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Proposal for a

## **COUNCIL DECISION**

**establishing the position to be adopted on behalf of the Union in the Association Committee set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, concerning the exchange of information with Morocco for the purpose of evaluating the impact of the agreement in the form of an Exchange of Letters on the amendment of the Euro-Mediterranean Agreement**

## **EXPLANATORY MEMORANDUM**

### **1. SUBJECT MATTER OF THE PROPOSAL**

This proposal concerns the decision establishing the position to be adopted on behalf of the Union in the Association Committee set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part<sup>1</sup>, with regard to the envisaged adoption of a decision concerning the exchange of information with Morocco for the purpose of evaluating the impact of the agreement in the form of an Exchange of Letters of 25 October 2018 on the amendment of the Euro-Mediterranean Agreement<sup>2</sup>

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1. The EU-Morocco Association Agreement**

The Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part ('the Association Agreement'), created a free-trade area between the European Union and Morocco based on reciprocal tariff liberalisation of trade in industry, agriculture and fishery products. It establishes a free-trade area guaranteeing Morocco very extensive preferential access to the EU market. The Association Agreement entered into force on 1 March 2000.

By Decision (EU) 2019/217 of 28 January 2019<sup>3</sup>, the Council approved the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, with a view to extending the tariff preferences laid down in the Association Agreement to products originating in Western Sahara.

#### **2.2. The EU-Morocco Association Committee**

Set up by the Association Agreement, the EU-Morocco Association Committee is responsible for the implementation of the Agreement. It also has the power to take decisions for the management of the Association Agreement. The Association Committee adopts its decisions by agreement between the parties. In the period between meetings, it may adopt decisions by written procedure if both parties so agree.

#### **2.3. The envisaged act of the EU-Morocco Association Committee**

The EU-Morocco Association Committee has to adopt a decision on the arrangements for evaluating the impact of the agreement approved by the Council on 28 January 2019, particularly on sustainable development and with regard to the advantages for the people concerned and the exploitation of the natural resources of Western Sahara ('the envisaged act'). It must be adopted at the latest two months after the entry into force of this agreement.

The envisaged act is aimed at laying down arrangements for the exchange of information between the parties for the purpose of evaluating the impact of the extension of the tariff preferences provided for in the Association Agreement to products from Western Sahara.

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<sup>1</sup> OJ L 70, 18.3.2000, p. 2.

<sup>2</sup> OJ L 34, 6.2.2019, p. 4.

<sup>3</sup> OJ L 34, 6.2.2019, p. 1.

The envisaged act will become binding on the parties in accordance with the second paragraph of Article 83 of the Association Agreement, which provides as follows: ‘It shall draw up its decisions by agreement between the Parties. These decisions shall be binding on the Parties, which shall take the measures necessary to implement the decisions taken.’

### **3. POSITION TO BE TAKEN ON THE UNION'S BEHALF**

From the entry into force of the Association Agreement, the trade preferences set out in the Association Agreement were applied *de facto* to products originating in Western Sahara, a non-self-governing territory. In its judgment of 21 December 2016 in Case C-104/16 P<sup>4</sup>, the Court of Justice of the European Union ruled that the Association Agreement between the Union and Morocco did not apply to Western Sahara.

The practice of applying the trade preferences set out in the Association Agreement and its protocols on a *de facto* basis to products originating in Western Sahara could not, therefore, continue. The bilateral agreements between the European Union and Morocco can, however, be extended to cover products from Western Sahara under certain conditions, provided that the appropriate legal basis exists.

On 29 May 2017 the Council authorised the Commission to open negotiations with a view to providing a legal basis to grant preferences to products originating in Western Sahara, and adopted negotiating guidelines. Two rounds of talks were held in 2017. The lead negotiators initialled the draft agreement on 31 January 2018. On 25 October 2018 the agreement was signed by the Parties. On 28 January 2019 the Council, with the consent of the European Parliament, adopted a decision on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, thereby providing a legal basis for granting products from Western Sahara the same tariff preferences as products from Morocco.

The amendment to the relevant Protocols to the Association Agreement also allows EU tariff preferences to be granted on the basis of an evaluation of the advantages for local populations and respect for human rights.

As requested by the Council in the negotiating directives adopted on 29 May 2017, the Commission evaluated the possible impact of the agreement on sustainable development, particularly with regard to the advantages for the people concerned and the exploitation of the natural resources of Western Sahara (‘the territories concerned’). This evaluation focuses on trade flows originating in Western Sahara, more specifically fishery products, agricultural products and phosphates. It is based on an evaluation of data available for the past as well as on forecasts. This evaluation revealed that granting the tariff preferences set out in the EU-Morocco Association Agreement has had a positive impact on the people concerned and that this impact is likely to continue and even be enhanced in the future. The evaluation of the impact figures in the report of 11 June 2018<sup>5</sup> by the Commission and the European External

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<sup>4</sup> Judgment of the Court of Justice of 21 December 2016, *Council of the European Union v Polisario Front*, C-104/16 P, ECLI:EU:C:2016:973.

<sup>5</sup> Commission staff working document (SWD (2018) 346 final) accompanying the proposal for a Council decision on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their

Action Service (EEAS) on the benefits for the people of Western Sahara and the public consultation on extending tariff preferences to products from Western Sahara.

