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2021/0014 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the Trade Committee regarding the amendment of Appendix 1 of Annex XII (Government Procurement) to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in the Trade Committee of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Ecuador and Peru, of the other part (“the Trade Agreement”), and in particular Article 191 thereof.

Article 191 of the Trade Agreement lays down the procedures whereby a Party may modify or rectify its coverage of procurement under Title VI of the Trade Agreement.

Subsection 1 (“Central government entities”) of Section A to Appendix 1 of Annex XII (“Government Procurement”) to the Trade Agreement specifies the central government entities of Colombia whose procurement is covered under Title VI.

At the meeting of the Sub-committee on Government Procurement of 17 October 2019, held in Bogota, Colombia informed the Union of its intention to update the list of procuring entities at central level by adding six agencies created after 2011, which belong to the executive level. At the time of the conclusion of the negotiations for the Trade Agreement between the Union and Colombia in 2010, competences currently carried out by such agencies were exercised by procuring entities at ministerial level. Those agencies do not currently appear in the list of procuring entities at central level in Colombia’s coverage.

The Union and Colombia agree to modify Subsection 1 of Section A to Appendix 1 of Annex XII to the Trade Agreement. The Union and Colombia agree that such update should not require any compensatory adjustments, as it is a minor amendment under Article 191(2) of the Trade Agreement.

The decision to modify Subsection 1 of Section A to Appendix 1 of Annex XII to the Trade Agreement can be adopted in the Trade Committee established by the Trade Agreement by the Union and Colombia (‘the signatory Andean Country concerned’), pursuant to paragraph 3 of Article 14 of the Trade Agreement in conjunction with paragraph 4 of Article 12, as it relates exclusively to the bilateral relationship between them.

2. CONTEXT OF THE PROPOSAL

2.1. The Trade Agreement

The Trade Agreement aims to open up markets and increase the stability of the trade relationship between the European Union and its Member States, and Colombia, Ecuador and Peru.

One of the key objectives of the Trade Agreement is the effective and reciprocal opening of government procurement markets of the Parties. The objectives of Title VI of the Trade Agreement on government procurement are twofold: to set procurement disciplines which seek to ensure that public contracts are concluded in a transparent, efficient and non-discriminatory manner, and to reciprocally open up procurement markets to bidders, goods and services from the other Party. In this light, the Union and Colombia bilaterally negotiated mutual access to each other’s tenders as defined in the coverage of the chapter on government procurement. The coverage of the chapter on government procurement defines which individual procurements the negotiated procedural and substantive rules apply to.

The Union and Colombia agree that the list of procuring entities at central level of Colombia should be updated by adding those six agencies as set out in this Decision.

Accordingly, the Union and Colombia agree to modify Subsection 1 of Section A to Appendix 1 of Annex XII to the Trade Agreement without compensatory adjustments, as it is a minor amendment under Article 191(2) of the Trade Agreement.

2.2. The Trade Committee

The Trade Committee established under Article 12 of the Trade Agreement supervises and facilitates the operation of the Trade Agreement and the correct application of its provisions; evaluates the results of the application of the Trade Agreement, in particular the evolution of the trade and economic relations between the Parties; supervises the work of all specialised bodies established under the Trade Agreement and recommends any necessary action; evaluates and adopts decisions regarding any subject matter which it is referred to by the specialised bodies; and adopts its own rules of procedure, as well as its meeting schedule and the agenda for its meetings. The Trade Committee adopts its decisions by consensus. The decisions adopted are binding upon the Parties, which take all necessary measures to implement them. In the cases referred to in Article 12 paragraph 4 of the Trade Agreement, any decision shall be adopted by the Union and the signatory Andean Country concerned and shall have effect only between those Parties, provided that such decisions do not affect the rights and obligations of another signatory Andean Country (Article 14 paragraph 3).

2.3. The envisaged act of the Trade Committee

On 17 October 2019, at the 6th Sub-committee on Government Procurement, held in Bogota, Colombia informed the Union of its intention to update the list of procuring entities at central level by adding six agencies created after 2011, which belong to the executive level.

The purpose of the envisaged act is to bring a modification to Subsection 1 (“Central government entities”) of Section A to Appendix 1 of Annex XII (‘Government Procurement’) to the Trade Agreement that specifies which central government entities of Colombia are covered under Title VI.

The modification proposed will update the list of procuring entities at central level by adding six agencies created after 2011, which belong to the executive level.

The envisaged act shall become binding on the Parties in accordance with Article 14 paragraph 2 of the Trade Agreement, which provides: ‘The decisions adopted by the Trade Committee shall be binding upon the Parties, which shall take all necessary measures to implement them.’

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

The Council is asked to adopt the decision establishing the position, to be adopted on behalf of the European Union, on a draft decision of the European Union–Colombia–Peru Trade Committee modifying Subsection 1 (“Central government entities”) of Section A to Appendix 1 of Annex XII (‘Government Procurement’) to the Trade Agreement that specifies which central government entities of Colombia are covered under Title VI.

