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Subject: 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, with the exception of its provisions falling within the scope of Title V of Part Three of the Treaty on the Functioning of the European Union

COUNCIL DECISION (EU) 2016/...

of ...

**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,
with the exception of its provisions falling within the scope of Title V of Part Three
of the Treaty on the Functioning of the European Union**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 33, 113, 114 and 207, in conjunction with Article 218(6)(a) and the second subparagraph of Article 218(8) 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 World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC) was approved on behalf of the Community by Council Decision 2004/513/EC¹.
- (2) In accordance with Council Decisions 2013/744/EU² and 2013/745/EU³, the Protocol to Eliminate Illicit Trade in Tobacco Products to the WHO FCTC ("the Protocol") was signed on 20 December 2013, subject to its conclusion at a later date.

¹ Council Decision 2004/513/EC of 2 June 2004 concerning the conclusion of the WHO Framework Convention on Tobacco Control (OJ L 213, 15.6.2004, p. 8).

² 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).

³ 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).

- (3) The Protocol represents a significant contribution to the international efforts to eliminate all forms of illicit trade in tobacco products, and thereby fight the circumvention of tax and customs duties obligations and 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 Union has exclusive competence for a number of provisions of the Protocol which fall within the scope of the Union's common commercial policy or in areas where the Union has established common rules¹. The Protocol may affect such common rules or alter their scope. Therefore, the Protocol should be approved on behalf of the Union as regards matters falling within Union's competence only insofar as the Protocol may affect these common rules or alter their scope.

¹ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1);
Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15);
Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1);
Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12);
Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176, 5.7.2011, p. 24).

- (5) By concluding the Protocol, the Union will not be exercising shared competence, therefore Member States retain their competence in the areas covered by the Protocol which do not affect common rules or alter the scope of such common rules.
- (6) Articles 14, 16, 26, 29 and 30 of the Protocol concern judicial cooperation in criminal matters and the definition of criminal offences, and therefore fall within the scope of Title V of Part Three of the Treaty on the Functioning of the European Union. Council Decision (EU) .../...^{1*}, adopted in parallel to this Decision, concerns those provisions.
- (7) The Protocol should be approved as regards matters that fall within the Union's competence,

HAS ADOPTED THIS DECISION:

¹ Council Decision (EU) .../... of ... 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 its provisions on obligations related to judicial cooperation in criminal matters and the definition of criminal offences (OJ L ..., ..., p. ...).

* OJ: please insert the number of the Decision contained in document st 14387/15, and insert the number, date and OJ reference of that Decision in the preceding footnote.

Article 1

The Protocol to Eliminate Illicit Trade in Tobacco Products to the WHO Framework Convention on Tobacco Control, with the exception of its provisions falling within the scope of Title V of Part Three of the Treaty on the Functioning of the European Union, in particular Articles 14, 16, 26, 29 and 30, is hereby approved on behalf of the Union.

The text of the Protocol is attached to this Decision*.

Article 2

The President of the Council shall designate the person(s) empowered to deposit, on behalf of the Union:

- (a) the instrument provided for in Article 44(1) of the Protocol;
- (b) the declaration of competences set out in the Annex to this Decision, in accordance with Article 44(3) of the Protocol.

* Note to OJ: see document ST 15044/13.

Article 3

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

ANNEX

DECLARATION OF COMPETENCES BY THE EUROPEAN UNION IN RESPECT OF MATTERS COVERED BY THE PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS

(PURSUANT TO ARTICLE 44 OF THE PROTOCOL)

The European Union (EU) submits, in accordance with Article 44 of the Protocol to Eliminate Illicit Trade in Tobacco Products to the World Health Organisation's Framework Convention on Tobacco Control ("FCTC Protocol"), the following Declaration of Competences specifying the categories and policy areas in respect of which the Member States of the EU have conferred competences upon the EU in the areas covered by the FCTC Protocol.

1. General Principles

The categories and areas of Union competence are set out in Articles 2 to 6 TFEU. When the Treaties confer on the EU exclusive competence in a specific area, only the EU may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the EU or for the implementation of EU acts. When the Treaties confer on the EU a competence shared with the Member States in a specific area, the EU and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the EU has not exercised its competence. The Member States shall again exercise their competence to the extent that the EU has decided to cease exercising its competence.

As regards the conclusion of international agreements, for the policy areas listed in Article 3(1) TFEU, only the EU has the competence to act. For the policy areas listed in Article 4(2) TFEU the EU and its Member States share competence, but only the EU has the competence to act when the envisaged action is necessary to enable the Union to exercise its internal competence, or insofar as the provisions in the agreement may affect common rules or alter their scope within the meaning of Article 3(2) TFEU; insofar as this is not the case (i.e. the conditions of Article 3(2) TFEU are not met), Member States may exercise their competence to act in these policy areas.

Competences not attributed to the EU by the Treaties fall within the competences of the Member States of the EU.

The EU will duly notify any substantial modification of the extent of its competences, in accordance with Article 44 of the Protocol, without this constituting a prerequisite for the exercise of its competence in matters covered by the FCTC Protocol.

2. Exclusive competence of the EU

2.1. The EU has exclusive competence to act with respect to the matters covered by the FCTC Protocol that fall under the scope of the common commercial policy of the EU (Article 207 TFEU).

2.2. In addition, the EU has exclusive competence to act with regard to matters covered by the FCTC protocol that fall under the scope of customs cooperation (Article 33 TFEU), approximation of laws in the internal market (Articles 113 and 114 TFEU), judicial cooperation in criminal matters (Article 82 TFEU) and definition of criminal offences (Article 83 TFEU), only insofar as the provisions of a Union act establish common rules that may be affected or altered in scope by provisions of the FCTC protocol.

The list of Union acts below illustrates the extent to which the Union has exercised its internal competence in these fields in accordance with the Treaty on the Functioning of the European Union. The extent of Union exclusive competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular the extent to which these provisions establish common rules that risk to be affected or altered in scope by the provisions of the FCTC Protocol or an act adopted in implementation thereof.

- Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ L 127, 29.4.2014, p. 1);

- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ L 309, 25.11.2005, p. 15);
- Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1);
- Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ L 9, 14.1.2009, p. 12);
- Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176, 5.7.2011, p. 24);
- Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182, 5.7.2001, p. 1);
- Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 48).

3. Competence of the Member States

For other matters covered by the FCTC Protocol not mentioned in sections 2.1 and 2.2, for which the EU has not exclusive competence to act, the Member States remain competent to act.