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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	25 August 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part, as regards the amendment of Protocol 3 to that Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation

Delegations will find attached document COM(2020) 390 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part, as regards the amendment of Protocol 3 to that Agreement concerning the definition of the concept of 'originating products' and methods of administrative cooperation

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 of the EU-Switzerland Agreement in connection with the envisaged adoption of a Decision amending Protocol 3 of the EU-Switzerland Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part

The Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part[1] ('the Agreement') aims to promote through the expansion of reciprocal trade the harmonious development of economic relations between the parties. The Agreement entered into force on 1 January 1973.

2.2. The Joint Committee

The Joint Committee established according to the provisions of article 29 of the Agreement, may decide to amend the provisions of Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation (Article 3 of Protocol 3). The Joint Committee draws up its decisions and recommendations by agreement between the two Parties.

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 provisions of Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation ('the envisaged act').

The purpose of the envisaged act is the amendment of the provisions of Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation.

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

The Regional Convention on pan-Euro-Mediterranean preferential rules of origin ('the Convention') lays down provisions on the origin of goods traded under relevant Agreements concluded between the Contracting Parties. The EU and Switzerland signed the Convention on 15 June 2011.

The EU and Switzerland deposited their instrument of acceptance with the depositary of the Convention on 26 March 2012 and 28 November 2011 respectively. As a consequence, in

[1] OJ L 300, 31.12.1972, p. 189

application of its Article 10(2), the Convention entered into force in relation to the EU and Switzerland on 1 May 2012 and on 1 January 2012 respectively.

Article 6 of the Convention provides that each Contracting Party shall take appropriate measures to ensure that the Convention is effectively applied. To that effect, 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 introducing the rules of the Convention under Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation. This is done by introducing in the amended Protocol a reference to the Convention that will render it applicable.

At the same time, the ongoing process of amending the Convention resulted in a new set of modernised and more flexible rules of origin. The formal amendment of the Convention requires a vote by unanimity by the Contracting Parties. The fact that there are still some Contracting Parties which have objections to the amendment risks delaying its adoption. Additionally, given the number of Contracting Parties and their respective internal procedures required to be in a position to vote on the formal adoption and to prepare the entry into force of the amended rules, no clear timeframe for the application of the amended Convention can be established.

Against this background, Switzerland has requested to start applying the amended set of rules as soon as possible, alternatively to the current rules of the Convention, while awaiting the outcome of the amendment process. Such request is explained below.

These alternative rules of origin are intended for provisional application, on an optional and bilateral basis, by the EU and Switzerland pending the conclusion and entry into force of the amendment of the Convention. They are intended to apply alternatively to the rules of the Convention, as the latter are laid down without prejudice to the principles laid down in the relevant agreements and other related bilateral agreements among Contracting Parties. Accordingly, these rules will not be mandatory but of optional application by economic operators that wish to use preferences based on them, instead of Convention-based preferences. They are not intended to modify the Convention, which will remain in application among the Contracting Parties, and will not alter the rights and obligations of the Contracting Parties under the Convention.

The position to be taken by the EU within the Joint Committee should be established by the Council.

The proposed amendments insofar they relate to the current Convention are technical in nature and do not affect the substance of the protocol on rules of origin currently in effect. Therefore, they do not require an impact assessment.

3.1. Details on the alternative rules of origin

The proposed amendments relating to the introduction of the alternative set of rules of origin provide for additional flexibilities and elements of modernisation, which have already been agreed by the Union in other bilateral agreements (Comprehensive Economic and Trade Agreement between the EU and Canada, EU-Vietnam Free Trade Agreement, EU-Japan Economic Partnership Agreement, EU-South African Development Community Economic

Partnership Agreement) or preferential schemes (Generalised System of Preferences). The main ones are the following:

(a) Wholly obtained products - 'vessels' conditions:

The so-called vessel conditions contained in the alternative set of rules are simpler and provide for more flexibility. Compared to the current text (art. 5) certain conditions have been deleted (i.e. specific crew requirements); others have been amended in order to provide for more relaxation (ownership).

