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THE EUROPEAN UNION**

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PROPOSAL

from:	European Commission
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Subject:	Proposal for a Council Decision on the conclusion of the Protocol Amending the Agreement on Government Procurement

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union.

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2013/0086 (NLE)

Proposal for a

COUNCIL DECISION

**on the conclusion of the Protocol Amending the Agreement on Government
Procurement**

EXPLANATORY MEMORANDUM

1. BACKGROUND

The Agreement on Government Procurement (GPA)¹ is to date the only legally binding agreement in the WTO on the subject of government procurement. Its present version was negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996 (the "1994 GPA").

The Parties to the 1994 GPA are: Armenia, Canada, European Union with respect to its 27 Member States, Hong Kong-China, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei, United States. It is administered by the Committee on Government Procurement (the "Committee").

The 1994 GPA has contained a built-in commitment to negotiations on both the text and coverage of the Agreement since its adoption in 1994 (Article XXIV:7(b)). Negotiations to that end were launched in 1999.

The purpose of the negotiations was three-fold: (i) to improve and update the 1994 GPA in the light of developments in information technology and procurement methods; (ii) to extend the coverage of the 1994 GPA; and (iii) to eliminate remaining discriminatory measures.

Negotiations have been conducted by the Commission. The Council was regularly informed orally and in writing about the state of play of the negotiations via the Trade Policy Committee. In addition, co-ordination meetings with Member States were held prior each negotiating session in Geneva. The European Parliament has been informed regularly in writing via the INTA Committee.

In December 2006, GPA Parties reached an understanding on the revision of the text of the 1994 GPA. However, the agreement of the negotiators was provisional in that it was subject to mutually satisfactory outcome of the negotiation on the expansion of coverage (market access; the coverage of the Agreement is determined with regard to each Party in Appendix I to the 1994 GPA).

In February 2007, the Council underlined in its conclusion² the importance of a successful and quick conclusion of the then on-going revision of the GPA. It stated that the revision should lead to an overall improvement of access to the procurement markets among GPA members, removing the existing imbalance.

On 30 March 2012 the GPA Parties reached a political agreement and adopted a Decision whereby they adopted the elements of the results of the negotiations ("Decision on the Outcomes of the Negotiations") consisting of: i) the Protocol amending the Agreement on Government Procurement (the "Protocol") and ii) seven Decisions of the Committee. By means of the Decision on the Outcomes of the Negotiations, the GPA Parties adopted the text of the Protocol and opened it for acceptance by the Parties to the 1994 GPA. The Protocol will enter into force for those Parties to the 1994 GPA that have deposited their respective instruments of acceptance of this Protocol, on the 30th day following such deposit by two thirds of the Parties to the 1994 GPA. Thereafter this Protocol will enter into force for each Party to the 1994 GPA, which has deposited its instrument of acceptance of this Protocol, on

¹ Official Journal J C256, 3.9. 1996 pag. 1.

² 2780th External Relations Council meeting, Brussels 12 February 2007, Nr 6039/07 (Press 18).

the 30th day following the date of such deposit. Any WTO Member wishing to accede to the 1994 GPA will be required to accept to be bound by the Protocol Amending the Agreement on Government Procurement upon its entry into force.

Furthermore, the Decision on the Outcomes of the Negotiations sets out in Appendix 2 seven Decisions of the Committee on Government Procurement establishing future work programmes of the Committee on Government Procurement and detailing notification requirements pursuant to Articles XIX and XXII of the Agreement.

These Decisions form part of the negotiated balance and reflect the GPA Parties commitment to start implementing certain provisions of the revised GPA, as soon as the Protocol enters into force. It was agreed that the Committee at its first meeting after the entry into force of the Protocol would take a decision confirming the political commitment to adopt those Decisions, with an effect as of the date of the entry into force of the Protocol. As both the Protocol and these Decisions are the object of the political agreement adopted in March 2012, they form part of the same package for the purpose of EU ratification of the GPA revision. However as the Committee Decisions are subject to a different internal decision making procedure than the Protocol, a separate Commission proposal is needed with regard to those Decisions.

