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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 Australia 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 Australia 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 2 June 2015, Australia applied to accede to the Agreement. It submitted revised coverage offers on 30 September 2016 and 2 June 2017.

The Commission, on behalf of the Union, negotiated a series of market opening commitments of Australia both in a bilateral format and within the Committee on Government Procurement.

Australia subsequently submitted a final offer to the Committee on Government Procurement on 7 March 2018. A summary of Australia's final offer 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 Australia 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 27 June 2018, during the informal session of the Committee on Government Procurement, the Commission expressed the agreement in principle of the European Union to the accession of Australia to the Agreement on Government Procurement, subject to the European Union's terms of accession of Australia.

On 17 October 2018, during its formal session, the Committee on Government Procurement is to adopt a decision regarding the accession of Australia to the Agreement on Government procurement ('the envisaged act').

The purpose of the envisaged act is to accept the accession of Australia 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

Australia's final offer

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

Thresholds

Australia applies in Annex 1 the thresholds that are commonly applied by the Parties of the Agreement for goods, services and construction services. However, in Annex 2, for goods and services, Australia foresees a higher threshold (355,000 SDR), than the one of the EU (200,000 SDR). In Annex 3, the thresholds on goods and services correspond to EU thresholds (400,000 SDR), however Australia includes entities corresponding to bodies governed by public law in its Annex 3, whereas the EU covers them in Annex 2, with a lower threshold.

Entities

In Annex 1 ("central government entities"), Australia provides for an exhaustive list featuring central government entities whose procurement is open to the Parties of the Agreement. The coverage is complete. Annex 1 includes four notes. Note 1 stipulates that this Agreement only covers those entities listed (including an office within a listed entity) in this Annex. Note 2 stipulates that this Agreement does not cover the procurement of motor vehicles by any entity listed in this Annex. However this note is to be phased out and applies only until 1 January 2019. Note 3 foresees that this agreement does not cover procurement by or on behalf of the Australian Government Solicitor. Note 4 relates to procurement of the Department of Defence.

In Annex 2 ("sub-central government entities"), Australia's coverage is limited to government entities of States and Territories. Lower sub-central levels such as cities are not covered. Utilities, railways and other transport related areas (such as road construction and ports) fall under the responsibilities of States and Territories. However, only a limited number of entities (mainly transport) are offered in Annex 2. Some replies by Australia indicate that these entities operate on a commercial basis, or that they are privatised. The thresholds in respect of goods and services are higher (355,000 SDR), than the one of the EU (200,000 SDR).

The reservation for the motor vehicles is still contained in the note for Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria. The remaining three territories do not contain this note. Annex 2 also contains some other limited notes for specific territories.

In Annex 3 (“other entities”), Australia offers 26 entities. This list is a rather standard list offered by Australia in its FTAs. The thresholds on goods and services correspond to EU thresholds (400,000 SDR), however Australia includes entities corresponding to bodies governed by public law in its Annex 3, whereas the EU covers them in Annex 2, with a lower threshold.

The Government business enterprises seem to be comparable to EU public undertakings, that the EU offers in Annex 3 if they operate in utilities sectors of waters, electricity, port and airports, urban transport and railways (definition approach). The GBEs in utilities sector are not covered.

Goods

Australia proposes a negative list for goods. Australia commits to cover procurement of all goods by the covered entities, with some very specific exclusion (procurement of blood and blood-related products, including plasma derived products).

Services

Australia proposes a negative list for services. Australia offers a very comprehensive coverage of services, meaning all services by covered entities, with some very specific exclusions (procurement of plasma fractionation services; government advertising services; health and welfare services; research and development services). There is a note on reciprocity that only services covered by other Parties of the Agreement are offered to those Parties.

Construction services

Australia proposed a negative list for construction. Australia offers all the construction services in Division 51 of the Central Product Classification (CPC Prov.) and the WTO system of classification – MTN. GNS/W/120, procured by the entities in Annexes 1, 2, and 3, as it is commonly offered by the Parties of the Agreement.

