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Proposal for a

COUNCIL DECISION

on the conclusion of the relevant agreements under Article XXI GATS with Argentina, Australia, Brazil, Canada, China, the Separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Columbia, Cuba, Ecuador, Hong Kong China, India, Japan, Korea, New Zealand, the Philippines, Switzerland, and the United States, on the necessary compensatory adjustments resulting from the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden to the European Union

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• **Reasons for and objectives of the proposal**

The present Commission proposal for a Council decision aims at formally concluding the compensatory agreements reached between the European Union and several WTO Members in order to obtain a consolidated GATS schedule of specific commitments covering all the Member States who were members of the European Union in 2006 (hereafter "the Agreements").

The terms and conditions under which WTO Members commit access to their market to the services and service suppliers of other WTO Members are specified in their GATS schedules of specific commitments. The original schedule of specific commitments of the European Union and its Member States (hereafter "the EU GATS schedule") dates back to 1994, and only covers those twelve Member States who were members of the European Union at that time. The thirteen Member States that have joined the European Union in 1995 and 2004 continued to maintain their individual GATS schedules, which were adopted prior to their accession to the European Union.

In order to ensure that those thirteen Member States did not maintain commitments which would be in breach of the *acquis communautaire* and that they were covered by the horizontal limitations included in the EU GATS schedule, it was necessary to notify the modification and withdrawal of certain specific commitments included in the EU GATS schedule and in the individual GATS schedules of the thirteen Member States concerned, and to consolidate those individual schedules with the EU GATS schedule.

To this end, on 28 May 2004, the European Union notified to the WTO the modification and withdrawal of certain commitments included in the EU GATS schedule and in the GATS schedules of the thirteen Member States concerned. The European Union subsequently entered into negotiations with eighteen WTO Members, who claimed to be affected by these modifications and withdrawals, under Article XXI of GATS. In the course of such negotiations, in accordance with the Council Conclusions of 26 July 2006¹, the European Union agreed on the compensation to be offered to the affected WTO Members. The notified modifications and withdrawals, together with the agreed compensatory adjustments, were incorporated into a consolidated EU GATS schedule, the certification of which was concluded pursuant to the applicable WTO rules on 15 December 2006.

Thereby, the European Union became the first member of the World Trade Organization that successfully used the GATS provisions on the modification and withdrawal of commitments. As a result of the successful consolidation of the EU GATS schedule, its services commitments could be presented in a single document covering its, at that time, twenty five Member States (hereafter "the EU25 consolidated schedule").

The agreed compensatory adjustments constituted a satisfactory and balanced outcome of the negotiations and should therefore be approved on behalf of the European Union.

¹ 12019/06 Limited WTO 135 Services 34.

Accordingly, on 27 March 2007, the Commission submitted a proposal for a Council Decision on the conclusion of the Agreements².

On 23 July 2007, the Council agreed on the text of a draft decision of the Council and of the representatives of the governments of the Member States meeting within the Council approving the conclusion of the Agreements on behalf of the European Union and its Member States³.

On 11 October 2007 the Parliament, in a consultation procedure, approved the conclusion of the Agreements⁴.

At this stage, the Council has not yet approved the conclusion of the Agreements, which have not been ratified by all the Member States concerned.

The fact that the Agreements have not yet been formally concluded is hindering the consolidation process of the EU GATS schedule regarding the Member States having joined the European Union after 2006, since the WTO Members who claimed to be affected by the modifications of the schedules of those Member States refuse to engage in this process until the legal status of the Agreements had been clarified.

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

The negotiation and conclusion of the Agreements is a necessary step for the entry into force of a common GATS schedule for the whole of the European Union. The entry into force of the EU25 schedule is needed, on the one hand, in order to ensure that all the Member States concerned are covered by the same horizontal limitations and that their commitments are not in breach of the *acquis communautaire* and, on the other hand, to advance in further consolidation processes.

- **Consistency with other Union policies**

The Agreements are fully consistent with European Union policies and do not require the European Union to amend its rules, regulations or standards in any regulated area. The Agreements safeguard public services and have no impact on the governments' right to regulate in the public interest.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

On 18 February 2008, the Commission seized the Court of Justice of the European Union for an opinion under Article 300(6) EC on whether the European Union had the necessary competence to sign and conclude alone the Agreements. In its Opinion 1/08 of 30 November 2009⁵, the Court concluded that, under the rules existing before the entry into force of the Lisbon Treaty, the Agreements had to be concluded by the European Union and its Member States.

² [COM\(2007\) 154 final](#), distributed in the Council as 2007/0055 (ACC); 8121/07 LIMITE.

³ Doc. 8123/07. This decision has not yet been formally adopted.

⁴ [P6_TA\(2007\)0424](#).

⁵ EU:C:2009:739.

