EUROPEAN
COMMISSION

Brussels, 12.1.2021
COM(2021) 11 final

2021/0005 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EU-Switzerland Joint Committee established by the Agreement of 25 June 2009 between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures as regards the amendment of Chapter III and Annexes I and II of the Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Joint Committee in connection with the envisaged adoption of the amendments of Chapter III and Annexes I and II of the Agreement of 25 June 2009 between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures ('the Agreement').

2. CONTEXT OF THE PROPOSAL

2.1. The amendment of the Agreement on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures

The Agreement entered into force on 1 July 2009 and has ensured both smooth trade flows between Switzerland and the EU and a high level of security in the supply chain. The Agreement is based on the principle that the EU and Switzerland set up and apply to the carriage of goods to and from third countries the same security measures thus ensuring an equivalent level of security at their external borders. The Agreement waives the obligation of traders to provide customs with an entry summary declaration prior to the import and export in bilateral trade between the EU and Switzerland. Meanwhile, in trade with third countries, Switzerland implements customs security measures equivalent to those in the EU.

Currently, each Party has its own system for managing the entry summary declarations (in the EU, this is the Import Control system (ICS)) but there is no bridge between both systems.

Since 2016, the Commission has conducted preliminary discussions in view of updating the legislation of the Agreement and integrating Switzerland's future participation in the EU's new customs pre-arrival security and safety programme, Import Control System 2 (ICS2), which is a centralised system.

Furthermore, the Union Customs Code (UCC) has provided for measures included in the new ICS2 project that will substantially change the advance cargo customs operations for goods entering the EU and overall common risk management framework. The new programme will remodel the existing process in terms of IT, legal, customs risk management/controls and from trade operational perspectives. It will collect data about all goods entering the EU prior to their arrival. Economic Operators (EOs) will have to declare safety and security data to ICS2, through the Entry Summary Declaration (ENS). The obligation to start filing such declarations will not be the same for all EOs. It will depend on the type of services that they provide in the international movement of goods and is linked to the three release dates of ICS2 (15 March 2021, 1 March 2023, and 1 March 2024). Advance cargo information and risk analysis will enable early identification of threats and help customs authorities to intervene at the most appropriate point in the supply chain.

ICS2, therefore, represents an essential EU customs instrument for improving the management of security and safety border controls at entry, supporting the EU's customs pre-arrival security and safety programme. In order to maintain the same level of security at the external borders, Switzerland has agreed to join the ICS2 project and be operational by the starting of the first release of ICS on 15 March 2021. These provisions will also apply in an equivalent manner with the similar amendments to the customs security agreement between EU and EEA, which is applicable to Norway only.

The proposed amendments to the Agreement are the result of negotiations that started in November 2019 and ended in October 2020 between the EU and Switzerland and Norway. The amendments to Chapter III of the Agreement are destined to take into account also the development of the relevant EU legislation in the area of Authorised Economic Operators (AEO) and the risk management and risk analysis framework. This will ensure an equivalent level of security at the external borders and will improve the security and safety of the common security area.

The Agreement will also include a financing arrangement (Annex I, Title III), which covers the costs of the development and operational use of ICS2 by Switzerland and the functional details of ICS2, which are exposed in the technical arrangements (Annex I, Title II).

Finally, on data protection the data protection and data transfers have to comply with the laws of the transferring Contracting Party, i.e. in the case of transfers from the EU, the General Data Protection Regulation (GDPR).

2.2. The EU-Switzerland Joint Committee

The EU-Switzerland Joint Committee is established by Article 19 of the Agreement. The Joint Committee acts by mutual agreement, representing each Contracting Party.

The Joint Committee meets at least once per year and it is the responsibility of the Joint Committee to administer the Agreement and ensure its proper implementation. For that purpose, it can also make recommendations and take decisions such as a Decision to amend Chapter III and the annexes, which are then implemented by the Contracting Parties in accordance with their own rules.

2.3. The envisaged act of the Joint Committee

On its next meeting or by exchange of letters, the Joint Committee is to adopt a decision regarding the amendment of the Agreement ('the envisaged act').

The purpose of the envisaged act is to ensure the highest standard of security and control for goods crossing the borders and entering the customs territories of the EU and Switzerland.

The envisaged act will become binding on the parties in accordance with Article 21 of the Agreement, which provides that: "*1. It shall be the responsibility of the Joint Committee to administer this Agreement and ensure its proper implementation. For that purpose, it shall make recommendations and take decisions. 2. By its decisions the Joint Committee may amend Chapter III and the Annexes.*"

Pursuant to Article 22.4 of the Agreement, if the decision cannot be adopted for such simultaneous implementation, the amendments provided for in the draft decision submitted for the Contracting Parties' approval shall be implemented provisionally.

