certain amendments to Annex 3 to the Protocol should be made. The application of these amendments should not lead to fiscal fraud risks or to any potential distortion of competition. Their implementation in Northern Ireland, and in particular the implementation of the special scheme for distance sales of goods imported from third territories or third countries, should neither create risks to the Union's internal market, and the United Kingdom's internal market, nor create undue burdens for businesses operating in Northern Ireland. In order to clarify the scope of application to and in the United Kingdom in respect of Northern Ireland, of certain acts already listed in Annex 3 to the Protocol, two notes should be added to that Annex. With a view to addressing further potential deficiencies or unforeseen circumstances, and in order to ensure that any other notes specifying the manner in which the Union acts listed in Annex 3 apply to and in the United Kingdom in respect of Northern Ireland could be added to that Annex at any point in time, such possibility should be foreseen.

(11) The Union and the United Kingdom should make a Joint Declaration in the Joint Committee on the VAT regime for goods not being at risk for the Union's internal market and the VAT arrangements for cross border refunds. By that declaration the Union and the United Kingdom would commit to examining the possibility to add notes clarifying the scope of application of certain acts listed in Annex 3 to the Protocol. The first note would concern the application of the rates laid down in

Council Directive 2006/112/EC[3] and would contain a list of goods that by their nature and by the conditions under which they are supplied would be subject to final consumption in Northern Ireland and where the application of different rates would not lead to a negative impact on the Union's internal market in the form of fiscal fraud risks or potential distortion of competition. The Union and the United Kingdom should also indicate their willingness to evaluate and revise such a list on a regular basis. The second note would concern the current VAT arrangements for cross border refunds under the applicable Union law referred to in Article 8 of the Protocol.

(12) To ensure the effectiveness of Article 8 of the Protocol, the Union and the United Kingdom should exchange information and discuss in a structured manner any issues arising from the implementation and application of Article 8 of that Protocol, including important changes envisaged in the applicable legislative framework in the Union and the United Kingdom in the areas of VAT and excise concerning goods. It is therefore appropriate for a Decision of the Joint Committee to provide for special meetings of the Specialised Committee on the implementation of the Protocol as an enhanced coordination mechanism to allow the Union and the United Kingdom to identify and discuss any issues relating to the functioning of the Protocol in the areas of VAT and excise and propose appropriate action, as necessary.

(13) In order to further clarify the scope of application of Article 10(1) of the Protocol, it is appropriate for the Union and the United Kingdom to set out a common understanding on the conditions for state aid granted by the United Kingdom authorities to be within scope of Article 10(1), notably as regards the genuine and direct link to Northern Ireland. It is therefore appropriate for the Union and the United Kingdom to make a Joint Declaration in the Joint Committee to that effect.

(14) In order to address a situation where a specific Union act amending or replacing an act referred to in the Protocol significantly changes the content or the scope of that act as applicable before being amended or replaced and where the application in Northern Ireland of the Union act as thus amended or replaced would have a significant impact on everyday life of communities in Northern Ireland in a way that is liable to persist, it is necessary to establish an emergency brake mechanism enabling 30 Members of the Legislative Assembly in Northern Ireland from at least two parties (and excluding the Speaker and Deputy Speakers), under each of the conditions set out in paragraph 1 of the draft Unilateral Declaration by the United Kingdom on involvement of the institutions of the Good Friday or Belfast Agreement of 10 April 1998 between the Government of the United Kingdom, the Government of Ireland and the other participants in the multi-party negotiations ('the 1998 Agreement') annexed to the envisaged Joint Committee Decision amending the Protocol, to address the abovementioned situation. These conditions include, *inter alia,* that the notification can be made in the most exceptional circumstances and as a last resort, and that MLAs have sought prior substantive discussion with the UK Government and within the Northern Ireland Executive to examine all possibilities in relation to the Union act. Where the United Kingdom has made a notification to the Union to that effect, the Union act as amended or replaced by the specific Union act would not apply to and in the United Kingdom in respect of Northern Ireland pursuant to Article 13(3) of the Protocol. Instead, the Union act as amended or replaced by the specific Union act would have to be added to the relevant Annex to the Protocol in accordance with the

[3] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

procedure provided for in Article 13(4) thereof. The Protocol should therefore be amended accordingly.

