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INFORMATION NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules

- Outcome of the European Parliament's first reading
(Brussels, 18 to 21 January 2021)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the Joint declaration on practical arrangements for the codecision procedure¹, a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this file at first reading.

In this context, the rapporteur, Marie-Pierre VEDRENNE (RE, FR), presented a compromise amendment (amendment number 24) to the abovementioned proposal for a Regulation on behalf of the International Trade Committee and two amendments containing joint declarations by the Council, the European Parliament and the Commission (amendment number 25), and statements and declarations by the Commission (amendment number 26). These amendments had been agreed during the informal contacts referred to above.

¹ OJ C 145, 30.6.2007, p. 5.

II. VOTE

When it voted on 19 January 2021, the plenary adopted the compromise amendment (amendment number 24) and the two amendments containing declarations and statements (amendment numbers 25 and 26) to the abovementioned proposal for a Regulation. No other amendments were adopted. The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto².

The Parliament's position reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

² The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in ***bold and italics***. The symbol "■" indicates deleted text.

P9_TA(2021)0004

Exercise of the Union's rights for the application and enforcement of international trade rules *I**

European Parliament legislative resolution of 19 January 2021 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules (COM(2019)0623 – C9-0197/2019 – 2019/0273(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2019)0623),
 - having regard to Article 294(2) and Article 207 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0197/2019),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to opinion 2/15 of the European Court of Justice³,
 - having regard to its resolution on the Crisis of the WTO Appellate Body of 28 November 2019⁴,
 - having regard to the provisional agreement approved by the committee responsible under Rule 74(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 4 November 2020 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on International Trade (A9-0133/2020),
1. Adopts its position at first reading hereinafter set out;
 2. Approves the joint statements by Parliament, the Council and the Commission annexed to this resolution;
 3. Takes note of the statements by the Commission annexed to this resolution;

³ ECLI:EU:C:2017:376.

⁴ Texts adopted, P9_TA(2019)0083.

4. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
5. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

P9_TC1-COD(2019)0273

Position of the European Parliament adopted at first reading on 19 January 2021 with a view to the adoption of Regulation (EU) 2021/... of the European Parliament and of the Council amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure⁵,

⁵ Position of the European Parliament of 19 January 2021.

Whereas:

- (1) Regulation (EU) No 654/2014 of the European Parliament and of the Council⁶ establishes a common legislative framework for the exercise of the Union's rights under international trade agreements in certain specific situations. One of those situations relates to the dispute settlement mechanisms set up by the Agreement establishing the World Trade Organization (WTO) and by other international trade agreements, including regional or bilateral agreements. Regulation (EU) No 654/2014 enables the Union to suspend concessions or other obligations under international trade agreements after dispute settlement proceedings are concluded.
- (2) Regulation (EU) No 654/2014 does not deal with situations where the Union has a right of action in response to a measure maintained by a third country but dispute settlement through adjudication is blocked or otherwise not available for reasons of non-cooperation of the third country which has adopted the measure.

⁶ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50).

- (3) The WTO Dispute Settlement Body has been unable to fill the outstanding vacancies on the WTO Appellate Body (the 'WTO Appellate Body'). The WTO Appellate Body is no longer able to fulfil its function from the moment when there are fewer than three WTO Appellate Body Members left. Until that situation is resolved and in order to preserve the essential principles and features of the WTO dispute settlement system and the Union's procedural rights in ongoing and future disputes, the Union has sought to agree interim arrangements for appeal arbitration pursuant to Article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'WTO Dispute Settlement Understanding'). That approach was endorsed by the Council on 27 May 2019, 15 July 2019 and 15 April 2020 and supported in the European Parliament resolution of 28 November 2019 on the crisis of the WTO Appellate Body. If a WTO Member refuses to enter into such an arrangement, and files an appeal to a non-functioning WTO Appellate Body, the resolution of the dispute is effectively blocked.
- (4) A similar situation might arise under other international trade agreements, including regional or bilateral agreements, where a third country does not cooperate in the manner necessary for dispute settlement to function, for example by failing to appoint an arbitrator and where there is no mechanism provided to secure the functioning of dispute settlement in such a situation.