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

3.1. General overview of the current Agreement

The 2009 Agreement underlines the special bilateral trade relations between the EU and Switzerland and the strong mutual interest that exists in implementing equivalent customs security measures. This agreement on customs security measures amounts to full mutual recognition between the EU and Switzerland of customs security controls and thereby to an effective extension of the EU customs security area.

The Agreement is based on Regulation (EU) No 952/2013 of the European Council and the Council of 9 October 2013 laying done the Union Customs Code and the following Implementing and Delegating Acts:

- Commission Implementing Regulation (EU) 2015/2447, including the relevant column in Annex B;
- Commission Implementing Regulation (EU) 2017/2089, which includes the responsibilities of the parties with regards to data protection and controllership;
- Commission Implementing Decision on the Work Programme;
- Commission Delegating Regulation (EU) 2015/2446, including the relevant columns of Annex B.

In order to increase security in the international trade of goods, the EU introduced new measures in 2006 designed to ensure higher standards in customs controls (IP/06/1821). These include rules and time limits for traders on the submission of information on goods before they are imported to or exported from the EU (electronic entry and exit declarations); an EU system of risk analysis and management; and a system to facilitate EU Authorised Economic Operators (AEOs).

The UE and Switzerland also agreed to work towards a common framework for risk management, including the exchange of risk-related information as appropriate.

It is in the context of the development of such a common framework for improved customs controls and following the modernisation of the Customs Union and its legislation that the Agreement has been amended. This should ensure the highest standard of security and control for goods crossing the borders and entering the customs territories of the EU and Switzerland.

3.2. Proposed amendments to the Agreement in the context of Swiss participation in ICS2

ICS2 is the first line of defence in terms of protecting the internal market and EU citizens. Through improved data-driven customs security processes it supports effective risk-based customs controls whilst facilitating free flow of legitimate trade across the EU external borders.

The programme will help establish an integrated EU approach to reinforce customs risk management framework. This is a core delivery of the Union Customs Code and customs risk management strategy, in line with the action plan adopted by the Council in 2014 and the objectives of the Von der Leyen Commission for taking the Customs Union to the next level.

As an advance cargo information system, ICS2 will collect data about all goods entering the EU prior to their arrival. Economic Operators will have to declare safety and security data to ICS2, through a so-called Entry Summary Declaration. The obligation to start filing such declarations will not be the same for all Economic Operators. It will depend on the type of services that they provide in the international movement of goods and is linked to the three release dates of ICS2 (15 March 2021, 1 March 2023, and 1 March 2024).

On 10 September 2019, Switzerland confirmed to participate in the Import Control System 2 (ICS2). This confirmation acted as the trigger for formal discussions to commence between the UE and Switzerland, allowing for the participation of the partner country in the common framework of ICS2, which will be launched on 15 March 2021.

As such, the adhesion to the ICS2 programme entails technical and financial adaptations in relation to the Agreement, and most particularly amendments that reflect the modernisation of the Customs Union and its legislation.

3.3. Proposed legal amendments to the Agreement in the context of the modernisation of the UCC

The main changes introduced in the draft amended Agreement are based on the Union Customs Code Regulation (EU) No 952/2013 and its Implementing Acts Reg.(EU)2015/2447 and Delegating Acts Reg.(EU) 2015/2446. These changes align the amended Agreement with the most recent EU legislation relevant to customs security measures, to entry and exit summary declarations (ENS and EXS), to the development and deployment of the relevant electronic systems, to authorised economic operators (AEO), to common risk analysis process and risk management framework in line with the most recent legislation related to the protection of personal data.

The following legal texts have been used as the basis for the major amendments to the Agreement:

- Regulation (EU) No 952/2013 of the European Council and the Council of 9 October 2013 laying done the Union Customs Code:
  - Article 46 regarding risk management and customs controls;
  - Article 127 regarding the relevant provisions for lodging of an entry summary declaration: form and content, use of electronic systems, lodging and waivers, time limits, registration, persons lodging, security and safety related risk analysis, multiple filing;
  - Article 128 regarding risk analysis;
  - Article 6(1), Articles 12, 16, 46, 47, and Articles 127 to 133 establish the legal basis for the development and deployment of ICS2;
- **Commission Implementing Regulation (EU) 2019/2151 of 13 December 2019** establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code;
- **Commission Delegating Regulation (EU) 2015/2446** (as applicable on 16 July 2020):
  - Articles 104, 106, 112, 113, 113a regarding the entry summary declaration;
  - Annex B on data requirements;
- **Commission Implementing Regulation (EU) 2015/2447** (as applicable on 20 July 2020):
  - Article 24 regarding compliance for authorised economic operators replacing the existing article 2 Annex II of the Agreement;
  - Articles 182, 183, 184, 185, 186, 188, 189 regarding the entry summary declaration;
  - Annex B on data structure and format;

The latest amendments to Annex B of Commission Delegated Regulation (EU) 2015/2446 and Annex B of Commission Implementing Regulation (EU) 2015/2447 have yet to be formally adopted. As such, a placeholder has been left within the proposed amendment to this Agreement to update the footnotes once the amendments have been published (see Annex I, Article 2 of the amended Agreement).

