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Delegations will find attached the partially declassified version of the above-mentioned document.

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EUROPEAN
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Brussels, 15.2.2013
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Recommendation for a

COUNCIL DECISION

**authorising the Commission to open negotiations on a plurilateral agreement on trade in
services**

{SWD(2013) 37 final}

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Date:	12/06/2017
by:	Peter SANDLER EN
Authority:	DG TRADE

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In October 1999, in preparation of the 3rd WTO Ministerial Conference concerning a new round of multilateral trade negotiations under the umbrella of the WTO (so-called "Doha development agenda" or "Doha negotiations"), the Council authorised the Commission to negotiate a multilateral comprehensive trade agreement including, *inter alia*, an agreement on trade in services (12092/99 WTO 131). In relation to the negotiations on trade in services, the Council stipulated that the "negotiations should be comprehensive and bring about a deeper and broader package of improved commitments from all WTO members to market access and national treatment. Current imbalances in commitments across countries and services sectors should be reduced. Negotiations should aim at strengthening of GATS disciplines with the aim of ensuring transparent and predictable regulatory environment. Any unfinished business (for instance safeguards, subsidies, government procurement) should also be absorbed in the negotiations. Other aspects of the functioning of GATS which have been subject to inconclusive discussion on interpretation or implementation could be reviewed. The participation of developing countries should be facilitated by exploiting fully the opportunities offered by the GATS. For the efficiency of the negotiations and in order to maximise the results while at the same time ensuring coherence of commitments by sector and by modes of supply, horizontal formulas, when appropriate, should be considered as a useful tool for the negotiations. This would apply across the board to sectors committed, except where expressly indicated." The Doha mandate also stipulates that "(...) the Union will ensure, as in the Uruguay negotiations, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity."

Following long and difficult negotiations amongst the WTO-membership, the Doha negotiations are pausing since spring 2011. In order to overcome this impasse, the "elements for political guidance" issued by the Ministers in the margins of the 8th WTO Ministerial Conference in December 2011 encourage WTO-members "(...) to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking." Moreover the guidelines stipulate: "(...) Ministers recognise that Members need to fully explore different negotiation approaches while respecting the principles of transparency and inclusiveness".

In this spirit, a group of currently 21 WTO-members¹ willing to advance the negotiations in the area of trade in services started to explore the possibility to negotiate and conclude a stand-alone agreement on trade in services. These WTO-members often referred to as the "Really Good Friends (of services)" (RGFs) comprise for the time being Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong-Kong China, Iceland, Israel, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the USA. These RGFs are neither an exclusive nor a stable group of WTO-members. Indeed, during the exploratory meetings held in 2011, one member dropped out of the RGFs and new members joined this group (latest newcomers were Panama, Turkey and Iceland). In terms of trade volume represented, in 2010, the current

¹ The EU is counted as one member.

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RGFs accounted for around 70% of global cross-border trade in services (excluding intra-EU trade in services). It is one of the clear objectives of the RGFs to attract possibly all WTO-members and notably some of the leading emerging countries to join the negotiations. However, in the current composition of the RGFs, the agreement will not be a multilateral agreement covering all WTO-members as was envisaged in the framework of the Doha negotiations, but a multi-country agreement often referred to as "plurilateral" services agreement.

Assuming that the composition of the group will remain largely the same and none of the leading emerging economies would join at this stage, the future agreement should be protected from the effects of the most-favoured-nation clause pursuant to Article II:1 of the WTO General Agreement on Trade in Services ('GATS'), i.e. the automatic and unconditional multilateralisation to all other WTO-members. Thus, the future agreement will include elements provided for in the GATS to prevent such automatic and unconditional multilateralisation. At the same time, it will contain a pathway for its future multilateralisation. In this respect, the agreement will differ from the above mentioned Council conclusions issued for the Doha negotiations. Against this background, new negotiation directives from the Council to authorise the Commission to conclude a plurilateral agreement on services are required.

In the course of 2012, the RGFs discussed the main elements of the objectives and architecture of a stand-alone agreement on trade in services. In December 2012, convergence could eventually be reached amongst RGFs on the main parameters of a possible plurilateral services agreement. On substance, the envisaged plurilateral agreement on trade in services would be a substitute for the stalled WTO Doha negotiations on trade in services. The objectives of the EU for this agreement are essentially the same as expressed in the above mentioned DDA mandate. The plurilateral agreement on trade in services would be a transitional vehicle to a genuinely new multilateral services agreement once the agreed conditions for the multilateralisation would be fulfilled.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

In this particular case, an ex-ante impact assessment cannot be carried out for the following specific reasons:

This agreement is meant to be a substitute for one particular aspect of the stalled Doha negotiations (trade in services) and the objectives of the EU are essentially the same as expressed in the above mentioned DDA mandate from 1999. Given that the Doha negotiations were officially launched in 2001, Member States, businesses and the civil society are well aware of the content of those negotiations, including the services part. All stakeholders had since then time to comment and to make their views known on the Doha negotiations, including its services pillar. Similarly, potential impacts have been analysed by a general study including, for example a study from September 2011 done by CEPPI-CIREM ("Economic Analysis in support of bilateral and multilateral trade negotiations – Economic impact of potential outcome of the DDA II").

