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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 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 2013.² 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).

¹ OJ L 312, 15.6.2004, p. 8.

² The signature was authorized by the Council Decisions 2013/744/EU and 2013/745/EU published in OJ L 333, 12.12.2013, p. 73 and p. 75.

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 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 as summarised under section 1. The main obligations which would have to be applied or implemented in 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 in Articles 6, 7, 8, 9, 11, 12, 13, 14, 15, 18 and 27 of the Protocol. Of these provisions Articles 7, 14 and 27 of the Protocol partly or fully fall within the areas of judicial cooperation in criminal matters, the definition of criminal offences and police cooperation, which are covered by Articles 83 and 87 TFEU

The Protocol contains provisions on the definition of unlawful conduct that may be established by the Parties as a non-criminal or a criminal offence, including establishing the liability of both natural and legal persons. As regards criminal offences, the EU has competence in this area on the basis of Article 83 of the TFEU. The list of unlawful conducts also includes the laundering of proceeds of the unlawful conduct established as a criminal offence. Under Council Framework Decision 2001/500/JHA³ of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Member States shall ensure that certain money laundering offences are sanctioned by criminal penalties.

The Protocol contains measures concerning judicial cooperation in criminal matters (mutual legal assistance and extradition). The EU has competence in this area based on Article 82 (1) of the TFEU, and a number of EU measures already exist in this area, which will facilitate the implementation of the relevant provisions of the Protocol.

The Protocol provides for measures on police and customs cooperation in criminal matters that fall under EU competence based on Article 87 (2) of the TFEU, and a number of EU measures already exist in this area, which will facilitate the implementation of the relevant provisions of the Protocol.

Article 82 (1), Article 83 and Article 87 (2) therefore constitute the legal basis under Title V of Part III of the TFEU for the EU to sign the Protocol.

³ OJ L172, 5.7.2001, p.1.

Proposal for a

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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 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 Article 82(1), Article 83 and Article 87(2), in conjunction with Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) The conclusion of the 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 Control⁴.
- (2) In accordance with Council Decisions 2013/744/EU⁵ and 2013/745/EU⁶, 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) In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the Treaty on European Union and to the Treaty on the Functioning of the

⁴ 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).

⁵ 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).

⁶ 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).

European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Decision and are not bound by it or subject to its application.

- (6) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (7) Council Decision .../.../EU⁷ [*on the conclusion of Protocol... s regards the provisions which do not fall under Title V of Part III TFEU*] concerns the conclusion of the Protocol as regards 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,

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 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(s) empowered to declare, on behalf of the European 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*

⁷ 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 don not fall under Title V of Part III of the Treaty on the Functioning of the European Union (OJ L ..., ..., p. ...).