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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 Annex XII of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, setting out the list of Colombian procuring entities in accordance with the provisions of Title VI ('Government Procurement')

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 and Peru, of the other part ('the Trade Agreement')¹, in connection with the envisaged adoption of a decision concerning the modification by Colombia of Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') to the Agreement.

Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') to the Agreement sets out the list of Colombia's sub-central government entities covered under the commitments on government procurement.

Colombia proposes to modify Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') to the Agreement by adding a note to specify that 'procuring entities' cover all sub-central public procuring entities not having an industrial or commercial character.

The representatives of the Parties agreed that such modification would not require compensatory adjustments pursuant to Article 191 paragraph 2 intend (a), on grounds that the modification does not lead to a reduction of coverage.

2. CONTEXT OF THE PROPOSAL

2.1. The Trade Agreement

The Trade Agreement aims to open up markets on both sides and increase the stability of the trade relationship.

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 way and to reciprocally open up procurement markets to bidders, goods and services from the other party. Thus, EU and Colombia bilaterally negotiated the mutual access to each other's tenders defined in the coverage of the chapter on public procurement. The coverage of the chapter on public procurement defines to which individual procurements the negotiated procedural and substantive rules would apply.

Following the provisional application of the Trade Agreement², it resulted that EU companies were denied market access in Colombia's government procurement entities at sub-central level. The Parties agreed that Colombia would modify its market access schedule at sub-central level and clarified that it would not require any compensatory adjustments.

The Trade Agreement has been provisionally applied since 1 March 2013 with Peru and since 1 August 2013 with Colombia. On 1 January 2017, Ecuador joined the Agreement³. However, as per Article 14 paragraph 3 of the Trade Agreement, since the decision to be adopted by the EU Party and Colombia only have effect only between those Parties, the decision can be taken bilaterally by the EU party and Colombia.

¹ OJ L 354, 21.12.2012, p. 3.

² OJ L 56, 28.2.2013, p. 1.

³ OJ L 356, 24.12.2016, p. 3.

2.2. The Trade Committee

The Trade Committee established by Article 12 of the Agreement supervises and facilitates the operation of the Agreement and the correct application of its provisions; evaluates the results from the application of the Agreement, in particular the evolution of the trade and economic relations between the Parties; supervises the work of all specialised bodies established under the Agreement and recommends any necessary action; evaluates and adopts decisions regarding any subject matter which is referred to it 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 Agreement, any decision shall be adopted by the EU Party 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 24 November 2017, during its fourth meeting, the Trade Committee is to adopt a decision regarding the modification of Colombia coverage on government procurement namely Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') of the Agreement ('the envisaged act').

The purpose of the envisaged act is to bring a modification to Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') to the Agreement which sets out the sub-central government entities of Colombia whose procurement is covered under Title VI. The modification proposed by Colombia entails an additional note to Subsection 2 to specify that 'procuring entities' cover all sub-central public procuring entities, not having an industrial or commercial character.

The envisaged act shall become binding on the Parties in accordance with Article 14 paragraph 2 of the 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 position, on behalf of the European Union, on a draft decision of the European Union–Colombia–Peru Trade Committee modifying Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement') to the Trade Agreement which specifies sub-central government entities of Colombia whose procurement is 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 adding a note to Subsection 2 of Colombia's government procurement coverage to specify that 'procuring entities' cover all sub-central public procuring entities, not having an industrial or commercial character.

The reason for this modification is due to a different interpretation by the EU and Colombia of Colombia's government procurement coverage at sub-central level that resulted in Colombia denying access to EU companies of procurement by economically important public entities at sub-central level. With such amendment, coverage of Colombian procuring entities at sub-central level would be clarified and would include entities such as the *Instituto de Desarrollo Urbano* (IDU) in charge of Bogota infrastructure development.

Article 191 ('Modifications and Rectifications of Coverage') of the Agreement foresees the possibility to modify the coverage of Title VI on Government Procurement; and 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 Agreement pursuant to paragraph 4 of Article 191.

Considering that the decision shall have effect only between the European Union and Colombia, the decision can be adopted in the Trade Committee by the European 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.'

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 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.

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 Agreement, fall 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 Article 207 (4) TFEU in conjunction with Article 218(9) TFEU.

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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 paragraph of Article 207(4), in conjunction with Article 218(9) 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, ('the Trade Agreement') has been provisionally applied with Colombia since 1 August 2013⁴.
- (2) Pursuant to paragraphs 1 and 3 of Article 14 of the Agreement, the Trade Committee may adopt decisions by consensus, involving only the EU Party and the signatory Andean Country concerned (i.e. Colombia), provided that such decisions do not affect the rights and obligations of another signatory Andean Country.
- (3) The Trade Committee, during its fourth meeting on 24 November 2017, is to adopt the decision to agree on the modification of Subsection 2 of Section A to Appendix 1 of Annex XII ('Government Procurement'). The modification consists of a clarification of the coverage of government procurement entities at sub-central level in Colombia. The modification entails the inclusion of a note to Subsection 2 of Colombia's government procurement coverage to specify that 'procuring entities' cover all sub-central public procuring entities not having an industrial or commercial character. The EU and Colombia agree that such modification would not require compensatory adjustments.
- (4) It is appropriate to establish the position to be adopted on behalf of the Union in the Trade Committee, as the decision will be binding upon the Union.
- (5) As the Decision of the Trade Committee will amend Annex XII of the Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.
- (6) In the Trade Committee, the Union is to be represented by the Commission in accordance with Article 17(1) of the Treaty on European Union (TEU),

⁴ 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. 3).

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted, on behalf of the Union, in the fourth meeting of the Trade Committee on 24 November 2017 shall be based on the draft Decision of the Trade Committee 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*