



Brussels, 2.4.2019
COM(2019) 165 final

Recommendation for a

COUNCIL DECISION

**supplementing the negotiating directives for the Doha Development Agenda regarding
the plurilateral negotiations of rules and commitments on electronic commerce**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 13 December 2017, at the Eleventh Ministerial Conference of the World Trade Organisation (WTO), 70 WTO Members adopted a Joint Statement on Electronic Commerce¹ to initiate exploratory work towards future WTO negotiations on trade-related aspects of electronic commerce.

The European Union (EU) strongly supported the exploratory work that was carried out during 2018 in the WTO. The exploratory work was transparent and open to all WTO Members, and discussed any trade-related aspect of electronic commerce put on the table by the participating Members.

After the successful conclusion of the exploratory work in December 2018, on 25 January 2019, 76 Members of the WTO, including the EU, confirmed their intention to commence WTO negotiations on trade-related aspects of electronic commerce.² The participating Members have confirmed that they would seek to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible. They recognised and committed to take into account the unique opportunities and challenges faced by Members, including developing and least developed countries, as well as by micro, small and medium sized enterprises, in relation to electronic commerce. Finally, they confirmed their intention to continue to encourage all WTO Members to participate in order to further enhance the benefits of electronic commerce for businesses, consumers and the global economy.

Accordingly, the e-commerce negotiations should take place in a plurilateral setting within the WTO framework, and remain transparent and open to any WTO Member that decides to join. The participating Members may put on the table any negotiating proposal in the realm of the trade-related aspects of electronic commerce, at the beginning or at a later phase of the negotiating process in the WTO.

The Commission obtained authorisation from the Council under the Doha Development Agenda (DDA), for negotiations in the WTO *inter alia* on trade in services and trade facilitation as well as on the progressive liberalisation of trade rules.³ Given that electronic commerce forms an integral part of how services and goods are traded,⁴ the new WTO negotiations on trade-related aspects of electronic commerce are covered by the existing authorisation, as the negotiations on electronic commerce belong to the field of trade in services, trade facilitation and progressive liberalisation of trade rules.⁵ Therefore, a new

¹ WT/MIN(17)/60

² WT/L/1056

³ A set of Council conclusions form the DDA authorisation, which date from 25 October 1999 to 10 March 2008.

⁴ The Work Programme of 25 September 1998 provides that electronic commerce is understood to mean the production, distribution, marketing, sale or delivery of goods or services by electronic means.

⁵ Reference is made in particular to the Council conclusions of 25 October 1999, 21 November 2001, 21 July 2003 (which specifically provides that the Singapore and Doha Ministerial Declarations and related texts adopted as Doha as well as the earlier Council conclusions constitute the basis for action by the Union in DDA negotiations), 5 December 2003, 6 October 2004, 19 July 2005, 18 October 2005, 21 November 2005, 12 June 2006 and 10 March 2008.

Council decision authorising the opening of negotiations pursuant to Article 218(3) of the Treaty on the Functioning of the European Union (TFEU) is not required.

Nonetheless, while electronic commerce is not a new issue on the agenda of the WTO,⁶ the plurilateral negotiations on trade-related aspects of electronic commerce could potentially be broad and may address a number of topics on which the EU has internal legislation as well as specific concerns, in particular on cross-border data flows and audio-visual services, and specific priorities. Consequently, in order to frame more accurately the negotiations, the Commission recommends to the Council the adoption of negotiating directives specific to the WTO negotiations on electronic commerce.

The proposed negotiating directives aim to ensure that the EU is in a position to engage in the negotiation of any trade-related aspect of electronic commerce proposed by the participating WTO Members in the course of negotiations, in full respect of the *acquis*, including the framework for personal data protection, and the EU's policy choices in trade negotiations.

For the EU, the objectives of the negotiations are to enhance global electronic commerce, facilitate the operations of businesses, including micro, small and medium enterprises, strengthen consumers' trust in the on-line environment and create new opportunities to promote inclusive growth and development. In order to achieve a high-standard outcome with the participation of the largest possible number of WTO Members, the rules and commitments should provide for appropriate flexibility for Members.

The most probable outcome of the WTO negotiations on electronic commerce is a set of WTO rules that Members can subsequently and unilaterally decide to attach to their existing schedules of commitments in the WTO.

- **Consistency with existing policy provisions in the policy area**

The above objectives are consistent with the Treaty on the European Union (TEU) that provides that the EU should 'encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'.⁷

The European Council of 28-29 June 2018 authorised the Commission to pursue WTO modernisation in pursuit of the objectives of (1) making the WTO more relevant and adaptive to a changing world, and (2) strengthening the WTO's effectiveness. Modernising the WTO's rulemaking activities, which is one of the main objectives of the negotiations on electronic commerce, form the central pillar of this process.

On 18 September 2018, the Commission presented a concept paper⁸ on the WTO modernisation. In the context of strengthening the WTO's rulemaking function, the Commission *inter alia* underlined the need for the WTO to address barriers to digital trade. It emphasised that '[...] establishing disciplines covering digital trade is important to remove unjustified barriers to trade by electronic means, to bring legal certainty for companies, and to ensure a secure online environment for consumers. [...] new disciplines should cover not only trade in services, but apply to all economic sectors.'

