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(Legislative acts)

REGULATIONS

REGULATION (EU) 2021/167 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 10 February 2021****amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas:

- (1) Regulation (EU) No 654/2014 of the European Parliament and of the Council ⁽²⁾ establishes a common legislative framework for the exercise of the Union's rights under international trade agreements in certain specific situations. One of those situations relates to the dispute settlement mechanisms set up by the Agreement establishing the World Trade Organization (WTO) and by other international trade agreements, including regional or bilateral agreements. Regulation (EU) No 654/2014 enables the Union to suspend concessions or other obligations under international trade agreements after dispute settlement proceedings are concluded.
- (2) Regulation (EU) No 654/2014 does not deal with situations where the Union has a right of action in response to a measure maintained by a third country but dispute settlement through adjudication is blocked or otherwise not available for reasons of non-cooperation of the third country which has adopted the measure.
- (3) The WTO Dispute Settlement Body has been unable to fill the outstanding vacancies on the WTO Appellate Body (the 'WTO Appellate Body'). The WTO Appellate Body is no longer able to fulfil its function from the moment when there are fewer than three WTO Appellate Body Members left. Until that situation is resolved and in order to preserve the essential principles and features of the WTO dispute settlement system and the Union's procedural

⁽¹⁾ Position of the European Parliament of 19 January 2021 (not yet published in the Official Journal) and decision of the Council of 3 February 2021.

⁽²⁾ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50).

rights in ongoing and future disputes, the Union has sought to agree interim arrangements for appeal arbitration pursuant to Article 25 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'WTO Dispute Settlement Understanding'). That approach was endorsed by the Council on 27 May 2019, 15 July 2019 and 15 April 2020 and supported in the European Parliament resolution of 28 November 2019 on the crisis of the WTO Appellate Body. If a WTO Member refuses to enter into such an arrangement, and files an appeal to a non-functioning WTO Appellate Body, the resolution of the dispute is effectively blocked.

- (4) A similar situation might arise under other international trade agreements, including regional or bilateral agreements, where a third country does not cooperate in the manner necessary for dispute settlement to function, for example by failing to appoint an arbitrator and where there is no mechanism provided to secure the functioning of dispute settlement in such a situation.
- (5) If dispute settlement is blocked, the Union is unable to enforce international trade agreements. Therefore, it is appropriate to extend the scope of Regulation (EU) No 654/2014 to cover such situations.
- (6) To that end, the Union should be able to expeditiously suspend concessions or other obligations under international trade agreements, including regional or bilateral agreements, if effective recourse to binding dispute settlement is not possible because the third country does not cooperate in making such recourse possible.
- (7) It is also appropriate to set out that where measures are taken to restrict trade with a third country, such measures should not exceed the nullification or impairment of the Union's commercial interests caused by the measures of that third country, in line with the Union's obligations under international law.
- (8) Measures to be adopted pursuant to this Regulation relate specifically to international trade in that they are essentially intended to govern such trade and have direct and immediate effects on it and, therefore, fall within the scope of the Union's exclusive competence pursuant to Article 207 of the Treaty on the Functioning of the European Union ⁽³⁾.
- (9) Services and intellectual property rights account for a large and growing share of world trade and are covered by international trade agreements, including regional or bilateral Union agreements. Measures in the fields of trade in services and trade-related aspects of intellectual property rights should therefore be included in the scope of the trade policy measures available to the Union to make Regulation (EU) No 654/2014 more consistent and effective.
- (10) This Regulation should ensure the coherent application of the enforcement mechanism in trade disputes relating to international trade agreements, including regional or bilateral agreements. The enforcement mechanism of the Trade and Sustainable Development chapters of the Union's international trade agreements forms an integral part of the Union's trade policy and this Regulation would apply to the suspension of concessions or other obligations and the adoption of measures in response to breaches of those chapters, if and to the extent that such measures are permitted and are warranted by the circumstances.
- (11) The review clause of Regulation (EU) No 654/2014 should also cover the application of the amendments to that Regulation introduced by this Regulation.
- (12) Regulation (EU) No 654/2014 should therefore be amended accordingly,

⁽³⁾ Opinion 2/15 of the Court of Justice of 16 May 2017, ECLI:EU:C:2017:376, paragraph 36.

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 654/2014 is amended as follows:

(1) in Article 1, point (b) is replaced by the following:

‘(b) rebalancing concessions or other obligations in the trade relations with third countries, when the treatment accorded to goods or services from the Union is altered in a way that affects the Union’s interests.’;

(2) in Article 2, point (b) is replaced by the following:

‘(b) “concessions or other obligations” means tariff concessions or other obligations or benefits in the field of trade in goods or services, or concerning trade-related aspects of intellectual property rights, that the Union has committed itself to applying in its trade with third countries by virtue of international trade agreements to which it is a party.’;

(3) Article 3 is amended as follows:

(a) the following point is inserted:

‘(aa) following the circulation of a WTO panel report upholding, in whole or in part, the claims brought by the Union, if an appeal under Article 17 of the WTO Dispute Settlement Understanding cannot be completed and if the third country has not agreed to interim appeal arbitration under Article 25 of the WTO Dispute Settlement Understanding.’;

(b) the following point is inserted:

‘(ba) 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.’;

(c) point (d) is replaced by the following:

