EUROPEAN
COMMISSION

Brussels, 12.5.2021
COM(2021) 237 final

2021/0121 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the General Council of the World Trade Organization on the European Union request for an extension of the WTO waiver permitting autonomous trade preferences to the Western Balkans

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The objective of this proposal is to establish the position to be taken on the Union's behalf in the General Council of the World Trade Organization ('WTO') in connection with the envisaged adoption of a decision to extend the WTO waiver permitting the European Union ('EU') to provide autonomous trade preferences to the Western Balkans.

2. CONTEXT OF THE PROPOSAL

2.1. The Marrakesh Agreement establishing the World Trade Organization

The Marrakesh Agreement establishing the World Trade Organization ('WTO Agreement') entered into force on 1 January 1995.

The European Union is a party to the Agreement.

2.2. Ministerial Conference and General Council of the World Trade Organization

Pursuant Article IV(1) of the WTO Agreement, the Ministerial Conference has the authority to take decisions on all matters under any of the Multilateral Trade Agreements.

Pursuant Article IV(2) of the WTO Agreement, in the intervals between meetings of the Ministerial Conference, its functions are conducted by the General Council.

Pursuant of Article IX(1) of the WTO Agreement, the WTO usually takes decisions by consensus.

2.3. The envisaged act of the General Council of the WTO

Pursuant Article IX(3) of the WTO Agreement, an obligation imposed on a member may be waived in exceptional circumstances.

Further to a request by the EU, the General Council of the WTO may adopt a decision to extend the existing WTO waiver permitting the EU to provide autonomous trade preferences to Western Balkans ('the envisaged act').

The existing waiver expires on 31 December 2021. Therefore, the purpose of the envisaged act is to extend the waiver until 31 December 2026.

The envisaged act will become binding on the Members of the WTO in accordance with Article IX(3), as well as Article II(2) of the WTO Agreement, which provides: 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 <…> are integral parts of this Agreement, binding on all Members'.

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

On 16 December 2020, the European Parliament and the Council adopted Regulation (EU) 2020/2172 extending the period of application of autonomous trade preferences until 31 December 2025[1] to products originating in the Western Balkans (Albania, Bosnia and

[1] Regulation (EU) 2020/2172 of the European Parliament and of the Council of 16 December 2020 amending Council Regulation (EC) No 1215/2009 introducing exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilisation and Association process (OJ L 432, 21.12.2020, p. 7).

Herzegovina, Kosovo* Montenegro, North Macedonia, and Serbia). The trade preferences were initially granted by Council Regulation (EC) No 2007/2000[2], amended and extended several times thereafter.

In the absence of a waiver from the EU obligations pursuant to Article I(1) of the General Agreement on Tariffs and Trade 1994 ('GATT 1994') and Article XIII of GATT 1994, to the extent necessary, the treatment provided by the autonomous trade preferences would need to be extended to all other Members of the WTO.

Therefore, the EU is required to submit a request to extend the WTO waiver on autonomous trade preferences granted by the EU to the Western Balkans pursuant Article IX(3) of the WTO Agreement for an additional time-period of five years, until 31 December 2026. In addition to making this request, the EU should support the adoption of this request at the General Council of the WTO.

This would be the fourth extension of the waiver, initially granted on 8 December 2000 until 31 December 2006[3], and last extended on 7 December 2016[4]. The reason for the initial waiver and the extensions thereof is the persistent difficult economic situation in the region and that the preferential treatment to eligible products the Union affords to these countries is intended to promote economic development in a manner consistent with the objectives of GATT 1994.

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.

4.1.2. Application to the present case

The General Council of the WTO is a body set up by an agreement, namely the WTO Agreement.

The act which the General Council would be called upon to adopt constitutes an act having legal effects. The envisaged act would be binding under international law in accordance Article II(2) and Article IX(3) of the WTO 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.

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* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

2 OJ L 240, 23.9.2000, p. 1. Regulation as last amended by Regulation (EC) No 530/2007 (OJ L 125, 15.5.2007, p. 1), as codified by Council Regulation (EC) No 1215/2009 of 30 November 2009 (OJ L 328, 15.12.2009, p. 1).

3 WT/L/380.

4 G/C/W/731.

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.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is the first subparagraph of Article 207(4).

4.3. Conclusion

The legal basis of the proposed decision should be the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU.

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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(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement establishing the World Trade Organization ('WTO Agreement') was concluded by the Union by Council Decision 94/800/EC[1] and entered into force on 1 January 1995.

(2) Pursuant to Article II (2)of the WTO Agreement, the agreements and associated legal instruments included in Annexes 1, 2 and 3 ('Multilateral Trade Agreements'), including the General Agreement on Tariffs and Trade 1994 ('GATT 1994'), are integral parts of this Agreement, binding on all Members.

(3) Pursuant to Article IV(1) of the WTO Agreement, the Ministerial Conference may adopt decisions on all matters under any of the Multilateral Trade Agreements. The Ministerial Conference is composed of representatives of all the Members and it meets at least once every two years. Pursuant to Article IV(2) of the WTO Agreement, during the intervals between meetings of the Ministerial Conference, the General Council is to conduct its functions. Pursuant to Article IX(1) of that Agreement, the WTO usually adopts decisions by consensus.

(4) In accordance with Article IX(3) of the WTO Agreement, in exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by the WTO Agreement or any of the Multilateral Trade Agreements.

(5) The Union was first granted a waiver of its obligations under Article I(1) of GATT 1994 on 8 December 2000 until 31 December 2006[2], and last extended on 7 December 2016 until 31 December 2021, to the extent necessary to permit the Union to afford preferential treatment to eligible products originating in the Western Balkans.

(6) On 16 December 2020, the European Parliament and the Council adopted Regulation (EU) 2020/2172 and again extended the period of application of autonomous trade

[1] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ L 336, 23.12.1994, p. 1).

[2] WT/L/380.

preferences until 31 December 2025[3] to the Western Balkans (Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia, and Serbia).

(7) In the absence of a waiver of WTO obligations, the Union's application of autonomous trade preferences to the Western Balkans until 31 December 2025 would need to be extended to all other Members of the WTO.

(8) The request to extend the WTO waiver permitting autonomous trade preferences to the Western Balkans is justified considering the persistent difficult economic situation in the region and that the preferential treatment to eligible products the Union affords to these countries is intended to promote economic development in a manner consistent with the objectives of GATT 1994 and not to create barriers for the trade of other WTO Members. Therefore, the exceptional circumstances justifying the extension of the waiver from Article I(1) and from Article XIII of GATT 1994 still applies.

(9) It is appropriate to establish the position to be taken on the Union's behalf in the General Council of the WTO, as the extension of the WTO waiver on autonomous trade preferences granted by the Union to the Western Balkans will be binding on Members of the WTO,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union within the General Council of the World Trade Organization (WTO) shall be to request an extension of the existing WTO waiver on the autonomous trade preferences granted by the Union to the Western Balkans until 31 December 2026, and to support the adoption of that request.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

[3] Regulation (EU) 2020/2172 of the European Parliament and of the Council of 16 December 2020 amending Council Regulation (EC) No 1215/2009 introducing exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilisation and Association process (OJ L 432, 21.12.2020, p. 7).

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.