In its Opinion 2/15 of 16 May 2017⁶, the Court confirmed, under the rules existing after the entry into force of the Lisbon Treaty, the EU's exclusive competence with regard to all matters covered by the agreement that had been negotiated with Singapore, except for non-direct investment and investor-to-state dispute settlement where the Member States are defendants that the Court considered to be of shared competence of the European Union and the Member States. The Court drew the EU exclusive competence from the scope of the Common Commercial Policy under Article 207(1) TFEU and from Article 3(2) TFEU (based on the affectation of existing common rules contained in secondary legislation).

In accordance with Opinion 2/15, all the matters covered by the Agreements must also be held to fall within the competence of the European Union and, more particularly, within the scope of Articles 91, 100(2) and 207 TFEU.

The Agreements are to be concluded by the European Union pursuant to a decision of the Council based on Article 218(6) TFEU, following the European Parliament's consent.

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

The Agreements, as presented to the Council, do not cover any matters that fall outside the scope of the European Union's exclusive competence.

- **Proportionality**

The proposal to conclude the Agreements does not exceed what is necessary to achieve the objective of having a consolidated GATS schedule for the whole of the European Union.

- **Choice of the instrument**

This proposal for a Council decision is submitted in accordance with paragraph 6 of Article 218 TFEU, which envisages the adoption by the Council of a decision authorising the conclusion of the agreement. There exists no other legal instrument that could be used in order to achieve the objective expressed in this proposal

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

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

Not applicable

- **Stakeholder consultations**

Not applicable

- **Collection and use of expertise**

Not applicable

- **Impact assessment**

Not applicable

- **Regulatory fitness and simplification**

The agreements are not subject to REFIT procedures.

⁶ EU:C:2017:376.

- **Fundamental rights**

The proposal does not affect the protection of fundamental rights within the European Union.

4. BUDGETARY IMPLICATIONS

The Agreements are not expected to have a financial impact on the EU budget.

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**

The Agreements permit the consolidation of fourteen of the seventeen different GATS schedules applicable in the territory of the European Union into a single text.

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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 91, Article 100(2), and Article 207, in conjunction with Article 218(6)(a)(v) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) The Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union entered into force on 1 January 1995.
- (2) The Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, to the European Union entered into force on 1 May 2004.
- (3) Pursuant to Article XX of the General Agreement on Trade in Services (hereinafter referred to as GATS), WTO Members shall set out in a schedule the specific commitments they undertake under Part III of GATS.
- (4) The current schedule of the European Union and its Member States only covers the specific commitments related to the twelve Member States of 1994. The individual schedules of specific commitments of the Member States that have joined the European Union in 1995 and in 2004 (hereinafter referred to as the acceding Member States) were adopted prior to their accession.
- (5) In order to ensure that the acceding Member States are covered by limitations included in the list of specific commitments of the European Union and to ensure consistency with the *acquis communautaire*, it was necessary to modify or withdraw certain specific commitments included in the list of specific commitments of the European Union and in the lists of specific commitments of the acceding Member States.

- (6) With a view to present a consolidated schedule, on 28 May 2004 the European Union submitted a communication pursuant to Article V of GATS whereby it notified its intention to modify or withdraw certain specific commitments included in its own schedule and in those of the acceding Member States, pursuant to Article V:5 of GATS and in accordance with the terms of Article XXI:1(b) of GATS.
- (7) Following the submission of the notification and pursuant to Article XXI:2(a) of GATS, eighteen WTO Members (Argentina, Australia, Brazil, Canada, China, the Separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Colombia, Cuba, Ecuador, Hong Kong China, India, Japan, Korea, New Zealand, the Philippines, Switzerland, Uruguay and the United States (hereinafter referred to as the affected WTO Members) submitted claims of interest.
- (8) The Commission conducted negotiations with the affected WTO Members. As a result of those negotiations, agreement was reached on compensatory adjustments related to the modifications and withdrawals notified on 28 May 2004.
- (9) Following the conclusion of the negotiations, in accordance with the Council Conclusions of 26 July 2006, the Commission was authorised to sign the respective agreements with each of the affected WTO Members concerned. With a view to launch the certification procedure provided for by the applicable WTO rules, on 14 September 2006 the Commission transmitted the draft consolidated schedule to the WTO Secretariat. The certification was concluded on 15 December 2006.
- (10) The agreed compensatory adjustments constitute a satisfactory and balanced outcome of the negotiations. They should therefore be approved on behalf of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

1. The Agreements with Argentina, Australia, Brazil, Canada, China, the Separate customs territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), Columbia, Cuba, Ecuador, Hong Kong China, India, Japan, Korea, New Zealand, the Philippines, Switzerland, and the United States on the necessary compensatory adjustments under Article XXI of GATS resulting from the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden to the European Communities, are hereby approved on behalf of the European Union.
2. The Agreements referred to in paragraph 1 are attached to this decision.

Article 2

The President of the Council shall designate the person empowered to express the consent of the European Union to be bound by the Agreements.

Article 3

This Decision shall enter into force on the day of its adoption and shall be published in the Official Journal of the European Union.

Done at Brussels,

*For the Council
The President*