(b) Sufficient working or processing – Average basis

The proposed alternative set of rules (art. 4) offers the exporter the flexibility to ask the customs authorities an authorisation to calculate the ex-works price and the value of non-originating materials on an average basis in order to take account of fluctuations in costs and currency rates. This should provide exporters with more predictability.

(c) Tolerance

The current tolerance (art. 6) is set at 10% in value of the ex-works price of the product.

The proposed text (art. 5) provides for agricultural products a tolerance of 15% of the net weight of the product and for industrial products a tolerance of 15% in value of the ex-works price of the product.

The tolerance in weight introduces a more objective criterion and a 15% threshold should provide a sufficient level of leniency. It ensures also that the international price fluctuation of the commodities does not have an impact on the origin of the agricultural products.

(d) Cumulation

The proposed text (art. 7) maintains diagonal cumulation for all products under the condition that the same set of alternative rules of origin is accepted by the partners involved in the cumulation. In addition, it provides for a generalised full cumulation for all products except textiles and clothing listed in Chapters 50-63 of the Harmonised System (HS).

Moreover, for products of HS Chapters 50-63, it provides for bilateral full cumulation. Finally, the Union and Switzerland will have the option to agree to extend the generalised full cumulation also to products of HS Chapters 50-63.

(e) Accounting segregation

Under the current rules (art. 20 of 'the Convention'), customs authorities may authorise accounting segregation where 'considerable cost or material difficulties arise in keeping separate stocks'. The amended rule (art. 12) stipulates that customs authorities may authorise accounting segregation 'if originating and non-originating fungible materials are used'.

An exporter will no longer have to justify when requesting an authorisation for accounting segregation that keeping separate stocks has a considerable cost or gives rise to material difficulties; it will be sufficient to indicate that fungible materials are used.

In the case of sugar, being a material or a final product, originating and non-originating stocks will no longer have to be kept physically separated.

(f) Principle of territoriality

The current rules (art. 12) allow for certain working or processing to be done outside the territory under certain conditions, with the exception of products of HS Chapters 50 to 63, such as textiles. The proposed rules (art. 12) no longer contain the exclusion for textiles.

(g) Non-alteration

The proposed non-alteration rule (art. 14) provides for more leniencies for the movement for originating products between Contracting Parties. It should avoid situations whereby products, for which there is no doubt about their originating status, are excluded from the benefit of the preferential rate at importation because the formal requirements of the direct transport provision are not met.

(h) Prohibition of drawback of, or exemption from, customs duties

Under the current rules (art. 15) the general principle of the prohibition of drawback applies to materials used in the manufacture of any product. Under the proposed rules (art. 16) the prohibition is eliminated for all products, with the exception of materials used in the manufacture of products falling within the scope of HS Chapters 50 to 63. Nevertheless, the text also provides for some exceptions to the prohibition of duty drawback to these products.

(i) Proof of origin

The text introduces a single type of proof of origin (EUR.1 or origin declaration), instead of the double approach EUR.1 and EUR.MED, which substantially simplifies the system. This should improve compliance by economic operators by avoiding mistakes due to complex rules as well as facilitate the management by the customs authorities. Moreover, it should not affect the capacity of verification of proofs of origin, which remains the same.

The amended rules (art. 17) also include the option to agree on the application of a system of registered exporters (REX). These exporters registered in a common database will be responsible for making out themselves statements on origin without going through the approved exporter procedure. The statement on origin will have the same legal value as the origin declaration or the movement certificate EUR.1.

Further, the amended rules foresee the option to agree on the use of proof of origin that is issued and/or submitted electronically.

In order to be able to distinguish products originating under the alternative set of rules from products originating under the Convention, origin certificates or invoice declarations based on the alternative set of rules will have to include a statement pointing to the rules applied.

