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2016/0090 (NLE)

Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union within the Committee on Government Procurement as regards the draft decision on arbitration procedures pursuant to Article XIX:8 of the Revised Agreement on Government Procurement

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The revised WTO Agreement on Government Procurement ("the GPA") which entered into force on 6 April 2014 lays down a revamped legal framework applicable by the GPA Parties to covered procurement. In this context, the revised agreement provided for the possibility for GPA Parties to use arbitration procedures in cases where objections regarding proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of Party's annexes to Appendix I were raised and the objection could not be solved through consultations. Article XIX:8 of the revised agreement stipulates that the GPA Committee has to adopt arbitration procedures to facilitate resolution of objections as mentioned above.

In view of the entry into force of the revised GPA Parties have extensively discussed the content of such arbitration procedures considering various options to be applied in case of objections to proposed modification of Party's procurement coverage and could find a consensus on the matter. In this regard, a draft decision on arbitration procedures has been prepared. In order to adopt this draft decision, the Commission needs to be enabled by the Council to express the Union's opinion within the GPA Committee on the adoption of the decision.

- **Consistency with existing policy provisions in the policy area**

This is the standard procedure followed when the Commission needs to express the Union's opinion within the GPA Committee on decisions which entail changes in the rights and obligations of the Union.

- **Consistency with other Union policies**

Not relevant.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides that, when a decision having legal effect needs to be taken in a body set up by an international agreement, the Council, on a proposal from the Commission, should adopt a Decision establishing the position to be adopted on the Union's behalf. The decision of the GPA Committee adopting the arbitration procedures pursuant to Article XIX: 8 of the revised GPA falls under Article 218(9) TFEU as the decision is taken in a body set up by an international agreement and it will have legal effects.

- **Subsidiarity (for non-exclusive competence)**

The Union has exclusive competence in trade related matters. The concerted action at Union level can ensure the best leverage towards third countries.

- **Proportionality**

Not relevant.

- **Choice of the instrument**

Article 218(9) TFEU provides that, when a decision having legal effect needs to be taken in a body set up by an international agreement, the Council, on a proposal from the Commission, should adopt a Decision establishing the position to be adopted on the Union's behalf.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not relevant.

- **Stakeholder consultations**

Not relevant.

- **Collection and use of expertise**

Not relevant.

- **Impact assessment**

The adoption of a decision on arbitration procedures in the framework of an international agreement where the Union is a party does not necessitate an impact assessment.

- **Regulatory fitness and simplification**

Not relevant.

- **Fundamental rights**

Not relevant.

4. BUDGETARY IMPLICATIONS

No.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Not relevant.

- **Explanatory documents (for directives)**

Not relevant.

- **Detailed explanation of the specific provisions of the proposal**

Content of the draft decision on arbitration procedures pursuant to Article XIX:8 of the revised GPA

Invocation of arbitration procedures

The draft decision on arbitration procedures sets out conditions of substance and time under which GPA Parties may refer a proposed modification of a Party's procurement coverage to arbitration. It also clarifies the procedure to be followed where several Parties object to the same modification in view of agreement on a single arbitration.

Appointment of the arbitrators

The draft decision indicates the number and the requirements to be met by arbitrators in order to be appointed. In particular, it stipulates that citizens of the Parties to the arbitration and government officials of the third Parties should not be appointed as arbitrators.

Third Party participation

According to the draft decision, third Parties will be entitled to participate in the arbitration procedures when they have a substantial interest in the proposed modification brought to arbitration and when they have notified their interest to the Committee on Government Procurement. The draft decision stipulates the rights of such third Parties.

Procedures

The working procedures to be followed by the appointed arbitrators are set out in the draft decision. These refer to the adoption of a timetable for the conduct of the arbitration proceedings, the conduct of substantive meetings with the Parties and the treatment of confidential information submitted by the Parties. The draft decision stipulates the way how substantive meetings and the deliberations of the arbitrators are to be conducted.

Arbitrators' determination

The draft decision provides indications for the points of content, form and timeline of the arbitrators' determination and in relevant cases, the possibility for Parties to ask the arbitrators to determine the level of compensatory adjustment as to obtain a comparable level of procurement coverage by the modifying Party and maintain the balance of rights and obligations under the GPA.

Commission position on the draft decision on arbitration procedures

The draft decision stipulates the conditions under which Parties will be able to refer to arbitration procedures objections regarding a modification proposed by a Party to its procurement coverage, in cases where divergences could not be solved through consultations. It sets out a procedural framework which will provide clarity, legal certainty and efficiency in the handling of objections to proposed modifications of coverage.

Recommendation

The Commission recommends that the draft decision on arbitration procedures as attached be adopted by the GPA Committee.

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 the adoption of the draft GPA Committee decision on arbitration procedures pursuant to article XIX:8 of the revised GPA.

Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union within the Committee on Government Procurement as regards the draft decision on arbitration procedures pursuant to Article XIX:8 of the Revised Agreement on Government Procurement

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) The Revised Agreement on Government Procurement ('the GPA') which entered into force on 6 April 2014, lays down a revamped legal framework applicable by the GPA Parties to covered procurement. The GPA provides for the possibility for the GPA Parties to use arbitration procedures in cases where objections regarding proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of a Party's annexes to Appendix I were raised and the objection could not be solved through consultations.
- (2) Pursuant to Article XIX:8 of the GPA, the Committee on Government Procurement is required to adopt arbitration procedures in order to facilitate the resolution of those objections.
- (3) The GPA Parties have extensively discussed the possible content of such arbitration procedures as regards various options to be applied in case of objections to a proposed modification of a Party's procurement coverage. The GPA Parties have been able to find a consensus on that matter.
- (4) The agreed arbitration procedures are laid down in a draft decision on arbitration procedures pursuant to Article XIX:8 of the GPA.
- (5) That draft decision on arbitration procedures provides for the conditions to be met in order to resort to the arbitration procedures and sets out rules governing the appointment of arbitrators, the participation of third Parties in arbitration procedures, the conduct of the proceedings and the arbitrators' determination.
- (6) The adoption of the decision on arbitration procedures is expected to make a positive contribution to the existing legal framework of the GPA as it has the purpose of facilitating the resolution of objections raised regarding a proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of a Party's annexes to Appendix I to the GPA.
- (7) Accordingly, it is appropriate to establish the position to be taken on behalf of the Union within the Committee on Government Procurement with regard to the draft decision on arbitration procedures,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union within the Committee on Government Procurement shall be to approve the adoption of the draft decision on arbitration procedures pursuant to Article XIX:8 of the revised WTO Agreement on Government Procurement.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*