EUROPEAN
COMMISSION

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2025/0015 (NLE)

Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union in the World Trade Organization on adding the Agreement on Electronic Commerce into the Agreement establishing the World Trade Organization

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Council decision establishing the position to be taken on the Union's behalf at the World Trade Organization ('WTO') in connection with the envisaged adoption of a decision on adding the Agreement on Electronic Commerce to Annex 4 to the Agreement establishing the World Trade Organization ('the WTO Agreement').

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement Establishing the World Trade Organization

The WTO Agreement aims to achieve the objectives mentioned in the preamble to the Agreement. The agreement entered into force on 1 January 1995.

The European Union ('EU') is a party to the Agreement.[1] All 27 EU Member States are also parties to the Agreement. The WTO may take decisions in accordance with the procedures set out in the WTO Agreement.

2.2. The General Council of the World Trade Organization

The General Council is composed of representatives of all Members, meeting regularly. In the intervals between sessions of the Ministerial Conference, it performs the functions of the Ministerial Conference, as well as those assigned to it under the WTO Agreement.

2.3. Reason for and objective of the proposal

Negotiations towards the Agreement on Electronic Commerce were launched in January 2019 when the WTO Joint Initiative on Electronic Commerce ('e-commerce JSI') was established. The negotiations focused on establishing a set of basic international trade rules governing digital trade that will promote and facilitate digital transactions. The Commission conducted the negotiations on behalf of the EU.[2]

On 26 July 2024, after five years of negotiation, the participants of the e-commerce JSI reached a stabilised text of the Agreement on Electronic Commerce[3]. This comprehensive agreement covers a wide range of digital trade disciplines and, once integrated into the WTO legal framework, will represent the first set of global rules governing digital trade. The Agreement on Electronic Commerce comprises: (1) trade facilitation disciplines that can lead to more seamless digital trade both within countries and across borders (e.g., provisions on paperless trading, electronic contracts, electronic authentication and electronic signatures); (2) provisions to improve trust in the digital trade environment for both consumers and businesses (e.g., provisions on unsolicited commercial electronic messages, online consumer protection, cybersecurity, or open internet access); and (3) provisions leading to a more reliable international digital trade environment, facilitating consumers' and companies' continued access to the internet and electronic services at affordable prices (e.g., provisions on

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

[2] Council Decision 8993/19 of 21 May 2019 supplementing the negotiating directives for the Doha Development Agenda regarding the plurilateral negotiations of rules and commitments on electronic commerce.

[3] Communication by the Joint Statement Initiative on Electronic Commerce, World Trade Organization (July 26, 2024), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/87.pdf

electronic payments or telecommunications services). The Agreement also includes a permanent prohibition of customs duties on electronic transmissions, which is of great commercial importance and is a key priority for the EU's industry. Finally, the Agreement includes a development component, aiming to enable and facilitate the participation of consumers and companies from developing countries in digital trade.

All the provisions contained in the Agreement are consistent with the EU acquis and will not require any implementation effort from the EU as they are already fully provided for in EU and Member States' law.

The Agreement on Electronic Commerce is set to become part of the WTO legal framework as a plurilateral agreement, formally appended to Annex 4 of the WTO Agreement. Participating WTO Members plan to submit a formal request to the WTO General Council by February 2025, seeking to incorporate the Agreement on Electronic Commerce under Annex 4 in accordance with Article X:9 of the WTO Agreement. Article X:9 mandates that any addition to Annex 4 requires an "exclusively by consensus" decision by the General Council.

For greater clarity, this Decision is only about allowing the EU to join the consensus regarding the legal incorporation of the Agreement on Electronic Commerce to Annex 4 to the WTO Agreement. This proposal does *not* relate to the formal acceptance of the Agreement on Electronic Commerce by the Union. For that purpose, the Commission will issue a proposal for a Council decision concluding the Agreement on Electronic Commerce pursuant to Article 218(6) TFEU after it has been added to Annex 4 to the WTO Agreement and declared open for acceptance.

2.4. Consistency with existing policy provisions in the policy area

In its Communication on a *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*,[4] the Commission announced as follows: "WTO rules need to be brought into line with the economic and trade realities of the 21st century. In substance, the priority should be to modernise the rules of the WTO on e-commerce, investment facilitation, services domestic regulation and on the role of the state in the economy, including on subsidies."

The envisaged act is fully consistent with that Communication because it is a necessary procedural step under WTO rules to incorporate the Agreement on Electronic Commerce into the WTO rules.

2.5. Consistency with other Union policies

The envisaged act is consistent with other Union policies, and notably with the Union's internal market and development cooperation policies.

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

The objective of this proposal is to enable the EU to join a possible consensus at the General Council of the WTO on the adoption of the envisaged act.

While it is not yet clear if, and to what extent, WTO Members will be able to reach consensus on the envisaged act, the EU position has to be established in advance by the Council pursuant to Article 218(9) TFEU.

[4] Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the Regions on a Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, 18 February 2021, COM(2021) 66 final.

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. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[5].

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, which according to Article IV:2 of the WTO Agreement has the authority to take decisions on all matters covered under any of the multilateral trade agreements, including decisions having legal effects.

The envisaged acts mentioned above constitute acts having legal effects, as they may affect the rights and obligations of the Union by virtue of international law.

The envisaged acts do not supplement or amend the institutional framework of the WTO Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

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.

The substantive legal basis of the proposed decision, therefore, is Article 207 TFEU.

4.3. Conclusion

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

[5] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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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,

The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 and delivered an opinion on [date of the opinion],

Whereas:

(1) The Marrakesh Agreement Establishing the World Trade Organization ('the WTO Agreement') was concluded by the Union by Council Decision 94/800/EC of 22 December 1994[6] and entered into force on 1 January 1995.

(2) Pursuant to Article X:9 of the WTO Agreement, the General Council of the World Trade Organization ('WTO') may adopt a decision by consensus to add an agreement to Annex 4 of the WTO Agreement.

(3) It is appropriate to establish the position to be taken on the Union's behalf in the General Council, as the decisions are binding on the Union.

(4) Negotiations towards an Agreement on Electronic Commerce were formally launched in January 2019. The Commission conducted the negotiations on behalf of the EU. The participating WTO Members reached a stabilised text of the Agreement on Electronic Commerce on 26 July 2024.

(5) The WTO Members participating in the negotiations on the Agreement on Electronic Commerce aim to submit a formal request to the General Council of the WTO seeking to incorporate the Agreement on Electronic Commerce under Annex 4 in accordance with Article X:9 of the WTO Agreement. The Union should participate in that request as a preparatory step to a possible decision of the General Council,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the General Council of the WTO shall be:

[6] OJ L 336, 23.12.1994, p. 1.

To join the consensus reached among WTO Members with a view to adding the Agreement on Electronic Commerce to Annex 4 to the WTO Agreement.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President