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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 28 October 2010

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**UD 291
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NOTE

from: General Secretariat
to: Working Party on Customs Union (Customs Legislation and Policy)
on: 4 November 2010

Subject: 4th session of the Conference of the Parties to the WHO Framework
Convention on Tobacco Control, Punta Del Este (Uruguay),
15 - 20 November 2010

Delegations will find attached a note by the Presidency on the above subject.

On 21 October, the Working Party was debriefed by the Commission services on the outcome of the EURO/AFRO/AMRO informal Framework Convention on Tobacco Control ("FCTC") Protocol consultations held in Cape Town on 4 - 6 October 2010.

In the light of the explanations provided by the Commission services at this occasion, and of the meeting report as set out in doc. 15112/10, delegations expressed some concerns related to the preparation of the Fourth Session of the Conference of the Parties to be held in Punta Del Este, Uruguay, on 15 - 20 November 2010 ("COP 4"), where the Protocol to eliminate illicit trade in tobacco products ("the Protocol") will be examined under Item 5.1 of the provisional agenda.

In particular, delegations

- * sought clarification as to how this item would be tackled at COP 4;
- * considered that, in any event, it was indispensable to establish a coordinated position in view of COP 4;
- * stressed that the views of the Working Party should be properly represented at COP 4.

Building on these comments, the Presidency considers that:

- * combating the illicit trade in tobacco products remains a strategic objective for the EU;
- * important progress has been achieved in negotiating the Protocol, as reflected in the Report of the Chairperson of the Intergovernmental Negotiating Body ("INB")¹;
- * these negotiations should be finalised as soon as possible, preferably in the framework of a last and decisive INB to be held in 2011;
- * COP 4 will be instrumental in providing guidance to the Parties as to how to bring the negotiations to a successful conclusion.

¹ Doc. FCTC/COP/4/4 of 14 May 2010.

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The Presidency further considers that the EU should play a pro-active role at COP 4 and suggests the following approach:

- * the text of Part III of the Protocol¹ as supported by the EU should be circulated to Parties via the FCTC Secretariat;
- * at the adoption of the COP 4 agenda, the EU could express the wish that an inter-regional Working Group be created in the margin of the plenary session to continue negotiations. The objective of these negotiations would be to provide information to the COP which the COP could take into account to provide guidance to the Parties on the future handling of the Protocol;
- * such negotiations should focus on two elements:
 - which parts of the Protocol could be left out;
 - Part III of the Protocol².
- * concerning the first element, the EU should support the deletion of Parts IV-V;
- * with regard to Part III of the Protocol, the negotiation should, if at all possible, be based on the text as tabled by the EU, with the understanding that any attempt to introduce new concepts or to reintroduce elements already examined and rejected, such as key inputs, intermingling, non-cash payments, etc., could be fatal to the negotiation process;
- * the outcome of these negotiations should be communicated to the COP to assist Parties in deciding how to pursue the final negotiations on the Protocol.

The text of Part III of the protocol to be circulated to Parties is laid down in the Annex.

¹ The "Red Lines", as laid down in docs. 7150/2/10 REV 2 + COR 1, 13639/1/10 REV 1 and 14136/1/10 REV 1 remain valid. They should not be circulated to Parties.

² Other than Article 7 on which consensus was reached at INB4.

Article 5

Licence or equivalent approval system

1. In light of the public health objectives of the WHO Framework Convention on Tobacco Control and with a view to eliminating illicit trade in tobacco products and manufacturing equipment, each Party shall prohibit the commercial conduct of any of the following activities by any legal or natural person except pursuant to a licence or equivalent approval system (hereafter “licence”) granted by a competent authority:

- (a) manufacturing tobacco products;
- (b) transporting commercial quantities of tobacco products;
- (c) import or export or wholesaling, brokering, warehousing or distribution of tobacco products or manufacturing equipment;
- (d) manufacture of manufacturing equipment unless it is subject to a control and verification system.

Each Party may decide that the obligations in this paragraph do not apply to:

- tobacco products on which all taxes have been discharged; or
- legal and natural persons that are already subjected to an equivalent approval system for tax or customs purposes.

2. Each Party shall endeavour to license, to the extent considered appropriate, any legal or natural person engaged in:

- (a) retailing of tobacco and tobacco products;
- (b) commercial growing of tobacco, except for traditional small scale growers, farmers and producers.