‘(d) in cases of modification of concessions or commitments by a WTO member under Article XXVIII of the GATT 1994 or Article XXI of the General Agreement on Trade in Services (GATS), where no compensatory adjustments have been agreed and, as regards services, compensatory adjustments are not made in conformity with the findings of the arbitration pursuant to Article XXI of the GATS.’;

(4) in Article 4, paragraph 2 is amended as follows:

(a) the following point is inserted:

‘(ba) where measures are taken to restrict trade with a third country in situations under point (aa) or (ba) of Article 3, the level of such measures shall not exceed the nullification or impairment of the Union’s commercial interests caused by the measures of that third country.’;

(b) point (d) is replaced by the following:

‘(d) where concessions or commitments are modified or withdrawn in the trade with a third country in connection with Article XXVIII of the GATT 1994 and the related Understanding (*), or with Article XXI of the GATS and the related implementing procedures, they shall be substantially equivalent to the concessions or commitments modified or withdrawn by that third country, in accordance with the terms established in Article XXVIII of the GATT 1994 and the related Understanding or Article XXI of the GATS and the related implementing procedures.

(*) Understanding “Interpretation and Application of Article XXVIII.”;

(5) Article 5 is amended as follows:

(a) in paragraph 1, the following points are inserted:

‘(ba) the suspension of obligations regarding trade in services and the imposition of restrictions on trade in services;

(bb) the suspension of obligations with respect to trade-related aspects of intellectual property rights granted by a Union institution or agency and valid throughout the Union, and the imposition of restrictions on the protection of such intellectual property rights or their commercial exploitation, in relation to right-holders who are nationals of the third country concerned.’;

(b) the following paragraphs are inserted:

‘1a. When selecting measures to be adopted pursuant to point (ba) of paragraph 1 of this Article, the Commission shall always consider measures according to the following hierarchy of steps:

(a) measures relating to trade in services requiring an authorisation valid throughout the Union and based on secondary legislation, or, where no such measures are available,

(b) measures relating to other services in areas where extensive Union legislation exists, or, where no such measures are available,

(c) measures which the information-gathering exercise conducted pursuant to Article 9(1a), as provided for in point (a) of Article 5(1b), has demonstrated would not impose a disproportionate burden on the process of administration of relevant national regulations.

1b. Measures adopted pursuant to points (ba) and (bb) of paragraph 1 shall:

(a) be subject to an information-gathering exercise pursuant to Article 9(1a);

(b) be adjusted, if necessary, by means of an implementing act pursuant to Article 4(1) where, after a review conducted pursuant to Article 9(1a), the Commission concludes that the measures are of insufficient effectiveness or impose an unreasonable burden on the process of administration of relevant national regulations. Such review by the Commission shall be first conducted six months after the date of application of the measures and at intervals of 12 months thereafter;

(c) be subject to an evaluation report, six months after their termination and based, inter alia, on stakeholder input, which shall examine their effectiveness and operation, and draw possible conclusions for future measures.’;

(6) in Article 6, the following paragraph is added:

‘3. Regarding trade-related aspects of intellectual property rights, the term “nationals” shall be understood in the same sense as it is used in paragraph 3 of Article 1 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.’;

(7) in Article 7, the first subparagraph of paragraph 2, point (c) is replaced by the following:

‘(c) in cases of the withdrawal or modification of concessions or commitments by a WTO member under Article XXVIII of the GATT 1994 or Article XXI of the GATS, when the third country concerned accords adequate and proportionate compensation to the Union after the adoption of an implementing act under Article 4(1).’;

(8) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. The Commission shall seek information and views regarding the Union’s economic interests in specific goods or services sectors, or regarding specific trade-related aspects of intellectual property rights, in the application of this Regulation, through a notice in the *Official Journal of the European Union* or through other suitable public communication means, indicating the period within which input is to be submitted. The Commission shall take the input received into account.’;

(b) the following paragraph is inserted:

‘1a. When the Commission envisages measures pursuant to point (ba) or (bb) of Article 5(1), it shall inform and conduct consultations with stakeholders, in particular industry associations, affected by possible commercial policy measures and with Member State public authorities involved in the formulation or implementation of legislation regulating the affected fields. Without unduly delaying the adoption of such measures, the Commission shall, in particular, seek information on:

- (a) the impact of such measures on third country service providers or right-holders who are nationals of the third country concerned and on Union competitors, users or consumers of such services or intellectual property rights holders;
- (b) the interaction of such measures with relevant Member State regulations;
- (c) the administrative burden which may be occasioned by such measures.

The Commission shall take utmost account of the information gathered during such consultations.

The Commission shall provide an analysis of the envisaged measures to Member States when proposing the draft implementing act pursuant to Article 8.’;

(9) Article 10 is replaced by the following:

‘Article 10

Review

1. At the earliest possible opportunity after 13 February 2021, but no later than one year after that date, the Commission shall review the scope of this Regulation, taking into account in particular the commercial policy measures that may be adopted, as well as its implementation, and shall report its findings to the European Parliament and the Council.

2. In acting pursuant to paragraph 1, the Commission shall undertake a review aimed at envisaging under this Regulation additional commercial policy measures suspending concessions or other obligations in the field of trade-related aspects of intellectual property rights.’.

Article 2

This Regulation shall enter into force on 13 February 2021.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 10 February 2021.

For the European Parliament
The President
D. M. SASSOLI

For the Council
The President
A. P. ZACARIAS