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Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the Trade Committee established under the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, as regards a recommendation for certain amendments to be made to the Agreement to take account of the accession of Samoa and of future accessions of other Pacific Islands

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 Trade Committee established under the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, as regards the recommendation of the Trade Committee to the Parties concerning the amendments to the Agreement to take account of the accessions of new Pacific States to the Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Interim Partnership Agreement between the European Community, on the one part, and the Pacific States, on the other part

On 30 July 2009, the EU signed the Interim Partnership Agreement¹, which establishes a framework for an Economic Partnership Agreement (hereinafter referred to as the 'EPA') between the European Community, of the one part, and the Pacific States, of the other part. Papua New Guinea, the Republic of the Fiji Islands and the Independent State of Samoa are provisionally applying the Agreement since 20 December 2009, 28 July 2014 and 31 December 2018, respectively.

The Economic Partnership Agreement aims to:

- (a) enable Pacific States to benefit from the improved market access offered by the EC;
- (b) promote sustainable development and the gradual integration of Pacific States into the world economy;
- (c) establish a free trade area between the Parties based on the common interest, through the progressive liberalisation of trade in a manner compliant with applicable WTO rules and the principle of asymmetry, taking account of the specific needs and capacity constraints of the Pacific States, in terms of levels and timing for commitments;
- (d) set up the appropriate dispute settlement arrangements; and
- (e) set up the appropriate institutional arrangements.

2.2. The EPA Trade Committee

Article 68 of the EPA establishes a Trade Committee that is composed of representatives of the Parties (the EU and the Pacific States).

The Trade Committee shall establish its rules of procedure and be co-chaired by a representative of the EC Party and a representative from the Pacific States. The two co-chairs shall alternate in presiding the meetings. The person presiding a meeting is considered 'presiding co-chair' for the purposes of the Agreement until the moment in time when the next meeting commences and the role of a presiding co-chair is assumed by the other Party.

The Trade Committee shall deal with all matters necessary for the implementation of the Agreement. In the performance of its functions, the Trade Committee may:

¹ Council Decision of 13 July 2009 on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part (OJ L 272, 16.10.2009, p. 1).

- (a) set up and oversee any special committees or bodies necessary for the implementation of the Agreement;
- (b) meet at any time agreed by the Parties;
- (c) consider any issues under the Agreement and take appropriate action in the exercise of its functions; and
- (d) take decisions or make recommendations in cases provided for in the Agreement.

The Trade Committee will delegate specific implementing decision-making powers to the Special Committees as provided for in the relevant provisions of the Agreement, in particular the Special Committee on Customs Cooperation and Rules of Origin.

Article 78 (revision clause) provides that the Trade Committee may review this Agreement, its implementation, operation and performance where necessary and make appropriate recommendations to the Parties for its amendment.

2.3. The envisaged recommendation of the EPA Trade Committee

Article 80 of the EPA provides for the possibility for other Pacific Islands to accede to the Agreement on the basis of the submission of a GATT 1994 Article XXIV compliant market access offer.

Accordingly, the Independent State of Samoa acceded to the Agreement on 21 December 2018². The Parties' procedures are also underway for the accessions of Solomon Islands and the Kingdom of Tonga to the Agreement. Furthermore, other Pacific States have indicated their interests to accede to the Agreement.

During the sixth EPA Trade Committee meeting on 24 October 2018, representatives of the Commission and of the Pacific side reviewed the Agreement and drew up a list of technical modifications to the Agreement that are necessary in order to take account of the accession of Samoa to the Agreement. The Committee concluded that such modifications would entail listing Samoa as a Party to the Agreement and adding its market access offer to Annex II to the Agreement. Similar changes to the Agreement would be needed each time a new Pacific State accedes to the Agreement.

