EUROPEAN
COMMISSION

Brussels, 22.11.2023
COM(2023) 722 final

2023/0408 (NLE)

Proposal for a

COUNCIL DECISION

on the positions to be taken on behalf of the European Union at the third session of the Meeting of the Parties to the Protocol to Eliminate Illicit Trade in Tobacco Products

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the positions to be taken on the Union's behalf at the third session of the Meeting of the Parties to the Protocol to Eliminate Illicit Trade in Tobacco Products, which takes place in Panama City from 27 November to 30 November 2023.

2. CONTEXT OF THE PROPOSAL

2.1. Protocol to Eliminate Illicit Trade in Tobacco Products

The Protocol to Eliminate Illicit Trade in Tobacco Products ('the Protocol') is a Protocol to the World Health Organization Framework Convention on Tobacco Control ('the Convention'). The Protocol aims to eliminating all forms of illicit trade in tobacco products through a package of measures to be taken by countries acting in cooperation with each other: it is a global solution to a global problem. The Protocol was developed in response to the growing illicit trade in tobacco products, often across borders, which causes substantial losses in government revenues, and at the same time contributes to the funding of international criminal activities. It entered into force on 25 September 2018.

The Union as well as 18 Member States are Parties to the Convention.[1]

2.2. Meeting of the Parties

The Meeting of the Parties ('MOP') is a body established by the Protocol whose task is to keep the implementation of the Protocol under regular review and take the decisions necessary to promote its effective implementation. The MOP may adopt amendments to the Protocol. To this end, the MOP, among others, promotes the exchange of information and assistance to enhance international cooperation to tackle illicit trade in tobacco products. The MOP also adopts regular reports on the implementation of the Protocol.

The regular sessions of the MOP are held every 2 years. According to the Rules of Procedure of the MOP, the Convention Secretariat (also the 'Secretariat') supports the work of both the Convention and the Protocol. It should submit to the Parties the provisional agenda together with other supporting documents (often containing draft decisions) for each agenda item at least 60 days before the start of the MOP.[2] At the MOP, decisions on budgetary and financial matters are taken by consensus. For all other decisions every effort should be made to reach agreement by consensus. As a last resort, decisions on substantive matters are taken by a three fourths majority vote of the Parties present and voting, and decisions on procedural matters should be taken by a majority vote of the Parties present and voting.[3]

2.3. Envisaged acts at the third session of the Meeting of the Parties

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1 Council Decision (EU) 2016/1749 of 17 June 2016 on the conclusion, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products of 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, OJ L 268, 1.10.2016, p. 1.

2 Rule 8 of the Rules of Procedure of the Meeting of the Parties (Protocol).

3 Rule 50 of the Rules of Procedure of the Meeting of the Parties (Protocol).

In November 2023, at its third session ('MOP3'), the MOP is expected to discuss and adopt decisions with regard to the possible amendments to the Rules of Procedures of the MOP and to the process for appointing the Head of the Secretariat.

3. POSITIONS TO BE TAKEN ON THE UNION'S BEHALF

The MOP is expected to take certain decisions that qualify as "decisions having legal effects" within the meaning of Article 218(9) of the Treaty on the Functioning of the European Union (TFEU).

With regard to the expected discussion on possible amendments of the Rules of Procedure of the MOP, the Union should support amendments to simplify the work at the MOP, to arrange for virtual sessions of the MOP, and to define more clearly the participation of the Bureau of the MOP in the appointment of the Head of the Convention Secretariat, as well as the amendment providing for the possibility of designating an acting Head of the Secretariat, when required. In addition, the Union should propose to increase the time period for the Secretariat to distribute the official conference documents up to 120 days, or at least 90 days for critical documents, before the start of the MOP, instead of the present 60 days. This will support the proper preparation of the Union positions in the future.

Regarding the appointment of the Head of the Secretariat, the Union should support the improvement of the process for the selection and appointment of the Head of the Secretariat,[4] notably to simplify the process for a single renewal of the term, while respecting the objective performance criteria. In this context, the Union should also support the improvement of the criteria for the selection of the candidates for the position of Head of the Secretariat, which should also include the aspects related to the Protocol.

These positions may need to be further adjusted during the on-the–spot coordination at the third session of the MOP in the light of the positions of the other Parties and related developments at that MOP, as well as decisions taken by the Conference of Parties ('COP') to the Convention which are held from 20 to 25 November 2023.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) TFEU provides for the adoption of 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*'[5].

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4 Procedure has been established by decisions FCTC/COP8(8) and FCTC/MOP1(12).

