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PROPOSAL

from: European Commission
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Subject: Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part
- Annex IX

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.

Encl.: COM(2013) 289 final - Annex IX



EUROPEAN
COMMISSION

Brussels, 15.5.2013
COM(2013) 289 final

Annex IX

ANNEX

Annex XXIII to XXV to Title IV of the Association Agreement between the European Union and its and its Member States, on the one hand, and Ukraine on the other

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to the

PROPOSAL FOR A COUNCIL DECISION

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ANNEX XXIII

GLOSSARY OF TERMS

The following glossary is intended to illustrate the meaning of certain terms used in Chapter 10 (Competition) of Title IV of this Agreement. This glossary is not legally binding and remains without prejudice to the provisions included in this Chapter.

- (a) Areas where the standard of living is abnormally low or where there is serious underemployment: These are areas where the economic situation is extremely unfavourable in relation to the European Union as a whole. This condition is fulfilled if a region or a sub-national geographical administrative entity, with an average population of approximately 800,000 to 3,000,000 inhabitants, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75 % of the Union average.
- (b) Serious disturbance: The disturbance in question must affect the whole of the economy of the Party concerned, or one of its Member States. A disturbance is deemed not to be serious for the purposes of this section if it is limited to one of the Parties' regions or parts of their territories.
- (c) Service of general economic interest ("SGEI"): This means economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention. The activity must exhibit special characteristics as compared with the general economic interest of other economic activities.
- (d) Public undertakings: Any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.
- (e) Exclusive rights: These are rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument,

reserving it the right to provide a service or undertake an activity within a given geographical area.

- (f) Special rights: These are rights that are granted by a Member State to a limited number of undertakings which, within a given geographical area, and otherwise than according to objective, proportional and non-discriminatory criteria,
- limit to two or more the number of such undertakings authorised to provide a service or undertake an activity, or
 - designate several competing undertakings as being authorised to provide a service or undertake an activity, or
 - confer on any undertaking or undertakings any legal or regulatory advantages which substantially affect the ability of any other undertaking to provide the same service or to operate the same activity in the same geographical area under substantially equivalent conditions.
- (g) Important project in the common European interest or in the common interest of the Parties: A project is important and in the common European interest or in the common interest of the Parties only if
- (i) the aid concerns a project which is clearly defined regarding the terms of its implementation including its participants as well as its objectives;
 - (ii) the project must be in the common European interest in the sense that the advantage achieved by the objective of the project must not be limited to one Member State or the Member States implementing it, but must extend to the EU as a whole
- or,
- it must be in the common interest of the Parties, in the sense that the advantage achieved by the objective of the project must extend to both Parties;
- (iii) the project must be of great importance with respect to its character and its volume: it must be a meaningful project with regard to its objectives and a project of a substantial size.
- (h) State monopoly of commercial character: State monopolies of a commercial character are monopolies through which the national, regional or local authorities or other public bodies of any kind of a Party are in a position, in law or in fact, to supervise, determine or appreciably influence, either directly or indirectly, imports or exports between the Parties. The provisions in the Agreement regarding State monopolies of a commercial character apply likewise to monopolies delegated by the Parties.

ANNEX XXIV

RULES OF PROCEDURE FOR DISPUTE SETTLEMENT

GENERAL PROVISIONS

1. In Chapter 14 (Dispute Settlement) of Title IV of the Agreement and under these rules:
 - “adviser” means a person retained by a Party to advise or assist that Party in connection with the arbitration panel proceeding;
 - “arbitration panel” means a panel established under Article 307 of the Agreement;
 - “arbitrator” means a member of an arbitration panel established under Article 307 of the Agreement;
 - “assistant” means a person who, under the terms of appointment of an arbitrator conducts research or provides assistance to the arbitrator;
 - “complaining Party” means any Party that requests the establishment of an arbitration panel under Article 306 of the Agreement;
 - “Party complained against” means the Party that is alleged have acted inconsistently with the Agreement;
 - “representative of a Party” means an employee or any person appointed by a government department or agency or any other public entity of a Party, who represents the Party for the purposes of a dispute under this Agreement;
 - “day” means a calendar day.
2. The Party complained against shall be in charge of the logistical administration of dispute settlement proceedings, in particular the organisation of hearings, unless otherwise agreed. However, both Parties shall share the expenses derived from organisational matters, including the expenses of the arbitrators.

