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Rt Hon Theresa May MP
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Dear Prime Minister,

Legal Effect of the Protocol on Ireland/Northern Ireland

Introduction

1. This note sets out my advice on the question I have been asked as follows:

> ***What is the legal effect of the UK agreeing to the Protocol to the Withdrawal Agreement on Ireland and Northern Ireland in particular its effect in conjunction with Articles 5 and 184 of the main Withdrawal Agreement?***

2. I note that the Withdrawal Agreement, of which the Protocol on Ireland/Northern Ireland (Protocol) forms part, is yet to be finalised. My advice is based, therefore, on an evolving text, which I have had to consider rapidly in light of the fluid situation.

Legal status and context

3. The Protocol is part of an international agreement that is binding on the United Kingdom and the European Union in international law and must be performed by them in good faith. The Protocol is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

4. The context includes its Preamble and Annexes, as well as the Joint Report on the progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU, dated 15 December 2017, which is expressly invoked in the Preamble, and which may have some freestanding legal significance.

5. The Protocol comes into force on the conclusion of the transition period, currently scheduled to end on 31 December 2020, and is intended to apply while negotiations are continuing for an agreement that supersedes it *and* "unless and until" that "subsequent agreement" is applicable, which maintains the necessary conditions for continued North-South cooperation, avoids a hard border and protects the 1998 [Good Friday] agreement in all its dimensions.

Operation of the Protocol

Position of the UK, NI and GB

6. Article 6 sets up the internal wiring for the functioning of the customs arrangements and movement of goods under the Protocol.

7. Pursuant to Article 6.1. *the UK as a whole (i.e. GB and NI) will form a single customs territory with the EU*. This is a *fiscal* arrangement only. The arrangements as a whole apply differently in GB and NI, albeit that those applicable to NI are dealt with in Article 6.2. (see below). NI remains in the EU's Customs Union, and will apply the whole of the EU's customs acquis, and the Commission and CJEU will continue to have jurisdiction over its compliance with those rules, which means goods can pass from NI to Ireland without any fiscal checks. GB is in a separate customs union with the EU creating a single customs territory between the EU and the UK, meaning NI and GB are not in separate customs territories. GB is required to align with the EU's Common External Tariff for any goods coming into the country. GB goods will also be able to pass between the UK and EU tariff-free. Goods passing from GB to NI will be subject to a declaration process. Compliance with these requirements in GB will not be subject to the jurisdiction of the Commission or the CJEU.

8. Pursuant to Article 6.2, *Northern Ireland will remain in the EU's Single Market for Goods and the EU's customs regime*, and will be required to apply and to comply with the relevant rules and standards. These include over 300 different legal instruments, listed in Annex 2 of the Protocol. *The Commission and CJEU will continue to have jurisdiction over NI's fulfilment of its obligations under these rules*. This will allow NI goods to enter into *free circulation* in the EU, allowing them to pass between NI and Ireland without any checks and, therefore, any hard border. The implications of NI remaining in the EU Single Market for Goods, while GB is not, is that for regulatory purposes *GB is essentially treated as a third country by NI* for goods passing from GB into NI. This means regulatory checks would have to take place between NI and GB, normally at airports or ports, although the EU now accepts that many of these could be conducted away from the border.

9. The consequence of these two provisions is that *Great Britain will no longer be a member of the EU's Single Market for Goods or the EU's customs arrangements*. This means that any GB goods crossing the border into the EU will be subject to third country checks by Member State authorities to ensure those goods meet EU standards. The EU currently requires some of these checks to take place at the border.

10. While it will not be directly bound by EU rules, GB will be obliged to observe a range of regulatory obligations in certain areas, such as environmental, labour, social and competition laws (the "level playing-field"), which reflects varying levels of correspondence to EU standards. *GB will not be subject to the jurisdiction of the CJEU or the Commission in relation to these obligations* – they will be monitored and enforced by independent UK authorities, and by its courts and tribunals. In the field of state aid, the independent authority would apply EU law and act in cooperation with the Commission. Any breach would be actionable through the Joint Committee within the governance arrangements of the Withdrawal Agreement, and directly by the Commission as a party in the UK courts.

