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WORKING DOCUMENT

From:	DE Delegation
To:	Working Party on Trade Questions
Subject:	Amended Enforcement Regulation - Comments by Germany

20. Januar 2020

DE comments on the Commission proposal for the amendment of the Enforcement Regulation (Regulation (EU) No 654 / 2014

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1. Introduction:

We thank the Presidency for the opportunity to submit comments on the Commission's proposal (2019/0273 (COD) to amend the Enforcement Regulation (654/2014). On 12 December 2019, the European Council called on the European Parliament and the Council to examine, as a matter of priority, the Commission's proposal. Germany is ready to engage in constructive and speedy discussions of the proposal. Germany reserves the right to submit further written comments, at a later stage.

We understand the aim of the Commission to strengthen the trade tool box of the EU, which is laid out in the mission letter to Commissioner Hogan. We share the aim of upgrading the Enforcement Regulation. In light of increasing trade tensions and the blockage of the Appellate Body of the WTO, the EU should demonstrate its ability to act and defend its rights against illegal trade measures by third countries. We acknowledge the need to work on an update of the Enforcement Regulation to address circumstances where neither a consensual solution of trade disputes nor a binding dispute settlement are possible. However, de-escalating the current global trade tensions should be our main goal. Countermeasures of the EU under the Enforcement Regulation can only be "second best" to finding agreed international or bilateral solutions for a two-staged dispute settlement mechanism.

In view of the European Council's resolution, our main priorities should be (1) to find a permanent solution to solve the paralysis of the Appellate Body and (2) to agree on interim agreements with third countries. In the current politically sensitive situation, the EU needs to continue to take the lead in efforts to save the WTO dispute settlement and to underline its commitment to the rules-based trading system.

2. First option: Art. 3 (a) (aa)

The Commission proposes that the Enforcement Regulation should also apply after a panel report confirmed the EU's view that a third country adopted WTO-inconsistent trade measures, provided that the decision has been appealed by the respective third country under Art. 17 of the WTO DSU and that the appeal procedures cannot be completed due to the third country's refusal to enter into an interim arbitration under Art.

25 of the WTO DSU. The proposed solution in Art. 3 (a) (aa) delivers a clear response to the blocking of the WTO dispute settlement. Germany welcomes that, according to Art. 3 (a) (aa) of the Enforcement Regulation, this amendment would lose its scope of application as soon as the paralysis of the Appellate Body will be resolved. In that case, it will be possible to complete the two-staged dispute settlement and obtain a binding decision.

The EU needs to ensure that this proposed amendment of the Regulation complies with the standards of WTO law and public international law. Therefore, we kindly ask the legal service of the Council for an opinion on the conformity of the proposal with international law.

In general, Germany supports the EU position to defend the two-staged dispute settlement process of the WTO. However, as the intention of the amendment of the Enforcement Regulation is to address an “appeal into the void” by a third country, the EU could also propose to a third country a mutual relinquishment of legal remedy. In this case binding dispute settlement would also be ensured, albeit in an alternative way.

Further, we see the need to reflect on the scope of Art. 3 (a) (aa) with regard to the following issues:

- Other WTO members have proposed different models of interim arbitration agreements than the EU. Would Art. 3 (a) (aa) apply to cases, where a trading partner has not accepted the EU text for an interim appeal agreement, but is willing to agree to a different interim agreement?
- Would it apply to cases, where an interim appeal agreement is not in place before a trade dispute arises but the trading partner is willing to consider such an agreement once a dispute arises?
- What happens in the case a third country has agreed to an interim agreement but nevertheless appeals a panel report at the Appellate Body? Would the enforcement regulation still apply (the current drafting has two cumulative conditions: Art 17 DSU procedure blocked and no interim agreement)? Would the first condition be enough (if the third country respects the interim agreement or a mutual relinquishment already the first condition cannot be met)?

3. Second option: Art. 3 (b) (bb)

The second option applies when a trade dispute occurs under an existing FTA and the other party does not take the necessary steps for a dispute settlement procedure to function. Germany proposes to reflect on this suggestion and carefully assess the political signal of including this option in the Enforcement Regulation:

In the past, there have hardly been any practical cases of bilateral dispute settlement procedures under EU FTAs. The Commission anticipates an increase of bilateral disputes and in its assessment especially older FTAs have insufficient dispute settlement provisions. However, if that is the case, we should first and foremost consequently apply all arbitration rules to ensure a quick and efficient decision making by the Arbitral Tribunal or consider to find consensual solutions with our FTA partners for FTAs which do not yet include sufficient safeguards. For agreements, that are currently being negotiated or still need to be ratified, the EU could take the initiative to amend the dispute settlement procedures consensually. We agree that the proposal could certainly provide additional leverage for such negotiations.

The EU needs to ensure that also this proposed amendment of the Regulation complies with the standards of WTO law and public international law. Therefore, we kindly ask the legal service of the Council for an opinion on the conformity of the proposal with international law.

4. Art. 10 para. 1

Germany supports the proposal for the Commission to review the scope of the Enforcement Regulation by March 1, 2025 at the latest and to report to the European Parliament and the Council.

5. Comitology procedure

Germany is of the opinion that individual decisions under the amended Enforcement Regulation may have strong political implications. Art. 8 of the current Enforcement Regulation contains a no-opinion clause. We consider it important to maintain this clause and appreciate the intention stated by the Commission not to facilitate the current procedure.

6. Scope of application

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Germany prefers for the scope of the application to remain limited on goods. A possible extension of that scope to services and IPR would mean slowing down the process regarding the revision of the Enforcement Regulation. It would be also very difficult to apply measures with regard to services and IPR in areas of Member States' competence.

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