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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	1 March 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 105 final
Subject:	Proposal for a COUNCIL DECISION establishing the position to be taken on behalf of the European Union within the Committee on Government Procurement on the accession of North Macedonia to the Agreement on Government Procurement

Delegations will find attached document COM(2023) 105 final.

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2023/0050 (NLE)

Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union within the Committee on Government Procurement on the accession of North Macedonia to the Agreement on Government Procurement

(Text with EEA relevance)

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 in connection with the envisaged adoption of a decision of the Committee on the accession of North Macedonia to the Agreement on Government Procurement.

2. CONTEXT OF THE PROPOSAL

2.1 The Agreement on Government Procurement

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

The European Union is a Party to the Agreement.

On 17 March 2017, North Macedonia applied to accede to the Agreement. North Macedonia submitted its first market access offer on 28 February 2018.

The Commission, on behalf of the Union, negotiated both with North Macedonia in a bilateral format and with other Parties to the Agreement on Government Procurement.

Subsequently, North Macedonia submitted its final offer on 13 September 2022. A corrigendum to the final market access offer was circulated on 27 September 2022. A summary of the final offer of North Macedonia and the Commission's assessment thereof are set out below.

The decision enables the Commission to express the position on behalf of the European Union on the accession of North Macedonia within the Committee on Government Procurement.

2.2 The Committee on Government Procurement

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

The Committee meets regularly, around four times a year, to give Parties the opportunity to consult on any matters relating to the implementation and operation of the Agreement or the furtherance of its objectives. It also carries out other responsibilities as may be assigned to it by the Parties.

The Committee annually informs the WTO General Council of its activities and of developments relating to the implementation and operation of the Agreement.

The European Union, like all other Parties, is a member of the Committee, where it is represented by the Commission.

2.3 The envisaged act of the Committee on Government Procurement

On 30 December 2022, the Commission provided tacitly the agreement in principle of the European Union to the accession of North Macedonia to the Agreement on Government Procurement, in the context of the written procedure launched by the WTO Secretariat.

The Committee on Government Procurement is to adopt a decision regarding the accession of North Macedonia to the Agreement on Government Procurement ('the envisaged act') during

its next formal session in March/April 2023, or, if circumstances do not allow, by way of written procedure.

The purpose of the envisaged act is to accept the accession of North Macedonia to the Agreement on Government Procurement in accordance with Article XXII:2 of the Agreement.

The adoption of the Decision will be subject to the Parties' respective internal procedures. In accordance with Article XXII of the 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.

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

3.1 The final offer of North Macedonia

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

Thresholds

North Macedonia applies thresholds that are commonly applied by the Parties of the Agreement for goods, services and construction services.

Entities (Annexes 1, 2 and 3)

In Annex 1 ("central government entities"), North Macedonia provides an exhaustive list of central government entities whose procurement is open to the Parties of the Agreement. The coverage is satisfactory. Annex 1 includes four notes. Note 1 excludes from coverage procurement of air traffic control equipment in regard of suppliers and service providers from the United States and procurement of good or service components of procurement which are not themselves covered by this Agreement in regard of suppliers and services providers from the United States and Canada. Note 2 provides for the SME-related non-application of Article XVIII GPA on domestic review procedures with regard to suppliers and service providers from Japan, Korea, the United States and Australia. Note 3 states that central government entities also include any subordinated entity of any contracting authority of North Macedonia provided it does not have separate legal personality. Note 4 clarifies that for procurement by entities in the field of defence and security, only non-sensitive and non-warlike materials as set out in Annex 4 are covered. The notes included under this Annex correspond to the EU notes under Annex 1. Notes 1 and 2 shall only apply as from the date North Macedonia becomes a member of the EU.

In Annex 2 ("sub-central government entities"), North Macedonia includes all regional and local contracting authorities. A broad definition of sub-central government entities has been introduced. Annex 2 includes four notes, which mirror the notes in the EU's schedules. Note 1 provides for exemptions from the coverage with respect to specific countries and/or goods or services. Note 2 provides for the SME-related non-application of Article XVIII GPA on domestic review procedures with regard to suppliers from Japan, Korea, the United States and Australia. Note 3 provides for the non-application of Article XVIII GPA on domestic review procedures in contesting the award of contracts by entities listed under Annex 2 paragraph 2, with regard to Japan and Korea. Note 4 provides for the non-application of Article XVIII GPA on domestic review for Japan and Korea for contesting the award of contracts by entities whose value is less than the threshold applied for the same category of contracts awarded by these Parties. The notes included under this Annex correspond to the EU notes under Annex

2. Notes 1, 2, 3 and 4 shall only apply as from the date North Macedonia becomes a member of the EU.

In Annex 3 ("other entities"), North Macedonia covers all contracting entities whose procurement is covered by the public procurement legislation of North Macedonia which are contracting authorities or public undertakings, and which have one of their activities in the field of water, electricity, airports, ports, urban transportation, and transport by railways. The thresholds on goods and services correspond to EU thresholds (400,000 SDR). Note 1 excludes from coverage procurement when exposed to competitive forces. Note 2 excludes from coverage procurement for the purchase of water and for the supply of energy or of fuels for the production of energy; procurement for purposes other than the pursuit of the procuring entities' activities and; procurement for purposes of re-sale or hire to third parties under the conditions set out in the note. Note 3 excludes the supply of drinking water or electricity under specific conditions. Note 4 excludes from coverage procurement by a procuring entity to an affiliated undertaking. Note 5 excludes from coverage procurement in the case of joint ventures under specific conditions. Note 6 excludes from coverage procurement in respect of suppliers and service providers from specific Parties for specific sectors. Note 7 provides for the SME-related non-application of Article XVIII GPA on domestic review procedures with regard to suppliers and service providers from Japan, Korea and the United States. Note 8 introduces further exemptions from coverage with regard to suppliers and service providers from Japan. The notes included under this Annex correspond to the EU notes under Annex 3. Notes 6, 7 and 8 shall only apply as from the date North Macedonia becomes a member of the EU.

