



Council of the
European Union

Brussels, 28 January 2019
(OR. en)

5740/19

LIMITE

WTO 24
MAP 1
MI 62
PREP-BXT 24

**Interinstitutional File:
2019/0020(NLE)**

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	28 January 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 46 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Committee on Government Procurement concerning the accession of the United Kingdom of Great Britain and Northern Ireland to the Agreement on Government Procurement in the context of its withdrawal from the European Union

Delegations will find attached document COM(2019) 46 final.

Encl.: COM(2019) 46 final



EUROPEAN
COMMISSION

Brussels, 28.1.2019
COM(2019) 46 final

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Committee on Government Procurement concerning the accession of the United Kingdom of Great Britain and Northern Ireland to the Agreement on Government Procurement in the context of its withdrawal from the European Union

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 Committee on Government Procurement ("GPA Committee" or "the Committee") in connection with the envisaged adoption of a decision concerning the accession of the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom"), to the Agreement on Government Procurement in the context of its withdrawal from the European Union.

2. CONTEXT OF THE PROPOSAL

2.1 The Agreement on Government Procurement and the United Kingdom's withdrawal from the European Union

The Agreement on Government Procurement (hereinafter 'the Agreement'¹) is a plurilateral agreement within the framework of the World Trade Organisation (WTO) which aims to mutually open government procurement markets among its Parties. The revised Agreement entered into force on 6 April 2014.

The European Union is a Party to the Agreement because its subject matter falls within the scope of the common commercial policy, for which the Union has exclusive competence. The Member States are covered by the Agreement pursuant to Union law.

On 29 March 2017, the United Kingdom notified the European Council pursuant to Article 50 of the Treaty on European Union of its intention to withdraw from the Union. Consequently, the United Kingdom will become a third country and Union law will cease to apply to it from 30 March 2019, unless another date is established in a withdrawal agreement between the Union and the United Kingdom, or the European Council, in agreement with the United Kingdom, unanimously establishes another date. The Union and the United Kingdom have negotiated a withdrawal agreement pursuant to Article 50 of the Treaty on European Union. The withdrawal agreement was endorsed by the European Council of 25 November 2018. Part Four of the withdrawal agreement provides for a transition period during which Union law will be applicable to and in the United Kingdom ('transition period').

A Withdrawal Agreement has been agreed between the Union and the United Kingdom and endorsed by the European Council (Article 50) on 25 November 2018. However, its ratification in the United Kingdom is uncertain.

As from the date in which Union law will cease to apply to and in the United Kingdom, the Agreement will automatically cease to apply to the United Kingdom.

It is in the interest of the Union to ensure that the United Kingdom remains subject to the rights and obligations under the Agreement as from the date Union law no longer applies to and in the United Kingdom. Until its withdrawal from the Union, the United Kingdom remains a Member State enjoying all the rights and bound by all obligations stemming from the Treaties, including the compliance with the principle of sincere cooperation. In the guidelines of 29 April 2017, the European Council recognised the need, in the international context, to take into account the specificities of the United Kingdom as a withdrawing Member State, provided it respects its obligations and remains loyal to the Union's interests while still a Member State.

¹ The 1994 Agreement and the revised Agreement are hereafter referred to together as the "Agreement" for the purposes of this Proposal.

The United Kingdom has expressed its wish to accede to the Agreement following its withdrawal from the Union.

Through their joint letter of 11 October 2017, the United Kingdom and the European Union informed the WTO Members of their intention to *"work together on the United Kingdom's objective of remaining, upon leaving the EU, subject to the rights and obligations it currently has under the Government Procurement Agreement as an EU Member State on the basis of the commitments currently contained in the EU schedule of commitments"*².

On 1 June 2018, the European Union transmitted to the Director General of the WTO a letter from the United Kingdom where it communicated its interest to accede to the Agreement and attached relevant supporting documentation including its initial market access offer and its replies to the "Checklist of Issues"³.

The United Kingdom's application along with its initial offer and its replies to the Checklist of Issues were circulated to the Parties to the Agreement on 5 June 2018⁴.

Following the consultations with the Parties to the Agreement, the United Kingdom subsequently submitted a final offer to the Committee on Government Procurement on 1 October 2018. The final offer was circulated to the Parties to the Agreement on 2 October 2018⁵. A summary of the United Kingdom's final offer and the Commission's assessment thereof are set out below.

The Council decision should enable the Commission to approve, on behalf of the Union, the accession of the United Kingdom to the Agreement, subject to the terms set out in the envisaged decision of the GPA Committee.

