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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the Union within the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards supplementing Annex I-A, and in the Association Committee in Trade configuration, on recalculating the schedule of export duty elimination set out in Annexes I-C and I-D to the Association Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in the Association Council in connection with the envisaged modification of Annex I-A and a decision of the Association Committee in Trade configuration on the recalculation of the schedule of export duty elimination set out in Annex I-C and Annex I-D to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the Agreement'). The proposal also introduces a corrective amendment to Annex I-C.

2. CONTEXT OF THE PROPOSAL

2.1. The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

The Agreement aims to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market. The agreement was signed on 21 March and 27 June 2014, and is provisionally applied in part. Title IV on Trade and Trade-Related Matters is provisionally applied since 1 January 2016.

2.2. The Association Council and the Association Committee in Trade configuration

2.2.1. The Association Council

The Association Council is a body established by the Agreement which meets at regular intervals at least once a year at ministerial level to hold political and policy dialogue. It supervises and monitors the application and implementation of this Agreement and periodically reviews the functioning of this Agreement in the light of its objectives. It consists of members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the Government of Ukraine, on the other. The Association Council has the power to take decisions within the scope of this Agreement, in the cases provided for therein. Such decisions shall be binding upon the Parties, which shall take appropriate measures, including if necessary action in specific bodies established under this Agreement, to implement the decisions taken. It shall adopt its decisions and recommendations by agreement between the Parties, following completion of the respective internal procedures.

2.2.2. The Association Committee in Trade configuration

The Association Committee in Trade configuration is a body established by the Article 465(4) of the Agreement, which, pursuant to Article 465(3) of the Agreement, has the power to adopt decisions in the cases provided for in the Agreement and in areas in which the Association Council has delegated powers to it. Those decisions shall be binding upon the Parties, which shall take appropriate measures to implement them.

As set out in Article 465(4) of the Agreement, the Association Committee shall meet in Trade configuration to address all trade and trade-related issues of Title IV of the Agreement. As specified in Article 1(4) of the Rules of Procedure of the Association Committee and of Sub-Committees ('the Rules of Procedure')¹, the Association Committee in Trade Configuration

¹ OJ L 157, 23.6.2015, p. 99

shall be composed of senior officials of the European Commission and of Ukraine who are responsible for trade and trade-related matters. A representative of the European Commission or of Ukraine who is responsible for trade and trade-related matters shall act as Chair of the Association Committee in Trade configuration. The meetings will also be attended by a representative of the European External Action Service.

Pursuant to Article 465(3) of the Agreement and Article 11(1) of the Rules of Procedure, the Association Committee in Trade Configuration shall adopt its decisions by mutual agreement between the Parties and on completion of the respective internal procedures. Each decision or recommendation shall be signed by the Chair of the Association Committee and authenticated by the Secretaries of the Association Committee.

2.3. The envisaged acts of the bodies

2.3.1. The envisaged act of the Association Council

The Association Council is to adopt a decision regarding the modification of Annex I-A.

2.3.2. The envisaged act of the Association Committee in Trade configuration

The Association Committee in Trade configuration is to adopt a decision on the recalculation of the schedule of export duty elimination set out in Annex I-C and Annex I-D to the Agreement. The proposal also introduces a corrective amendment to Annex I-C.

The addition of Appendix C to Annex I-A, while not implying any substantive change is nonetheless considered necessary to provide the maximum clarity as regards the implementation of the Agreement. The recalculation of export duties for Annexes I-C and I-D is mandated in the Agreement itself, and is instrumental to maintaining the relative preference (same proportion) compared to the WTO-bound export duty rates applicable during the period of export duties dismantlement.

The envisaged acts shall become binding upon the Parties to the Agreement in accordance with Article 465(3) of the Agreement, which provides: 'The Association Committee shall have the power to adopt decisions in the cases provided for in this Agreement and in areas in which the Association Council has delegated powers to it. These decisions shall be binding upon the Parties, which shall take appropriate measures to implement them. The Association Committee shall adopt its decisions by agreement between the Parties'.

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

The attached proposal for a Council decision establishes the Union position on a decision by the Association Council on the modification of Annex I-A and a decision of the Association Committee in Trade configuration on the recalculation of the schedule of export duty elimination set out in Annex I-C and Annex I-D to the Agreement . The proposal also introduces a corrective amendment to Annex I-C.

This proposal implements the Union's common commercial policy towards Ukraine, based on the provisions of the above-mentioned Association Agreement. One of the objectives of the Association Agreement is to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market.

This proposal is consistent and complements the other external policies of the Union, notably the European Neighbourhood Policy and the development cooperation policy in relation to Ukraine.

The Association Agreement between the Union and Ukraine is not subject to REFIT procedures; it does not imply any costs for the Union SMEs; and it does not raise any issues from the viewpoint of the digital environment.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

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 notion of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’.²

4.1.2. Application to the present case

Pursuant to Article 465(4) of the Agreement, the Association Committee shall meet in Trade configuration to address all trade and trade-related issues of Title IV of the Agreement.

