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Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the Trade Committee established under the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, as regards the amendment of Annexes II and VIII to Protocol II of the Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the EPA Trade Committee established by the Interim Partnership Agreement between the European Union, of the one part, and the Pacific States, of the other part, as regard the amendment of Annex II (List of working or processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status) and Annex VIII (Overseas countries and territories) to Protocol II of the Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Interim Partnership Agreement between the European Union, on the one part, and the Pacific States, on the other part

On 30 July 2009, the EU signed the Interim Partnership Agreement¹, which establishes a framework for an Economic Partnership Agreement (hereinafter referred to as the 'EPA') between the European Union, of the one part, and the Pacific States, of the other part. Papua New Guinea, the Republic of the Fiji Islands and the Independent State of Samoa are provisionally applying the Agreement since 20 December 2009, 28 July 2014 and 31 December 2018, respectively.

The Economic Partnership Agreement aims to:

- (a) enable Pacific States to benefit from the improved market access offered by the EU;
- (b) promote sustainable development and the gradual integration of Pacific States into the world economy;
- (c) establish a free trade area between the Parties based on common interests, through the progressive liberalisation of trade in a manner compliant with applicable WTO rules and the principle of asymmetry, taking account of the specific needs and capacity constraints of the Pacific States, in terms of levels and timing for commitments;
- (d) set up the appropriate dispute settlement arrangements; and
- (e) set up the appropriate institutional arrangements.

2.2. The EPA Trade Committee

Article 68 of the EPA establishes a Trade Committee that is composed of representatives of the Parties (the EU and the Pacific States).

The Trade Committee shall establish its rules of procedure and be co-chaired by a representative of the EU Party and a representative from the Pacific States. The two co-chairs shall alternate in presiding the meetings. The person presiding a meeting is considered 'presiding co-chair' for the purposes of the Agreement until the moment in time when the next meeting commences and the role of a presiding co-chair is assumed by the other Party.

The Trade Committee shall deal with all matters necessary for the implementation of the Agreement. In the performance of its functions, the Trade Committee may:

¹ Council Decision of 13 July 2009 on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part (OJ L 272, 16.10.2009, p. 1).

- (a) set up and oversee any special committees or bodies necessary for the implementation of the Agreement;
- (b) meet at any time agreed by the Parties;
- (c) consider any issues under the Agreement and take appropriate action in the exercise of its functions; and
- (d) take decisions or make recommendations in cases provided for in the Agreement.

The Trade Committee will delegate specific implementing decision-making powers to the Special Committees as provided for in the relevant provisions of the Agreement, in particular the Special Committee on Customs Cooperation and Rules of Origin.

Article 78 (revision clause) of the Agreement provides that the Trade Committee may review this Agreement, its implementation, operation and performance where necessary and make appropriate recommendations to the Parties for its amendment.

2.3. The envisaged act of the EPA Trade Committee

Protocol II (Article 41 on the revision and application of rules of origin) provides that the Trade Committee may decide to amend the provisions of this Protocol.

During the sixth EPA Trade Committee meeting on 24 October 2018, representatives of the Commission and of the Pacific side reviewed the products mentioned in Annex II to Protocol II of the Agreement. The headings and descriptions of such products are based on the International Convention on the Harmonised Commodity Description and Coding System – (HS)2007 of the World Customs Organisation (WCO). However, the WCO has issued a new HS Nomenclature 2017, effective from 1 January 2017. The HS2017 version includes changes, covering agricultural / fisheries sectors; chemical sector; wood sector; textile sector, base metal sector; machinery sector; transport sector, etc. These products constitute the bulk of trade in goods between the EU and the Pacific States. The Committee therefore concluded that it is necessary to update Annex II to take account of the new HS2017. At the same time, the status quo on the rules of origin should be maintained because the changes made to the HS Nomenclature are not supposed to affect the rule of origin applicable to a given product.

Furthermore, the Committee reviewed the list of Overseas Countries and Territories (OCTs) of the EU in Annex VIII to Protocol II of the Agreement in order to align it with Annex II of the Treaty on the Functioning of the European Union (TFEU), taking into account the recent change of status of some territories. In particular, Saint Barthélemy (FR) and Bermuda (UK) became OCTs associated with the EU on 1 January 2012 and 1 January 2014 respectively, whereas Mayotte (FR) became an Outermost Region (OR) of the EU on 1 January 2014. Council Decision 2013/755/EU on the association of the OCTs with the EU, which applies to all the OCTs listed in Annex II to the TFEU entered into force on 1 January 2014. The Committee also concluded that Annex VIII to Protocol II should be amended in order to reflect the recent change of status of those territories.