General Notes

In Annex 7, Australia includes two general notes. Pursuant to note 1, the Agreement does not apply to any form of preference to benefit small and medium sized enterprises; measures to protect national treasures of artistic, historic, or archaeological value; measures for health and welfare of Indigenous people; procurement of goods and services outside the territory of the procuring Party for consumption outside the territory of the procuring Party. Note 2 states for greater certainty the following: the Agreement does not apply to procurement funded by grants and sponsorship payment received from persons not listed in Annexes 1, 2 or 3; it does not apply to procurement by a procuring entity from another government entity; nothing in the Agreement precludes the procuring Party, or its procuring entities, from preparing, adopting or applying technical specifications required to protect sensitive government information, including specifications that may affect or limit the storage, hosting or processing of such information outside the territory of the procuring Party; and a procuring entity may use limited tendering procedures for unsolicited innovative proposals under Article XIII:1.

Australia's Legislation

Australia's legislation in the field of covered government procurement appears to be non-discriminatory. According to Australian Commonwealth Procurement Rules (CPRs), its government procurement framework is non-discriminatory. All potential suppliers to government must, subject to the CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or origin of their goods and services. Thus, Australia's legislation on government procurement appears to be open, transparent and non-

discriminatory in line with the Agreement's requirements. This being said, Australia's final offer contains under Annex 7 a broad exclusion on any form of preference to benefit small and medium sized enterprises, which is to be addressed in the EU reservations towards Australia and reflected in the EU's schedule in Appendix I.

Commission's Assessment of Australia's Offer

Australia widely opens its procurement market to all the Parties of the Agreement as it has a very comprehensive offer in terms of entities, goods and services, and construction services and non-discriminatory legislation. In addition, Australia does not maintain any particular restriction against any Party of the Agreement. However, considering that Australia's coverage, although significant, is not complete, it would be appropriate to introduce certain specific restrictions or carve-outs from the access to the Union procurement market (with respect to Australia) as the EU has done in the past for the Parties to the Agreement which offer only partial coverage.

The specific following restrictions, which will become part of the terms of accession of Australia to the Agreement and are to be adopted by the Committee on Government Procurement, will be reflected in the EU's schedule in Appendix I:

- Annex 1, section 2 (The Central Government contracting authorities of the EU Member States), point 3:

Australia will be added to the list of Parties to the Agreement which have access to procurement of fewer central government level contracting authorities than the rest of the Agreement membership.

- Annex 1, Notes to Annex 1, note 2:

Given Australia's general note excluding from the Agreement preferences for SMEs, the EU will introduce a reservation to address it. Australia will be mentioned in the list of countries in note 2 of the Notes to Annex 1 to Appendix I Commitments of the European Union, alongside Japan, Korea and the US. The provisions of Articles XVIII will therefore not apply to suppliers and service providers from Australia in contesting the award of contracts to SMEs from Parties other than Japan, Korea, the US and Australia until such time as the EU accepts that Australia no longer operates discriminatory measures in favour of certain domestic small and minority businesses.

- Annex 2, Notes to Annex 2, note 1:

Given Australia's limited coverage under Annex 2, the EU will offer to Australia procurement by local contracting authorities (administrative units under NUTS 1). As to administrative units under NUTS 2 and NUTS 3 in Regulation 1059/2003 (as amended) in regard of goods, services, suppliers and service providers from Australia, procurement by the contracting authorities of administrative units under NUTS 2 and 3 will not be offered to Australia.

- Annex 2, Notes to Annex 2, note 1:

Given that Australia's threshold for goods and services by regional and local entities in Annex 2 (355,000 SDR) and respectively for bodies governed by public law covered in Annex 3 (400,000 SDR) is higher than the EU threshold under the GPA (200,000 SDR), the EU will introduce the reservation for procurement between 200,000 SDR and 355,000 SDR by regional contracting authorities and between 200,000 SDR and 400,000 SDR for bodies governed by public law covered under Annex 2 to Appendix I Commitments of the European Union, in so far as goods and services and suppliers and service providers from Australia are concerned.

