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General Secretariat

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#### **WORKING DOCUMENT**

From:	Presidency
To:	Working Party on Trade Questions
Subject:	Enforcement Regulation: Debrief of the 4th technical trilogue and suggested approach for the next political trilogue

In preparation of the upcoming political trilogue on the enforcement regulation which will take place on Wednesday 28 October 2020 via videoconference, the German Presidency wanted to inform delegations on the discussions and outcome from the technical trilogue on each cluster, and provide Member States with some information on our suggested approach. Delegations are invited to provide feedback to this suggested approach during the videoconference of the Members of the Working Party on Trade Questions on Tuesday 27 October 2020.

## **1. Cluster 1 - Extension of the scope**

### Discussion in the technical trilogue

The Presidency presented its compromise proposal as it was presented to Member States in document WK 11278/2020 and as discussed during the videoconference of the Members of the Working Party on Trade Questions on 20 October 2020.

In its response, the European Parliament acknowledged that the Council had made another concession towards their position, but indicated that the extension of the scope to IPR would be very limited in the Council's compromise proposal. They reiterated their arguments that they would like to have an efficient Regulation, and they want to ensure that the EU has an ability to take countermeasures in all areas. They therefore insisted on a broader extension of the scope to IPR. They asked specifically whether the Council could imagine extending countermeasures in IPR to areas where "extensive EU legislation" exists.

The European Parliament also indicated that referred to the reference to Article 22(3) of the WTO Dispute Settlement Understanding in Article 5(3) of the Commission's compromise proposal was a difficult issue for them which it could however probably accept as a compromise. It argued that this was a concession by the EP in Cluster 1.

Prior to the technical trilogue, the European Parliament also provided some draft language for Article 3(bb) to indicate that an undue delay by the counterparty would also trigger the Enforcement Regulation. The Parliament proposed the following amendment to Article 3(bb) in this context (in **bold underlined**):

*" 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**"*

The European Parliament had also shared some suggested language to be added to the chapeau of Article 9(1a) on the information gathering exercise:

*" 1a. In circumstances where it is envisaged to adopt measures affecting trade in services or the protection or commercial exploitation of intellectual property rights, the Commission shall provide*

information as to the possible measures it considers adopting and in addition seek **without delaying the process of the adoption of such measures** information on:"

The Commission reiterated their arguments that Article 22(3) DSU could prohibit a cross-retaliation in different areas of IPR. They also argued that the mere threat caused by the ability to take countermeasures would assist the Commission in ensuring to enforce the EU's rights in the trade area.

In its rebuttal, the Presidency indicated to the European Parliament and the Commission that the Council has moved significantly from their initial negotiating mandate and that it was not possible for the Council to move further on this topic. It also reminded the Parliament and the Commission that the extension of the scope was not part of the initial legislative proposal. The Presidency also referred to the fact that there have been very few cases in the area of IPR in the past 25 years. As regards the reference to Article 22(3) of the WTO DSU, the Presidency indicated that this was not a compromise for the Council given that this was a suggestion by the Commission in their compromise proposal and that the Council had not requested this nor did it discuss it much. It seemed to the Presidency that the Council may not see any significant value in this reference.

In the conclusion, the Presidency proposed to discuss this item at the political trilogue. The Presidency did however clarify that the Council will not propose any new text. The European Parliament indicated that it will discuss the Council position internally.

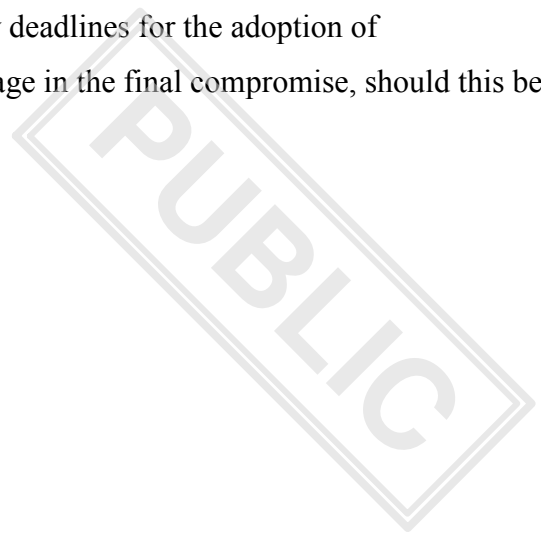
#### Suggested approach for the political trilogue

As regards the extension of the scope to IPR, the Presidency is intending not to provide any further concessions during the political trilogue.

As regards the reference to Article 22(3) of the WTO DSU in Article 5(3), the Presidency intends to agree with the European Parliament that this reference is not necessary and it could therefore agree to delete it.