NOTIFICATIONS

3. The Parties and the arbitration panel shall transmit any request, notice, written submission or other document by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.
4. A Party shall provide a copy of each of its written submissions to the other Party and to each of the arbitrators. A copy of the document shall also be provided in electronic format.
5. All notifications, including requests for consultations, shall be addressed to the Ministry of Foreign Affairs of Ukraine and to the Directorate-General for Trade of the European Commission, respectively.
6. Minor errors of a clerical nature in any request, notice, written submission or other document related to the arbitration panel proceeding may be corrected by delivery of a new document clearly indicating the changes.

7. If the last day for delivery of a document falls on a legal holiday of Ukraine or of the institutions of the European Union, the document may be delivered on the next business day.

COMMENCING THE ARBITRATION

8. Unless the Parties agree otherwise, they shall meet the arbitration panel within seven days of its establishment in order to determine such matters that the Parties or the arbitration panel deem appropriate, including the remuneration and expenses to be paid to the arbitrators, which will be in accordance with WTO standards.

INITIAL SUBMISSIONS

9. The complaining Party shall deliver its initial written submission no later than 20 days after the date of establishment of the arbitration panel. The Party complained against shall deliver its written counter-submission no later than 20 days after the date of delivery of the initial written submission.

WORKING OF ARBITRATION PANELS

10. The chairperson of the arbitration panel shall preside at all its meetings. An arbitration panel may delegate to the chairperson authority to make administrative and procedural decisions.
11. Unless otherwise provided in the Agreement and without prejudice to paragraph 24, the arbitration panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
12. Only arbitrators may take part in the deliberations of the arbitration panel, but the arbitration panel may permit its assistants to be present at its deliberations.
13. The drafting of any ruling shall remain the exclusive responsibility of the arbitration panel and shall not be delegated.
14. Where a procedural question arises which is not covered by the provisions of the Agreement and its annexes, an arbitration panel may adopt any appropriate procedure provided that the procedure ensures equal treatment between the Parties and is compatible with the provisions of the Agreement and its annexes.
15. When the arbitration panel considers that there is a need to modify any time limit applicable in the proceedings or to make any other procedural or administrative adjustment, it shall inform the Parties in writing of the reasons for the change or adjustment and of the period or adjustment needed. The time limits of Article 310(2) of the Agreement shall not be modified without the agreement of the Parties.

REPLACEMENT

16. If an arbitrator is unable to participate in the proceeding, withdraws, or must be replaced, a replacement shall be selected in accordance with Article 307(3) and (4) of the Agreement.

17. Where a Party considers that an arbitrator does not comply with the requirements of the Code of Conduct and for this reason should be replaced, this Party should notify the other Party within 15 days from the time at which it came to know of the circumstances underlying the arbitrator's violation of the Code of Conduct.
18.
 - a) Where a Party considers that an arbitrator other than the chairperson does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so agree, replace the arbitrator by selecting a replacement following the procedure set out in Article 307(3) and (4) of the Agreement.
 - b) If the Parties fail to agree on the need to replace an arbitrator, any Party may request that such matter be referred to the chairperson of the arbitration panel, whose decision shall be final.
 - c) If, pursuant to such a request, the chairperson finds that an arbitrator does not comply with the requirements of the Code of Conduct, she or he shall select a new arbitrator by lot among the pool of individuals referred to under Article 323(1) of the Agreement of which the original arbitrator was a Member. If the original arbitrator was chosen by the Parties pursuant to Article 307(2) of the Agreement, the replacement shall be selected by lot among the pools of individuals that have been proposed by the complaining Party and by the Party complained against under Article 323(1) of the Agreement. The selection of the new arbitrator shall be done in the presence of the Parties and within five days of the date of the submission of the request to the chairperson of the arbitration panel.
19.
 - a) Where a Party considers that the chairperson of the arbitration panel does not comply with the requirements of the Code of Conduct, the Parties shall consult and, if they so agree, replace the chairperson by selecting a replacement following the procedure set out in Article 307(3) and (4) of the Agreement.
 - b) If the Parties fail to agree on the need to replace the chairperson, any Party may request that such matter be referred to one of the remaining members of the pool of individuals selected to act as chairpersons under Article 323(1) of this Agreement. Her or his name shall be drawn by lot, in the presence of the Parties, by the chair of the Trade Committee, or the chair's delegate. The decision by this person on the need to replace the chairperson shall be final.
 - c) If this person decides that the original chairperson does not comply with the requirements of the Code of Conduct, she or he shall select a new chairperson by lot among the remaining pool of individuals referred to under Article 323(1) of the Agreement who may act as chairpersons. This selection of the new chairperson shall be done in the presence of the Parties and within five days of the date of the submission of the request referred to in this paragraph.
20. The arbitration panel proceedings shall be suspended for the period taken to carry out the procedures provided for in paragraphs 16, 17, 18 and 19.