2. THE OUTCOME OF THE NEGOTIATION

The Protocol amends the text of the 1994 GPA, as well as its Appendices. It is composed of the Preamble, the amended text of the GPA and of 4 Appendices. It should be recalled that the Agreement does not automatically apply to all government procurement of the Parties. Rather, the coverage of the Agreement is determined with regard to each Party in Appendix I, where each Party's offer is detailed in different Annexes referring to entities and/or specific sectors covered.

Appendix II to the Agreement lists the publications where Parties make available the applicable procurement rules and procedures. Appendix III lists the publications where Parties make available notices of intended procurement. Appendix IV lists the publications where Parties make available notices concerning awarded contracts and statistics.

2.1. The revised GPA

The revised GPA text provides for a higher level of clarity and transparency and guarantees equal footing in procurement procedures to suppliers, supplies and services originating in GPA Parties.

To that aim, the EU successfully sought to re-structure the text of the revised GPA in order to follow the sequential order of a procurement procedure and to bring the text closer to the EU procurement directives. As a consequence, the new revised text is a substantial improvement in terms of readability and clarity of its provisions, making them more user-friendly.

Furthermore, to allow for an effective opening of the procurement markets of the other GPA Parties, the revised text entails complete new provisions which constitute a significant improvement of the conditions of participation of the EU suppliers abroad.

These new elements include the following:

The GPA Parties will be required to set up a free of charge and centralised electronic database which will include procurement notices published by Ministries and other central procurement entities. The new obligations are largely inspired by the EU model, as the EU maintains a free of charge single data base called Tender Electronic Daily- TED- where all procurement notices are made available. This will result in procurement opportunities in all GPA Parties being made more accessible.

The revised GPA contains clearer rules on the selection of suppliers, allowing for more competition: similarly to the EU system, the selection process will ensure that companies wishing to participate to procurement have not been found guilty of bribery or corruption. Also, permanent lists of suppliers maintained by procuring entities shall be opened to suppliers not registered in the lists, allowing for more competition in the markets.

The revision of the GPA also leads to the introduction of electronic procurement: a set of provisions on the use of electronic procurement have been introduced at the EU's initiative. They include the possibility to use electronic auctions. Also, the use of electronic means allows for more flexibility in the procedures, including shorter deadlines in the procedures.

The revised GPA text includes new provisions for developing countries wishing to join the Agreement. This is particularly important as the 1994 GPA has a limited number of members, most of them being developed economies. To encourage developing countries to join they can benefit under the revised text from a set of transitional measures such as higher thresholds, phasing in of entities and sectors aiming at facilitating the transition to an open economy facing foreign competition.

Another important element relates to the conditions under which a procuring entity that has been included in a Party's commitments can be withdrawn from the scope of the GPA. The move from the previous cumbersome system of modifications of coverage to a clearer one was among the most difficult issues to agree on, and constitutes one of the most important changes in the new text, much to the advantage of the EU.

The EU has obtained that the current obligations regarding statistical reporting are more simple and flexible. This includes a limitation of the number of data to be provided, the possibility to provide estimates, and the introduction of a waiver of the obligations for the Parties (like the EU) who maintain a centralised database.

Finally, the EU has obtained that the Agreement explicitly provides for a simplified procedure (Article XIX) for the notification by a Party of rectifications and modifications of its Annexes to Appendix I (coverage). This means that in cases of any rectification, transfer of an entity from one Annex to the other, withdrawal of an entity and in case of any other modification, it would no longer be necessary to resort to the formal amendment procedure (set out in Article XXII.11 of the Agreement). It is proposed that the Commission is authorized to submit to the Committee on Government procurement any proposal for rectification and modification of the EU Annexes to Appendix I. In case of Member States' entities, the Commission will proceed to notification to the Committee, upon receipt of relevant information from any Member State, and after informing the Member States in the relevant Committee (Trade Policy Committee). This would be consistent with the practise existing under the current 1994 GPA.

