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PROPOSAL

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 22 March 2021

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: COM(2021) 132 final

Subject: Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Association Committee in Trade configuration and in the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, as regards a favourable opinion to the comprehensive roadmap approved by the Georgian Government for the implementation of the legislation related to public procurement and recognizing the completion of phase 1 of Annex XVI-B of the Association Agreement

Delegations will find attached document COM(2021) 132 final.

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EUROPEAN
COMMISSION

Brussels, 22.3.2021
COM(2021) 132 final

2021/0067 (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 and in the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, as regards a favourable opinion to the comprehensive roadmap approved by the Georgian Government for the implementation of the legislation related to public procurement and recognizing the completion of phase 1 of Annex XVI-B of the Association Agreement

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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 EU-Georgia Association Committee in Trade configuration in connection with the envisaged adoption of a decision giving a favourable opinion to the comprehensive roadmap approved by the Georgian Government for the implementation of the legislation related to public procurement and recognizing the completion of phase 1 of Annex XVI-B of the Association Agreement.

Additionally, this proposal concerns the decision establishing the position to be taken on the Union's behalf in the EU-Georgia Association Council granting further market access to the parties as foreseen in Title IV of the Association Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Association Agreement

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part¹ ('the Agreement') establishes a Deep and Comprehensive Free Trade Area ('DCFTA') which aims to establish conditions for enhanced economic and trade relations. This includes the progressive approximation of legislation in the area of public procurement. The Agreement entered fully into force on 1 July 2016.

2.2. The Association Committee in Trade configuration

The Association Committee in Trade configuration was established in Article 408(4) of the Agreement and performs the tasks conferred upon it under Title IV of the Agreement, i.e. Trade and Trade-related matters.

According to Article 408(3), the Association Committee shall have the power to adopt decisions in the cases provided for in this Agreement. The decisions of the Association Committee are binding, and the Parties shall take appropriate measures to implement them. The Association Committee adopts its decisions by agreement between the Parties, taking into account the respective internal procedures.

2.3. The Association Council

The Association Council was established in Article 404 of the Agreement. It supervises and monitors the application and implementation of the Agreement and periodically reviews the functioning of the Agreement in the light of its objectives. In addition to supervising and monitoring the application and implementation of this Agreement, the Association Council shall examine any major issues arising within the framework of the Agreement, and any other bilateral or international issues of mutual interest.

According to Article 406 of the Agreement, the Association Council shall have the power to take decisions within the framework of the Agreement, which shall be binding upon the Parties. In particular, Article 419(5) stipulates that if the Parties agree that necessary measures covered by Title IV (Trade and Trade-related Matters) of the Agreement have been implemented and are being enforced, the Association Council, under the powers conferred to it in Articles 406 and 408 of the Agreement, shall decide on further market opening where provided for in Title IV.

¹ OJ L 261, 30.8.2014, p. 744.

The decisions of the Association Council are binding, and the Parties shall take appropriate measures to implement them. The Association Council adopts its decisions and recommendations by agreement between the Parties following the completion of their respective internal procedures.

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

The purpose of the envisaged act is to give a favourable opinion to the recent comprehensive reform roadmap in the area of public procurement approved by the Georgian government and to acknowledge the completion of phase 1 of Annex XVI-B of the Agreement (Indicative Time Schedule for Institutional Reform, Approximation and Market Access).

Annex XVI-B of the EU-Georgia DCFTA stipulates the following requirements for completion of phase 1:

- Implementation of Article 143(2) and Article 144 of this Agreement
- Agreement of the Reform Strategy set out in Article 145 of this Agreement.

With regard to the first requirement, Article 143(2) states that Georgia shall designate in particular:

- an executive body at central government level tasked with guaranteeing a coherent policy and its implementation in all areas related to public procurement. That body shall facilitate and coordinate the implementation of this Chapter and guide the process of gradual approximation to the Union *acquis*, as set out in Annex XVI-B to this Agreement;
- an impartial and independent body tasked with the review of decisions taken by contracting authorities or entities during the award of contracts. In this context, ‘independent’ means that that body shall be a public authority which is separate from all contracting entities and economic operators. There shall be a possibility to subject the decisions taken by this body to judicial review.