In addition, the plurilateral nature of this initiative has a bearing on the timing. Unlike in a bilateral context, the question of the launching of the negotiation is not under the full control of the EU. The other 20 RGFs agreed to start phasing in the launching of the negotiations in

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early March 2013 regardless of whether the EU will be present or not. Joining the negotiations from the start is essential to ensure that the compromise found amongst RGFs on objectives and architecture would be preserved throughout the negotiations and to ensure that the final agreement will take into account the EU interests.

Given the above, an analytical document outlining the background of the negotiations has been drafted as a contribution to the Commission's Decision. Moreover, the customary impact assessment (SIA) will be carried out as early as possible to feed into the EU's position during the negotiations.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Nature and scope of the Plurilateral Services Agreement

Convergence could be found amongst the RGFs regarding the objectives of such an agreement and the main elements of its architecture.

As regards the objectives, the plurilateral services agreement should achieve essentially the same objectives as were set out in the Doha Council conclusions, i.e. the agreement should be seeking to bind in general the autonomous level of liberalisation and provide for opportunities through negotiations for improved market access. The agreement should also be comprehensive with no *a priori* exclusion of any sector or mode of supply. New and enhanced regulatory disciplines should be developed on the basis of proposals brought forward by participants during the negotiations.

It is understood between the RGFs that the agreement will have to be adapted to the fact that not all WTO-members are participating in the negotiations. Notably, for the time being, none of the leading emerging countries has joined the initiative. To prevent an automatic and unconditional multilateralisation of the agreement based on GATS Article II:1, the plurilateral services agreement would need to fulfil the conditions of an Economic Integration Agreement pursuant to GATS Article V, i.e. have substantial sectoral coverage and provide for the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures. To base the plurilateral agreement (like the Agreement on Government Procurement) on Annex IV to the WTO Agreement is not conceivable as this would require consensus of all WTO members.

As regards the architecture of the future agreement, the agreement should be built on GATS and thereby ensure that it can be brought back into WTO GATS agreement when the conditions for multilateralisation are fulfilled and a critical mass of WTO-members would support this. To ensure smooth future incorporation of the plurilateral services agreement into the GATS, the plurilateral services agreement should incorporate GATS core articles, i.e. Article I (scope and definition), Article XIV and Article XIV bis (general and security exceptions), Article XVI (market access), Article XVII (national treatment) and Article XXVIII (definitions).

The agreement would provide for market access (GATS Article XVI) for services sectors where commitments are undertaken, as under the GATS. It would go beyond GATS in providing for a horizontal discipline for national treatment (GATS Article XVII) that would be applied in principle to all sectors and modes of supply, subject to exemptions. Exempted

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discriminatory measures should be subject to a standstill² and/or a ratchet clause³. Exemptions to the standstill and/or ratchet clause would have to be listed. In line with the Council conclusions of 1999, by applying this horizontal formula subject to exemptions, the negotiations would be more efficient and the results would be maximised

The future agreement should also contain new or enhanced regulatory disciplines relative to GATS and its services sectors based on proposals by the RGFs. To that end, the negotiations should aim at including, *inter alia*, regulatory disciplines concerning transparency (Article III and III bis), domestic regulation (Article VI:4), state-owned enterprises, telecommunication services, computer related services, e-commerce, cross-border data transfers, financial services, postal and courier services, international maritime transport services, government procurement for services and subsidies (developing the GATS inbuilt agenda in line with Articles XIII:2 and XV:1).

To underline the objective of the future multilateralisation, the overall architecture of the agreement should be conducive to its future multilateralisation and the mechanisms and conditions for it should be defined in the agreement. In the same vein, the agreement should contain an accession clause so as to ensure that WTO-members sharing the objectives of the agreement could become a party. Lastly, the agreement should include an effective dispute settlement mechanism to ensure that the parties observe mutually agreed rules and commitments.

3.2. Procedures

The RGFs intend to commence the negotiations in March 2013. It is important for the Commission to be in a position to negotiate from the outset in order to ensure the full implementation of the compromise found amongst RGFs on objectives and architecture. It is noted that the remaining 20 RGFs will start the negotiations whether the EU will be present or not. There is also a common understanding between the RGFs to aim at concluding the negotiations within one to two years.

Based on Article 207(3) TFEU and in line with normal practice, the Commission will conduct the negotiations and report regularly to Member States in the appropriate committees of the Council on progress in the negotiations and will also keep European Parliament informed.

The Commission recommends to the Council:

- to adopt the attached Decision authorising the Commission to negotiate on behalf of the European Union, a plurilateral agreement on trade in services;
- to issue the negotiating directives attached to that Decision;
- to appoint the special Committee, foreseen in Article 207 TFEU, to assist it in this task.

4. BUDGETARY IMPLICATION

No implications.

² This means that exempted measures should in principle reflect the autonomous level of liberalisation.

³ This means that any future removal of a discriminatory measure would be captured.

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