HEARINGS

21. The chairperson shall fix the date and time of the hearing in consultation with the Parties and the other members of the arbitration panel, and confirm this in writing to

the Parties. This information shall also be made publicly available by the Party in charge of the logistical administration of the proceedings unless the hearing is closed to the public. Unless the Parties disagree, the arbitration panel may decide not to convene a hearing.

22. Unless the Parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is Ukraine and in Kyiv if the complaining Party is the European Union.
23. The arbitration panel may convene additional hearings if the Parties so agree.
24. All arbitrators shall be present during the entirety of any hearing.
25. The following persons may attend the hearing, irrespective of whether the hearing is closed to the public or not:
 - (a) representatives of the Parties;
 - (b) advisers to the Parties;
 - (c) administrative staff, interpreters, translators and court reporters; and
 - (d) arbitrators' assistants.

Only the representatives and advisers of the Parties may address the arbitration panel.

26. No later than five days before the date of a hearing, each Party shall deliver to the arbitration panel a list of the names of persons who will make oral arguments at the hearing on behalf of that Party and of other representatives or advisers who will be attending the hearing.
27. The hearings of the arbitration panels shall be open to the public, unless the Parties decide that the hearings shall be partially or completely closed to the public. However the arbitration panel shall meet in closed session when the submission and arguments of a Party contain confidential information.
28. The arbitration panel shall conduct the hearing in the following manner, ensuring that the complaining Party and the Party complained against are afforded equal time:

Argument

- (a) argument of the complaining Party
- (b) argument of the Party complained against

Rebuttal Argument

- (a) argument of the complaining Party
- (b) counter-reply of the Party complained against

29. The arbitration panel may direct questions to either Party at any time during the hearing.

30. The arbitration panel shall arrange for a transcript of each hearing to be prepared and delivered as soon as possible to the Parties.
31. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within 10 days of the date of the hearing.

QUESTIONS IN WRITING

32. The arbitration panel may at any time during the proceedings address questions in writing to one or both Parties. Each of the Parties shall receive a copy of any questions put by the arbitration panel.
33. A Party shall provide a copy of its written response to the arbitration panel's questions to the other Party. Each Party shall be given the opportunity to provide written comments on the other Party's reply within five days of the date of delivery.

CONFIDENTIALITY

34. The Parties and their advisers shall maintain the confidentiality of the arbitration panel hearings where the hearings are held in closed session, in accordance with paragraph 27. Each Party and its advisers shall treat as confidential any information submitted by the other Party to the arbitration panel which that Party has designated as confidential. Where a Party submits a confidential version of its written submissions to the arbitration panel, it shall also, upon request of the other Party, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public no later than 15 days after the date of either the request or the submission, whichever is later. Nothing in these rules shall preclude a Party from disclosing statements of its own positions to the public to the extent that they do not contain confidential information.

EX PARTE CONTACTS

35. The arbitration panel shall not meet or contact a Party in the absence of the other Party.
36. No member of the arbitration panel may discuss any aspect of the subject matter of the proceedings with one Party or both Parties in the absence of the other arbitrators.

AMICUS CURIAE SUBMISSIONS

37. Unless the Parties agree otherwise within three days of the date of the establishment of the arbitration panel, the arbitration panel may receive unsolicited written submissions from interested natural or legal persons established in the territories of the Parties, provided that they are made within 30 days of the date of the establishment of the arbitration panel, that they are concise, including any annexes, and that they are directly relevant to the factual and legal issues under consideration by the arbitration panel. The arbitration panel may decide to impose a page limit on such submissions.
38. The submission shall contain a description of the person making the submission, whether natural or legal, including its place of establishment, the nature of its

activities and the source of its financing, and specify the nature of the interest that the person has in the arbitration proceeding.

39. The arbitration panel shall list in its ruling all the submissions it has received that conform to the above rules. The arbitration panel shall not be obliged to address in its ruling the factual or legal arguments made in such submissions. Any submission obtained by the arbitration panel under this rule shall be submitted to the Parties for their comments.

URGENT CASES

40. In cases of urgency referred to in Article 310(2) of the Agreement, the arbitration panel shall adjust the time limits referred to in these rules as appropriate.

