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European Union

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**COEST 5
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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	6 January 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union

No. Cion doc.:	COM(2023) 6 final
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the EU-Ukraine Association Council updating Annex XLIV to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.
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Delegations will find attached document COM(2023) 6 final.

Encl.: COM(2023) 6 final



Brussels, 5.1.2023
COM(2023) 6 final

2023/0004 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EU-Ukraine Association Council updating Annex XLIV to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.

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 EU-Ukraine Association Council in connection with the envisaged adoption of a Decision regarding the update of Annex XLIV of the EU-Ukraine Association Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The EU-Ukraine Association Agreement

The EU-Ukraine Association Agreement has been provisionally applied since 1 November 2014 and entered into force on 1 September 2017. The Preamble to the Agreement recognises the Parties' desire to move the reform and approximation process forward in Ukraine, thus contributing to the gradual economic integration and deepening of political association as well as to achieving economic integration through extensive regulatory approximation.

2.2. The EU-Ukraine Association Council

Pursuant to Article 463(1) and (3) of the Agreement, the Association Council has the power to take decisions for the purpose of attaining the objectives of the Agreement. In particular, it may update or amend the Annexes to the Agreement, taking into account the evolution of Union law and applicable standards set out in international instruments deemed relevant by the Parties.

2.3. The envisaged act of the EU-Ukraine Association Council

During its eighth meeting or by written procedure thereafter, the EU-Ukraine Association Council is to adopt a Decision regarding the update of Association Agreement Annex XLIV. ('the envisaged act').

The purpose of the envisaged act is enable Ukraine to align with the most recent EU legislation in the field of financial cooperation/anti-fraud provisions.

The envisaged act will become binding on the parties in accordance with Article 463(1) of the Agreement, which provides that: 'For the purpose of attaining the objectives of this Agreement, the Association Council shall have the power to take decisions within the scope of this Agreement, in the cases provided for therein. Such decisions shall be binding upon the Parties, which shall take appropriate measures, including if necessary action in specific bodies established under this Agreement, to implement the decisions taken.'

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

The EU-Ukraine Association Agreement includes provisions on financial cooperation with anti-fraud provisions. In line with Article 459 (1) of the Agreement, the Parties shall implement assistance in accordance with the principles of sound financial management and shall cooperate in protecting of the financial interests of the EU and of Ukraine as set out in Annex XLIII to the Agreement. The Parties shall take effective measures to prevent and fight fraud, corruption and any other illegal activities, inter alia by means of mutual administrative assistance and mutual legal assistance in the fields covered by this Agreement. Furthermore, pursuant to Article 459 (2) of the Agreement, Ukraine shall also gradually approximate its legislation in line with the provisions as set out in Annex XLIV to this Agreement. The EU acquis in this area has evolved since the conclusion of negotiation of the Agreement. This

evolution needs to be reflected in Annex XLIV to the Agreement, which should therefore be updated.

The updated Annex XLIV is expected to allow Ukraine to align with the most recent EU legislation in the field of the fight against fraud to the Union's financial interests by means of criminal law. The updates proposed are limited to those strictly necessary to help Ukraine achieve the objective of approximation of domestic legislation to the EU *acquis*. They do not go beyond what is necessary to achieve this objective and as was agreed with Ukraine.

This proposal is fully consistent with the EU's Eastern Partnership policy in general and toward Ukraine in particular.

Furthermore, it is consistent with the EU Neighbourhood Policy and related assistance policy toward Ukraine and other neighbourhood 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 EU legislature'*¹.

4.1.2. Application to the present case

The EU-Ukraine Association Council is a body set up by an agreement, namely the EU-Ukraine Association Agreement. The act which the EU-Ukraine Association Council is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 463(1) of the EU-Ukraine Association Agreement.

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.

¹ 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.

4.2.2. *Application to the present case*

The main objective and content of the envisaged act relate to the fight against fraud to the Union's financial interests by means of criminal law.

Therefore, the substantive legal basis of the proposed decision is Article 83(2) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 83(2) TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EU-Ukraine Association Council will amend Annex XLIV, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EU-Ukraine Association Council updating Annex XLIV to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (1) ('the Agreement') was signed on 21 March and 27 June 2014 and entered into force on 1 September 2017.
- (2) The Preamble to the Agreement recognises the Parties' desire to move the reform and approximation process forward in Ukraine, thus contributing to the gradual economic integration and deepening of political association as well as to achieving economic integration through extensive regulatory approximation.
- (3) Article 1 of the Agreement provides for the objective to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union.
- (4) Pursuant to Article 459 (1) of the Agreement, the Parties shall implement assistance in accordance with the principles of sound financial management and shall cooperate in protecting of the financial interests of the EU and of Ukraine as set out in Annex XLIII to the Agreement, and shall take effective measures to prevent and fight fraud, corruption and any other illegal activities, inter alia by means of mutual administrative assistance and mutual legal assistance in the fields covered by this Agreement.
- (5) Pursuant to Article 459 (2) of the Agreement, Ukraine shall also gradually approximate its legislation in line with the provisions as set out in Annex XLIV to this Agreement.
- (6) Article 474 of the Agreement provides for the general commitment of Ukraine to carry out gradual approximation of its legislation to EU law, including protection of the financial interests of the EU and of Ukraine in the context of financial assistance provided through the relevant EU funding mechanisms and instrument in order to achieve the objectives of this Agreement taking into account Ukraine's needs, sector capacities and progress with reforms.
- (7) Pursuant to Article 463(1) and (3) of the Agreement, the Association Council has the power to take decisions for the purpose of attaining the objectives of the Agreement.

In particular, it may update or amend the Annexes to the Agreement, taking into account the evolution of Union law and applicable standards set out in international instruments deemed relevant by the Parties.

- (8) Since the completion of negotiations regarding the Agreement, EU acquis on protection of the financial interests of the European Union, provisions of which were incorporated in Annex XLIV, was replaced by Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017, and thus Ukraine's commitments envisaged by the implementation of the Agreement have changed as well. Such amendments need to be reflected in Annex XLIV to the Agreement, which therefore needs to be updated.
- (9) The Association Council is therefore to amend Annex XLIV to the Agreement and to adjust the deadline for implementation in order to take into account the new amendments.
- (10) The EU-Ukraine Association Council, during its eighth meeting on 5 September 2022 or by written procedure thereafter, is to adopt a Decision on the update of Annex XLIV.
- (11) It is appropriate to establish the position to be taken on the Union's behalf in the EU-Ukraine Association Council, as the Decision will be binding on the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the eighth EU-Ukraine Association Council shall be the following:

Annex XLIV to the Agreement is replaced by the Annex to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*