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3. With a view to ensuring an effective licensing system, each Party shall:
- (a) establish or designate a competent authority or authorities to issue, renew, suspend, revoke and/or cancel licences, subject to the provisions of this Protocol, and in accordance with its national legislation to conduct the activities specified in paragraph 1 of this Article;
 - (b) require that each application for a licence contains all the necessary information about the applicant, which should include:
 - (i) where the applicant is a natural person, information regarding his or her identity, including full name, trade name, business registration number (if any), applicable tax registration numbers and proof of his or her official identification;
 - (ii) when the applicant is a legal person, information regarding its identity, including full legal name, trade name, business registration number, date and place of incorporation, location of corporate headquarters, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, complete names of its directors and the names of any designated representatives, including the representatives' complete names and proof of their official identification;
 - (iii) precise business location of the manufacturing unit(s) and production capacity of the business run by the applicant;
 - (iv) details of tobacco products and manufacturing equipment covered by the application, such as product description, name, registered trade mark if any, design, brand, model or make;
 - (v) description of where manufacturing equipment will be installed and used;
 - (vi) documentation regarding any unlawful conduct, including criminal offences committed, which is directly related to tobacco transactions and which has been the subject of a final judicial sanction;

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- (vii) identification of the bank accounts intended to be used in the relevant transactions and
 - (viii) a description of the intended use and intended market of sale of the tobacco products, with particular attention to ensuring that tobacco product production or supply is commensurate with reasonably anticipated legitimate demand.
- (c) monitor and collect any licence fees that may be levied and consider using them in effective administration and enforcement of the licensing system or for public health or any other related activity in accordance with national laws;
 - (d) take appropriate measures to prevent, detect and investigate any irregular or fraudulent practices in the operation of the licensing system;
 - (e) undertake measures such as periodic review, renewal, inspection or audit of licenses, in particular with regard to any unlawful conduct, including criminal offences committed, which is directly related to tobacco transactions and which has been the subject of a final judicial sanction;
 - (f) oblige licensed or equivalently approved manufacturers of tobacco products and manufacturing equipment to inform the competent authority in advance of any change of location of their business.
4. Each Party shall ensure that no licence shall be assigned and/or transferred without prior approval from the designated or established competent authority.
5. Each Party shall endeavour to adopt and apply control and verification measures to the international transit, within its territory of tobacco, tobacco products and manufacturing equipment in conformity with the provisions of this Protocol in order to prevent illicit cross-border trade in such products.

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Article 6

Due Diligence

1. Each Party shall require, subject to its national laws or legally binding and enforceable agreements, that all natural and legal persons engaged in the supply chain of tobacco, tobacco products and manufacturing equipment used in the manufacture of tobacco products:
 - (a) conduct due diligence before the commencement of, or during the course of, a business relationship for the purpose of ascertaining whether a customer or prospective customer is complying with or can be expected to comply with the provisions of this Protocol;
 - (b) monitor the sales to their customers to ensure that the quantities are commensurate with the demand for such products within the intended market of sale or use; and
 - (c) report to the designated competent national authorities any evidence that the customer is engaged in activities in contravention of this Protocol or is otherwise not compliant with its provisions.
2. Due diligence pursuant to paragraph 1 of this Article may include requirements for customer identification, such as obtaining and updating information relating to the following:
 - (a) establishing that the legal or natural person holds a licence in accordance with Article 5;
 - (b) when the customer is a natural person, information regarding his or her identity, including full name, business registration number (if any), applicable tax registration numbers and verification of his or her official identification;
 - (c) when the customer is a legal person, information regarding its identity, including full name, business registration number, date and place of incorporation, corporate headquarters, applicable tax registration numbers, copies of articles of incorporation or equivalent documents, its corporate affiliates, complete names of its directors and any designated legal representatives, including the representatives' complete names and verification of their official identification;

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- (d) documentation or a declaration regarding any criminal records;
 - (e) identification of the bank accounts intended to be used in transactions;
 - (f) a description of the intended use and intended market of sale of tobacco, tobacco products or manufacturing equipment used in the manufacture of tobacco products; and
 - (g) a description of the location where manufacturing equipment for use in the manufacture of tobacco products will be installed and used.
3. Each Party shall, on the basis of the information reported in paragraph 1(c), take all the necessary measures to ensure compliance with this Protocol.