2.2 The Committee on Government Procurement

The GPA Committee was established to administer the implementation of the Agreement. It is composed of representatives from each of the Parties as well as WTO members and inter-governmental organizations with observer status.

The Union, like all other Parties to the Agreement, is a member of the GPA Committee, where it is represented by the Commission. The GPA Committee decisions are taken by consensus.

2.3 The envisaged decision of the Committee on Government Procurement

At the meeting of the GPA Committee of 17 October 2018, the European Commission expressed, on behalf of the Union, the agreement in principle to the accession of the United Kingdom to the Agreement.

The Union provided its agreement in principle in so far as the terms of United Kingdom's accession to the Agreement do not change to Union's detriment or that the Union's interests are not negatively affected by the position of other Parties to the Agreement.

Moreover, this agreement in principle was given without prejudice to the negotiations between the Union and the United Kingdom for a withdrawal agreement, which could include

² https://ec.europa.eu/commission/sites/beta-political/files/letter_from_eu_and_uk_permanent_representatives.pdf

³ The Checklist of issues contains information on the consistency of the UK's procurement administrative system and legal framework with the GPA's requirements

⁴ United Kingdom's application contained in document GPA/146; United Kingdom's initial market access offer contained in document GPA/ACC/GBR/1; United Kingdom's replies to the Checklist of Issues contained in document GPA/ACC/GBR/2

⁵ United Kingdom's final market access offer contained in document GPA/ACC/GBR/16

transition period during which the United Kingdom would remain bound by the Union's commitments under the Agreement, and the United Kingdom's accession would be effective as of the end of transition.

At the meeting of the GPA Committee of 28 November 2018, all Parties expressed their agreement in principle to the accession of the United Kingdom to the Agreement, while still deliberating on the precise text of the decision to be formally adopted at a later stage.

The GPA Committee is to adopt a decision regarding the accession of the United Kingdom to the Agreement and stating the terms of its accession.

In accordance with Article XXII:2 of the revised Agreement '*Any Member of the WTO may accede to this Agreement on terms to be agreed between that Member and the Parties, with such terms stated in a decision of the Committee. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. This Agreement shall enter into force for a Member acceding to it on the 30th day following the deposit of its instrument of accession*'.⁶

2.4. Conditions attached to the United Kingdom's accession to the Agreement.

The accession of the United Kingdom to the Agreement should be subject to conditions to be reflected in the envisaged act of the GPA Committee.

In the absence of a withdrawal agreement between the United Kingdom and the Union providing for a transition period, the United Kingdom should be allowed to deposit its instrument of accession provided it does so:

- (a) not earlier than thirty days before the date on which the United Kingdom ceases to be a Member State of the Union; and
- (b) within six months of the date of the decision of the GPA Committee, unless the period for submission of the instrument is extended by that Committee.

However, the deposit of the United Kingdom's instrument of accession with the Director-General of the WTO should be deemed not to have taken place within the meaning of Article XXIV:2 of the 1994 Agreement and Article XXII:2 of the revised Agreement if, within the following thirty days, the Union notifies the GPA Committee that the United Kingdom continues to be covered by the Agreement pursuant to Union law.

In the event of a withdrawal agreement between the Union and the United Kingdom providing for a transition period, the Union should notify the other Parties to the Agreement that during the transition period the United Kingdom is to be treated as a Member State for the purposes of the Agreement. Hence, the United Kingdom would be covered by the Agreement until the date of expiry of the agreed transition period.

In that case, the United Kingdom should submit an updated set of Replies to the Checklist of Issues no later than three months prior to the expiration of the transition period. The GPA Committee will review the updated set of Replies to the Checklist of Issues and consider an appropriate decision at that time.

⁶ In the 1994 Agreement the relevant article is Article XXIV:2

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

3.1. United Kingdom's final offer

The United Kingdom's final offer replicates the terms of the current Union schedule of commitments under the Agreement in so far as it is applicable to the United Kingdom. The objective of the United Kingdom is to ensure that these terms maintain the same level of market access to other Parties to the Agreement upon its accession to the Agreement. In replicating the terms of the Union schedule, the United Kingdom needs to make technical adaptations to take account that Union law will no longer apply to and in the United Kingdom.

Market access commitments (thresholds, covered entities, goods, services, construction services and general notes)

Thresholds

The United Kingdom's thresholds in Annex 1, Annex 2 and Annex 3 correspond to the thresholds applied by the Union for goods, services and construction services.

Entities

In Annex 1 ("central government entities"), the list of United Kingdom entities remains identical to the one for the United Kingdom under the Union schedule and, therefore, the coverage is the same as it currently stands under the Union schedule.