Accordingly, on 24 July 2019, during its seventh meeting, the EPA Trade Committee is to adopt its recommendation to the Parties, recommending to them to amend the Agreement to take account of the accession of Samoa, and to empower the Trade Committee to decide on any transitional or amending measures that might be necessary following the accession of a new Party in the future ('the envisaged recommendation').

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

The proposed Council decision establishes the position to take on behalf of the Union concerning the adoption of the suggested amendments to the Agreement, to take account of the recent accession of the Independent State of Samoa, as well as subsequent accessions, thus fulfilling the EU's obligations under the provisions of the EPA.

Such position shall be based on the draft recommendation of the Trade Committee on the amendments to the Agreement attached to the draft Council Decision.

The subject matter of the envisaged recommendation concerns an area for which the Union has an exclusive external competence by virtue of Article 3(2) of the TFEU.

² OJ L 333, 28.12.2018, p. 1.

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*’.

4.1.2. Application to the present case

The Trade Committee is a body set up by the Economic Partnership Agreement.

The amendments that the Trade Committee recommend the Parties to adopt shall have legal effects. Once adopted by the Parties, the envisaged amendments will be binding under international law in accordance with Article 68 taken in conjunction with Articles 78 and 80 of the Agreement.

The envisaged amendments do 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 recommendation in respect of which a position is taken on the Union's behalf. If the envisaged recommendation 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 recommendation relates to the common commercial policy.

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

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED RECOMMENDATION

As the recommendation of the Trade Committee, once endorsed by the Parties, will amend the Economic Partnership Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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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 subparagraph of Article 207(4), in conjunction with Article 218(9), thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 30 July 2009, the Union (the European Community at the time) signed the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part³, which establishes a framework for an Economic Partnership Agreement (“the Agreement”). The Agreement has been provisionally applied by Papua New Guinea and by the Republic of the Fiji Islands since 20 December 2009 and 28 July 2014, respectively.
- (2) Article 80 of the Agreement provides that other Pacific Islands may accede to the Agreement on the basis of the submission of a GATT 1994 Article XXIV compliant market access offer. Accordingly, the Independent State of Samoa (Samoa) submitted, on 5 February 2018, an accession request together with GATT 1994 Article XXIV compliant market access offer to the Parties for decision.
- (3) The Council has approved Samoa’s accession request on 6 December 2018⁴. Samoa acceded to the Agreement on 21 December 2018 and is provisionally applying the Agreement since 31 December 2018.
- (4) During the sixth EPA Trade Committee meeting on 24 October 2018, representatives of the EU and of the Pacific States drew up a list of technical modifications to the Agreement that are necessary in order to take account of the accession of Samoa to the Agreement. They concluded that such modifications would entail listing Samoa as a Party to the Agreement and adding its market access offer to Annex II to the Agreement. Similar changes to the Agreement would be needed each time a new Pacific State accedes to the Agreement.

³ OJ L 272, 16.10.2009, p. 1.

⁴ OJ L 333, 28.12.2018, p. 1.

- (5) Article 68 of the Agreement provides that the EPA Trade Committee is to deal with all matters necessary for the implementation of the Agreement. It is necessary to empower the Trade Committee to decide on any transitional or amending measures that might be necessary following the accession of a new Party.
- (6) The next (seventh) meeting of the EPA Trade Committee is to be held on 24 July 2019, where the Committee will be able, pursuant to Article 78 of the Agreement, to recommend the Parties to introduce the amendments to the Agreement in order to take account of the accession of Samoa and of future accessions of other Pacific Islands to the Agreement.
- (7) The European Union should determine the position to be taken as regards the recommendation for such amendments,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union in the EPA Trade Committee at its next meeting as regards the amendments to the Agreement to take account of the accession of Samoa and of the future accessions of other Pacific Islands shall be based on the Annex.

Article 2

After its adoption, the recommendation of the Trade Committee shall be published in the *Official Journal of the European Union*.

Article 3

This Decision is addressed to the European Commission.

Done at Brussels,

*For the Council
The President*