These measures were completed respectively on 23 April 2014 by Government Decree 306 and on 2 July 2020 by Law of Georgia no 6730.

According to article 144, the Parties shall comply with a set of basic standards for the award of all contracts as stipulated in paragraphs 2 to 15 of this Article on publication, award of contracts and judicial protection. These basic standards derive directly from the rules and principles of public procurement, as regulated in the Union public procurement *acquis*, including the principles of non-discrimination, equal treatment, transparency and proportionality.

These principles have been incorporated into Georgian public procurement rules with the introduction of an e-Procurement system in 2010 and the adoption of Law of Georgia 617, of 6 April, 2017 amending the Law on State Procurement.

With regard to the second requirement of phase 1 of Annex XVI-B, the approval of a roadmap as set out in Article 145 of the Agreement is necessary. Article 145(1) of the Association Agreement provides that, prior to the commencement of gradual approximation, Georgia shall submit to the Association Committee in Trade configuration a comprehensive roadmap for the implementation of Chapter 8 of Title IV of the Agreement with time schedules and milestones. This document, which according to the Association Agreement shall comply with the phases and time schedules set out in Annex XVI-B, shall include all reforms in terms of approximation to the Union *acquis* and institutional capacity building.

On 31 March 2016, the Government of Georgia approved Decree 536 of the Government of Georgia, on approval of the Roadmap “Concerning the planned changes in the Public Procurement field envisaged in compliance with the obligations between Georgia and EU within the scope of the Deep and Comprehensive Free Trade Area (DCFTA) agreement”. This decree was modified by Government Decrees no 154 of 22 January 2018 and no 974 of 12 June 2020. The Roadmap fulfills the requirements of Article 145 (1).

The envisaged act will become binding on the parties in accordance with Article 145(2) of the Agreement, which provides that “following a favourable opinion by the Association Committee in Trade configuration, the roadmap shall be considered as the reference document for the implementation of this Chapter. The Union shall make its best efforts in assisting Georgia in the implementation of the roadmap.” According to Article 146(3) the acknowledgement of completion of phase 1 of Annex XVI-B will allow the Association Committee in Trade configuration to proceed to the evaluation of the next phase.

2.5. The envisaged decision by the Association Council on market access

After the acknowledgement of completion of phase 1 the Association Council shall in accordance with Article 146(2) and 419(5) and the schedule for institutional reform, approximation and market access contained in Annex XVI-B decide to grant reciprocal market access for supplies for central government authorities.

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

The position to be adopted on behalf of the Union by the Association Committee in Trade configuration aims at giving a favourable opinion to the roadmap approved by the Georgian government for the implementation of the legislation related to public procurement.

Additionally, it aims at acknowledging that, by approving the comprehensive reform strategy in accordance with article 145 and recognising the implementation of Articles 143(2) and 144 of the Agreement, Georgia has completed phase 1 of Annex XVI-B of the Association Agreement (Indicative Time Schedule for Institutional Reform, Approximation and Market Access).

According to Article 145(2) of the Agreement, following a favourable opinion by the Association Committee in Trade configuration the roadmap shall be incorporated as a reference document for the implementation of Chapter 8 of Title IV of the Association Agreement.

The position to be adopted on behalf of the Union by the Association Council aims at deciding on granting further market access to the parties as provided for in Title IV of the Agreement.

These decisions should be seen in the broader context of the efforts undertaken by the EU and Georgia to approximate their legislations, including in the area of public procurement, in order to establish conditions for enhanced economic and trade relations.

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'².

4.1.2. Application to the present case

The Association Committee in Trade configuration is a body set up by an agreement, namely the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part.

The act which the Association Committee in Trade configuration is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 408(3) of the Agreement.

The Association Council decision to grant reciprocal market access will produce legal effects in the territories of the signatories, pursuant to Article 406(1) of the Agreement,

The envisaged acts do not supplement or amend the institutional framework of the Agreement

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

4.2. 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) 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

The main objective and content of the envisaged act relate to ensuring the implementation of the Union's common commercial policy.

Therefore, the substantive legal basis of the proposed decision is the first subparagraph of Article 207(4) TFEU.