- (5) If dispute settlement is blocked, the Union is unable to enforce international trade agreements. Therefore, it is appropriate to extend the scope of Regulation (EU) No 654/2014 to cover such situations.
- (6) To that end, the Union should be able to expeditiously suspend concessions or other obligations under international trade agreements, including regional or bilateral agreements, if effective recourse to binding dispute settlement is not possible because the third country does not cooperate in making such recourse possible.
- (7) It is also appropriate to set out that where measures are taken to restrict trade with a third country, such measures should not exceed the nullification or impairment of the Union's commercial interests caused by the measures of that third country, in line with the Union's obligations under international law.
- (8) *Measures to be adopted pursuant to this Regulation relate specifically to international trade in that they are essentially intended to govern such trade and have direct and immediate effects on it and, therefore, fall within the scope of the Union's exclusive competence pursuant to Article 207 of the Treaty on the Functioning of the European Union⁷.*

⁷ Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376, paragraph 36.

- (9) *Services and intellectual property rights account for a large and growing share of world trade and are covered by international trade agreements, including regional or bilateral Union agreements. Measures in the fields of trade in services and trade-related aspects of intellectual property rights should therefore be included in the scope of the trade policy measures available to the Union to make Regulation (EU) No 654/2014 more consistent and effective.*
- (10) *This Regulation should ensure the coherent application of the enforcement mechanism in trade disputes relating to international trade agreements, including regional or bilateral agreements. The enforcement mechanism of the Trade and Sustainable Development chapters of the Union's international trade agreements forms an integral part of the Union's trade policy and this Regulation would apply to the suspension of concessions or other obligations and the adoption of measures in response to breaches of those chapters, if and to the extent that such measures are permitted and are warranted by the circumstances.*
- (11) The review clause of Regulation (EU) No 654/2014 should **also** cover the application of the amendments to that Regulation introduced by this Regulation.
- (12) Regulation (EU) No 654/2014 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 654/2014 is amended as follows:

(1) *in Article 1, point (b) is replaced by the following:*

‘(b) rebalancing concessions or other obligations in the trade relations with third countries, when the treatment accorded to goods or services from the Union is altered in a way that affects the Union's interests.’;

(2) *in Article 2, point (b) is replaced by the following:*

‘(b) “concessions or other obligations” means tariff concessions or other obligations or benefits in the field of trade in goods or services, or concerning trade-related aspects of intellectual property rights, that the Union has committed itself to applying in its trade with third countries by virtue of international trade agreements to which it is a party;’;

(3) Article 3 is amended as follows:

(a) the following point is inserted:

‘(aa) following the circulation of a WTO panel report upholding, in whole or in part, the claims brought by the Union, if an appeal under Article 17 of the WTO Dispute Settlement Understanding cannot be completed and if the third country has not agreed to interim appeal arbitration under Article 25 of the WTO Dispute Settlement Understanding;’;

(b) the following point is inserted:

‘(ba) in trade disputes relating to other international trade agreements, including regional or bilateral agreements, if adjudication is not possible because the third country is not taking the steps that are necessary for a dispute settlement procedure to function, ***including unduly delaying the proceedings amounting to non-cooperation in the process;***’;

(c) *point (d) is replaced by the following:*

‘(d) ***in cases of modification of concessions or commitments by a WTO member under Article XXVIII of the GATT 1994 or Article XXI of the General Agreement on Trade in Services (GATS), where no compensatory adjustments have been agreed and, as regards services, compensatory adjustments are not made in conformity with the findings of the arbitration pursuant to Article XXI of the GATS.***’;

(4) in Article 4, paragraph 2 is amended as follows:

(a) the following point is inserted:

‘(ba) where measures are taken to restrict trade with a third country in situations under point (aa) or (ba) of Article 3, ***the level of*** such measures shall ***not exceed*** the nullification or impairment of the Union’s commercial interests caused by the measures of that third country;’;