11. In my opinion, Articles 6.1. and 6.2. function together to create a single, coherent mechanism for the operation of the customs arrangements and movement of goods between the UK (including NI) and the EU, for as long as the Protocol subsists.

The indefinite nature of the Protocol

12. Axiomatic to the agreement, pursuant to Article 2.1., is the duty of the parties to negotiate a superseding agreement. This must be done using best endeavours, pursuant to Article 184 of the Withdrawal Agreement. This is subject also to the duty of good faith, which is both implied by international law, and expressly created by Article 5 of the Withdrawal Agreement.

13. But what happens if both parties, pursuing their best endeavours in good faith, are simply unable to agree a superseding agreement within a reasonable time, or indeed at all? It might be argued that if, as Article 1.4. states, the Protocol is intended to apply "only temporarily", and "taking account of the commitments of the Parties set out in Article 2.1." (to use their best endeavours to negotiate a superseding agreement) they must intend that the Protocol is to subsist *only as long as those negotiations are genuinely continuing*. The Protocol appears to assume that the negotiations will result in an agreement.

14. However, on closer examination of the provisions of the Protocol, the position becomes less clear. The preamble on the one hand reinforces the temporary nature of the Protocol: it refers to the Withdrawal Agreement, which is based on Article 50 TEU, not aiming to establish a permanent future relationship between the UK and the EU, and the intention of the parties to replace the backstop solution on Northern Ireland with alternative, permanent arrangements for ensuring the absence of a hard border on the island of Ireland. But on the other hand, it also recalls the commitment of the UK to protect North-South cooperation and the UK's guarantee of avoiding a hard border, including any physical infrastructure or related checks and controls, and *bearing in mind that any future arrangements must be compatible with these overarching requirements.*

15. Article 1.4. includes in the final sentence the statement that "the provisions of this Protocol shall apply ***unless and until*** they are superseded, in whole or in part, by a subsequent agreement" (emphasis added). Further, Article 1.3. is premised on the assumption that the arrangements that the Protocol puts in place in relation to NI are "necessary" to achieve its objectives.

16. It is difficult to conclude otherwise than that the Protocol is intended to subsist even when negotiations have clearly broken down. The ordinary meaning of the provisions set out above and considered in their context allows no obvious room for the termination of the Protocol, save by the achievement of an agreement fulfilling the same objectives. **Therefore, despite statements in the Protocol that it is not intended to be permanent, and the clear intention of the parties that it should be replaced by alternative, permanent arrangements, in *international law* the Protocol would endure indefinitely until a superseding agreement took its place, in whole or in part, as set out therein.** Further, the Withdrawal Agreement cannot provide a legal means of compelling the EU to conclude such an agreement.

The EU perspective

17. However, a temporary customs union erected on such a legal foundation is by no means a comfortable resting place in law for the EU. First, it is unclear whether Article 50 provides an adequate legal basis *in EU law* for enduring and wide-ranging future arrangements between the EU and the UK. The EU has maintained that Article 50 is not designed for permanent future arrangements, with which the references to the impermanence of the Protocol are consistent. The EU's position would appear to be that Article 50 is intended to mandate the settlement of historic obligations and liabilities and any arrangement that extends beyond that must be necessary and proportionate to the resolution of those obligations. The EU apparently contends that while the NI-only backstop can be defended on the basis that it is necessary and proportionate to secure an orderly withdrawal, the addition of GB to the EU customs territory is only sustainable because it is a temporary "bridge to the future", which will be superseded by a final agreement.

18. Therefore, the legal basis for the UK-wide customs union comes under pressure in the context of a whole-UK customs union, in particular, if it appears to be open-ended. The EU had previously argued in the negotiations that Article 50 could *not* afford a legal basis for such an arrangement – or at least not once the point is reached at which it becomes clear that it is not a bridge to a more permanent arrangement. There are numerous references in the Protocol to its temporary nature but there is no indication of how long such temporary arrangements could last. There may be, therefore, some doubt as to whether the proposed Protocol is consistent with EU law, and that uncertainly will increase the longer it subsists.

19. Secondly, the regime under the Protocol is subject to enforcement by United Kingdom authorities. The EU has expressed the concern that the protection of the EU's single market for goods (in which

NI remains) and the Customs Union is substantially in the hands of a Third Country. It is fair to say that there is no precedent for this and it is reasonable to suppose that it is not a position that it will wish to prolong under conditions of legal uncertainty to which I refer above.