2.2. The coverage

The negotiations resulted in a significant extension of the coverage of the GPA. The additions to the coverage reach according to estimates of the WTO 80 billion Euro. The EU secured

roughly 30 billion Euro of additional market access opportunities for the European companies.

The market access has been expanded through:

(i) Addition of more than 200 contracting entities, both on central and sub-central levels. In comparison to the 1994 GPA, all Parties that have sub-central level of government are now offering coverage to varying degrees.

(ii) Greater coverage of goods through deletion or reduction in scope of existing derogations and through additions of goods on the non-sensitive defence procurement list.

(iii) Expanded coverage of services to varying degrees by almost all Parties. All Parties offer now the entire category of construction services (works).

(iv) Downwards revision of thresholds from which the GPA discipline will be applicable (by some Parties).

(v) New coverage for contractual arrangements such as works concessions/Build-Operate-Transfer contracts/Private Finance Initiative.

(vi) Removal of certain discriminatory provisions, such as offsets and Buy National rules that some Parties maintained under the 1994 GPA.

3. PROCEDURE

The Commission proposes the Council to conclude the Protocol Amending the Agreement on Government Procurement on behalf of the European Union.

The European Parliament will be called upon to give its consent to the conclusion of the Protocol. This proposal has no implications for the EU budget.

Proposal for a

COUNCIL DECISION

on the conclusion of the Protocol Amending the Agreement on Government Procurement

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(6)(a)(v) and Article 218(7) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) The negotiations on the revision of the WTO Agreement on Government Procurement (GPA) were launched in January 1999, based on a commitment built-in to Article XXIV:7(b) of the GPA.
- (2) Negotiations have been conducted by the Commission in consultation with the Committee established by Article 207 of the Treaty on the Functioning of the European Union.
- (3) On 15 December 2011, GPA Parties reached a political agreement at Ministerial level on the outcomes of the negotiation. The political agreement was confirmed through the adoption of the Decision on the outcomes of the negotiations by the GPA Committee on 30 March 2012. By means of the Decision on the outcome of the Negotiations, which includes the Protocol Amending the Agreement on Government Procurement (the "Protocol"), GPA Parties authenticated the text of the Protocol and opened it for acceptance by the Parties to the 1994 GPA.
- (4) The Protocol consists of the Preamble, the Agreement on Government Procurement and its four Appendices.
- (5) Article XIX of the GPA foresees a simplified procedure to be followed in cases of modification and rectification of the list of the covered entities, as set out under each Party's Annexes to Appendix I of the Agreement. The Commission should be authorized to propose rectification and modification to the lists of Member States' entities set out in the EU Annexes to Appendix I, in accordance with Article XIX of the GPA, upon receipt of relevant information from Member States.
- (6) The Protocol should be concluded on behalf of the Union.

HAS ADOPTED THIS DECISION:

Article 1

The Protocol Amending the Agreement on Government Procurement is hereby concluded on behalf of the European Union.

The text of the Protocol is attached to this Decision.

Article 2

The President of the Council shall designate the person(s) empowered to deposit, on behalf of the Union, the instrument of acceptance, as specified in paragraph 3 of the Protocol in order to express the consent of the Union to be bound by the Protocol.

Article 3

This Protocol shall not be construed as conferring rights or imposing obligations which can be directly invoked in the Union or Member State courts.

Article 4

For the purpose of notifying rectification and modifications of coverage, in accordance with Article XIX of the Agreement, the European Commission is authorized to notify to the Committee of the Agreement on Government Procurement any rectification or modification of the list of entities covered under EU Annexes to Appendix I, on the basis of relevant information from Member States.

Article 5

This Decision shall enter into force on the day of its adoption. It shall be published in the *Official Journal of the European Union*.

The date of entry into force of the Protocol shall be published in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*