For those cases where the functions of an entity listed in this Annex have been or are transferred to another entity, which is itself a contracting authority, the United Kingdom, in order to ensure that this would not entail loss of market access, further clarifies under footnote 1 that, the successor entity should be deemed to be included in this Annex. Furthermore, where relevant, the United Kingdom has included references to United Kingdom domestic legislation rather than to Union law.

For comparison purposes, Annex 1 of the Union schedule covering central government entities contains four categories providing different levels of access to procurement in its paragraphs 1 to 4. In its final offer, the United Kingdom has granted the Union the maximum possible coverage, including all central government entities of the United Kingdom (paragraph 1).

Paragraph 2 of the United Kingdom's final offer covers all Parties not listed in paragraph 1.

Annex 1 includes four notes. The United Kingdom's final offer replicates the reservations that the Union has towards some Parties.

In Annex 2 ("sub-central government entities"), the United Kingdom's final offer provides the coverage of sub-central government entities as currently through the Union coverage under the Agreement.

However, the references to Union NUTS Regions as defined in Union law have been replaced by United Kingdom Territorial Units set out in Note 3 of Annex 7 (see below under General Notes).

Under paragraph 2 of Annex 2, the United Kingdom continues to follow the definition-based approach, as it is currently the case under the Union schedule, as regards the coverage of "bodies governed by public law". The United Kingdom's final offer defines the bodies governed by public law for England, Wales, Scotland and Northern Ireland, by reference to United Kingdom's domestic legislation and not to Union law. In any event, the United Kingdom provides for the indicative list of contracting authorities which are bodies governed

by public law which remains identical to the one for the United Kingdom under the Union schedule. Therefore, the United Kingdom's coverage remains the same as under the Union schedule.

Annex 2 includes four notes. The United Kingdom's final offer replicates the reservations the European Union has towards some Parties. In note 2, with regard to the reservation of the United Kingdom *vis-à-vis* Japan, Korea and the US in relation to small or medium sized enterprises (SMEs), a technical adaptation is necessary. The definition of SME will be as provided under the United Kingdom domestic legislation and not under the provisions of Union law. The United Kingdom legislation (Regulation 112 (4) of the Public Contracts Regulations 2015) refers directly to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

The United Kingdom's schedule replicates the reservations the Union has towards some Parties.

In Annex 3 ("other entities"), the United Kingdom's final offer provides the coverage with regard to procuring entities operating in the utilities sector, also replicating the Union schedule.

However, minor technical adaptations are needed in that Annex. The United Kingdom's final offer does not contain references to Union law but to United Kingdom's domestic legislation: e.g. with regard to the notions of "public undertaking" and "dominant influence".

The indicative lists of entities remain identical to the ones for the United Kingdom under the Union schedule. Therefore, the United Kingdom's coverage remains the same as under the Union schedule.

Annex 3 includes eight notes. The United Kingdom's final offer replicates the reservations that the Union has towards some Parties.

Goods

Annex 4 of the United Kingdom's final offer covers the same goods as under the current Union schedule.

Services

In Annex 5, the United Kingdom's final offer covers the services as currently covered under the Union schedule.

Construction services and works concessions

In Annex 6, point 2 of its final offer, the United Kingdom offers construction service providers from the Union market access to its works concessions contracts equal or higher than the 5,000,000 SDR (special drawing rights) threshold.

In addition, the United Kingdom replicates the reservation made by the Union in the note to Annex 6.

General Notes

The United Kingdom provides in Annex 7 the list of its domestic Territorial Units for the purpose of paragraph 1 of Annex 2, Note 1 in Annex 2 and Note 6 in Annex 3. These

replicate the NUTS regions of the United Kingdom as currently defined under Regulation 1059/2003⁷.

3.2. Commission's Assessment of United Kingdom's Offer

The United Kingdom's final offer replicates the existing Union schedule in so far as it applies to the United Kingdom, with minor technical adaptations. Since the Union schedule is already a very comprehensive one in terms of entities, goods and services covered and provides for significant openness of the procurement markets, therefore, the United Kingdom will maintain, upon acceding to the Agreement, the current extensive level of openness of its procurement market with regard to the Parties to the Agreement.

In terms of market access for Union goods, services and economic operators, the United Kingdom's final offer is appropriate since the United Kingdom offers to the Union the maximum coverage offered to the Parties (see in particular Annex 1 for central government contracting authorities and Annex 6 for works concessions).

