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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the OECD Public Governance Committee and the OECD Council on the draft Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones

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 OECD Public Governance Committee and the OECD Council in connection with the envisaged adoption of the draft Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones.

2. CONTEXT OF THE PROPOSAL

2.1. The draft Recommendation on Countering Illicit Trade

The draft Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones ('the draft Recommendation') has been developed by the OECD Task Force on Countering Illicit Trade, a subsidiary body of the High Level Risk Forum of the OECD Public Governance Committee, based on six years of analysis and expert consultation which identified key challenges that make Free Trade Zones (FTZs) susceptible to illicit trade.

The main purpose of the draft Recommendation is to enhance transparency in FTZs in order to prevent criminal organisations from taking advantage of them. To this end, the draft Recommendation calls on OECD Members and non-Members: (i) to ensure adequate levels of oversight and control of FTZs; and (ii) to encourage FTZ operators to comply with the 'Code of Conduct for Clean Free Trade Zones', which is set out in the Appendix to the draft Recommendation and forms an integral part thereof.

In its first pillar, the draft Recommendation outlines areas where adhering countries are called to take further actions, including through international cooperation, to increase the monitoring and control of FTZs within their jurisdiction. Such actions include a legal framework for FTZs allowing competent authorities to conduct effective on-site investigations, examinations or inspections and to enforce applicable prohibitions and restrictions within the FTZ. The draft Recommendation also seeks to increase the availability of aggregated statistical data on goods entering and leaving the FTZ on the basis of their tariff classification.

In its second pillar, the draft Recommendation advises adhering countries to take measures to encourage FTZ operators to comply voluntarily with the code of conduct. Such measures may include stricter control of consignments arriving from non-compliant FTZs. Compliance will be assessed and monitored by a mechanism to be elaborated after the adoption of the draft Recommendation. In practice, the code of conduct entails that FTZs conduct oversight of economic operators established in their zone, cooperate with customs and foster the availability of information for investigations. This aims at enhancing accountability and establishing a level playing field with the positive net result of reducing illicit trade.

2.2. The OECD Council and the OECD Public Governance Committee

The OECD Council is the decision-making body of the OECD. It is made up of one representative per member country, plus a representative of the European Commission. The Council meets regularly at the level of permanent representatives to the OECD and decisions are taken by consensus. These meetings are chaired by the OECD Secretary-General. Twenty-three Member States of the Union are member countries of the OECD and have thus a voting right in the OECD Council. The Union is not a member of the OECD and is therefore not entitled to vote when legal acts are being adopted by the OECD Council. The OECD Public Governance Committee operates on the basis of a mandate granted by the OECD Council. While the European Commission expresses the Union's position in the OECD Public

Governance Committee and the OECD Council based on this Council Decision, it is for the Member States of the Union that are member countries of the OECD to use their voting rights to take position on behalf of the Union, acting jointly.

2.3. The envisaged act of the OECD Council

The text of the draft Recommendation, which is a non-legally binding legal instrument of the OECD, was finalised on 29 March 2019 by the Steering Committee of the OECD Task Force on Countering Illicit Trade and has been presented to the OECD Public Governance Committee for discussion at its session of 16 April 2019. Upon entry into force of this Council Decision, the draft Recommendation will be submitted to the OECD Public Governance Committee for approval via written procedure. Subject to the latter's approval, the draft Recommendation will be presented for adoption to the OECD Council.

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

The Union plays an active role in the fight against illicit trade, including through provisions contained in the Union Customs Code and rules concerning the customs enforcement of intellectual property rights.

In the past decades, many countries around the world have set up FTZs as a way to spur economic development. These developments, however, have outpaced the adoption of standards and regulations governing effective oversight of the activities in FTZs in some countries. As a result, criminal networks have found ways to abuse supervisory gaps in some FTZs to smuggle or divert illicit products to domestic markets, set up production facilities for counterfeit and contraband goods, transit illicit goods and facilitate the conduct of illicit services. In some countries, FTZs are treated for all purposes as if they were outside the country's customs territory; as a result, goods enter or exit these areas with minimal customs controls.

To address these challenges, the European Commission has worked closely with the OECD Task Force on Countering Illicit Trade to develop guidance that assists governments and policy makers to reduce and deter illicit trade conducted through and inside FTZs. The resulting draft Recommendation lays down measures to enhance transparency, to promote clean and fair trade in FTZs and to make them unattractive to the criminal organisations that currently take advantage of them.