As regards the Parliament's suggestion on Article 3(bb), the Presidency intends to agree with this at the political trilogue in order to facilitate the compromise.

As regards the addition in Article 9(1a), the Presidency will argue that such language is not necessary given that the Regulation does not foresee any deadlines for the adoption of countermeasures, but could eventually accept this language in the final compromise, should this be necessary.



## **2. Cluster 2 - Provisional measures**

Prior to the technical meeting, the European Parliament shared the following suggestions for amendments to the Commission's compromise proposal on the declaration on cluster 2 as set out in document WK 10439/2020 (changes in **bold underlined**):

~~Commission~~ **Declaration of the Parliament, Council and Commission** ~~declaration~~ (cluster 2)

*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 EU 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 possible measures, which could be adopted in order to dissuade or offset such actions **and which would be triggered by such actions and which would allow for the expeditious adoption of countermeasures**. 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 **at the earliest, should the need arise as a result of coercive action taken by a third country, and in any case no later than the end of 2021. In the current context, the Council and the European Parliament recognise the urgency and the importance of adopting such an instrument and are committed to fulfil their institutional role as co-legislator and work expeditiously on such Commission legislative proposal.***

### **Discussion at the technical trilogue**

The Presidency responded that a joint declaration would be very difficult for the Council. The Presidency argued that the Council cannot agree to language which would prejudge its position and that it can also not commit at this stage to work expeditiously on this file, as this would mean that the Council would be bound to treat this file as a priority.

The Presidency indicated that the only potential joint statement which the Council could agree to, would be a reminder that the Council and the Parliament would fulfil their institutional role as co-legislator and will consider a legislative proposal when it is on the table.

The European Parliament indicated that it is open for drafting suggestions but that it was important for them to stress the urgency of the situation.

*Suggested approach for the political trilogue*

It was agreed to split the declaration into a Commission declaration and a short Joint declaration from the Parliament and the Council. The Presidency would propose the following drafting for these declarations (changes compared to WK 10439/2020 are marked in **bold underlined**):

**Declaration of the Commission on an instrument to deter coercive actions**

*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 EU 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 possible measures, which could be adopted in order to dissuade or offset such actions **and which would be triggered by such actions and which would allow for the expeditious adoption of countermeasures**. 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.***

**Declaration of the Parliament and the Council**

**The Council and the European Parliament take note of the Declaration of the Commission on an instrument to deter coercive actions. Both institutions are committed to fulfil their institutional role as co-legislators and to consider the proposal in a timely manner, taking into account relevant developments in international trade.**

### 3. Cluster 3: Role of the European Parliament and the Council

#### EP suggestion

Prior to the technical trilogue, the European Parliament suggested to merge the proposed Commission declarations on clusters 3 and 4 as presented in WK 10439/2020, and to add one amendment.

#### Commission declaration

*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 well 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.*

#### *Suggested approach for the political trilogue*

In view of the fact that the Council could agree to the Commission compromise proposal on clusters 3 and 4 as laid out in WK 10439/2020 and in view of the fact that there have been no real substantive changes, the Presidency intends to agree with the proposal by the European Parliament.

#### **4. Compliance with international law and TSD**

##### *Discussion in the technical trilogue*

The Presidency had expressed that it could agree to the proposed joint declaration on cluster 4 on the EU's commitment to a multilateral approach to international dispute settlement, rules-based trade, and international cooperation to achieve the Sustainable Development Goals of the United Nations, as laid out in WK 10439/2020. As indicated above, the Presidency also intends to agree the merging of the Commission declarations on cluster 3 and 4.

The European Parliament also insisted on keeping its proposed amendment to add a recital 2a to the text, which states the following:

**The Regulation should ensure the coherent application of the enforcement mechanism in trade disputes relating to international trade agreements, including regional or bilateral agreements. Dispute settlement provisions, including in regional or bilateral trade agreements, might not be sufficiently specific or explicit enough to effectively resolve disputes in the event of a clear breach of obligations of trade agreements. A full impact assessment should accompany the Commission's future legislative proposal to review Regulation (EU) No 654/2014. The Commission should make proposals to strengthen the enforcement of sustainable development commitments.**

The Presidency indicated that it has concerns regarding this recital. It indicated that it is not good legislative practice to describe policy issues in recitals and it also argued that it is not a good practice to cast doubt on the efficiency of dispute settlement provisions in regional or bilateral trade agreements. The Presidency did however express openness to work on a recital which contains declaratory language regarding the need for compliance with TSD chapters.

##### *Suggested approach for the political trilogue*

If the Commission is ready to accept a recital on this topic, the Presidency will work with the European Parliament and the Commission on acceptable language .