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Article 7

Tracking and tracing

1. For the purposes of further securing the supply chain and to assist in the investigation of illicit trade in tobacco products, the Parties to this Protocol agree to establish within five years of entry into force of this Protocol a global tracking and tracing regime, comprising national and/or regional tracking and tracing systems and a global information sharing focal point located at the Convention Secretariat of the WHO Framework Convention on Tobacco Control and accessible to all Parties, enabling Parties to make enquiries and receive relevant information.
2. Each Party shall establish, in accordance with this Article, a tracking and tracing system, controlled by the Party for all tobacco products that are manufactured in or imported onto its territory taking into account their own national or regional specific needs and available best practice.
3. With a view to enabling effective tracking and tracing, each Party shall require that unique, secure and non-removable identification markings (hereafter called unique identification markings), such as codes or stamps, are affixed to or form part of all unit packets, packages and any outside packaging of cigarettes within a period of five years and other tobacco products within a period of ten years of entry into force of this Protocol for that Party.
- 4.1 Each Party shall, for purposes of paragraph 3, as part of the global tracking and tracing regime, require that the following information be available, either directly or accessible by means of a link, to assist Parties in determining the origin of tobacco products, the point of diversion where applicable, and to monitor and control the movement of tobacco products and their legal status:
 - (a) date and location of manufacture;
 - (b) manufacturing facility;
 - (c) machine used to manufacture tobacco products;

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- (d) production shift or time of manufacture
- (e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer;
- (f) the intended market of retail sale;
- (g) product description;
- (h) any warehousing and shipping;
- (i) the identity of any known subsequent purchaser; and
- (j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee.

4.2 The information in subparagraphs (a), (b), (g) and where available (f), shall form part of the unique identification markings.

4.3 Where the information in subparagraph (f) is not available at the time of marking, the Parties shall require the inclusion of such information in accordance with the provisions of Article 15.2(a) of the WHO Framework Convention on Tobacco Control.

5. Each Party shall require, within the time limits specified in this Article, that the information set out in paragraph 4 of this Article is recorded, at the time of production, or at the time of first shipment by any manufacturer or at the time of import onto its territory.

6. Each Party shall ensure that the information recorded under paragraph 5 of this Article is accessible by that Party by means of a link with the unique identification markings required under paragraphs 3 and 4 of this Article.

7. Each Party shall ensure that the information recorded in accordance with paragraph 5 of this Article, as well as the unique identification markings rendering such information accessible in accordance with paragraph 6 of this Article shall be included in a format established or authorized by the Party and its competent national authorities.

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8. Each Party shall ensure that the information recorded under paragraph 5 of this Article is accessible to the global information sharing focal point on request, subject to the provisions of paragraph 9, through a standard electronic secure interface with its national and/or regional central point. The global information sharing focal point shall compile a list of the designated competent national authorities of the Parties and make the list available to all Parties.
9. Each Party or the designated national competent authority shall:
 - (a) have access to the information outlined in paragraph 4 in a timely manner by making a query to the global information sharing focal point;
 - (b) request such information only where it is necessary for the purpose of detection or investigation of illicit trade in tobacco products;
 - (c) not unreasonably withhold information;
 - (d) answer the information requests in relation to paragraph 4, in accordance with its national laws; and
 - (e) protect and treat as confidential, as mutually agreed, any information that is exchanged.
10. Each Party shall require the further development and expansion of the scope of the applicable tracking and tracing system up to the point that all duties, relevant taxes, and where appropriate, other obligations have been discharged at the point of manufacture, import or release from customs or excise control.
11. Parties shall cooperate with each other and with competent international organizations, as mutually agreed, in sharing and developing best practices for tracking and tracing systems including:
 - (a) facilitation of the development, transfer and acquisition of improved tracking and tracing technology, including knowledge, skills, capacity and expertise;
 - (b) support for training and capacity-building programmes for Parties that express such a need; and

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- (c) further development of the technology to mark and scan unit packs and packets of tobacco products to make accessible the information listed in paragraph 4 of this Article.
12. Obligations assigned to a Party shall not be performed by or delegated to the tobacco industry.
13. Each Party shall ensure that its designated competent national authorities, in participating in the tracking and tracing regime, interact with the tobacco industry and those representing the interests of the tobacco industry only to the extent strictly necessary in the implementation of the provisions of this Article.
14. Each Party may require the tobacco industry to bear any costs associated with that Party's obligations under this Article.

