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2023/0041 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Association Committee in Trade configuration established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part as regards the modification of Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII to that Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Council decision establishing the position to be taken on the Union's behalf in the Association Committee in Trade configuration ('the Trade Committee') in connection with the envisaged adoption of a decision to modify Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the Agreement') on regulatory approximation in order to include EU acts relating to roaming on public mobile communications networks.

2. CONTEXT OF THE PROPOSAL

2.1. The Association Agreement

The Agreement aims to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of the Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union. The Agreement entered into force on 1 September 2017. Ukraine has requested further integration with regards to the roaming sector in the European Union, in particular through internal market treatment for the purpose of roaming services. Granting internal market treatment will require approximation to the EU roaming *acquis* and the full enactment and complete and full implementation thereof in Ukrainian law.

2.2. The Association Committee in Trade configuration

Pursuant to Article 465(4) of the Agreement, all issues related to Title IV (Trade and Trade-related Matters) of the Agreement shall be addressed in the Trade Committee. According to Article 11 of Annex XVII of the Agreement, that Committee can take a decision to modify Annex XVII. Pursuant to Article 465(3), these decisions shall be binding upon the Parties, which shall take appropriate measures to implement them. The Trade Committee shall adopt its decisions by agreement between the Parties.

2.3. The envisaged act of the Association Committee in Trade configuration

The Trade Committee is to adopt a decision to modify Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII on regulatory approximation ('the envisaged act').

The purpose of the envisaged act is to modify the aforementioned Appendix of Annex XVII in order to include relevant EU acts relating to roaming on public mobile communications networks. This conforms to the objective of Ukraine's gradual regulatory approximation to the Union *acquis* as laid down in the preamble to the Agreement and Article 124 of the Agreement, which concerns regulatory approximation in electronic communications specifically.

The envisaged act will become binding on the parties in accordance with Article 11 of the Annex XVII, which provides that: 'The Trade Committee may decide to modify the provisions of this Annex XVII in case it deems necessary'. Furthermore, Article 465(3) of the Agreement provides that: 'The Association Committee shall have the power to adopt decisions in the cases provided for in this Agreement and in areas in which the Association Council has delegated powers to it. These decisions shall be binding upon the Parties, which shall take appropriate measures to implement them. The Association Committee shall adopt its decisions by agreement between the Parties'.

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

The position to be adopted on the Union's behalf is to support the adoption of envisaged act by the Trade Committee.

Modifying Appendix XVII-3 (Rules applicable to telecommunication services) is necessary in order to add to the EU *acquis* regarding telecommunications services already included in the Appendix the relevant EU acts relating to roaming on public mobile communications networks. The EU acts relating to roaming on public mobile communications networks are the following: European Electronic Communications Code (EU) 2018/1972 ("EECC"), Roaming Regulation (EU) 2022/612, Commission Implementing Regulation (EU) 2016/2286 laying down detailed rules on the application of fair use policy and on the methodology for sustainability derogations, Commission Delegated Regulation (EU) 2021/654 setting out single maximum Union-wide voice termination rates and the BEREC Regulation (EU) 2018/1971. The EECC is already included in Appendix XVII-3, which makes it necessary to add the remaining four relevant EU acts relating to roaming on public mobile communications networks.

This decision implements the Union's common commercial policy towards an Eastern Partner country and candidate country, based on the provisions of the above-mentioned Association Agreement. It is consistent with the objective of Ukraine's gradual regulatory approximation to the Union *acquis* as laid down in the preamble to the Agreement.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. 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 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'¹.

4.1.2. Application to the present case

The Trade Committee is a body established by the Association Agreement. The decision the Association Committee in trade configuration shall adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 465(3) of the Agreement. The envisaged act does not supplement or amend the institutional framework of the Agreement. Therefore, the procedural legal basis for the proposed Council decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. 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)

¹ 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.

TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. *Application to the present case*

Article 207 TFEU is the legal basis for the Union's common commercial policy. In particular, the first subparagraph of Article 207(4) TFEU provides the legal basis for trade in services, with the exception of transport services, with regard to third countries including stipulations on the regulatory framework conditions for the supply of such services.

The main objective and content of the envisaged act relates to the Union's common commercial policy because the act concerns trade in telecommunication services with Ukraine. Therefore, the substantive legal basis of the proposed Council decision is Article 207 TFEU.

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

As the decision of the Association Committee will amend the Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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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 Association Agreement between the European Union and the European Atomic Energy Community, and their Member States of the one part, and Ukraine, of the other part¹ ('the Agreement') entered into force on 1 September 2017.
- (2) Pursuant to Article 11 of Annex XVII to the Agreement, the Association Committee in Trade configuration may modify Annex XVII to that Agreement.
- (3) The Association Committee in Trade configuration should adopt the envisaged act on modifying Appendix XVII-3 (Rules applicable to telecommunication services) in the course of 2023.
- (4) As stated in the preamble to the Agreement and in accordance with Article 124 of the Agreement, the Parties recognise the importance of the approximation of Ukraine's existing legislation to that of the European Union, meaning that Ukraine is to ensure that existing laws and future legislation will be gradually made compatible with the EU *acquis*.
- (5) Ukraine has requested further integration with regards to the roaming sector in the European Union, in particular through internal market treatment for the purpose of roaming services.
- (6) Considering that Appendix XVII-3 (Rules applicable to telecommunication services) of the Annex XVII to the Agreement should be complemented by the relevant European Union acts relating to roaming on public mobile communications networks, it is necessary to modify the Appendix by adding to that Appendix Regulation (EU) 2022/612 of the European Parliament and of the Council², Commission Implementing Regulation (EU) 2016/2286³, Commission Delegated Regulation (EU) 2021/654⁴ and Regulation (EU)

¹ OJ L 161, 29.5.2014, p. 3.

² Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (OJ L 115, 13.4.2022, p. 1).

³ Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment (OJ L 344, 17.12.2016, p. 46).

⁴ Commission Delegated Regulation (EU) 2021/654 of 18 December 2020 supplementing Directive (EU) 2018/1972 of the European Parliament and of the Council by setting a single maximum Union-wide mobile

2018/1971 of the European Parliament and of the Council⁵. Directive (EU) 2018/1972 of the European Parliament and of the Council⁶ is already covered by Appendix XVII-3 of the Annex XVII to the Agreement.

- (7) It is therefore appropriate to establish the position to be taken on the Union's behalf in the Association Committee in Trade configuration, as the envisaged act modifying Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII to the Agreement will be binding upon the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the course of 2023 in the Association Committee in Trade configuration of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the modification of Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII to that Agreement shall be based on the draft Decision of that Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

voice termination rate and a single maximum Union-wide fixed voice termination rate (OJ L 137, 22.4.2021, p. 1).

⁵ Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ L 321, 17.12.2018, p. 1).

⁶ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).