In view of the fact that the United Kingdom's final offer replicates the Union schedule of commitments in terms of coverage and of the fact that the United Kingdom is ready to provide to the Union the highest level of market access offered to the Parties, the Union will provide reciprocal treatment and adapt its schedule where necessary, in order to provide United Kingdom's goods, services, suppliers and service providers access to the procurements covered by the Union schedule.

The consequential amendments to the Union schedule, which are the Union's terms of the United Kingdom's accession (as set out in the Annex to this Decision) will be attached to the decision to be adopted by the GPA Committee and therefore become part of the terms of accession of the United Kingdom to the Agreement. The consequential amendments will be reflected in the Union's schedule in Appendix I to the Agreement as follows:

- Annex 1, section 2 (The Central Government contracting authorities of the EU Member States), point 1:

The United Kingdom will be added to the list of Parties to the Agreement which have access to procurement of all central government contracting authorities of Union Member States.

- Annex 6, Section 2 (Works concessions contracts awarded by Annex 1 and Annex 2 entities):
- The United Kingdom will be added to the list of Parties to the Agreement which have access to works concessions contracts of a value equal or exceeding 5,000,000 SDR.
- Footnote to the title Appendix I Commitments of the European Union :

The Union will clarify in its schedule in Appendix I that all the references to the United Kingdom's contracting authorities and contracting entities currently contained in the Union's schedule become obsolete.

Other Parties' reservations

If any other Party to the Agreement included specific restrictions or carve-outs to its coverage with respect to the United Kingdom, this would need to be reflected in the decision of the GPA Committee as the Party's terms of the United Kingdom's accession. However, any such restrictions or carve-outs from a Party's coverage which are specific to the United Kingdom

⁷ Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS)

would not affect the United Kingdom's final offer as outlined above, or the mutually agreed coverage between current Parties of the Agreement.

Recommendation

The United Kingdom's accession to the Agreement is expected to maintain the current level of international opening of public procurement markets. The United Kingdom, following its accession to the Agreement, will remain subject to the rights and obligations it currently has under the Agreement as a Union Member State on the basis of the commitments currently contained in the Union schedule. The Commission recommends that the final offer by the United Kingdom is accepted, subject to the Union's terms of United Kingdom's accession to the Agreement.

Accordingly, it is proposed that the Commission be authorised to express within the GPA Committee the position of the Union in favour of the United Kingdom's accession subject to the following terms to be reflected in the decision of the GPA Committee:

In the absence of a withdrawal agreement between the United Kingdom and the Union providing for a transition period, the United Kingdom should be allowed to deposit its instrument of accession provided it does so:

- (a) not earlier than thirty days before the date on which the United Kingdom ceases to be a Member State of the Union; and
- (b) within six months of the date of the decision of the GPA Committee, unless the period for submission of the instrument is extended by that Committee.

The deposit of the United Kingdom's instrument of accession should be deemed not to have taken place within the meaning of Article XXIV:2 of the 1994 Agreement and Article XXII:2 of the revised Agreement if, within the thirty days following the deposit, the European Union notifies the Committee that the United Kingdom continues to be covered by the Agreement pursuant to Union law.

The Commission should be authorised, on the Union's behalf, to make such notification if the conditions are met.

In the event of a withdrawal agreement between the Union and the United Kingdom providing for a transition period, the Union should notify the other Parties to the Agreement that during the transition period the United Kingdom is to be treated as a Member State for the purposes of the Agreement. Hence, the United Kingdom would be covered by the Agreement until the date of expiry of the agreed transition period.

In that case, the United Kingdom should submit an updated set of Replies to the Checklist of Issues no later than three months prior to the expiration of the transition period. The GPA Committee will review the United Kingdom's updated set of Replies to the Checklist of Issues and consider an appropriate decision at that time.

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*’⁸.

4.1.2. Application to the present case

The GPA Committee is a body set up by an agreement, namely the Government Procurement Agreement.

The act which the GPA Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law.

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.

4.2. 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 several aims or has several components and if one of those aims or components is identifiable as the main one, whereas the others are 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 the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 TFEU.