(b) point (d) is replaced by the following:

‘(d) where concessions or commitments are modified or withdrawn in the trade with a third country in connection with Article XXVIII of the GATT 1994 and the related Understanding⁸, or with Article XXI of the GATS and the related implementing procedures, they shall be substantially equivalent to the concessions or commitments modified or withdrawn by that third country, in accordance with the terms established in Article XXVIII of the GATT 1994 and the related Understanding or Article XXI of the GATS and the related implementing procedures.’;

(5) Article 5 is amended as follows:

(a) in paragraph 1, the following points are inserted:

‘(ba) the suspension of obligations regarding trade in services and the imposition of restrictions on trade in services;

(bb) the suspension of obligations with respect to trade-related aspects of intellectual property rights granted by a Union institution or agency and valid throughout the Union, and the imposition of restrictions on the protection of such intellectual property rights or their commercial exploitation, in relation to right-holders who are nationals of the third country concerned;’;

⁸ Understanding ‘Interpretation and Application of Article XXVIII’.

(b) *the following paragraphs are inserted:*

‘1a. When selecting measures to be adopted pursuant to point (ba) of paragraph 1 of this Article, the Commission shall always consider measures according to the following hierarchy of steps:

- (a) measures relating to trade in services requiring an authorisation valid throughout the Union and based on secondary legislation, or, where no such measures are available,*
- (b) measures relating to other services in areas where extensive Union legislation exists, or, where no such measures are available,*
- (c) measures which the information-gathering exercise conducted pursuant to Article 9(1a), as provided for in point (a) of Article 5(1b), has demonstrated would not impose a disproportionate burden on the process of administration of relevant national regulations.*

1b. Measures adopted pursuant to points (ba) and (bb) of paragraph 1 shall:

- (a) be subject to an information-gathering exercise pursuant to Article 9(1a);**
- (b) be adjusted, if necessary, by means of an implementing act pursuant to Article 4(1) where, after a review conducted pursuant to Article 9(1a), the Commission concludes that the measures are of insufficient effectiveness or impose an unreasonable burden on the process of administration of relevant national regulations. Such review by the Commission shall be first conducted six months after the date of application of the measures and at intervals of twelve months thereafter;**
- (c) be subject to an evaluation report, six months after their termination and based inter alia on stakeholder input, which shall examine their effectiveness and operation, and draw possible conclusions for future measures.’;**

(6) in Article 6, the following paragraph is added:

- ‘3. Regarding trade-related aspects of intellectual property rights, the term “nationals” shall be understood in the same sense as it is used in paragraph 3 of Article 1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.’;**

(7) *in Article 7, the first subparagraph of paragraph 2, point (c) is replaced by the following:*

‘(c) in cases of the withdrawal or modification of concessions or commitments by a WTO member under Article XXVIII of the GATT 1994 or Article XXI of the GATS, when the third country concerned accords adequate and proportionate compensation to the Union after the adoption of an implementing act under Article 4(1),’;

(8) *Article 9 is amended as follows:*

(a) paragraph 1 is replaced by the following:

‘1. The Commission shall seek information and views regarding the Union's economic interests in specific goods or services sectors, or regarding specific trade-related aspects of intellectual property rights, in the application of this Regulation, through a notice in the Official Journal of the European Union or through other suitable public communication means, indicating the period within which input is to be submitted. The Commission shall take the input received into account.’;

(b) the following paragraph is inserted:

‘1a. When the Commission envisages measures pursuant to point (ba) or (bb) of Article 5(1), it shall inform and conduct consultations with stakeholders, in particular industry associations, affected by possible commercial policy measures and with Member State public authorities involved in the formulation or implementation of legislation regulating the affected fields. Without unduly delaying the adoption of such measures, the Commission shall, in particular, seek information on:

- (a) the impact of such measures on third country service providers or right-holders who are nationals of the third country concerned and on Union competitors, users or consumers of such services or intellectual property rights holders;***
- (b) the interaction of such measures with relevant Member State regulations;***
- (c) the administrative burden which may be occasioned by such measures.***

The Commission shall take utmost account of the information gathered during such consultations.