- Annex 2, Notes to Annex 2, note 1:

Given the reservation for the motor vehicles contained in the note for Australian Capital Territory, New South Wales, Queensland, South Australia and Victoria the EU will introduce a reservation regarding procurement by procuring entities covered under Annex 2 of motor vehicles and of components for motor vehicles, citing specific Chapters of the Combined Nomenclature (CN) (namely, for motor vehicles: 8702, 8703, 8704, 8705, 8711, 8713; for components for motor vehicles: 870600, 8707, 8708, 8714, 8716).

- Annex 2, Notes to Annex 2, note 2:

Given Australia's general note excluding from the Agreement preferences for SMEs, the EU will introduce a reservation to address it. Australia will be mentioned in the list of countries in note 2 of the Notes to Annex 2 to Appendix I Commitments of the European Union, alongside Japan, Korea and the US. The provisions of Articles XVIII will therefore not apply to suppliers and service providers from Australia in contesting the award of contracts to SMEs from Parties other than Japan, Korea, the US and Australia until such time as the EU accepts that Australia no longer operates discriminatory measures in favour of certain domestic small and minority businesses.

- Annex 3, Notes to Annex 3, note 6:

A more limited coverage will be offered to Australia for sub-central entities. The EU will not offer to Australia procurement by entities operating in the sectors of: i) production, transport or distribution of drinking water covered under this Annex; ii) production, transport or distribution of electricity covered under this Annex; iii) airport facilities covered under this Annex; iv) maritime or inland port or other terminal facilities covered under this Annex; v) urban railway, tramway, trolley bus or bus services covered under this Annex; and vi) transport by railways covered under this Annex in regard of supplies, services, suppliers and service providers from Australia. For reference see note 6 of the Notes to Annex 3 to Appendix I Commitments of the European Union.

In case any other Party to the Agreement would include specific carve-outs to their coverage with respect to Australia, this would also be reflected in the decision of the Committee on Government Procurement on Australia's terms of accession. It should be noted, however, that any such restrictions or carve-outs from coverage by a Party to the Agreement which are specific to Australia would not affect Australia's final offer as outlined above, nor the proposed EU's specific reservations, or the mutually agreed coverage between current Parties of the Agreement.

Recommendation

Australia's accession to the Agreement is expected to make a very 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. The Commission recommends that the offer by Australia is accepted subject to the above mentioned restrictions to the Union's coverage with respect to Australia.

Accordingly, it is proposed that the Commission be authorised to express within the Committee on Government Procurement the position of the Union in favour of Australia's accession subject to the abovementioned restrictions, to be reflected in the decision of the Committee on Government Procurement on the terms of Australia's accession to the GPA.

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*’¹.

4.1.2. 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.

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.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Committee on Government Procurement will amend the Government Procurement Agreement, it is appropriate to publish it in the Official Journal of the European Union after its adoption.

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.

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(Text with EEA relevance)

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 2 June 2015, Australia applied for accession to the Agreement on Government Procurement (“the GPA”).
- (2) Australia’s commitments on coverage are laid down in its final offer, as submitted to the Parties to the GPA (“the Parties”) on 7 March 2018.
- (3) Although comprehensive, the offer by Australia does not provide full coverage. It is thus appropriate to introduce certain carve-outs specific to Australia to the Union coverage. These specific carve-outs, as reflected in the Annex to this Decision, will become part of the terms of accession to the GPA for Australia and will be reflected in the decision adopted by the Committee on Government Procurement (“the GPA Committee”) on Australia's accession.
- (4) Australia's accession 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 Australia,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union’s behalf within the Committee on Government Procurement shall be to approve the accession of Australia to the Agreement on Government Procurement, subject to the specific terms of accession 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*