20. It affords NI full access to the single market for goods, and the Customs Union, without the corresponding obligations of membership, thus splitting the "four freedoms". It is arguable that this poses a dangerous precedent for other member states at risk of seeking to exit. In addition, precisely because the Protocol is expressed to last only until a superseding agreement, it introduces uncertainty as to the extent of the EU customs territory for trade negotiation purposes with Third Countries. It is likely to be important for the EU that it can be presented as a temporary arrangement with a clear and early end.

21. The flexibilities that the UK will seek in the movement of goods between NI and GB may also set a difficult precedent for the EU, of which other member states that possess overseas territories with different regulatory regimes, such as Spain and the Canary Islands, may wish to take advantage. Furthermore, it might be said that the benefits to NI of access to the EU market will far outweigh any contributions to the EU system. The Irish, in particular, are likely to find this problematic, and it would be reasonable to expect them to exert pressure on the EU to find alternative arrangements. The Protocol creates the potential for trade distortion and relocation of businesses from Ireland to NI, in order to benefit from frictionless access to the market in GB. This issue is particularly pertinent in the context of the Irish agri-food industry. The Protocol is also not comprehensive. There are important EU requirements and areas of mutual economic interest that are not provided for in the backstop, for example within the field of socio-economic cooperation and of services.

22. Finally, as we have seen from the negotiations, the legal and administrative arrangements required to underpin the Protocol would be enormously complex, particularly in the light of proposed GB / NI flexibilities and will require considerable resources. These are not something to which the Commission will readily commit in the long term, particularly because the financial contributions of the UK will have ceased.

23. Given the lack of any effective means of termination, it is to these very real, albeit unquantifiable, factors among others, that the UK may have to trust in seeking a satisfactory outcome from the negotiations that will ensue upon the ratification of the Withdrawal Agreement and the Protocol. However, these factors also form the background against which the review mechanism contained in the draft Article 19 must be considered.

The Article 19 review mechanism

24. The Protocol sets out a review mechanism at Article 19. This provision allows termination by mutual consent when, in the view of both Parties, the Protocol is *"no longer necessary"* to achieve the objectives set out in Article 1.3. In my view, this adds little, other than procedurally, to the international law position to which the Protocol is already subject, that the Parties could always terminate or amend the treaty by consent. I understand that we attempted to negotiate a unilateral termination mechanism exercisable on notice and on the grounds that there was no longer any reasonable prospect of agreement, but this was rejected by the EU.

25. Furthermore, perhaps beyond the advent of a yet unforeseen technical solution, it is difficult to think of a circumstance when the option to use the review mechanism might arise *other* than, as the Protocol *already* provides, on the conclusion of a subsequent agreement that supersedes, wholly or partly, the Protocol and to that extent renders it unnecessary to fulfil its stated objectives. The position would have been different under a clause allowing for mutual termination once it was clear that negotiations had irretrievably broken down. I understand that the EU was not prepared to agree to this, but such a clause would have provided United Kingdom with reasonable assurance that it could terminate the Protocol once it had become clear that there was no reasonable prospect of agreement and that the Protocol had now assumed the guise of a permanent arrangement.

26. Article 19 does not expressly state that the review mechanism is intended to be arbitrable under the governance provisions of the Withdrawal Agreement, but I consider that the better view is that it is.

Either party could invoke this review mechanism. Therefore, Article 19 provides also for the EU to argue that the Protocol is no longer necessary *"in whole or in part"*: it would be open to the EU, under the pressure of the factors set out above, if it considered negotiations had clearly broken down, or were taking an unsatisfactorily long time, to argue that Article 50 TEU no longer provided a legal base for a UK wide customs union. They could, therefore, submit a formal notification to the Joint Committee arguing that the Protocol was no longer necessary *in part* and that the GB elements of the customs union should fall away, leaving only NI in the EU customs territory as the minimum necessary to achieve the objectives in Article 1.3. That contention would meet the strong objection that it would contradict the very clear intention of the parties that the single customs territory created by Article 6.1. was not to be treated as severable.