5 Judgment of 7 October 2014 in case C-399/12, *Germany* v *Council*, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.1.2. Application to the present case

The MOP is a body set up by an agreement, namely the Protocol to Eliminate Illicit Trade in Tobacco Products.

Certain acts that the third session of MOP is expected to adopt constitute acts having legal effects since they are binding or capable of decisively influencing the content of Union legislation.

The envisaged decision related to possible amendments to the Rules of Procedure of the MOP constitutes an act with legal effect due to the binding nature of the Rules of Procedure and to the fact that the MOP is a body with decision-making powers under the Protocol[6]. Modifications of the Rules of Procedure of the MOP would bind the Protocol Parties (and therefore also the Union) in a way equivalent to the main Agreement.

The envisaged decision related to the amendment of the procedure for the appointment of the Head of the Secretariat also constitutes a decision having legal effects. First, the Head of the Secretariat's functions go beyond merely administrative functions and include influence on the policy and substantive work of the Protocol. As a result, the appointment of the Head of Secretariat would constitute a decision having legal effects within the meaning of Article 218(9) TFEU. This conclusion then also extends to MOP decisions amending the appointment procedure for the Head of Secretariat, which constitute decisions of an organisational nature impacting the decision-making process of decisions having legal effects (i.e. relating to the appointment of the Head of Secretariat).

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

As these two decisions expected to be adopted at the third session of the MOP are considered to have legal effects, the appropriate procedural legal basis for the proposed Council decision establishing Union positions at the third session of MOP for these two agenda items is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in terms of which the position is to be 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) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component. If the envisaged act is of an organisational nature, the substantive legal basis of the decision establishing the Union position should in principle be the same as the legal basis of the Council decision concluding the agreement by which the body was set up.

4.2.2. Application to the present case

The main objectives and content of the Protocol to Eliminate Illicit Trade in Tobacco Products relate to various complementary areas, namely the internal market, in particular the free movement of excise goods, external trade and common

[6] See section 2.2. above.

commercial policy, as well as customs cooperation. Given that the envisaged act is of an organisational nature, the substantive legal bases of the proposed decision are Articles 33, 113, 114 and 207 TFEU, which are the same substantive legal bases of Council Decision (EU) 2016/1749 of 17 June 2016 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.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 33, 113, 114 and 207 TFEU, in conjunction with Article 218(9) TFEU.

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on the positions to be taken on behalf of the European Union at the third session of the Meeting of the Parties to the Protocol to Eliminate Illicit Trade in Tobacco Products

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(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Protocol to Eliminate Illicit Trade in Tobacco Products ('Protocol') was concluded by the Union pursuant to Council Decision 2016/1749[1] and entered into force on 25 September 2018.

(2) Pursuant to Article 33(5) of the Protocol, the Meeting of the Parties ('MOP') may take the decisions necessary to promote the effective implementation of the Protocol.

(3) At its third session from 27 to 30 November 2023, the MOP is expected to adopt certain acts having legal effects. Therefore, it is appropriate to establish the positions to be taken on the Union's behalf at the third session of the MOP pursuant to Article 218(9) TFEU.

(4) In order to enable appropriate preparation and representation of the Union positions, the Union should propose an amendment to the Rules of Procedure of the MOP to require the Secretariat to distribute the official meeting documents up to 120 days before each MOP.

(5) For the purpose of simplifying the work at a MOP and to arrange for virtual sessions of the MOP, as well as to provide for the possibility of designating an acting Head of the Secretariat, the Union should also support the amendments to the Rules of Procedure of the MOP proposed with these aims.

(6) The Union should support the improvement of the process for the selection and appointment of the Head of the Convention Secretariat, notably to simplify a single renewal of the term of office, while respecting the objective performance criteria,

[1] Council Decision (EU) 2016/1749 of 17 June 2016 on the conclusion, on behalf of the European Union, of the Protocol to Eliminate Illicit Trade in Tobacco Products of 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, OJ L268, 1.10.2016, p. 1.

HAS ADOPTED THIS DECISION:

Article 1

The positions to be taken on the Union's behalf at the third session of the Meeting of the Parties to the Protocol to Eliminate Illicit Trade in Tobacco Products shall be in accordance with the Annex to this Decision.

Article 2

Refinement of the positions referred to in Article 1 may be agreed to, in the light of developments at the third session of the Meeting of the Parties to the Protocol to Eliminate Illicit Trade in Tobacco Products and at the tenth session of the Conference of Parties to the World Health Organisation's Framework Convention for Tobacco Control, by the representatives of the Union, in consultation with Member States during on-the-spot coordination meetings, without a further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President