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Proposal for a

COUNCIL DECISION

on the conclusion, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control, in so far as the provisions of the Protocol which do not fall under Title V of Part III of the Treaty on the Functioning of the European Union are concerned

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The World Health Assembly adopted in 2003 the Framework Convention on Tobacco Control (FCTC), which aims at reducing tobacco-related deaths and diseases around the world in a comprehensive manner. The EU concluded the FCTC by Council Decision 2004/513/EC of 2 June 2004 ⁽¹⁾.

The FCTC recognises in its Article 15 that the elimination of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, is an essential component of tobacco control, and obliges Parties to adopt and implement effective measures to eliminate illicit trade. Article 33 of the FCTC provides for the possibility for the Conference of the Parties to adopt protocols to the Convention. On the basis of these Articles, the Conference of the Parties (COP) to the FCTC, at its second session in June-July 2007 decided to establish an Intergovernmental Negotiating Body (INB) to draft and negotiate a Protocol to Eliminate Illicit Trade in Tobacco Products (hereinafter referred to as ‘the FCTC Protocol’ or “the Protocol”). The INB concluded its work successfully, and the Conference of the Parties to the FCTC at its fifth meeting on 12 November 2012 in Seoul, Republic of Korea, adopted the Protocol.

Illicit trade in tobacco products and in particular cigarette smuggling into the EU and within the EU is a criminal activity causing huge losses in revenue for the EU and the Member States in terms of unpaid taxes and customs duties. Estimates indicate more than €10 billion losses of revenue annually to the EU and Member States. Most of the EU Member States are affected by the illicit tobacco trade, either as points of entry or transit or destination countries. Since the illicit products mostly originate from countries outside the EU, international cooperation, in particular also based on clear legislative procedures, is key to addressing the problem of illicit trade. The FCTC Protocol is an international agreement building upon and complementing Article 15 of the FCTC, and currently constitutes the only multilateral regulatory initiative in the area. The Commission has participated in the negotiations of the FCTC Protocol on behalf of the European Union.

The EU has signed the FCTC Protocol on 20 December 2013. The present proposal concerns the second step by which the EU will establish at international level its consent to be fully bound by the FCTC Protocol.

The Protocol consists of core provisions on the control of the supply chain of tobacco products and of equipment for manufacturing those products (Part III: Supply Chain Control). In particular, it requires the introduction of a licensing, equivalent approval or control system by a competent authority for any natural or legal person involved in the manufacturing and in the import and export of tobacco products and manufacturing equipment (Article 6 – Licensing). It, furthermore, requires all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment to conduct customer due diligence (Article 7 – Due diligence). It also provides for the establishment of a global tracking and tracing regime, within five years of the entry into force of the Protocol, consisting of national and/or regional tracking and tracing systems controlled by the Parties for all tobacco products manufactured in or imported into their territory (Article 8 – Tracking and tracing).

Those articles are complemented by provisions on record-keeping and security and preventive measures, including anti-money-laundering measures, and reporting of suspicious transactions (Articles 9 and 10). Further provisions concern sales by Internet, telecommunication or any

¹ OJ L 312, 15.6.2004, p. 8.

other evolving technology (Article 11), duty free sales of tobacco products and the obligation to implement effective controls on tobacco and tobacco products in the free zones, including not mixing tobacco products with non-tobacco products at the time of removal from a free zone (Article 12).

Part IV of the Protocol defines the conduct to be established as unlawful under the Parties' legislation (Article 14) and obliges the Parties to ensure that natural and legal persons are held liable for such unlawful conduct, including criminal offences (Articles 15 and 16). Further provisions concern seizure payments (Article 17), the handling of confiscated tobacco (Article 18) and special investigative techniques (Article 19). Part V of the Protocol contains provisions for the exchange of relevant information between the Parties (Articles 20 to 22), cooperation and mutual assistance (both administrative and legal in relation to criminal matters – Articles 23 and 24, and Articles 27 to 29), jurisdiction (Article 26) and extradition (Articles 30 and 31).

2. LEGAL ELEMENTS OF THE PROPOSAL

The Protocol contains a complex set of measures, rules and policy in the field of fighting illicit trade in tobacco products. The main obligations which would have to be applied or implemented by the EU and/or the Member States as of the entry into force of the Protocol or, at a later stage, within the periods indicated in the Protocol are Articles 6, 7, 8, 9, 11, 12, 13, 14, 15, 18 and 27 of the Protocol.

The Protocol provisions fall into different areas of EU activity which may be subdivided as follows:

- (a) the manufacture and sale of tobacco (and related) products,
- (b) customs controls and cooperation including through mutual administrative assistance in customs matters,
- (c) approximation of criminal offences, judicial cooperation in criminal matters and police cooperation,
- (d) harmonised taxation and related rules.

Individual provisions usually fall under one or, in a few cases, more of those headings. As a consequence, the EU has external competence to deal with these matters. In some cases this competence is of an exclusive nature, in accordance with Article 3 TFEU.

Regarding heading (a), the Protocol contains an important provision (Article 8) covered by EU legislation based on Article 114 TFEU. Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC² introduces in its Article 15 a system of traceability in the EU which contributes to the smooth functioning of the internal market by ensuring that compliant products are traded and which is affected by Article 8 of the Protocol. Moreover, the obligations regarding customer due diligence in the Protocol (Article 7) affect similar obligations currently addressed to other economic operators in the Money Laundering Directive 2005/60/EC³, based equally on Article 114 TFEU. The EU shall therefore conclude the Protocol on the basis of Article 114 TFEU.