The EU systematically puts forward ambitious regulatory disciplines both on telecommunications services and on digital trade in its free trade negotiations. The negotiating

⁶ The WTO Work Programme on Electronic Commerce was launched in 1998.

⁷ Article 21(2)(e) TEU

⁸ http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

directives proposed for the WTO electronic commerce negotiations follow the same approach as the one the EU follows in its FTAs (points 10-12 in the Annex).

- **Consistency with other Union policies**

The disciplines proposed by the EU in bilateral negotiations as well as those that the EU may propose in the WTO build on, and are fully in line with, the EU's internal market legislation in the areas of digital trade and telecommunications services.

The proposed negotiating directives confirm that any rule or commitment agreed upon by the EU should be in line with the EU legal framework (point 9 in the Annex).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 207(3) and (4) first subparagraph in conjunction with Article 218(3) and (4) of the TFEU.

Pursuant to Article 207(3), where agreements concerning the common commercial policy are to be negotiated, the Commission shall make recommendations to the Council. The Commission shall conduct such negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may address to it.

Article 218(3) TFEU stipulates that the Commission shall submit recommendations to the Council. The Council is empowered to adopt decisions authorising the opening of negotiations and pursuant to Article 218(4) TFEU, it may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

As regards the WTO negotiations on electronic commerce, the Council has already authorised the opening of negotiations, and issued directives to the Commission, on trade in services and trade facilitation as well as on the progressive liberalisation of trade rules in the WTO, which covers electronic commerce related trade rules and commitments (see Section 1). However, the adoption of supplementary negotiating directives is necessary to frame more accurately these negotiations. Accordingly, the Commission recommends to the Council to adopt a Decision on the basis of Article 207(3) and (4) first subparagraph in conjunction with Article 218(3) and (4) TFEU.

- **Subsidiarity (for non-exclusive competence)**

The common commercial policy is an area of exclusive EU competence under Article 3 TFEU. Accordingly, the subsidiarity principle does not apply (Article 5(3) TEU).

- **Proportionality**

. The recommendation of the Commission is in line with the principle of proportionality.

- **Choice of the instrument**

Decision of the Council of the European Union on negotiating directives on trade-related aspects of electronic commerce to supplement the directives issued to the Commission on the Doha Development Agenda.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable.

- **Stakeholder consultations**

Public consultation has not been carried out, as the substantive elements of the WTO negotiations are not known yet.

The Commission regularly consults stakeholders *inter alia* in the Expert Group on Trade Agreements⁹ and the Civil Society Dialogue.¹⁰

- **Collection and use of expertise**

Not applicable.

- **Impact assessment**

An impact assessment is not required at this stage since the WTO negotiations on electronic commerce are based on the existing authorisation of the Commission by the Council for WTO negotiations (see Section 1). The substance of the negotiations does not represent a new policy area; they are the continuation of wider WTO negotiations that have been in progress for years.

(a) Furthermore, it is key that the EU moves ahead quickly and takes part already in the early stages of the negotiations.

(b) The impacts of possible new rules and commitments resulting from the plurilateral negotiations in the WTO cannot be identified *ex ante*. Firstly, because negotiating proposals have not been put on the table yet by the participating WTO Members. Secondly, because it is not known which Members will take commitments on all or some of the new WTO rules and obligations.

The need for an impact assessment will be reassessed at the conclusion of the WTO negotiations.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

The initiative fully respects the Charter of Fundamental Rights of the European Union, and in particular Article 8 on the protection of personal data.

4. BUDGETARY IMPLICATIONS

The initiative does not have budgetary implications.

⁹ <http://ec.europa.eu/trade/trade-policy-and-you/expert-groups/>

¹⁰ <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11531>

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Not applicable.

- **Explanatory documents (for directives)**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

Not applicable.

Recommendation for a

COUNCIL DECISION

supplementing the negotiating directives for the Doha Development Agenda regarding the plurilateral negotiations of rules and commitments on electronic commerce

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 (4) first subparagraph in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) On 13 December 2017, at the Eleventh Ministerial Conference of the World Trade Organisation (WTO), 70 Members of the WTO adopted a Joint Statement on Electronic Commerce¹¹ to initiate exploratory work towards future WTO negotiations on trade-related aspects of electronic commerce.
- (2) On 25 January 2019, 76 Members of the WTO confirmed their intention to commence WTO negotiations on trade-related aspects of electronic commerce.¹²
- (3) Under the Doha Development Agenda, the Council authorised the opening of negotiations in the World Trade Organisation, and addressed directives to the Commission, *inter alia* on trade in services, trade facilitation and the progressive liberalisation of trade rules.
- (4) The adoption of supplementary negotiating directives is necessary to further frame the position of the Union in the WTO negotiations on trade-related aspects of electronic commerce.
- (5) Pursuant to Article 218(4), the Trade Policy Committee should continue to be designated as the committee in consultation with which the negotiations shall be conducted,

HAS ADOPTED THIS DECISION:

Article 1

The negotiating directives addressed to the Commission on the Doha Development Agenda are supplemented by the negotiating directives for the plurilateral negotiations of rules and commitments on electronic commerce set out in the Annex.

