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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Council for Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Council for Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation ('TRIPS Council') in connection with the envisaged adoption of a decision concerning the request for an extension of the transitional period under Article 66(1) of the TRIPS Agreement for Least Developed Country Members.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') aims, among others, to provide adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights, effective and appropriate means for their enforcement and effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments. The TRIPS Agreement covers the following intellectual property rights: copyright and related rights, trademarks, geographical indications, including appellations of origin, industrial designs, patents, including the protection of new varieties of plants, layout-designs of integrated circuits and undisclosed information. The TRIPS Agreement entered into force on 1 January 1995.

The European Union is a party to the TRIPS Agreement.¹

2.2. The TRIPS Council

The TRIPS Council oversees the functioning of the TRIPS Agreement. In its regular sessions, the TRIPS Council serves as a forum for discussion on the trade-related aspects of the protection and enforcement of intellectual property rights covered by the TRIPS Agreement. The TRIPS Council operates under the general guidance of the General Council of the WTO. It is open to all WTO Members and to the observers approved by Members. The TRIPS Council takes decisions by consensus. Pursuant to Rule 33 of the rules of procedure of the TRIPS Council², where a decision cannot be arrived at by consensus in the TRIPS Council, the matter at issue shall be referred to the General Council for decision. Pursuant to Article IX of the Marrakesh Agreement establishing the World Trade Organisation ('the Marrakesh Agreement') where the European Union exercises the right to vote it has a number of votes equal to that of the Member States which are Members of the WTO.

2.3. The envisaged act of the TRIPS Council

On 8-9 June 2021, during its formal session, the TRIPS Council is to adopt a decision regarding the request for an extension of the transitional period under TRIPS Article 66(1) for Least Developed Country (LDC) Members as of 1 July 2021 ('the envisaged act').

From the entry into force on 1 January 1995 of the Marrakesh Agreement, LDC Members were exempted from TRIPS obligations except Article 3, 4 and 5 for a period of ten years under Article 66(1) of the TRIPS Agreement. This Article also provides for the possibility of further extensions of this period upon a duly motivated request by a least-developed country

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

² Rules of procedure for meetings of the Council for TRIPS (28 September 1995) - IP/C/1.

member. In 2005 and 2013, following specific requests from LDC Members, this exemption was extended already twice, the second time until 1 July 2021.

Chad, on behalf of the LDC group, formally submitted a request³ on 1 October 2020 for an extension of the transitional period. The LDC group has asked for an extension of the transitional period for "as long as the Member remains in the category of least developed country and for a period of twelve years from the date of entry into force of a decision by the UN General Assembly to exclude the Member from the least developed country category."

The envisaged act will become binding on the parties in accordance with Article 66(1) of the TRIPS Agreement, which provides: "In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period".

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

As a response to the LDC Members' request, the Commission recommends the Council of the European Union to establish the following Union position: LDC Members should not be required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5, for a limited period of time not exceeding 10 years, or until such a date, on which they cease to be a LDC, whichever date is earlier.

However, an extension of the transitional period without time limit, as proposed by the LDCs, would not be consistent with the objective to gradually integrate LDC Members, as members of the multilateral trading system, in the international IP system on the basis of the minimum requirements provided in the TRIPS Agreement.

Should Members of the WTO support the extension of the transitional period under Article 66(1) of the TRIPS Agreement without a time limit, the Union should not stand in the way of reaching a consensus.

A certain level of IPR protection and enforcement is needed also in LDC Members, because IPRs are a catalyst for innovation and an important tool for sustainable development. IPR protection and enforcement also constitute an incentive for technology holders' to promote the diffusion of knowledge and attract inward investment to LDC Members. A certain level of protection and enforcement of IPR in LDC Members also serves as an incentive for EU companies to bring their new technologies to LDC Members without fearing IP theft or other abuses. An extension of the transitional period without time limit would not be encouraging enough for LDC Members to make efforts in this area and could be counter-productive for their competitiveness in the world trading system. However, another extension of the transitional period for the implementation of the TRIPS Agreement, other than Articles 3, 4 and 5, is justified. LDC Members represent the most vulnerable segment of the international trade community, characterised by constraints such as low per capita income, low level of human development, and economic and structural handicaps to growth. The COVID-19 pandemic has further increased the challenges that LDC Members face. Therefore, LDC Members need to have policy space and flexibility to address their development challenges and to create a viable technological base.

