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2019/0200 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Committee on Rules of Origin set up by the Agreement on Rules of Origin (WTO-GATT 1994), annexed to the final act signed in Marrakech on 15 April 1994

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 Committee on Rules of Origin set up by the Agreement on Rules of Origin (WTO-GATT 1994) annexed to the final act signed in Marrakech on 15 April 1994, in connection with the envisaged adoption of a communication on enhancing transparency in non-preferential rules of origin.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on Rules of Origin

The Agreement on Rules of Origin (WTO-GATT 1994) annexed to the final act signed in Marrakech on 15 April 1994 ('the Agreement') aims to ensure that non-preferential rules of origin do not themselves create unnecessary obstacles to trade and aims to harmonise at international level rules of origin, other than rules of origin relating to the granting of tariff preferences. Until the completion of the harmonisation programme, contracting parties are to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner, and that they are based on a positive standard. The Agreement entered into force on 1 January 1995.

The European Union is a party to the Agreement[1]. All Member States are also parties to the Agreement.

2.2. The Committee on Rules of Origin

The Committee on Rules of Origin was established within the framework of the World Trade Organisation (WTO) and is open to WTO members. It is to meet at least once a year and is to review the implementation and operation of the Agreement on Rules of Origin. The work of the Committee focused primarily on the harmonisation of non-preferential rules of origin. The negotiations have not concluded and WTO members currently apply national rules of origin for non-preferential purposes. More recently, some work on preferential rules of origin have been initiated, in particular on those used under trade preferences for least-developed countries. Decisions in the Committee are normally taken by consensus.

2.3. The envisaged act of the Committee on Rules of Origin

On [date], during its annual meeting, the Committee on Rules of Origin is to adopt a Communication[2] regarding "Enhancing transparency in non-preferential rules of origin" ('the envisaged act').

The purpose of the envisaged act is to enhance transparency of laws, regulations and practices regarding non-preferential rules of origin and to complement the notification obligations of Article 5 of the Agreement on Rules of Origin.

Neither the Agreement establishing the World Trade Organisation nor the Agreement on Rules of Origin address the legal status of acts adopted by the WTO committees. The binding

[1] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ L 336, 23.12.1994, p.1).

[2] Communication from Australia; Brazil; Canada; Hong Kong; Japan; Republic of Korea; New Zealand; Norway; Philippines; Russian Federation; Singapore; Switzerland; the separate customs territory of Taiwan, Penghu, Kinmen and Matsu; and the United States.

nature of the envisaged act is to be determined in the light of the text used in the said act. Taking into consideration the wording of the communication on enhancing transparency in non-preferential rules of origin, the envisaged act will become binding on the parties.

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

Non-preferential rules of origin are those rules, which apply in the absence of any trade preference, i.e. when trade is performed on a most-favoured nation basis. In addition, some trade policy measures such as quotas, anti-dumping or origin marking may require a determination of origin based on the application of non-preferential rules of origin.

In accordance with Article 5 of the Agreement on Rules of origin, each WTO member had to notify to the WTO secretariat within a given deadline from the entry into force of the WTO agreement for it, its rules of origin, judicial decisions and administrative rulings of general application relating to non-preferential rules of origin in effect on that date. The European Union notified the required information to the WTO secretariat.

In the Agreement on Rules of Origin, WTO members agreed to negotiate harmonised non-preferential rules of origin. However, these negotiations have not concluded and WTO members currently apply national rules of origin for non-preferential purposes. As a result, different non-preferential rules of origin apply at import and/or export, depending on the WTO members concerned. In addition, not all WTO members apply specific legislation related to non-preferential rules of origin. In the Union, these rules are provided for by Articles 59 to 61 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code[3].

In order to avoid unnecessary obstacles to trade being created due to the variety and the multitude of non-preferential rules of origin to be applied, a small working group selected from the Committee of Rules of Origin delegates was set up in order to explore the ways to improve transparency as regards non-preferential rules of origin. The European Union participated in this small working group and contributed in a constructive manner to the envisaged act. Discussions continued in meetings of the Committee on rules of origin in March and May 2019. Coordination with the Member States was ensured through Member States' delegations in the WTO and through the Origin Section of the Customs Expert Group.

Considering that clear and predictable rules of origin facilitate the flow of international trade, the envisaged act aims at enhancing transparency of laws, regulations and practices regarding non-preferential rules of origin and at complementing the notification obligations of Article 5 of the Agreement on Rules of Origin.

The envisaged act provides for a mandatory notification of each WTO member's non-preferential rules of origin used for the purposes of the application of the most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994. It also provides for a voluntary notification of non-preferential rules of origin used for all other purposes covered by Article 1.2 of the Agreement on Rules of Origin (anti-dumping and countervailing duties under Article VI of GATT 1994, safeguard measures under Article XIX of GATT 1994, origin marking requirements under Article IX of GATT 1994, quantitative restrictions or tariff quotas, rules of origin used for government procurement and trade statistics). In addition, the envisaged act contains a notification obligation by WTO members of possible certificates of non-preferential origin, which are mandatory when performing import or export transactions. Notifications are to be carried out using templates annexed to the envisaged act.

[3] OJ L 269, 10.10.2013, p.1.

The envisaged act creates notification obligations in addition to those mentioned in Article 5 of the Agreement on Rules of Origin.

As a result, a position to be taken on the Union's behalf in the Committee on Rules of Origin is needed.

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*.'

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*'[4].

4.1.2. Application to the present case

The Committee on Rules of Origin is a body set up by an agreement, namely the Agreement on Rules of Origin (WTO-GATT 1994).

The act which the Committee on Rules of Origin is called upon to adopt constitutes an act having legal effects. Neither the Agreement establishing the World Trade Organisation nor the Agreement on Rules of Origin address the legal status of acts adopted by the Committee on Rules of Origin. The binding nature of the envisaged act is therefore to be determined in the light of the text used in the said act. Taking into consideration the wording of the communication on enhancing transparency in non-preferential rules of origin, the envisaged act is to be considered as 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 the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 TFUE.

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[4] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

Not applicable.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(3) and the first paragraph of Article 207(4) in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement on Rules of origin (WTO-GATT 1994) annexed to the final act signed in Marrakech on 15 April 1994 ('the Agreement') was concluded by the Union by Council Decision 94/800/EC[5] and entered into force on 1 January 1995.

(2) Article 4 of the Agreement establishes the Committee on Rules of Origin.

(3) The Committee on Rules of Origin, during its session/meeting on [date], is to adopt a communication entitled "enhancing transparency in non-preferential rules of origin".

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Committee on Rules of Origin, as the communication will be binding on the Union.

(5) The proposed position to be taken on the Union's behalf aims at enhancing transparency of laws, regulations and practices regarding non-preferential rules of origin, by means of rules on mandatory or voluntary notification by WTO members of their non-preferential rules of origin, using standardised templates. This will result in clearer and more predictable rules of origin and will facilitate the flow of international trade,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the session/meeting of the Committee on Rules of Origin shall be based on the draft act of the Committee on Rules of Origin attached to this Decision.

The representatives of the Union may agree to minor editorial changes to the draft act in the light of developments at the upcoming meetings of the Committee on Rules of Origin, in consultation with Member States, or during on-the-spot coordination meetings, without a further decision of the Council.

[5] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p. 1).

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President