In order to monitor the effects of the agreement on the people concerned and the exploitation of the natural resources of the territories in question, the agreement specifically provides for a suitable framework and procedure to allow the parties to evaluate its consequences during implementation, via regular exchanges of information. The European Union and Morocco agreed to exchange information at least once a year by means of the Association Committee set up under the EU-Morocco Association Agreement. The purpose of this proposal is precisely to lay down the specific arrangements for the evaluation exercise provided for in the agreement with a view to their adoption by the Association Committee.

The purpose of the exchange of information tallies with that of the report of the Commission and the EEAS referred to above.

As regards the impact on the territory's economy, the information available to date primarily concern agriculture and fishing, but the preferences concern all products; the data to be exchanged could therefore evolve according to developments in Western Sahara. The exchange does not exclusively concern economic aspects ('benefits' in the narrow meaning of the word) but is intended to allow a broader evaluation covering such aspects as sustainable development and the impact on the exploitation of natural resources.

In addition to the exchange of information provided for in the agreement, Morocco has agreed to set up a mechanism for collecting statistics on exports to the EU of products originating in Western Sahara, which will be made available on a monthly basis to the Commission and the Member States' customs administrations.

Lastly, the use of the phrase 'have agreed to exchange' in the agreement of 25 October 2018 underlines the fact that the exchange is not unilateral. Morocco could therefore ask the European Union for information on production and trade in specific product categories of interest to Morocco, on the basis of the information systems that already exist.

This proposal complies with current trade policy. It is also in line with the overall aims of the European Neighbourhood Policy and with the Union's overall policy on Morocco, which seeks to strengthen a special partnership with the country without prejudicing the outcome of the procedure implemented by the UN in relation to Western Sahara.

## **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 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 covers instruments that do

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Member States, of the one part, and the Kingdom of Morocco, of the other part, (COM (2018) 481 final).

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’<sup>6</sup>.

#### *4.1.2. Application to the present case*

The EU-Morocco Association Committee was set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

The act which the Association Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 83 of the Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Accordingly, the procedural legal basis of the proposed decision is Article 218(9) TFEU.

### **4.2. Substantive legal basis**

#### *4.2.1. Principles*

The substantive legal basis of a decision under Article 218(9) TFEU depends primarily on the objective and content of the act envisaged in respect of which a position is taken on behalf of the Union. If the act envisaged 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.

#### *4.2.2. Application to the present case*

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

Therefore the substantive legal basis of the proposed decision is Article 207(3) and (4), first subparagraph, TFEU.

### **4.3. Conclusion**

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

## **5. PUBLICATION OF THE ENVISAGED ACT**

Given that the act of the Association Committee will add to the Association Committee’s rules of procedure, it should be published in the Official Journal of the European Union once it has been adopted.

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<sup>6</sup> Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(3) and (4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part ('the Association Agreement'), was concluded on behalf of the European Union by Council and Commission Decision 2000/204/EC, ECSC<sup>7</sup> of 24 January 2000 and entered into force on 1 March 2000.
- (2) By Decision (EU) 2019/217 of 28 January 2019, the Council approved the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Association Agreement ('amendment of Protocols 1 and 4')<sup>8</sup> with a view to extending the tariff preferences laid down in the Association Agreement to products originating in Western Sahara.
- (3) In accordance with Article 81 of the Association Agreement, an Association Committee was set up to manage the Agreement. Pursuant to Article 83 of the Agreement, the Association Committee has the power to take decisions for the management of the Agreement as well as in areas where the Association Council has delegated its powers to it.
- (4) Within two months of the entry into force of the amendment to Protocols 1 and 4, the Association Committee has to adopt a decision on the arrangements for evaluating the impact of the agreement, particularly on sustainable development and with regard to the advantages for the people concerned and the exploitation of the natural resources of Western Sahara ('the territories concerned').
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the Committee, as the envisaged decision will be binding on the Union.

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<sup>7</sup> OJ L 70, 18.3.2000, p. 1.

<sup>8</sup> OJ L 34, 6.2.2019, p. 4.

- (6) In order to monitor the effects of the agreement on the people concerned and the exploitation of the natural resources of the territories in question, the Agreement specifically provides for a suitable framework and procedure to allow the parties to evaluate its consequences during implementation, via regular exchanges of information. The European Union and Morocco have agreed to exchange information at least once a year by means of the Association Committee set up under the EU-Morocco Association Agreement. The specific arrangements for the evaluation exercise should therefore be laid down with a view to their adoption by the Association Committee.
- (7) The purpose of the exchange of information tallies with that of the joint report of 11 June 2018 by the Commission and the European External Action Service on the benefits for the people of Western Sahara and the public consultation on extending tariff preferences to products from Western Sahara<sup>9</sup>.
- (8) As regards the impact on the territory's economy, the information available to date primarily concern agriculture and fishing, but the preferences concern all products; the data to be exchanged could therefore evolve according to developments in Western Sahara. The exchange does not exclusively concern economic aspects ('benefits' in the narrow meaning of the word) but is intended to allow a broader evaluation covering such aspects as sustainable development and the impact on the exploitation of natural resources.
- (9) Morocco has agreed to set up separately a mechanism for collecting statistics on exports to the EU of products originating in Western Sahara, which will be made available on a monthly basis to the Commission and the Member States' customs administrations.
- (10) Morocco will be able to ask the European Union for information on production and trade in specific product categories of interest to Morocco, on the basis of information systems that already exist,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The position to be adopted on behalf of the Union in the Association Committee set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, is based on the draft decision of the Association Committee annexed to this Decision.

#### *Article 2*

This Decision is addressed to the Member States and the Commission.

Done at Brussels,

*For the Council*  
*The President*

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<sup>9</sup> SWD (2018) 346 final.