³ WTO Document IP/C/W/668.

It is also important to strive to provide that any changes in LDC Members' laws, regulations and practice made during the additional transitional period cannot result in a lesser degree of consistency with the provisions of the TRIPS Agreement. This requirement would incentivise LDC Members to gradually implement certain provisions of the TRIPS Agreement and prevent lowering the level of protection and enforcement of intellectual property rights. LDC Members' efforts to implement certain provisions of the TRIPS Agreement would be taken into account when deciding on the beneficiaries of the technical and financial cooperation provided under Article 67 of the TRIPS Agreement to facilitate the implementation of the TRIPS Agreement focusing on those areas of most immediate utility.

The second part of the LDC Members' request, i.e. the request for an additional period of twelve years exemption from the date a least-developed country Member graduates from the least developed country category appears to go beyond the scope of Article 66(1) of the TRIPS Agreement, as this Article only applies to the extension of the transitional period for the implementation of certain provisions of the TRIPS Agreement by LDC Members. The request would appear to amount to an exemption from the relevant provisions of the TRIPS Agreement, which cannot be decided by the TRIPS Council. Therefore, the request to grant an exemption for non-LDCs as part of a TRIPS Council decision under Article 66(1) of the TRIPS Agreement cannot be supported.

It should be noted that the request for an additional period of twelve years exemption from the date a least-developed country Member graduates from the least developed country category is included also in the communication⁴ on smooth transition in favour of countries graduating from the LDC category submitted by the mission of Chad on behalf of the LDC group on 17 November 2020 to the General Council and is under discussion in the General Council.

The initiative is fully consistent with EU policies. Similar decisions have been adopted previously. The European Union supported extending the transitional period, agreed by WTO Members on 11 June 2013, for LDC Members not to apply the TRIPS Agreement, other than Articles 3, 4 and 5, until 1 July 2021⁵.

LDC Members have been also granted a specific waiver regarding the implementation of the TRIPS Agreement provisions on pharmaceuticals. This waiver was initially due to expire on 1 January 2016 based on the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001. In 2015, Bangladesh, on behalf of the LDC group, requested a waiver of the TRIPS Agreement obligations with respect to pharmaceutical products for LDC Members for as long as they remain LDCs. The EU supported this request of the LDC group in view of the Doha Declaration on the TRIPS Agreement and Public Health and the decision of the WTO General Council of 30 August 2003 on implementation of paragraph 6 of the Doha Declaration. Eventually the waiver was extended until 1 January 2033 or until such a date on which an LDC Member ceases to be an LDC, whichever date is earlier.

The EU's position on the envisaged act is fully consistent with the EU's position regarding the implementation of the TRIPS Agreement provisions on pharmaceuticals.

4. PROCEDURAL LEGAL BASIS

4.1. 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

⁴ WT/GC/W/807.

⁵ WTO document IP/C/64.

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’⁶.

4.2. Application to the present case

The TRIPS Council is a body set up by the Marrakesh Agreement and its Annex 1C on the TRIPS Agreement.

The act, which the TRIPS Council is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 66(1) of the TRIPS Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

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

4.3. Substantive legal basis

4.3.1. 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.

4.3.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy. Therefore, the substantive legal basis of the proposed decision is Article 207(4) TFEU.

4.4. Conclusion

The legal basis of the proposed decision should be Article 207(4) TFEU, first subparagraph, in conjunction with Article 218(9) TFEU.

