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Proposal for a

COUNCIL DECISION

**pursuant to Article 218 (9) TFEU on the Union position concerning the draft Joint
Committee Decision on the determination of goods not at risk**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The Commission proposes that the Council approves the position to be adopted 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 Joint Committee decision establishing the conditions under which goods are considered not to be subject to commercial processing in Northern Ireland as well as the conditions under which goods brought into Northern Ireland are not considered as being at risk of subsequently being moved into the Union.

2. CONTEXT OF THE PROPOSAL

Article 5 (1) of the Protocol on Ireland and Northern Ireland ('the Protocol') establish which the applicable regime for customs duties for goods brought into Northern Ireland:

- for goods brought into Northern Ireland by direct transport from another part of the United Kingdom: no customs duties, unless the good is at risk of subsequently being moved into the Union
- for goods brought into Northern Ireland from other third countries than the United Kingdom: the customs duties applicable in the United Kingdom, unless the good is at risk of subsequently being moved into the Union.

According to Article 5 (2) of the Protocol, any good brought into Northern Ireland is considered as being at risk of subsequently being moved into the Union unless it is established that the good concerned is

- not subject to commercial processing in Northern Ireland
- and fulfils the criteria established by the Joint Committee for determining goods not at risk of subsequently being moved into the Union.

Article 5 (2) of the Protocol provides for a Decision of the Joint Committee establishing the conditions under which either of these requirements for considering goods as not being at risk of moving from Northern Ireland into the Union are fulfilled.

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

Conditions for considering goods as “not at risk” of moving into the Union

Goods brought into Northern Ireland may be considered as “not at risk” of subsequently moving into the Union if

- either there is no economic incentive to ship them into the EU via Northern Ireland because of the applicable tariff differential, meaning that
 - for goods from Great Britain: the customs tariff is zero
 - for goods from other third countries: the EU tariff is lower or equal to the UK tariff,

or if it is otherwise ensured that the risk of them being moved further to the EU is minimized, notably because the importer is recognised as a trader selling only to end consumers in Northern Ireland (“Trusted Trader Scheme”). The implementation of Article 5 (1) of the Protocol through a Trusted Trader Scheme requires particularly diligent monitoring by the Union. In order to enable the Union to react if this schemes proves to be insufficiently robust, the Joint Committee Decision provides for procedural guarantees enabling a termination of the approach laid down therein (sunset clause).

4. LEGAL BASIS

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 decision which the Joint Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding on the Parties in accordance with Article 166 of the Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

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

5. PUBLICATION OF THE ENVISAGED ACT

As the decision of the Joint Committee concerns the implementation of substantive provisions of the Protocol, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

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 of 30 January 2020 and entered into force on 1 February 2020.
- (2) Article 166 of the Withdrawal Agreement empowers the Joint Committee to adopt decisions in respect of all matters for which the Agreement so provides. The Protocol on Ireland and Northern Ireland to the Withdrawal Agreement ('the Protocol') forms an integral part of that Agreement.
- (3) Article 5 (1) of the Protocol provides for the application of customs duties applicable in Union law for goods brought into Northern Ireland which are considered at risk of subsequently being moved into the Union. Goods not at risk are subject to either no customs duties or those customs duties applicable in the United Kingdom.
- (4) According to Article 5 (2) all goods brought into Northern Ireland are to be considered as being at risk of subsequently being moved into the Union. In order to be considered as "not at risk" in this sense, goods brought into Northern Ireland must not be subject to commercial processing there or fulfil the criteria set out in a Joint Committee Decision.
- (5) The criteria for goods not being subject to commercial processing should also respect the fact that, according to Article 6 of the Protocol, Northern Ireland forms part of the United Kingdom's customs territory, and it should reflect the commitment of Parties to the Protocol that its implementation should impact as little as possible on everyday life of communities in both Ireland and Northern Ireland.
- (6) Goods brought into Northern Ireland may be considered as not at risk of subsequently being moved into the Union where the tariff differential is zero, or where it is otherwise ensured that there is no incentive for economic operators to ship goods into Northern Ireland solely as a choice of the applicable customs tariff.

¹ OJ L 29, 31.1.2020, p.1.

- (7) It is therefore 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 in the Joint Committee, established by Article 164 of the Withdrawal Agreement, on a decision to be taken in accordance with Article 12 of the Protocol shall be based on the draft decision of the Joint Committee attached to this Decision.

Article 2

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

Article 3

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

Done at Brussels,

*For the Council
The President*