



Council of the
European Union

134566/EU XXVII. GP
Eingelangt am 16/03/23

Brussels, 16 March 2023
(OR. en)

7099/23

Interinstitutional File:
2023/0066 (NLE)

UK 32

LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject:	COUNCIL DECISION on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made
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COUNCIL DECISION (EU) 2023/...

of ...

**on the position to be taken on behalf of the European Union
within the Joint Committee established by the Agreement
on the withdrawal of the United Kingdom of Great Britain and Northern Ireland
from the European Union and the European Atomic Energy Community
as regards 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) 2020/135¹ and entered into force on 1 February 2020.
- (2) Article 164(5)(d) of the Withdrawal Agreement empowers the Joint Committee established under Article 164(1) thereof ('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 that 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 are to 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.

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

- (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 within 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, refer to the Protocol as amended as 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 in Northern Ireland, it is necessary to provide that the Union and the United Kingdom should make their best efforts to ensure that the facilitations to trade between Northern Ireland and other parts of the United Kingdom 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 that 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 Unilateral Declaration by the United Kingdom within 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 Unilateral Declaration by the United Kingdom 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) Taking into account the specific circumstances in 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 those amendments should not lead to fiscal fraud risks or to any potential distortion of competition. The implementation of those amendments 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 within 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/EC¹ 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.

¹ 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).

- (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 issues related to the implementation of the Protocol on Ireland/Northern Ireland ('the Specialised Committee') 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 of the conditions for state aid granted by the United Kingdom authorities to be within the 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 (MLAs) 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. Those conditions provide, *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 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 Article 13(3a), first subparagraph, of the Protocol as newly envisaged, but 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. That 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 No .../2023, being met.
- (16) The Union and the United Kingdom should acknowledge that the United Kingdom's notification under the newly envisaged Article 13(3a) of the Protocol is to be made under each of the conditions of paragraph 1 of the Unilateral Declaration by the United Kingdom 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 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 that 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 Unilateral Declaration by the United Kingdom 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 Committee¹. 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 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.

¹ 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).

- (21) The Union should take note of the Unilateral Declaration by the United Kingdom 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 within the Joint Committee as regards a decision to be adopted, and recommendations and joint and unilateral declarations to be made,

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') as regards a Decision to be adopted and certain Recommendations to be made 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 as regards 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 within the Joint Committee as regards 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 Unilateral Declaration by the United Kingdom 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 shall enter into force on the date of its adoption.

Done at ...,

For the Council

The President