¹¹ WT/MIN(17)/60

¹² WT/L/1056

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*



Brussels, 2.4.2019
COM(2019) 165 final

ANNEX

ANNEX

to the

Recommendation for a Council Decision

**supplementing the negotiating directives for the Doha Development Agenda regarding
the plurilateral negotiations of rules and commitments on electronic commerce**

ANNEX

1. NATURE AND SCOPE OF THE RULES AND COMMITMENTS

1. Based on the existing authorisation by the Council for negotiations in the World Trade Organisation (WTO) under the Doha Development Agenda, the aim of the plurilateral negotiations should be to establish disciplines in the WTO on trade-related aspects of electronic commerce with a view to enhancing global electronic commerce, facilitating the operations of businesses, including micro, small and medium enterprises, in particular, by strengthening consumers' trust in the on-line environment and by creating new opportunities to promote inclusive and sustainable growth and development. The negotiations should also aim to liberalise trade in services and in goods in specific sectors that are directly relevant for enabling electronic commerce.
2. The negotiations should be conducted and concluded with due regard to the rights and obligations of Members under the WTO, respecting the principles of transparency and inclusiveness and building on existing WTO agreements, including the exceptions therein.
3. The negotiations should aim to develop high-standard disciplines and commitments with the participation of the largest possible number of WTO Members. The negotiations should take into account the unique opportunities for, and challenges faced by, WTO Members in relation to electronic commerce. Accordingly, the rules and commitments should provide for appropriate flexibility.
4. The rules and commitments agreed upon by the European Union (EU) should take account of the most-favoured-nation treatment obligation in existing WTO agreements, unless WTO Members can agree otherwise.

2. PROPOSED CONTENT OF THE RULES AND COMMITMENTS

5. The negotiations should develop new disciplines on trade-related aspects of electronic commerce in the WTO. These should aim to improve the conditions for global electronic commerce for the benefit of businesses and consumers in the European Union, and to increase the participation of micro, small and medium enterprises as well as developing and least developed countries in global value chains.
6. The negotiations will be conducted in an open and inclusive manner. Therefore, they may cover any trade-related aspect of electronic commerce that is proposed by the participating Members. Recognising the crosscutting nature of electronic commerce, the negotiations may cover matters such as:
 - facilitation of electronic transactions (e.g. electronic signatures and other trust services, electronic authentication);
 - customs duties on electronic transmissions and the transmitted content;
 - consumer trust (e.g. online consumer protection, unsolicited electronic communications, access to redress);
 - regulatory disciplines on telecommunications services to ensure that there is a level playing field and effective competition in the telecommunications sector;

- cross-border data flows, data localisation requirements and personal data protection;
 - business trust (e.g. protection of computer source code, forced technology transfer);
 - improved access to electronic commerce (e.g. access to the internet, online services and government data or the liability of and access to online intermediaries);
 - trade facilitation measures relevant for electronic commerce (e.g. paperless trading), taking due account of the WTO Agreement on Trade Facilitation;
 - electronic commerce-related aspects of intellectual property rights, including trade secrets;
 - development-related issues;
 - transparency; and
 - cooperation (e.g. between participating Members, consumer protection authorities).
7. The European Union may also engage in negotiations on other trade-related aspects of electronic commerce, proposed by the participating Members, in line with these directives.
 8. The negotiations should also aim at the progressive liberalisation of trade in services and in goods by reducing restrictions to market access and national treatment in certain specific sectors that are directly relevant for enabling electronic commerce, notably telecommunications services and computer and related services, beyond Members' existing WTO commitments.
 9. Any rule or commitment agreed upon by the European Union should be in line with the EU legal framework.
 10. In particular, the European Union shall not agree to disciplines or commitments that could affect its legal framework on cybersecurity, notably on a high common level of security of networks and information systems across the European Union.
 11. Furthermore, the European Union shall not agree to disciplines or commitments that could affect its legal framework on the protection of personal data. On cross-border data flows (data localisation requirements and personal data protection), the European Union shall follow the horizontal approach endorsed in relation to bilateral trade and investment agreements.
 12. Moreover, the European Union and its Member States shall maintain the possibility to preserve and develop their capacity to define and implement cultural and audio-visual policies for the purposes of preserving their cultural diversity. The European Union shall not agree to rules or commitments for audio-visual services. The European Union shall not take commitments on services supplied or activities performed in the exercise of governmental authority.
 13. The rules and commitments should not prevent the European Union, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and

personal data protection and the promotion and protection of cultural diversity. The high quality of the public services in the European Union should be preserved in accordance with the Treaty on the Functioning of the European Union, and in particular, with Protocol No. 26 on Services of General Interest, and take into account the European Union's reservations in this area, including pursuant to the GATS.