⁶ 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,

Whereas:

- (1) The Agreement establishing the World Trade Organization, and also the Agreements in Annexes 1, 2 and 3 to that Agreement ('the Marrakesh Agreement') was concluded by the Union by Council Decision 94/800/EC¹ and entered into force on 1 January 1995.
- (2) Pursuant to Article 66(1) of the Agreement on the Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement'), included in Annex 1C to the Marrakesh Agreement, the Council for Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation ('the TRIPS Council') is to, upon duly motivated request by a least-developed country (LDC) Member, accord extensions of the transitional period during which LDC Members are not required to apply the provisions of the TRIPS Agreement, other than Articles 3, 4 and 5.
- (3) The existing transitional period, as agreed in the Decision of the TRIPS Council of 11 June 2013² is due to expire on 1 July 2021.
- (4) On 1 October 2020, Chad, on behalf of the LDC group, formally submitted a request for an extension of the transitional period³.
- (5) The TRIPS Council, during its formal session on 8 and 9 June 2021, is to adopt a decision regarding the request for an extension of the transitional period under Article 66(1) of the TRIPS Agreement for LDC Members ('the TRIPS Council's Decision').
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the TRIPS Council, as the TRIPS Council's Decision will be binding on the Union.
- (7) LDC Members represent the most vulnerable segment of the international trade community, facing economic, financial and administrative constraints. LDC Members need to have policy space and flexibility to address their development challenges and further time to implement the TRIPS Agreement.

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

² IP/C/64.

³ WTO Document IP/C/W/668.

- (8) A certain level of intellectual property rights (IPR) protection and enforcement is beneficial to LDC Members, because IPRs are a catalyst for innovation and an important tool for sustainable development. Some LDC Members have already taken steps towards implementation of the TRIPS Agreement and need to be encouraged not to decrease the existing level of IPR protection and enforcement.
- (9) An extension of the transitional period without a time limit, as proposed by the LDC group, would slow down the process of gradually integrating LDC Members, as members of the multilateral trading system, in the international IP system on the basis of the minimum requirements provided in the TRIPS Agreement.
- (10) Accordingly, it is appropriate to extend the transitional period for the implementation of the TRIPS Agreement, other than Articles 3, 4 and 5, for LDC Members for a limited period of time not exceeding ten years.
- (11) Should Members of the World Trade Organisation support the extension of the transitional period under Article 66(1) of the TRIPS Agreement for a longer period or without a time limit, the Union should not stand in the way of reaching a consensus.
- (12) The LDCs' request for an additional period of twelve years exemption calculated from the date an LDC Member graduates from the LDC category appears to go beyond the scope of Article 66(1) of the TRIPS Agreement, as this Article only applies to the extension of the transitional period for the implementation of certain provisions of the TRIPS Agreement by LDC Members. Therefore, the request to grant an exemption for non-LDC Members as part of a TRIPS Council's Decision under Article 66(1) of the TRIPS Agreement should not be supported,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Council for Trade-Related Aspects of Intellectual Property Rights of the World Trade Organisation ('the TRIPS Council'), during its formal session on 8 and 9 June 2021, shall be as follows:

- (a) LDC Members should not be required to apply the provisions of the Agreement on the Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') other than Articles 3, 4 and 5, for a limited period of time not exceeding ten years, or until such a date on which they cease to be an LDC Member, whichever date is earlier.
- (b) Should Members of the World Trade Organisation support the extension of the transitional period under Article 66(1) of the TRIPS Agreement for a longer period or without a time limit, the Union should not stand in the way of reaching a consensus.
- (c) LDC Members should ensure that any changes in their laws, regulations and practice made during the additional transitional period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement. However, should Members of the World Trade Organisation not support such an obligation of the LDC Members, the Union should not stand in the way of reaching a consensus.
- (d) The LDC Members' request for an additional period of twelve years exemption calculated from the date an LDC Member graduates from the LDC category should not be supported, as falling outside the scope of Article 66(1) of the TRIPS Agreement.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*