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACTS

According to Article 145(2) the act of the Association Committee in Trade configuration will incorporate the roadmap approved by the Georgian authorities as a reference document for Chapter 8 of Title IV of the Agreement and it acknowledges the completion of phase 1 of Annex XVI-B (Indicative Time Schedule for Institutional Reform, Approximation and Market Access). The Association Council decision to grant reciprocal market access will produce

² 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.

rights and obligations. It is therefore appropriate to publish the acts in the Official Journal of the European Union after their adoption.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Association Committee in Trade configuration and in the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, as regards a favourable opinion to the comprehensive roadmap approved by the Georgian Government for the implementation of the legislation related to public procurement and recognizing the completion of phase 1 of Annex XVI-B of the Association Agreement

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 Georgia, of the other part³ ('the Agreement') was concluded by the Union by Council Decision (EU) 2016/838⁴ and entered into force on 1 July 2016.
- (2) Article 145(1) of the Agreement stipulates that Georgia should submit to the Association Committee in Trade Configuration a comprehensive roadmap for the implementation of the legislation related to public procurement with time schedules and milestones, which should include all reforms in terms of legislative approximation to the Union *acquis*.
- (3) Pursuant to Article 145(2) of the Agreement, a favourable opinion by the Association Committee in Trade Configuration is needed in order for the comprehensive roadmap to become a reference document for the process of implementation, namely for the legislative approximation of the public procurement related legislation to the Union *acquis*.
- (4) In accordance with Article 146(2) of the Agreement, the approximation to the Union *acquis* is to be carried out in consecutive phases as set out in the schedule in Annex XVI-B to the Agreement. The implementation of each phase should be evaluated by the Association Committee in Trade configuration, as set out in Article 408(4) of the Agreement, and, following a positive assessment by that Committee, be linked to the reciprocal granting of market access as set out in Annex XVI-B to the Agreement.

³ OJ L 261, 30.8.2014, p. 4.

⁴ Council Decision (EU) 2016/838 of 23 May 2016 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (OJ L 141, 28.5.2016, p. 26).

- (5) The Association Committee in Trade configuration, is to adopt a decision according to Article 11(2) of Annex II of Decision No 1/2014 of the EU-Georgia Association Council of 17 November 2014 on rules of procedure, giving an opinion regarding the roadmap approved by the Georgian authorities as well as an assessment of the approximation of Georgian law to Union law so far in the completion of phase 1 as set out in Annex XVI-B to the Agreement. The roadmap was approved by the Government of Georgia in Decree no 536 of 31 March 2016 of the Government of Georgia, on approval of the Roadmap “Concerning the planned changes in the Public Procurement field envisaged in compliance with the obligations between Georgia and the EU within the scope of the Deep and Comprehensive Free Trade Area (DCFTA) Agreement” as amended by Decrees no 154 of 22 January 2018 and no 974 of 12 June 2020 of the Government of Georgia
- (6) After the acknowledgement of the completion of phase 1, the Association Council, should take a decision, according to Article 11(2) of Annex I of Decision No 1/2014 of the EU-Georgia Association Council of 17 November 2014 on rules of procedure, on granting reciprocal market access, in accordance with Annex XVI-B to the Agreement, for supplies for central government authorities.
- (7) It is appropriate to establish the position to be taken on the Union’s behalf in the Association Committee in Trade configuration as well as in the Association Council as the envisaged decisions will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union’s behalf in the Association Committee in Trade configuration as regards the comprehensive roadmap approved by the Government of Georgia, and the completion of phase 1 as set out in Annex XVI-B to the Deep and Comprehensive Free Trade Area (DCFTA) shall be based on the draft Decision of the Association Committee in Trade configuration attached to this Decision in Annex I.

Article 2

The position to be taken on the Union’s behalf in the Association Council as regards the granting of reciprocal market access in accordance with Annex XVI-B thereto shall be based on the draft Decision of the Association Council attached to this Decision in Annex II.

Article 3

After their adoption, the Decision of the Association Committee in Trade configuration referred to in Article 1 and the Decision of the Association Council referred to in Article 2 shall be published in the *Official Journal of the European Union*.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*