(j) Validity of a proof of origin

It is proposed to prolong the period of validity of a proof of origin from 4 to 10 months. It should again provide for more leniencies for the movement for originating products between the Parties.

3.2. List rules

3.2.1. Agricultural products

(a) Value and weight

The limit of non-originating materials was expressed only in value. The new thresholds are expressed in weight in order to avoid price fluctuation and currency fluctuation (e.g. ex-chapters 19, 20, 2105, 2106) together with a deletion of certain limit for sugar (e.g. chapter 8 or HS 2202).

The alternative set of rules raised the threshold of weight (from 20% to 40%) and the possibility for some headings to use an alternative choice value or weight. The HS chapters and headings concerned by the change are notably: ex-1302, 1704 (alternative rule weight or value), 18 (1806: alternative rule weight or value), 1901.

(b) Adaptation to sourcing patterns

Other agricultural products (i.e. vegetable oils, nuts, tobacco) contain more flexible rules adapted to the economic reality notably for HS chapters 14, 15, 20 (including heading 2008), 23, 24. The alternative set of rules strike the balance between regional and global sourcing like for chapters 9 and 12. Rules have also been simplified (reduction of exceptions) in chapters 4, 5, 6, 8, 11, ex-13.

3.2.2. Industrial products (except textiles)

The proposed compromise contains considerable changes compared to the current rules:

- regarding a number of products the current Chapter rule contains a double cumulative condition. This is brought to a single condition (HS Chapters 74, 75, 76, 78 and 79);

- a large number of specific rules that are derogating from the Chapter rule have been deleted (HS Chapters 28, 35, 37, 38 and 83). This more horizontal approach implies a simpler panorama for operators and customs;

- the inclusion in the current Chapter rule of an alternative rule thereby offering to the exporter more choice in meeting the origin criterion (Chapters 27, 40, 42, 44, 70 and 83, 84 and 85).

All these changes result in updated and modernised list rules which in general make it easier to meet the criterion for obtaining the originating status of a product. In addition, the above-mentioned possibility of using an average basis over a period of time to calculate the ex-works price and the value of non-originating will provide for further simplification for exporters.

3.2.3. Textiles

In relation to textiles and garments, new options have been introduced regarding outward processing and tolerances. New origin conferring processes have also been introduced for these products, especially for fabric which would become more easily available. Finally, full bilateral cumulation will apply also to these products. Such cumulation will allow processing

carried out on textile materials (i.e. weaving, spinning etc.) to be taken into account in the production process in the cumulation zone.

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*'[2].

4.1.2. Application to the present case

The Joint Committee is a body set up by an agreement, namely the Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part.

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.

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 the first subparagraph of Article 207(4) TFEU.

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[2] 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 the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU.

5. BUDGETARY IMPLICATIONS

The proposed amendments relating to the introduction of the alternative set of rules of origin are based on a principle of modernization of the rules of origin to align them to the new trends set by the recent Free Trade Agreements. The amended rules in the PEM Convention contain mostly elements of simplification of customs procedures and elements of modernisation, such as:

Sufficient working or processing – Average basis: by calculating the ex-works price and the value of non-originating materials on an average basis taking into account the fluctuations of the market, provides exporters with more predictability,

Proof of origin: it is subject to simplification since only one type certificate of origin will be used – EUR1,

Validity of a proof of origin: provides for more leniencies for the movement of originating products, by increasing the validity from 4 to 10 months).

These amendments to the PEM Convention have no measurable impact on the EU budget since their scope mainly concerns trade facilitation and consolidation of modern practices by customs authorities. They provide for optional facilitation in the areas which remain under competence of the authorities without impacting the substance of the rules (accounting segregation, proofs of origin, averaging). Some aspects of simplification (such as reduction of the vessels criteria) provide for greater predictability by removing conditions which are currently difficult to control by customs authorities whereas others (non-alteration) refer to logistics without affecting the substance of the rules.