TRANSLATION AND INTERPRETATION

41. During the consultations referred to in Article 305 of the Agreement, and no later than the meeting referred to in paragraph 8(b) of these Rules of Procedure, the Parties shall endeavour to agree on a common working language for the proceedings before the arbitration panel.
42. If the Parties are unable to agree on a common working language, each Party shall expeditiously arrange for and bear the costs of the translation of its written submissions into the language chosen by the other Party and the Party complained against shall arrange for the interpretation of oral submissions into the languages chosen by the Parties.
43. Arbitration panel rulings shall be notified in the language or languages chosen by the Parties.
44. The costs incurred for translation of an arbitration ruling shall be borne equally by the Parties.
45. Any Party may provide comments on any translated version of a document drawn up in accordance with these rules.

CALCULATION OF TIME-LIMITS

46. Where, by reason of the application of paragraph 7 of these Rules of Procedure, a Party receives a document on a date other than the date on which this document is received by the other Party, any period of time that is calculated on the basis of the date of receipt of that document shall be calculated from the latter date of receipt of that document.

OTHER PROCEDURES

47. These Rules of Procedure are also applicable to procedures established under Article 312(2), Article 313(2), Article 315(3) and Article 316(2) of the Agreement. However, the time-limits laid down in these Rules of Procedure shall be adjusted in line with the special time-limits provided for the adoption of a ruling by the arbitration panel in those other procedures.

ANNEX XXV

CODE OF CONDUCT FOR MEMBERS OF ARBITRATION PANELS AND MEDIATORS

Definitions

1. In this Code of Conduct:
 - (a) "arbitrator" means a member of an arbitration panel established under Article 307 of the Agreement;
 - (b) "mediator" means a person who conducts a mediation procedure in accordance with Chapter 15 (Mediation Mechanism) of Title IV;
 - (c) "candidate" means an individual whose name is on the list of arbitrators referred to in Article 323 of the Agreement and who is under consideration for selection as a member of an arbitration panel under Article 307 of the Agreement;
 - (d) "assistant" means a person who, under the terms of appointment of an arbitrator or mediator, conducts research or provides assistance to the arbitrator or mediator;
 - (e) "proceeding", unless otherwise specified, means an arbitration panel or mediation proceeding under the Agreement;
 - (f) "staff", in respect of an arbitrator or mediator, means persons under the direction and control of the arbitrator or mediator, other than assistants.

Responsibilities to the process

2. Every candidate and arbitrator or mediator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Former candidates, arbitrators or mediators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.

Disclosure obligations

3. Prior to confirmation of her or his selection as an arbitrator or as a mediator under the Agreement, a candidate shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.
4. A candidate, arbitrator or mediator shall communicate matters concerning actual or potential violations of this Code of Conduct only to the Trade Committee for consideration by the Parties.

5. Once selected, an arbitrator or mediator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator or mediator to disclose any such interests, relationships or matters that may arise during any stage of the proceeding. The member shall disclose such interests, relationships or matters by informing the Trade Committee, in writing, for consideration by the Parties.

Duties of arbitrators or mediators

6. Upon selection an arbitrator or mediator shall perform her or his duties thoroughly and expeditiously throughout the course of the proceeding, and with fairness and diligence.
7. An arbitrator or mediator shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person.
8. An arbitrator or mediator shall take all appropriate steps to ensure that his or her assistants and staff are aware of, and comply with, paragraphs 2, 3, 4, 5, 16, 17 and 18 of this Code of Conduct.
9. Without prejudice to Article 330 of the Agreement, an arbitrator or mediator shall not engage in ex parte contacts concerning the proceeding.

Independence and impartiality of arbitrators or mediators

10. An arbitrator or mediator must be independent and impartial and avoid creating an appearance of impropriety or bias and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, and loyalty to a Party or fear of criticism.
11. An arbitrator or mediator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of her or his duties.
12. An arbitrator or mediator may not use her or his position on the arbitration panel to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence her or him.
13. An arbitrator or mediator may not allow financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgement.
14. An arbitrator or mediator must avoid entering into any relationship or acquiring any financial interest that is likely to affect her or his impartiality or that might reasonably create an appearance of impropriety or bias.

Obligations of former arbitrators or mediators

15. All former arbitrators or mediators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from any decision or ruling of the arbitration panel or from an advisory opinion.

Confidentiality

16. No arbitrator or mediator or former arbitrator or mediator shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding except for the purposes of that proceeding and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
17. An arbitrator shall not disclose an arbitration panel ruling or parts thereof prior to its publication in accordance with the Agreement.
18. An arbitrator or former arbitrator shall not at any time disclose the deliberations of an arbitration panel, or any arbitrator's views.