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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Recommendation for a COUNCIL DECISION supplementing the negotiating directives for the Doha Development Agenda regarding the negotiations of a multilateral framework on investment facilitation

Delegations will find attached document COM(2019) 314 final.

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EUROPEAN
COMMISSION

Brussels, 3.7.2019
COM(2019) 314 final

Recommendation for a

COUNCIL DECISION

**supplementing the negotiating directives for the Doha Development Agenda regarding
the negotiations of a multilateral framework on investment facilitation**

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 Investment Facilitation for Development¹ that called for ‘structured discussions with the aim of developing a multilateral framework on investment facilitation.’ These discussions seek to identify and develop the elements of a framework for facilitating foreign direct investment (FDI). The European Union (EU) and its Member States strongly supported and joined the initiative.

The EU actively participated in the structured discussions that took place during 2018 in the WTO. The discussions were transparent and open to all WTO Members, and resulted in a ‘Checklist of Issues Raised by Members’ containing possible elements of a framework for facilitating FDI identified by WTO members. This ‘Checklist’ was endorsed at a stock-taking meeting on 6 December 2018.

In 2019, a new phase of discussions has started. WTO members agreed on a schedule of meetings for the first half of the year, which will be devoted to the development of the elements included in the Checklist. This exploratory work on the development of such elements remains transparent and open to all WTO Members. The discussion will cover all the elements of the ‘Checklist’ on the basis of examples of existing provisions in bilateral or multilateral agreements that are relevant to investment facilitation. These examples are collected in a “Compendium of text-based examples”. A stock-taking meeting will be held in July 2019. In autumn 2019, members are likely to start proposing specific texts for a multilateral framework on investment facilitation. This means that the first phase of negotiations is likely to start as from September-October 2019.

The negotiations should take place within the WTO framework, and remain transparent and open to any WTO Member that decides to join. During the negotiations, the participating Members may put on the table any negotiating proposal in the realm of facilitating FDI, at the beginning or at a later stage 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 and investment.² Given that FDI is a major vehicle for international trade, and investment facilitation is a way to foster cross-border investment by helping to secure a stable and predictable climate for FDI worldwide,³ the new WTO negotiations on investment facilitation are covered by the existing authorisation, as they belong to the field of trade and investment.⁴ Therefore, a new Council

¹ WT/MIN(17)/59 of 13 December 2017.

² A set of Council conclusions form the DDA authorisation, which date from 25 October 1999 to 18 July 2008.

³ The latest Schedule of Meetings of the Structured Discussions on Investment Facilitation for Development (INF/IFD/W/3) of 17 April 2019 on the basis of the “Checklist of Issues Raised by Members” provides that investment facilitation concerns providing a stable, transparent and predictable business climate for FDI worldwide. The latest version of the “Checklist of Issues Raised by Members” dated 9 November 2018, was circulated to all Members as an annex to the Informal Note on Stock-taking and Next Steps on 27 November 2018.

⁴ Reference is made in particular to the Council conclusions of 26 October 1999, 8 December 1999, 29 October 2001, 21 November 2001, 21 July 2003 (which specifically provided that the Singapore and

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 trade and investment is not a new issue on the agenda of the WTO,⁵ the negotiations on investment facilitation could potentially be novel in some aspects and may address some topics on which the EU has specific priorities. Consequently, in order to frame more accurately the negotiations, the Commission recommends to the Council the adoption of supplementary negotiating directives specific to the WTO negotiations on investment facilitation.

The proposed negotiating directives aim to ensure that the EU is in a position to engage in the negotiation of any investment facilitation element proposed by the participating WTO Members in the course of negotiations, in full respect of the *acquis* and the EU's policy choices in trade and investment negotiations.

For the EU, the objectives of the negotiations are to facilitate FDI by investors and businesses, including micro, small and medium enterprises, and create new opportunities to promote inclusive growth and sustainable development. A multilateral investment facilitation framework could facilitate global investment in the same way that the WTO is helping to facilitate global trade with the Trade Facilitation Agreement. 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.

- **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'.⁶

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 prospective negotiations on investment facilitation, forms the central pillar of this process.