Accordingly, on 24 July 2019, during its seventh meeting, the EPA Trade Committee is to adopt its decision (1) to amend Annex II to Protocol II of the Agreement in order to update the tariff classification and (2) to amend Annex VIII to Protocol II of the Agreement in order to update the list of OCTs ('the envisaged decision').

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

The proposed Council decision establishes the position to take on behalf of the Union concerning the adoption of the amendments to the Agreement, to update the products

headings and descriptions mentioned in Annex II to Protocol II of the Agreement in order to align them with the latest WCO HS Nomenclature 2017, as well as updating the list of OCTs of the EU in order to align it with the list in Annex II to the TFEU, thus fulfilling the EU's obligations under the provisions of the EPA.

Such position shall be based on the draft decision of the Trade Committee on the amendments to the Agreement attached to the draft Council Decision.

The subject matter of the envisaged decision concerns an area for which the Union has an exclusive external competence by virtue of Article 3(2) of the TFEU.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the 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 concept 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

The Trade Committee is a body set up by the EU-Pacific Economic Partnership Agreement.

The decision that the Trade Committee is called upon to adopt has legal effects. Once adopted the decision will be binding under international law in accordance with Article 68 of the Agreement and Article 41 of Protocol II thereof.

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) of the TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) of the TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. 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) of the TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

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

² Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207(4) first sub-paragraph, in conjunction with Article 218(9) of the TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Trade Committee will amend the Economic Partnership Agreement, 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 (TFEU), and in particular Article 207(3) and the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 30 July 2009, the Union (the European Community at the time) signed the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part³, which establishes a framework for an Economic Partnership Agreement (“the Agreement”). The Agreement has been provisionally applied by Papua New Guinea, the Republic of the Fiji Islands and the Independent State of Samoa since 20 December 2009, 28 July 2014 and 31 December 2018, respectively.
- (2) Annex II to Protocol II of the Agreement is based on the 2007 version of the Harmonised System (HS) Nomenclature annexed to the International Convention on the Harmonised Commodity Description and Coding System of the World Customs Organisation. Since 1 January 2007 a number of changes have been introduced in the HS Nomenclature. It is necessary to take account of these changes and align Annex II with the 2017 version of the HS. At the same time the status quo with regard to the rules of origin should be pursued because changes made to the HS Nomenclature are not supposed to affect the rule of origin applicable to a given product.
- (3) Annex VIII to Protocol II of the Agreement lists the Overseas Countries and Territories (OCTs) of the Union. Following the change of status of Bermuda⁴, Mayotte⁵ and Saint-Barthélemy⁶, and the entry into force of Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union⁷ the list of OCTs needs to be put in line with Annex II of the TFEU to take into account these recent changes.

³ OJ L 272, 16.10.2009, p. 1.

⁴ Annex II to the TFUE (OJ C326, 26.10.2012, p. 336).

⁵ Council Decision 2012/419/EU of 11 July 2012 amending the status of Mayotte with regard to the European Union (OJ L 204, 31.7.2012, p. 131).

⁶ European Council Decision 2010/718/EU of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy (OJ L 325, 9.12.2010, p. 4.).

⁷ European Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union (‘Overseas Association Decision’) (OJ L 344, 19.12.2013, p. 1).

- (4) Pursuant to Article 41 (on the revision and application of rules of origin) of Protocol II, the Trade Committee may decide to amend the provisions of this Protocol.
- (5) The next (seventh) meeting of the EPA Trade Committee is to be held on 24 July 2019, where the Committee will be able, pursuant to Article 41 of Protocol II of the Agreement, to decide on the amendments of Annexes II and VIII to Protocol II of the Agreement in order to align them with the 2017 version of the WCO HS Nomenclature and the list of OCTs in Annex II of the TFEU, respectively.
- (6) The European Union should determine the position to be taken as regards such amendments,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union in the EPA Trade Committee at its next meeting as regards the amendments to the Agreement to update Annexes II and VIII to Protocol II of the Agreement to align them with the WCO HS2017 Nomenclature and the list of OCTs in Annex II of the TFEU, respectively shall be based on the Annex.

Article 2

After its adoption, the Decision of the Trade Committee shall be published in the *Official Journal of the European Union*.

Article 3

This Decision is addressed to the European Commission.

Done at Brussels,

*For the Council
The President*