² OJ L 127, 29.4.2014, p. 1.

³ OJ L 309, 25.11.2005, p. 15.

Regarding heading (b), the Protocol contains the obligation to exercise effective controls in free zones (Article 12). It prohibits the intermingling of tobacco products with non-tobacco products at the time of removal from free zones. Under EU law, goods brought into the customs territory of the EU (including where transshipment is involved) are, from the time of their entry, subject to customs supervision (Article 37 of the Customs Code⁴). Under Article 59(1) of that Code, all goods intended to be placed under a customs procedure (including transit) must be covered by a declaration for that procedure.

Regarding heading (c), the Protocol contains provisions concerning approximation of criminal offences, law enforcement cooperation and judicial cooperation in criminal matters (respectively Chapters 4 and 5 of Title V of Part III TFEU). Together with this proposal, a separate proposal for a Council Decision is presented on the conclusion of the Protocol, on behalf of the European Union, in so far as those provisions of the Protocol which fall under Title V of Part III TFEU are concerned.

Regarding heading (d), the Protocol contains provisions in its Articles 6, 9, 11, 12 and 13 partly covered by existing EU legislation on indirect taxation based on Article 113 TFEU, notably licensing (Article 6), record-keeping (Article 9) and duty free sales (Article 13). Certain of these harmonised rules are already partly transposing the provisions of the Protocol and therefore may be affected by the Protocol. In particular the license requirement in Article 6 of the Protocol will in good part be implemented through the relevant provisions of Directive 2008/118/EC (Articles 15 to 17) regarding the production in and the trading from tax warehouses. In how far Article 6 is covered will, however, also depend on how Articles 16 and 17 of Directive 2008/118/EC are transposed in national legislation. Furthermore, Articles 15 to 17 of Directive 2008/118/EC apply only to manufactured tobacco within the meaning of Directive 2011/64/EU (cigarettes, cigars, cigarillos and smoking tobacco). Thus Directive 2008/118/EC only covers the manufacturing and the importation of such products within the EU. Article 113 TFEU therefore provides a legal basis for the EU to conclude the Protocol. Moreover, control and verification measures in respect of goods coming in the EU from third countries fall within the area of the common commercial policy under Article 207 TFEU.

The Protocol also contains provisions on the sanctioning and procedures regarding unlawful conduct (Articles 14, 15, 18, 27) that may be established by the Parties either as a non-criminal or as a criminal offence. As far as non-criminal offences are concerned they may all fall under EU activity in the fields described under headings (a), (b) or (d).

⁴ Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ L 253, 11.10.1993, p.1-766.

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COUNCIL DECISION

on the conclusion, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control, in so far as the provisions of the Protocol which do not fall under Title V of Part III of the Treaty on the Functioning of the European Union are concerned

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 33, 113, 114 and 207 in conjunction with Article 218(6)(a) and the second subparagraph of Article 218(8) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) The conclusion of a Framework Convention on Tobacco Control (FCTC) was approved on behalf of the Community by Council Decision 2004/513/EC concerning the conclusion of the WHO Framework Convention on Tobacco Control⁵.
- (2) In accordance with Council Decisions 2013/744/EU⁶ and 2013/745/EU⁷, the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control was signed on 20 December 2013, subject to its conclusion at a later date.
- (3) The Protocol represents a significant contribution to the international efforts to eliminate all forms of illicit trade in tobacco products and to thereby fight the circumvention of tax and customs duties obligations and to reduce the supply of tobacco products in line with Article 15 of the WHO FCTC. The Protocol also contributes to the smooth functioning of the internal market for tobacco products whilst ensuring a high level of public health.
- (4) The Protocol should be approved on behalf of the European Union.

⁵ Council Decision of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control (OJ L 312, 15.06.2004, p. 8).

⁶ Council Decision 2013/744/EU of 9 December 2013 on the signing, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control, as regards its provisions on obligations related to judicial cooperation in criminal matters, the definition of criminal offences, and police cooperation (OJ L 333, 12.12.2013, p. 73).

⁷ Council Decision 2013/745/EU of 9 December 2013 on the signing, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control, with the exception of its provisions on obligations related to judicial cooperation in criminal matters, the definition of criminal offences, and police cooperation (OJ L 333, 12.12.2013, p. 75).

- (5) Council Decision .../.../EU⁸ [*on the conclusion of Protocol... s regards the provisions which **fall** under Title V of Part III TFEU*] concerns the conclusion of the Protocol as regards the provisions of the Protocol which fall within the scope of Title V of Part III of the Treaty on the Functioning of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Protocol to Eliminate Illicit Trade in Tobacco Products to the WHO Framework Convention on Tobacco Control is hereby approved on behalf of the European Union.

The text of the Protocol is attached to this Decision.

Article 2

This Decision applies to the provisions of the Protocol which do not fall within the scope of Title V of Part III of the Treaty on the Functioning of the European Union.

Article 3

The President of the Council shall designate the person empowered to declare, on behalf of the Union, the formal confirmation of the Protocol provided for in Article 44(1) of the Protocol in order to express the consent of the European Union to be bound by the Protocol.

Article 4

This Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*

⁸ Council Decision .../.../EU on the conclusion, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control, as regards the provisions of the Protocol which fall under Title V of Part III of the Treaty on the Functioning of the European Union (OJ L ..., ..., p. ...).