(15) Where the United Kingdom has made the notification to the Union referred to in the first subparagraph of the envisaged new paragraph 3a of Article 13 of the Protocol, but where an arbitration panel has ruled that the United Kingdom has failed to comply with the conditions for such notification as laid down in the third subparagraph of that paragraph, swift compliance with such an arbitration panel ruling should be achieved. The Joint Committee should therefore make a recommendation providing for such swift compliance. This should be based on the joint understanding that swift compliance should be achieved in the same way where the United Kingdom has failed to comply with its good faith obligations under Article 5 of the Withdrawal Agreement by making such notification without each of the conditions set out in paragraph 1 of the Unilateral Declaration by the United Kingdom on involvement of the institutions of the 1998 Agreement, as annexed to Joint Committee Decision [XX]/2023, being met.

(16) The Union and the United Kingdom should acknowledge that the United Kingdom's notification under the envisaged new Article 13(3a) of the Protocol is to be made under each of the conditions of paragraph 1 of the United Kingdom's unilateral declaration on involvement of the institutions of the 1998 Agreement for it to be made in good faith, in accordance with Article 5 of the Withdrawal Agreement. It is also appropriate to clarify through a joint declaration that where an arbitration panel has ruled that the United Kingdom failed to comply with Article 5 of the Withdrawal Agreement in relation to a notification to the Union triggering the mechanism, swift compliance with the ruling of the arbitration panel should be achieved.

(17) The Union and the United Kingdom should make full use of the joint bodies established by the Withdrawal Agreement to oversee its implementation. The Specialised Committee on the implementation of the Protocol may allow for exchanges of views on any future legislation of the United Kingdom regarding goods of relevance to the operation of the Protocol. To this end, the Specialised Committee may convene in a specific composition, namely the Special Body on Goods, to assess the potential impact of that future legislation in Northern Ireland, anticipate and discuss any practical difficulties at stake. The Union and United Kingdom would resolve any issues in the operation of the Protocol in the best and most expeditious way possible. It is therefore appropriate for the Union and the United Kingdom to adopt a Joint Declaration in the Joint Committee to that effect.

(18) The Union should take note of the United Kingdom's Unilateral Declaration in the Joint Committee concerning the democratic consent mechanism in Article 18 of the Protocol, recalling the tasks of the Joint Committee under Article 164 of the Withdrawal Agreement.

(19) It has proven necessary to extend the scope of the traders eligible for moving goods not at risk from other parts of the United Kingdom to Northern Ireland referred to in Decision No 4/2020 of the Joint Committee[4]. In particular, new conditions should be established for considering that goods are not subject to commercial processing including by increasing the annual turnover threshold for operators in order to consider

[4] Decision No 4/2020 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 17 December 2020 on the determination of goods not at risk [2020/2248] (OJ L 443, 30.12.2020, p. 6).

that the processing of goods by those operators does not qualify as commercial processing, irrespective of their sector of activity. Moreover, operators established in other parts of the United Kingdom should be allowed to adhere to the trusted trader scheme underpinning the arrangements for moving goods not at risk. The specific conditions for the authorisation of trusted traders should be set out in greater detail, thereby ensuring that the customs facilitations afforded to trusted traders and authorised carriers when moving goods not at risk from other parts of the United Kingdom to Northern Ireland, which are to be laid down in targeted amendments to the relevant Union acts will be accompanied by stronger safeguards.

(20) In addition, rules should be laid down for specifying the conditions under which goods sent in parcels from other parts of the United Kingdom to Northern Ireland can be considered as being not at risk where those parcels are delivered to private individuals residing in Northern Ireland and are brought into Northern Ireland by authorised carriers.

(21) The Union should take note of the United Kingdom's Unilateral Declaration in the Joint Committee setting out the practice it intends to put in place to strengthen enforcement action concerning goods moved in parcels from another part of the United Kingdom to Northern Ireland.

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

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 ('the Joint Committee') in relation to a Decision and certain Recommendations to be adopted by the Joint Committee is set out in the draft Decision and draft Recommendations attached in Annex 1 to this Decision.

Article 2

The position to be taken on the Union's behalf within the Joint Committee in relation to certain Joint Declarations to be made by the Union and the United Kingdom in the Joint Committee is set out in the draft Joint Declarations attached in Annex 2 to this Decision.

Article 3

The position to be taken on the Union's behalf in the Joint Committee in relation to certain Unilateral Declarations to be made by the United Kingdom in the Joint Committee which are attached in draft form in Annex 3 to this Decision shall be to take note of these Declarations. In relation to the United Kingdom's Unilateral Declaration in the Joint Committee concerning the democratic consent mechanism in Article 18 of the Protocol, the Union shall also recall the tasks of the Joint Committee under Article 164 of the Withdrawal Agreement.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President