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Article 8

Record-keeping

1. Each Party shall, as appropriate, require that all natural and legal persons engaged in the commercial sale of tobacco or in the manufacture, sale, distribution, storage, shipment, import or export of tobacco products or manufacturing equipment maintain complete and accurate records of all transactions relevant to the objectives and purposes of this Protocol.
2. Each Party shall require persons licensed in accordance with Article 5 to provide the following information to the designated competent national authorities, on request:
 - (a) general information on market volumes, trends, forecasts and other relevant information; and
 - (b) the quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in stock in tax and customs warehouses under the regime of transit or duty suspension as of the date of the request.
3. With respect to tobacco products and manufacturing equipment sold or manufactured on the territory of the Party for export -or subject to duty-suspended movement in transit on the territory of the Party, each Party shall, as appropriate, require that persons licensed in accordance with Article 5, provide to the designated competent national authorities in the country of departure (electronically where the infrastructure exists) at the time of departure from their control with the following information, on request:
 - (a) date of shipment from the last point of physical control of the products ;
 - (b) details concerning the products shipped (including brand, amount, warehouse);
 - (c) intended shipping routes and destination;
 - (d) identity of the natural or legal person(s) to whom the products are being shipped;
 - (e) mode of transportation, including the identity of the transporter;
 - (f) expected date of arrival of the shipment at the intended shipping destination; and
 - (g) intended market of retail sale or use.

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4. Each Party may require that tobacco growers, except for traditional growers working on a non-commercial basis and retailers, maintain complete and accurate records of all relevant transactions in which they engage in accordance with its national laws and regulations.
5. For the purposes of implementing paragraph 1 of this Article, each Party shall require that all records are:
 - (a) maintained for a period of five years;
 - (b) made available to the designated competent national authorities; and
 - (c) maintained in a format as required by the designated competent national authorities.
6. Each Party shall, as appropriate and subject to national laws, establish a system for sharing details contained in all records kept in accordance with this Article with other Parties.
7. Parties shall endeavour to cooperate, with each other and with competent international organizations, in progressively sharing and developing improved systems for record-keeping.

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Article 9

Security and preventive measures

1. Each Party shall, in accordance with its national laws, require that all natural and legal persons subject to Article 5, take necessary measures to prevent the diversion of tobacco products into illicit trade channels, including, amongst others:
 - (a) Reporting to the designated competent national authorities the cross-border transfer¹ of cash in amounts stipulated in national laws or regulations;
 - (b) Supplying tobacco products or manufacturing equipment only in amounts commensurate with the demand for such products within the intended market of retail sale or use; and
 - (c) Reporting to the designated competent national authorities all suspicious transactions.
2. Each Party shall require, in accordance with its national laws, that payments for transactions relating to the manufacture, sale, distribution, storage, shipment, import or export of tobacco products and manufacturing equipment be allowed only in the currency and in the same amount as the invoice for those products, and only by wire or cheque from financial institutions located on the territory of the intended market of retail sale of the tobacco products and shall not be operated through any other alternative remittance system.
3. Each Party shall ensure that any contravention of the requirements of this Article is subject to appropriate criminal, civil or administrative procedures and effective, proportionate and dissuasive sanctions including, as appropriate, suspension or cancellation of a license and prohibition of the licensee from re-applying for a license during a stipulated period.

¹ In the context of this provision, the EU interprets "cross-border transfer" to mean "transfer made between EU Member States and third countries".

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Article 10

Sale by Internet, telecommunication or any other evolving technology

Each party may, in accordance with the fundamental principles of its legal system and in accordance with national law, ban the retail sales of tobacco products by any manner of distance sales, including internet, telecommunication or other evolving technology based modes of sale.

In any event, all distance sales of tobacco products shall be subject to the provisions of this Protocol.

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Article 11

Duty free sales and free zones

1. Each party may, in accordance with national law, implement effective measures to ban duty free sales of tobacco and tobacco products.

In any event, all duty free trade in tobacco and tobacco products shall be subject to the provisions of this Protocol.

2. Free Zones shall be subject to all provisions of this Protocol such as licensing/equivalent approval system, tracking and tracing, customer identification, and anti-money laundering provisions. In addition, the intermingling of tobacco products with non-tobacco products on import to and export from Free Zones shall be prohibited.

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