The position to be adopted, on behalf of the European Union, on the proposed amendment shall be in accordance with the draft Decision of the Trade Committee attached to this Decision.

The said amendment aims at updating the list of procuring entities at central level by adding six agencies created after 2011, which belong to the executive level. At the time of the conclusion of the negotiations for the Trade Agreement between the Union and Colombia in 2010, competences currently carried out by such agencies were exercised by procuring

entities at ministerial level. Those agencies do not currently appear in the list of procuring entities at central level in Colombia's coverage.

Article 191 ('Modifications and Rectifications of Coverage') of the Trade Agreement foresees the possibility to modify the coverage of Title VI on Government Procurement. Pursuant to paragraph 4 of Article 191, the Trade Committee is empowered to agree on any such proposed modification for the Parties to modify the relevant Annex, i.e. Annex XII ('Government Procurement') of the Trade Agreement.

Considering that the decision shall have effect only between the Union and Colombia, the decision can be adopted in the Trade Committee by the Union and Colombia, as it relates exclusively to the bilateral relationship between them pursuant to Article 14 paragraph 3 of the Agreement.

The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

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 notion 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 Trade Committee is a body set up by an agreement, namely the Trade Agreement between the European Union and its Member States of the one part and Colombia and Peru of the other part.

The decision which the Trade Committee is called upon to adopt constitutes an act having binding legal effects, in accordance with Article 14 paragraph 2 of the Trade Agreement. The envisaged act does not supplement or amend the institutional framework of the Trade Agreement.

The procedural legal basis for the proposed decision is, therefore, 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 adopted on behalf of the Union. 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.

¹ Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

4.2.2. *Application to the present case*

The main objective and content of the envisaged act, i.e. extending the coverage of procurement under Title VI of the Trade Agreement, falls under the common commercial policy.

The substantive legal basis of the proposed decision is, therefore, Article 207 TFEU and in particular its paragraph 4.

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) thereof.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Council will amend Subsection 1 (“Central government entities”) of Section A to Appendix 1 of Annex XII (‘Government Procurement’) to the Trade Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the Trade Committee regarding the amendment of Appendix 1 of Annex XII (Government Procurement) to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part

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 Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part, and in particular Article 191 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, was signed by the Union in accordance with Council Decision 2012/735/EU² and it has been provisionally applied from 1 March 2013 between the Union and Peru, and from 1 August 2013 between the Union and Colombia. The Trade Agreement was amended by the Protocol of Accession of Ecuador³, which was signed on 11 November 2016 in accordance with Council Decision (EU) 2016/2369⁴ and it has been provisionally applied from 1 January 2017 ('the Trade Agreement').
- (2) Pursuant to Article 14(3), in conjunction with Article 12(4), of the Trade Agreement, a decision may be adopted within the Trade Committee established by the Trade Agreement between the Union and Colombia where it relates exclusively to the bilateral relationship between them.
- (3) The Trade Committee, will adopt the decision to amend Subsection 1 of Section A of Appendix 1 of Annex XII to the Trade Agreement by adding six agencies to the list of procuring entities at central level for Colombia.

² Council Decision 2012/735/EU of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (OJ L 354, 21.12.2012, p. 1).

³ Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador (OJ L 356, 24.12.2016, p. 3).

⁴ Council Decision (EU) 2016/2369 of 11 November 2016 on the signing, on behalf of the Union, and provisional application of the Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador (OJ L 356, 24.12.2016, p. 1).

- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Trade Committee, as the decision to amend Subsection 1 of Section A of Appendix 1 of Annex XII to the Trade Agreement will be binding on the Union, in accordance with Article 14(2) of the Trade Agreement.
- (5) Article 191 of the Trade Agreement lays down the procedures whereby a Party may modify or rectify its coverage of procurement under Title VI of the Trade Agreement.
- (6) Subsection 1 on Central government entities of Section A of Appendix 1 of Annex XII, on Government Procurement, to the Trade Agreement specifies the central government entities of Colombia whose procurement is covered under Title VI.
- (7) At the meeting of the Sub-committee on Government Procurement of 17 October 2019, held in Bogota, Colombia informed the Union of its intention to update the list of procuring entities at central level by adding six agencies created after 2011, which belong to the executive level. At the time of the conclusion of the negotiations of the Trade Agreement between the Union and Colombia in 2010, competences currently carried out by such agencies were exercised by procuring entities at ministerial level. Those agencies do not currently appear in the list of procuring entities at central level in Colombia's coverage.
- (8) The Union and Colombia agree that the list of procuring entities at central level of Colombia should be updated by adding those six agencies.
- (9) It is therefore necessary to amend Subsection 1 of Section A of Appendix 1 of Annex XII to the Trade Agreement. The Union and Colombia agree that such update should not require compensatory adjustments, as it is a minor amendment pursuant to Article 191(2) of the Trade Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Trade Committee shall be based on the draft Decision of the Trade Committee regarding the amendment of Appendix 1 of Annex XII to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Ecuador and Peru, of the other part, attached to this Decision.

Article 2

After its adoption, the decision of the Trade Committee shall be published in the *Official Journal of the European Union*.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*