The Commission shall provide an analysis of the envisaged measures to Member States when proposing the draft implementing act pursuant to Article 8.’;

(9) Article 10 is replaced by the following:

‘Article 10

Review

1. *At the earliest possible opportunity after ... [the date of entry into force of this amending Regulation], but no later than one year after that date*, the Commission shall review the scope of this Regulation, taking into account in particular **■** the commercial policy measures that may be adopted, as well as its implementation, and shall report its findings to the European Parliament and the Council.
2. In acting pursuant to paragraph 1, the Commission shall undertake a review aimed at envisaging under this Regulation additional commercial policy measures suspending concessions or other obligations in the field of *trade-related aspects of intellectual property rights*.’

Article 2

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

For the Council

The President

The President

Joint Declaration of the Commission, the Council and the European Parliament on an instrument to deter and counteract coercive actions by third countries

The Commission takes note of the concerns of the Parliament and Member States as to the practices of certain third countries to seek to coerce the Union and/or its Member States to take or withdraw particular policy measures. The Commission shares the view that such practices raise significant concerns. The Commission confirms its intention to further examine a possible instrument, which could be adopted in order to dissuade or offset coercive actions by third countries and which would allow the expeditious adoption of countermeasures triggered by such actions. The Commission intends to continue its assessment and on the basis of that assessment, taking into account all relevant circumstances, adopt a legislative proposal providing for a mechanism allowing to dissuade or offset such actions in a manner consistent with international law. As announced in the Letter of Intent of the President of the Commission to the President of the Parliament and President in office of the Council of 16 September 2020 the Commission shall adopt the proposal in any case no later than the end of 2021, or earlier, should the need arise as a result of coercive action taken by a third country.

The Council and the European Parliament take note of the intention of the Commission to submit a proposal for an instrument to deter and counteract coercive actions by third countries. Both institutions are committed to fulfil their institutional role as co-legislators and to consider the proposal in a timely manner, taking into account the Union's obligations under public international law and WTO law as well as relevant developments in international trade.

Joint Declaration of the European Parliament, the Council and the Commission

The Union remains committed to a multilateral approach to international dispute settlement, rules-based trade, and international cooperation to achieve the Sustainable Development Goals of the United Nations. The Union will cooperate in all endeavours aiming to reform the WTO Dispute Settlement Mechanism which can ensure the effective functioning of the WTO Appellate Body.

Statements by the Commission

1. Commission declaration on compliance with international law

When the Union brings a dispute under the Dispute Settlement Understanding (DSU) against another Member of the World Trade Organization (WTO), the Commission will make every reasonable effort to obtain, as early as possible, the agreement of that Member to resort to arbitration under Article 25 of the DSU as an interim appeal procedure, which preserves the essential features of appeals before the Appellate Body (the “appeal arbitration procedure”), as long as the Appellate Body is unable to fully resume its functions in accordance with Article 17 of the DSU.

When adopting implementing acts pursuant to Article 3(aa) of the Regulation, the Commission will act in accordance with the requirements of the international law on countermeasures, as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.

In particular, before adopting implementing acts pursuant to Article 3(aa), the Commission will call upon the WTO Member concerned to implement the WTO panel’s findings and recommendations, notify that WTO Member of the Union’s intention to take countermeasures and reiterate its openness to negotiate a mutually agreed solution in accordance with the requirements of the DSU.

When implementing acts have already been adopted pursuant to Article 3(aa), the Commission will suspend their application if the Appellate Body resumes its functions in respect to the case concerned in accordance with Article 17 of the DSU, or if an interim appeal procedure is initiated, provided that such procedure is pursued in good faith.

2. Statement by the Commission

The Commission welcomes the adoption of the Regulation of the European Parliament and of the Council amending Regulation (EU) No 654/2014.