4.3. Conclusion

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

⁸ 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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on the position to be taken on behalf of the European Union in the Committee on Government Procurement concerning the accession of the United Kingdom of Great Britain and Northern Ireland to the Agreement on Government Procurement in the context of its withdrawal from the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Union is a Party to the Agreement on Government Procurement ('the Agreement') and its Member States are covered by the Agreement pursuant to Union law.
- (2) On 29 March 2017, the United Kingdom submitted the notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union. The Treaties will cease to apply to the United Kingdom from the date of entry into force of a withdrawal agreement or failing that, two years after that notification, i.e. from 30 March 2019, unless the European Council, in agreement with the United Kingdom, unanimously decides to extend that period. The Agreement will automatically cease to apply to the United Kingdom from that date.
- (3) On 1 June 2018, the United Kingdom, with the support of the Union, applied for accession to the Agreement.
- (4) According to Article XXII:2 of the revised Agreement any Member of the WTO may accede to that Agreement on terms to be agreed between that Member and the Parties, with such terms stated in a decision of the Committee. Accession is to take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. The Agreement enters into force for a Member acceding to it on the 30th day following the deposit of its instrument of accession.
- (5) The United Kingdom's commitments on government procurement market access coverage are laid down in its final offer circulated to the Parties to the Agreement on 2 October 2018.
- (6) The final offer of the United Kingdom is appropriate since the United Kingdom's commitments on coverage offer to the Union the maximum coverage the United Kingdom currently has under the Union's GPA schedule, which corresponds to the coverage that the United Kingdom currently has under the Union schedule as a Member State. The Union should provide reciprocal treatment and adapt its schedule in order to provide a corresponding level of access to the United Kingdom's economic operators under the Agreement. In addition, clarifications are necessary in the Union schedule in Appendix I to the revised Agreement since the United Kingdom will no longer be covered by that schedule under the Agreement. These terms, as set out in the

Annex to this Decision, will become part of the terms of accession to the Agreement for the United Kingdom and will be reflected in the decision to be adopted by the Committee on Government Procurement ('the GPA Committee') on the United Kingdom's accession.

- (7) Accordingly, it is necessary to establish the position to be taken on the Union's behalf within the GPA Committee in relation to the accession of the United Kingdom to the Agreement.
- (8) In the event of a withdrawal agreement between the United Kingdom and the Union providing for a transition period during which Union law would apply to and in the United Kingdom, the Union should notify the other Parties to the Agreement that the United Kingdom is to be treated as a Member State for the purposes of the Agreement during such transition period. Hence, the United Kingdom would be covered by the Agreement until the date of expiry of the agreed transition period. In that case, the United Kingdom should submit an updated set of Replies to the Checklist of Issues no later than three months prior to the end of the transition period. The GPA Committee will review the United Kingdom's updated set of Replies to the Checklist of Issues and consider an appropriate decision at that time.
- (9) While the United Kingdom will not be a third country when the GPA Committee decides on the United Kingdom's accession to the Agreement, it is in the interest of the Union to ensure that the Agreement enters into force for the United Kingdom as from the date following that on which Union law ceases to apply to and in the United Kingdom. Until its withdrawal from the Union, the United Kingdom remains a Member State enjoying all the rights and bound by all obligations stemming from the Treaties, including compliance with the principle of sincere cooperation.
- (10) If Union law continues to apply to and in the United Kingdom, the Commission should be authorised to notify the GPA Committee, on the Union's behalf, within 30 days of the deposit of the United Kingdom's instrument of accession, that the United Kingdom continues to be covered by the Agreement pursuant to Union law,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Committee on Government Procurement ('the GPA Committee') shall be to approve the accession of the United Kingdom to the Agreement on Government Procurement ('the Agreement'), subject to the conditions laid down in Article 2 of this Decision and to the terms of accession set out in the Annex to this Decision, insofar as the Union's interests are not negatively affected by the position of other Parties to the Agreement.

Article 2

The position to be taken on behalf of the Union pursuant to Article 1 shall be subject to the condition that the decision of the GPA Committee contains provisions ensuring the following:

- (1) in the absence of a withdrawal agreement between the United Kingdom and the Union providing for a transition period, the United Kingdom is allowed to deposit its instrument of accession with the Director-General of the WTO provided it does so:
 - (a) not earlier than 30 days before the date on which the United Kingdom ceases to be a Member State; and

- (b) within six months of the date of the decision of the GPA Committee, unless the period for submission of the instrument is extended by that Committee;
- (2) the deposit of the United Kingdom's instrument of accession is deemed not to have taken place for the purposes of Article XXIV:2 of the 1994 Agreement and Article XXII:2 of the revised Agreement if, within 30 days following that deposit, the Union notifies the GPA Committee that the United Kingdom continues to be covered by the Agreement pursuant to Union law.

Article 3

In the event that Union law will continue to apply to and in the United Kingdom, the Commission is authorised to notify the GPA Committee, on the Union's behalf, within 30 days of the deposit of the United Kingdom's instrument of accession, that the United Kingdom continues to be covered by the Agreement pursuant to Union law.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President