In light of the fact that illicit trade has broad adverse economic, social, environmental and even political impacts, the Union's support for the adoption of the draft Recommendation in the OECD Council would send a strong positive message to other OECD members as well as non-member countries.

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 Union legislature.

4.1.2. Application to the present case

The OECD Council is a body set up by an agreement, namely the Convention on the OECD. While the Union is not a member of the OECD as such, a representative of the European Commission is participating in OECD Council meetings and expresses the Union's position. For matters falling into the Union's competence, the Union's position is expressed on the basis of a Council Decision and it is for the Member States of the Union that are member countries of the OECD to use their voting rights to take position on behalf of the Union, acting jointly.

The draft Recommendation, which the OECD Council may adopt, following approval by the OECD Public Governance Committee, is capable of influencing the risk analysis carried out by customs authorities of the Member States in accordance with the Regulation (EU) No 952/2013 laying down the Union Customs Code in conjunction with the Customs Risk Management Framework. This is because non-compliance with the code of conduct is an indicator of risk which customs authorities of the Member States may use within their margin of discretion to select goods or economic operators for customs control in light of shipments arriving from or having transited through relevant FTZ. 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. As set out in its paragraph 1, the draft Recommendation is designed to assist governments and policy makers to reduce and deter illicit trade conducted through and inside FTZs. Accordingly, the draft Recommendation aims to foster and protect legitimate trade within the meaning of Article 207 TFEU.

4.3. Conclusion

For this reason, a Council decision based on Article 207 TFEU in conjunction with Article 218(9) TFEU is required to establish the position to be taken on the Union's behalf in the OECD Public Governance Committee and the OECD Council. While the European Commission expresses the Union's position in the OECD Public Governance Committee and the OECD Council based on this Council Decision, it is for the Member States of the Union that are member countries of the OECD to use their voting rights to take position on behalf of the Union, acting jointly.

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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(4), first subparagraph TFEU, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) International standards on countering illicit trade are essential for a global level playing field and for fostering legitimate trade. Such standards should include guidance that assists governments and policy makers in their efforts to reduce and deter illicit trade conducted through and inside Free Trade Zones, such as in the draft OECD Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones (the ‘draft Recommendation’).
- (2) Extensive discussions on the draft Recommendation have taken place in the OECD Task Force on Countering Illicit Trade, a subsidiary body of the High Level Risk Forum of the OECD Public Governance Committee, based on six years of analysis and expert consultation including the WCO and the WTO.
- (3) The draft Recommendation is expected to be first presented to the OECD Public Governance Committee for approval and then to the OECD Council for adoption.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the OECD Public Governance Committee and in the OECD Council in accordance with Article 218(9) TFEU, as the draft Recommendation is capable of influencing the risk analysis carried out by customs authorities of the Member States in accordance with the Regulation (EU) No 952/2013 laying down the Union Customs Code in conjunction with the Customs Risk Management Framework. This is because non-compliance with the code of conduct is an indicator of risk which customs authorities of the Member States may use within their margin of discretion to select goods or economic operators for customs control in light of shipments arriving from or having transited through relevant FTZ. Illicit trade has broad adverse economic, social, environmental and even political impacts and it is essential that the Union supports the adoption of the draft Recommendation in the OECD Council.
- (5) The OECD Council is a body set up by an agreement, namely the Convention on the OECD. Twenty-three Member States of the Union are member countries of the OECD and have a voting right in the OECD Council. The Union is not a member of the OECD and is therefore not entitled to vote when legal acts are being adopted by the OECD Council. While the European Commission expresses the Union's position in the OECD Public Governance Committee and the OECD Council, the Member States

that are member countries of the OECD should use their voting rights to take position on behalf of the Union, acting jointly, in line with the Union's position.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the OECD Public Governance Committee and in the OECD Council with regard to enhancing transparency in free trade zones shall be based on the draft Recommendation on Countering Illicit Trade: Enhancing Transparency in Free Trade Zones, attached to this Decision.

Minor changes to the draft Recommendation may be agreed to by the representatives of the Union in the OECD Public Governance Committee and in the OECD Council without further decision of the Council.

Article 2

The position referred to in Article 1 shall be taken by the Member States of the Union that are member countries of the OECD, acting jointly.

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*