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Briefing Note- Proposed Protocol Legislation

In recent media reports it is being suggested that the Government are to take steps- apparently to be announced in the Queen's speech- to bring forward legislation in order to address the issues arising from the imposition of the Union-subjugating Protocol.

This short briefing note is designed to crystalise the key tests to be applied to such legislation in order to ascertain whether it will be sufficient as a solution to the Protocol, or whether it will fall short of that which is required.

The Protocol flows into domestic law via section 7A of the European Union (Withdrawal) Act 2018 ('the 2018 Act'). It provides, *inter alia*, as follows:

7A General implementation of remainder of withdrawal agreement

(1) *Subsection (2) applies to –*

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) *The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be –*

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly.

(3) *Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)*

This legislative provision has been held to enjoy interpretative supremacy over every other enactment, including constitutional statutes such as the Act of Union and Northern Ireland Act 1998, pursuant to section 7A (3).

That means that the Protocol- which flows into domestic law via section 7A- has supremacy over every other piece of legislation, including foundational constitutional statutes such as those aforementioned.

Therefore, **any solution must repeal or substantially amend section 7A to strip away its supremacy over the fundamental constitutional law of the United Kingdom.** Put simply, the Act of Union and Northern Ireland Act 1998 must have supremacy over the Protocol, rather than the other way around.

It is trite to point out that restoring the supremacy of the foundational constitutional law of the United Kingdom in the form of the Act of Union would in effect render the Protocol obsolete. This is so because any arrangement which interfered with the UK Internal Market (GB- NI trade and vice versa) or which placed Northern Ireland on an unequal footing in matters of trade or international treaties would be incompatible with Article VI of the Acts of Union and would as such be impermissible as a matter of UK law.

The consequence would necessarily be (i) the end of NI being effectively in the EU and UK internal market and following EU laws; and (ii) remove the barriers to internal UK trade which exist due to the Irish Sea border.

That would be an acceptable solution. This can only be achieved in one of three ways; (i) by repealing section 7A of the 2018 Act (particularly subsection (3)); (ii) by amending section 7A to insert a new subsection which expressly provides that the Act of Union and Northern Ireland Act 1998 has supremacy; or (iii) by potentially using a third way (which would be a lot messier) of amending section 46 of the Internal Market Act 2020 to make the protection for the UK internal market a legal requirement, rather than simply requiring 'special regard'. This would nevertheless still have to grapple with section 7A, so is less preferable.

Accordingly, the key test for any legislation brought forward is as follows:

- **Does the legislation expressly as a matter of domestic law restore the supremacy of the Acts of Union and Northern Ireland Act 1998 (and thus restores cross community and Executive consent provisions)?**
- **Is section 7A of the 2018 Act (and thus the Protocol) subservient to the fundamental constitutional law of the United Kingdom?**

If the answer is yes to the two key tests (which are interconnected and are effectively the same question put two different ways for clarity) set out above, then this will provide a satisfactory solution to the Protocol, which would in effect cease to apply.

Anything which falls short of satisfying the restoration of the supremacy of the foundational constitutional law of the United Kingdom would not be sufficient and therefore would not provide a basis for the protection of peace and restoration of political stability in Northern Ireland.