On 18 September 2018, the Commission presented a concept paper⁷ on the WTO modernisation. In the context of strengthening the WTO's rulemaking function, the Commission *inter alia* underlined that 'following the Joint Statements agreed in Buenos Aires, work is already ongoing in the areas of [...] investment facilitation but further efforts will be needed to address gaps and to update the WTO rule book.'

The EU systematically puts forward ambitious disciplines on transparency and domestic regulation in the services and non-services sectors in its free trade negotiations. The

Doha Ministerial Declarations and related texts adopted 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 (which specifically recalled that the Council conclusions from October 1999 to July 2005 remain valid and together constitute the Commission's mandate for the DDA negotiations), 21 November 2005, 12 June 2006, 10 March 2008 and 18 July 2008.

⁵ The WTO Working Group on the Relationship between Trade and Investment was launched in 1997.

⁶ Article 21(2)(e) TEU.

⁷ http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

negotiating directives proposed for the investment facilitation negotiations would be based on the same approach as the EU follows in its FTAs.

- **Consistency with other Union policies**

The disciplines that the EU may propose in the WTO, would be fully in line with, and build on the EU's relevant internal market legislation, and reflect the proposals made by the EU in bilateral negotiations

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 5 in the Annex).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

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

Pursuant to Article 207, 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 investment facilitation, the Council has already authorised the opening of negotiations, and issued directives to the Commission, on trade and investment in the WTO. 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(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 (Article 5(4) TEU).

- **Choice of the instrument**

Decision of the Council of the European Union on negotiating directives on investment facilitation in the WTO 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 Agreements⁸ and the Civil Society Dialogue.⁹

- **Collection and use of expertise**

Not applicable.

- **Impact assessment**

An impact assessment has not been carried out for the following reason: The WTO negotiations on investment facilitation 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 now been narrowed down to a more specific area, not including investment liberalisation or investment protection.

Based on the possible elements of a multilateral framework for investment facilitation identified in the “Checklist”, there is no indication that a ratification of such an agreement would lead to any significant impact for the EU. It would rather translate into a codification of practices that are already well-established within the EU. The impacts of possible new rules and commitments resulting from the negotiations in the WTO are likely to be more substantial for certain third countries, notably developing countries and least developed countries. However, they 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 the new WTO rules and obligations and, if so, in which time span.

When the potential impacts are clearer, i.e. when the content of the multilateral framework and commitments of WTO members is better known, the Commission will reassess the need for a more thorough analysis. This should happen no later than at the conclusion of the WTO negotiations.

The EU will actively participate and submit proposals from the early stages of the negotiations to influence the outcome.

- **Regulatory fitness and simplification**

Not applicable.

⁸ <http://ec.europa.eu/trade/trade-policy-and-you/expert-groups/>

⁹ <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11531>

- **Fundamental rights**

The initiative fully respects the Charter of Fundamental Rights of the European Union.

4. BUDGETARY IMPLICATIONS

The initiative does not have budgetary implications.

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 negotiations of a multilateral framework on investment facilitation

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

Having regard to the recommendation from the European Commission,

Whereas:

- (1) Under the Doha Development Agenda, the Council authorised the opening of negotiations in the World Trade Organisation (WTO), and addressed directives to the Commission, *inter alia* on trade and investment,
- (2) On 13 December 2017, at the Eleventh Ministerial Conference of the World Trade Organisation, 70 Members of the WTO adopted a Joint Statement on Investment Facilitation for Development¹⁰ calling for structured discussions with the aim of developing a multilateral framework on investment facilitation.
- (3) The current phase of discussions, aimed at developing the possible elements of a multilateral framework on investment facilitation, will conclude in July 2019 according to the latest schedule¹¹, and is likely to be followed by a first negotiating phase in autumn 2019.
- (4) The adoption of supplementary negotiating directives is necessary to further frame the position of the Union in the prospective WTO negotiations on investment facilitation.
- (5) Pursuant to Article 207(3), 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 negotiations of a multilateral framework on investment facilitation set out in the Annex.

¹⁰ WT/MIN(17)/59.

¹¹ INF/IFD/W/3.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*