The Commission recalls the Statement which it made upon the adoption of the original regulation, inter alia that the implementing acts which the Commission is empowered to adopt would be

designed on the basis of objective criteria and subject to the control of the Member States. In exercising that empowerment, the Commission intends to act in accordance with the statement made upon the adoption of the original regulation as well as this Declaration.

When preparing draft implementing acts affecting trade in services or trade-related aspects of intellectual property rights, the Commission recalls its obligations pursuant to Article 9(1a) and confirms that it will undertake intensive prior consultations with a view to ensuring that all relevant interests and implications can be brought to the Commission's attention, shared with Member States and are duly taken into account in the possible adoption of measures. In those consultations, the Commission will seek and expects to receive input from private stakeholders affected by possible commercial policy measures to be adopted by the Union in those areas. Similarly, the Commission will seek and expects to receive input from public authorities that may be involved in or affected by the implementation of possible commercial policy measures adopted by the Union.

In the case of measures in the fields of trade in services and trade-related aspects of intellectual property rights, in particular the input from Member States' public authorities involved in the formulation or implementation of legislation regulating the affected fields will be duly taken into account in the preparation of draft implementing acts, inter alia on how possible commercial policy measures would interact with Union and national legislation. Likewise, other stakeholders affected by such commercial policy measures will be given an opportunity to formulate their recommendations and concerns with respect to the choice and design of measures to be adopted. The observations will be shared with the Member States when measures are adopted pursuant to Article 8 of the Regulation. The regular review of any such measures imposed during their application or after their termination will likewise take into account the input from Member State authorities and private stakeholders in relation to the operation of such measures, and allow for adjustments to be made if problems have arisen.

Finally, the Commission reaffirms that it attaches great importance to ensuring that the Regulation is an effective and efficient tool for the enforcement of the Union's rights under international trade agreements, including in the field of trade in services and trade-related aspects of intellectual property rights. Therefore, the measures to be chosen in these fields must also ensure effective enforcement in line with the rights of the Union, such that they induce compliance by the third country concerned and are consistent with the applicable international rules on the type of enforcement measures allowed.

Declaration of the Commission

Upon the adoption of the Regulation in 2014, the Commission committed to an effective communication and exchange of views with the European Parliament and the Council on trade disputes that may lead to the adoption of measures under the Regulation, and on enforcement actions in general. Mindful of the overarching objective of effective and efficient enforcement of Union's rights under the Union's international trade agreements, the Commission will continue to promote and streamline its interactions with the European Parliament and the Council to the mutual benefit.

In particular, the Commission undertakes to examine, as part of its enhanced enforcement system, alleged violations of the Union's international trade agreements when raised by the Parliament, its Members, or its Committees, or by the Council on the understanding that such requests be accompanied by supporting evidence. The Commission will keep the Parliament and the Council informed of the output of its enhanced enforcement work.

In deploying the enhanced enforcement system, the Commission will pay equal attention to alleged breaches of the trade and sustainable development provisions of EU trade agreements as to alleged breaches of market access systems. The processing of alleged breaches of trade and sustainable provisions will be fully integrated into the system. The Commission will prioritise those cases which are particularly serious in terms of their effect on workers or the environment in a trade context, which have systemic importance and which are legally sound.

The Commission will continue to fully engage in dedicated sessions with the responsible Parliamentary committee to exchange views on trade disputes and enforcement actions, including with regard to impacts on Union industries. In this context, the Commission will continue its reporting practice by providing periodically a state of play on all pending disputes and instant information for major developments in relation to disputes at the same time such information is shared with Member States. This reporting and information sharing will take place through the responsible committees in the Council and in the Parliament.

At the same time, the Commission will continue keeping the Parliament and the Council regularly informed of international developments that may lead to situations requiring the adoption of measures under the Regulation.

Finally, the Commission reaffirms its commitments under Regulation (EU) No 182/2011 of the European Parliament and of the Council to promptly transmit to the Parliament and to the Council draft implementing acts that it submits to the committee of Member States as well as final draft implementing acts following the delivery of opinions in the committee. This is managed via the comitology register.