27. In any event, whichever party attempted to submit a notification, it is extremely difficult to see how a five member arbitral panel made up of lawyers who were independent of the parties would be prepared to make a judgment as political as whether the Protocol is no longer necessary, in the absence of the consent of the parties, much less make a finding that it would be appropriate that only certain parts of the Protocol were no longer necessary.

28. Furthermore, the Withdrawal Agreement makes clear that the arbitral panel (preceded by consideration by the Joint Committee) is the only mechanism through which disputes can be adjudicated. In addition, only the remedies expressly provided for in the Withdrawal Agreement are applicable. This *does not include termination* of all or part of the Withdrawal Agreement. While the Withdrawal Agreement does contemplate one side suspending part of the Agreement as a remedy following arbitration, the aim of suspension is simply to force the other party back to the negotiating table to continue negotiations in good faith.

29. While the duties to act in good faith and in particular to use best endeavours in negotiating a new agreement are forceful and precise, they could not require the parties to a negotiation to set aside their fundamental interests, although they do require the parties to consider proposed modifications of the means by which they might be secured. For the EU, it can be assumed that avoiding a hard border on the island of Ireland and protecting the 1998 agreement in all its dimensions are fundamental interests and that the arrangements set out in the Protocol achieve those objectives. That does not rule out other means of securing them, and it is possible that if the EU peremptorily refused to entertain any alternative proposal for safeguarding them put forward by the UK, clearly demonstrating bad faith and a breach of the duty to use best endeavours, it could be challenged. But such conduct on the part of the EU would be highly unlikely; all they would have to do to show good faith would be to consider the UK's proposals, even if they ultimately rejected them. This could go on repeatedly without such conduct giving rise to bad faith or failure to use best endeavours, which would require clear and convincing evidence of improper motive and wilful intransigence.

30. **In conclusion, the current drafting of the Protocol, including Article 19, does not provide for a mechanism that is likely to enable the UK lawfully to exit the UK wide customs union without a subsequent agreement. This remains the case even if parties are still negotiating many years later, and even if the parties believe that talks have clearly broken down and there is no prospect of a future relationship agreement. The resolution of such a stalemate would have to be political.**

Extension of the Implementation Period

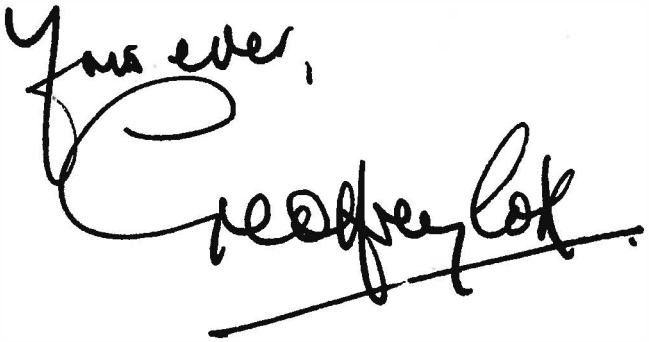
31. The application of the Protocol must be considered in light of the option under Article 3 to extend the Implementation Period. In considering whether to agree to this, the EU will have regard to the progress that has been made towards the subsequent agreement which would supersede the Protocol. Article 132 of the Withdrawal Agreement provides that before 1 July 2020, the Joint Committee may adopt a *single* decision extending the transition period. In other words, the Withdrawal Agreement does not allow for more than one extension.

32. One reason why the UK may wish to seek such an extension is if the parties are close to but have not yet concluded all the terms of a subsequent agreement. It may well be the case however, noting that the transition period lasts 21 months, that all the systems required to enter into the

arrangements envisaged by the Protocol are not yet agreed or ready. In that event, both parties are likely to want to extend the implementation period, although it has not yet been agreed between the parties how long such a period could last. If for whatever reason an extension was not agreed, it is not clear what arrangements the parties would fall back on. This might be thought to make a viable date for an extension of the implementation period critical.

Conclusion

33. Finally, in considering any international agreement, it is important also to take into account the changing political context in which it is to operate and that the solution to any essentially political question is rarely wholly or even predominantly legal. In the absence of a right of termination, there is a legal risk that the United Kingdom might become subject to protracted and repeating rounds of negotiations. This risk must be weighed against the political and economic imperative on both sides to reach an agreement that constitutes a politically stable and permanent basis for their future relationship. This is a political decision for the Government.



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