Article 463(3) of the Agreement provides that the Association Council shall have the power to update or amend the Annexes to the Agreement. Pursuant to Article 465(2) of the Agreement, the Association Council may delegate to the Association Committee in Trade *configuration* any of its powers, including the power to take binding decisions. The Association Council delegated the power to update or amend certain trade-related Annexes to the Association Committee in Trade configuration by its Decision No 3/2014 of 15 December 2014.

The acts which the Association Committee in Trade configuration is called upon to adopt constitute acts having legal effects. The envisaged acts will be binding upon the Parties in accordance with Article 465(3) of the Agreement. The envisaged acts do not supplement or amend the institutional framework of the agreement. Accordingly, the Union positions are to be taken in the EU-Ukraine Association Committee in Trade configuration in application of Article 218(9) TFEU.

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

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

² Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

4.2.2. Application to the present case

The main objective and content of the envisaged acts is the modification of Annex I-A and the recalculation of the schedule of export duty elimination set out in Annex I-C and Annex I-D to the Agreement. Consequently, the main objective and content of the envisaged acts relate to the common commercial policy in accordance with Article 207.

The substantive legal basis of the proposed decision, therefore, is Article 207 TFEU.

The conclusion of the Agreement as mixed Agreement does not require the consent of all Parties because the updates of the aforementioned Annexes on tariff schedules fall within an area of exclusive competence of the Union pursuant to Article 3(1) and Article 207 TFEU.

4.3. Conclusion

The legal bases of the proposed Council decision are Article 207 in conjunction with Article 218(9) TFEU.

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on the position to be taken on behalf of the Union within the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards supplementing Annex I-A, and in the Association Committee in Trade configuration, on recalculating the schedule of export duty elimination set out in Annexes I-C and I-D to the Association Agreement

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 and Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Article 486(3) and (4) of the Association Agreement between the European Union and the European Atomic Energy Community, and their Member States of the one part, and Ukraine, of the other part, (the 'Agreement') provide for the provisional application of the Agreement in part, as specified by the Union.
- (2) Article 4 of Council Decision 2014/668/EU³ specifies the provisions of the Agreement to be applied provisionally, including those related to the elimination of customs duties and those related to Annexes I-A to I-D to the Agreement. The provisional application has been effective from 1 January 2016.
- (3) Having unilaterally anticipated the implementation of the Schedule of concessions set out in Annex I-A to the Agreement by means of the autonomous trade preferences provided for under Regulation (EU) No 374/2014 of the European Parliament and the Council⁴, the Union has already applied the specific modalities of implementation of the schedule ('staging categories') which were agreed by the Parties.
- (4) A clarification on the modalities of tariff dismantlement was adopted in the context of the amendment to the autonomous trade preferences⁵ with a view to specifying the reduction to be applied to the base rate of customs duties for each staging category referred to in Annex I of Regulation (EU) No 374/2014.

³ Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (OJ L 278, 20.9.2014, p. 1).

⁴ Regulation (EU) No 374/2014 of the European Parliament and of the Council of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine (OJ L 118, 22.4.2014, p. 1)

⁵ Regulation (EU) No 1150/2014 of the European Parliament and the Council of 29 October 2014 amending Regulation (EU) No 374/2014 on the reduction or elimination of customs duties on goods originating in Ukraine (OJ L 313, 31.10.2014, p. 1)

- (5) An equivalent clarification is required to ensure that the same modalities, reflecting the joint understanding reached by the Parties during negotiations, are clearly set out for the optimal implementation of the Schedule of concessions. Such modalities are to be applied by both parties to the Agreement,
- (6) Annex I-C to Chapter 1 of the Agreement, setting out the schedules of export duty elimination of Ukraine, provides that the recalculation of the table is needed in order to maintain the relative preference (same proportion) compared to the WTO-bound export duty rates applicable for each period in case the trade-related provisions of the Agreement enter into force after 15 May 2014.
- (7) Annex I-D to Chapter 1 of the Agreement, setting out safeguard measures in the form of a surcharge to be applied to the export duty for specific goods, also provides that the recalculation of the table is needed in order to maintain the relative preference (same proportion) compared to the WTO-bound export duty rates applicable for each period in case the trade-related provisions of the Agreement enter into force after 15 May 2014.
- (8) A technical amendment in Annex I-C is required to tariff code 1207 9997 00 to reflect the correct description as per United Commodities Classifier (UKTZED) of Ukraine.
- (9) By Decision No. 3/2014 of 15 December 2014 the EU-Ukraine Association Council empowered the Association Committee in Trade configuration to update or amend certain trade-related annexes, including Annexes I-C and I-D to the Agreement.
- (10) The position of the Union within the Association Council and within Association Committee in Trade configuration should therefore be based on the draft Decisions set out in the Annex,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union within the Association Council as regards supplementing Annex I-A to the Agreement and within the Association Committee in Trade configuration as regards supplementing Annexes I-C and I-D to the Agreement shall be based on the draft Decisions set out in the Annex.

Article 2

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

Article 3

After its adoption, the decisions of the Association Council and of Association Committee in Trade configuration shall be published in the *Official Journal of the European Union*.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President