Goods (Annex 4)

North Macedonia proposes to cover procurement of all goods by the entities listed in Annexes 1 to 3. North Macedonia commits to cover procurement of all goods by the covered entities, with the exception of procurement by the Ministry of Defence and agencies for defence or security activities. For those entities, North Macedonia provides a list of goods for which procurement is covered.

Services (Annex 5)

North Macedonia proposes a list of covered services. Note 1 of Annex 5 states that procurement of services by procuring entities covered under Annexes 1, 2 and 3 is covered in regard to a particular Party's provider of service only to the extent that such Party has covered that service as well under its Annex 5.

Construction services (Annex 6)

North Macedonia offers all the construction services in Division 51 of the Central Product Classification (CPC Prov.), procured by the entities in Annexes 1, 2 and 3, as it is commonly offered by the Parties of the Agreement.

For works concessions, when awarded by Annex 1 and 2 entities, they are included under the national treatment regime for the construction service providers of the EU, Iceland, Liechtenstein, Norway, the Netherlands on behalf of Aruba, Switzerland, Montenegro and the United Kingdom, provided their value equals or exceeds SDR 5,000,000 and for the construction service providers of Korea provided their value equals or exceeds SDR 15,000,000.

Note 1 of Annex 6 states that procurement of construction services by procuring entities covered under Annexes 1, 2 and 3 is covered in regard to a particular Party's provider of service only to the extent that such Party has covered that service as well under its Annex 6.

General Notes (Annex 7)

In Annex 7, North Macedonia includes two General Notes. Pursuant to note 1, the Agreement does not apply to procurement of agricultural products made in furtherance of agricultural support programmes and human feeding programmes (e.g. food aid including urgent relief aid) and to procurement for the acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time.

Note 2 excludes from coverage procurement by entities under Annexes 1 and 2 in connection with activities in the fields of drinking water, energy, transport and the postal sector, unless covered under Annex 3.

The thresholds for the different annexes correspond to the respective EU thresholds.

3.2 Legislation of North Macedonia

The legislation of North Macedonia in the field of covered government procurement allows for the implementation by North Macedonia of obligations under the Government Procurement Agreement.

The legal framework of North Macedonia on public procurement is largely aligned with the EU *acquis* in view of its process of accession to the EU. The legislation of North Macedonia on government procurement is open, transparent and non-discriminatory in line with the Agreement's requirements.

4. COMMISSION'S ASSESSMENT OF THE OFFER OF NORTH MACEDONIA

The offer of North Macedonia is complete and satisfactory. It mirrors to a large extent the EU offer under Appendix I to the Government Procurement Agreement. On this basis, there is no need for introducing any reciprocity specific restrictions or carve-outs from the access to the Union procurement market.

The following terms of the accession of North Macedonia will be reflected in the EU Appendix I:

The access of goods, services, suppliers and service providers of North Macedonia to the EU coverage should be as indicated under point 1 of section 2 of the EU Annex 1, meaning access to the procurement of all EU Member States central government contracting authorities.

North Macedonia will also be included among the GPA Parties to which the EU gives access to works concessions tenders under section 2 of Annex 6.

Recommendation

The accession of North Macedonia to the Agreement on Government Procurement is expected to make a positive contribution to further international opening of public procurement markets, by enlarging the number of Parties to the Agreement and thus encouraging other countries to accede to it. In addition, in the current geopolitical context, the accession of North Macedonia to the Agreement on Government Procurement would send a strong message to the region. The Commission recommends that the offer by North Macedonia is accepted subject to the above-mentioned specific terms of accession.

Accordingly, it is proposed that the Commission be authorised to express within the Committee on Government Procurement the position of the European Union in favour of the accession of North Macedonia, to be reflected in the decision of the Committee on

Government Procurement on the terms of the accession of North Macedonia to the Agreement on Government Procurement.

5. LEGAL BASIS

5.1 Procedural legal basis

5.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[1].

5.1.2. Application to the present case

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

The act which the Committee on Government Procurement is called upon to adopt constitutes an act having legal effects.

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.

5.2. Substantive legal basis

5.2.1. 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.

5.2.2. 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.

5.3. Conclusion

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

6. PUBLICATION

As the act of the Committee on Government Procurement will amend the Agreement, it is appropriate to publish the Council Decision establishing the position to be taken on the

[1] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Union's behalf in the Committee on Government Procurement in the Official Journal of the European Union after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) On 17 March 2017, North Macedonia applied for accession to the Agreement on Government Procurement ("the GPA").

(2) The commitments of North Macedonia on coverage are laid down in its final offer, as submitted to the Parties to the GPA ("the Parties") on 13 September 2022 and corrected on 27 September 2022.

(3) The final offer of North Macedonia is satisfactory and does not require the introduction of specific reservations with respect to North Macedonia. The terms of the accession of North Macedonia, as reflected in the Annex to this Decision, will be reflected in the decision adopted by the Committee on Government Procurement ("the GPA Committee") on the accession of North Macedonia.

(4) The accession of North Macedonia to the GPA is expected to make a positive contribution to further international opening of public procurement markets.

(5) Article XXII(2) of the GPA provides that any Member of the WTO may accede to the Agreement on terms to be agreed between that Member and the Parties, with such terms stated in a decision of the GPA Committee.

(6) 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 North Macedonia,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Committee on Government Procurement of the World Trade Organization shall be to approve the accession of North Macedonia to the Agreement on Government Procurement, subject to the modifications to the Union's schedule following the accession of North Macedonia as set out in the Annex to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President