The amendment of Article 24 of Commission Implementing Regulation (EU) 2015/2447 was adopted by the European Commission Customs Code Committee on 28 September 2020. The date of publication of the amendment has not yet been determined.

Pursuant to Joint Committee Decision 1/2014[1] and to the Air Transport Agreement of 21 June 1999[2] which governs aviation safety and security in particular between the European Community and the Swiss Confederation, an exception for air transport has been proposed in the body of the amended Agreement (Annex I, article 20) regarding the lodging of exit summary declarations.

3.4. Proposed structural amendments to the Agreement

In term of the structure of the Agreement, there has been a need to split into two different Titles the sections covering the Entry (Title I) and Exit (Title IV) of goods within Annex I on Entry and Exit Summary Declarations, mainly due to the more detailed provisions concerning Entry Summary Declarations (ENS) and ICS2.

In line with the reasoning behind this structural revision of Annex I, two new Titles have been created to cover:

- Title II: the Technical Arrangements for the Import Control System 2;
- Title III: the Financial Arrangements for the Import Control System 2.

3.5. Position to be taken by the Union

The Joint Committee established by the Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part, should adopt a Decision agreeing to the amendment of Chapter III and Annexes to the Agreement. This is done by a Joint Committee Decisison during a meeting of the Joint Committee in which the EU is a represented party or by exchange of letters.

The position to be taken by the EU within the Joint Committee should be established by Council decision on the basis of the proposal of the Commission. By mutual agreement, the amended Agreement shall then be implemented by the Contracting Parties.

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*.'

4.1.2. Application to the present case

The EU-Switzerland Joint Committee is a body set up by an agreement, namely the Agreement on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures.

[1] Decision No 1/2014 of the EU-Switzerland Joint Committee of 10 October 2014 determining the cases of exemption from transmitting the data referred to in the first subparagraph of Article 3(3) of Annex I to the Agreement of 25 June 2009 between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures (OJ L 331, 18.11.2014, p. 38–39)

[2] OJ L 114, 30/04/2002, pp. 73 - 90

The act which the Joint Committee is called upon to adopt constitutes an act having legal effects.

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

Therefore, the procedural legal basis for the proposed decision 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 respect of which a position is 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.

4.2.2. Application to the present case

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

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

4.3. Conclusion

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

5. BUDGETARY IMPLICATIONS

The proposed amendments relating to the amendment of the Agreement on customs security measures is based on the principle that Switzerland will join the ICS2 programme as of its first release on 15 March 2021. Further releases will take place in 2023 and 2024.

This incurs budgetary implications for Switzerland. The breakdown of costs are laid out in article 17 of Annex I and have been further communicated to Switzerland via a non-paper.

Switzerland will contribute to each release of ICS2, hence paying a flat fee for the development costs incurred by the European Commission. For Release 1, these costs amount to EUR 520,000, for Release 2 EUR 550,000 and for Release 3 EUR 550,000, and are based on an allocation formula of 4%.

Switzerland will also contribute to the operational costs incurred by the European Commission to cover the yearly costs for the conformance testing, the maintenance of the infrastructure (hardware, software, hosting, licenses, etc.), of the ICS2 central components and of the related applications and services required for their operation and interconnection (quality assurance, helpdesk and IT Service Management). These operational costs are based on the 4% allocation formula but are not a fixed yearly rate. As such, the maximal operational costs are capped at EUR 450,000 per year.

6. PUBLICATION OF THE ENVISAGED ACT

As the act of the EU-Switzerland Joint Committee will amend the Agreement between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

2021/0005 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EU-Switzerland Joint Committee established by the Agreement of 25 June 2009 between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures as regards the amendment of Chapter III and Annexes I and II of the Agreement

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

(1) the Agreement of 25 June 2009 between the European Community and the Swiss Confederation on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures ('the Agreement') entered into force on 1 July 2009[3];

(2) Pursuant to Article 21.2 of the Agreement, the EU-Switzerland Joint Committee may adopt by its decision the amendment of Chapter III and the Annexes to the Agreement during its next session or by exchange of letters;

(3) In application of Article 22.4 of the Agreement, if the decision cannot be adopted for such simultaneous implementation, the amendments provided for in the draft decision submitted for the Contracting Parties' approval shall be implemented provisionally where possible from 15 March 2020 in compliance with the internal procedures of the Contracting Parties. This choice of date coincides with the first Release of the Import Control System 2, in which Switzerland has agreed to participate.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the amendment will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Joint Committee shall be based on the draft act of the Joint Committee attached to this Decision.

[3] OJ L 199 of 31/07/2009 p.24

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President