Although the provisions on duty drawback are amended, the prohibition of duty drawback is maintained in the sector of textiles and clothing, which remains one of the main sectors of trade in the PEM zone. The amended rules codify the status quo by maintaining the prohibition currently applied with some Contracting Parties. The proposed generalisation of full cumulation in the PEM zone aims at strengthening the existing trade patterns within the zone and their complementarity, but should not affect in a meaningful way the EU customs duties collected since products subject to cumulation will have to comply with their own requirement of value added in the zone in order to benefit from preferences, as it is currently the case.

The amendments to the list rules in the sector of agricultural and processed agricultural goods mainly consist of adapted methodology without affecting the substance of the rules. The existing thresholds expressed currently in value will be expressed in weight. This criterion is more objective and more easy to be controlled by customs authorities. The simplification of the product-specific rules for industrial products should have a limited impact on custom duty revenues, as in many instances they may result more in sourcing changes than in increases of preferential imports from PEM countries replacing imports that were previously subject to

import duties. The impact on import duty revenue of those changes is therefore not quantifiable.In terms of trade and its impact on the use of preferences, the relaxations provided in the new rules put emphasis on economic integration in the entire zone, for example in the textile sector where the use of preferences is already very high. The improved rules on textiles and cumulation are mainly intended to enhance already existing regional integration and availability of materials within the zone, rather than to allow more non-originating materials to be imported from outside the zone.

6. PUBLICATION OF THE ENVISAGED ACT

As the act of the Joint Committee will amend the 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 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) The Agreement between the European Economic Community, of the one part, and the Swiss Confederation, of the other part ('the Agreement') was concluded by the Union by Council Regulation (EEC) No 2840/72[1] and entered into force on 1 January 1973.

(2) The Agreement includes Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation. Pursuant to Article 3 of that Protocol, the Joint Committee established by Article 29 of the Agreement ("Joint Committee") may decide to amend its provisions.

(3) The Joint Committee is to adopt a Decision on an amendment of Protocol 3 during its next meeting.

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

(5) The Regional Convention on pan-Euro-Mediterranean preferential rules of origin ('the Convention') was concluded by the Union by Council Decision 2013/93/EU[2] and entered into force in relation to the Union on 1 May 2012. It lays down provisions on the origin of goods traded under relevant agreements concluded between the

[1] Council Regulation of 19 December 1972 concluding an Agreement between the European Economic Community and the Swiss Confederation and adopting provisions for its implementation and concluding an additional Agreement concerning the validity, for the Principality of Liechtenstein of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 (OJ L 300, 31.12.1972, p. 188).

[2] Council Decision 2013/93/EU of 14 April 2011 on the signing, on behalf of the European Union, of the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (OJ L 54, 26.2.2013, p. 4).

Contracting Parties, which apply without prejudice to the principles laid down in those agreements.

(6) Article 6 of the Convention provides that each Contracting Party is to take appropriate measures to ensure that the Convention is effectively applied. To that effect, the Joint Committee should adopt a decision introducing in Protocol 3 to the Agreement a reference to the Convention.

(7) The discussions on amending the Convention have resulted in a new set of modernised and more flexible rules of origin to be incorporated into the Convention. The Union and Switzerland have signalled their will to apply the new rules as soon as possible bilaterally, on an alternative basis alongside the current rules while awaiting the final outcome of the amending process

(8) In the cumulation zone constituted by the EFTA States, the Faroe Islands, the European Union, Turkey, the participants in the Stabilisation and Association Process, the Republic of Moldova, Georgia and Ukraine, the possibility of using EUR.1 movement certificates or origin declaration instead of movement certificates EUR-MED or origin declaration EUR-MED, as a derogation from the provisions of the Convention in case of diagonal cumulation among these partners, should be maintained,

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.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President