



EUROPEAN
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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 New Zealand to the
Agreement on Government Procurement**

EXPLANATORY MEMORANDUM

1. INTRODUCTION

On 28 September 2012, New Zealand applied to accede to the WTO Agreement on Government Procurement (“GPA”). New Zealand indicated its intention to complete its accession with reference to the amended text of the GPA (the text was adopted by the Parties on 30 March 2012 and concluded by the EU via a Council decision of 3.12.2013¹). The GPA, as amended, has entered into force for the Union, on 6 April 2014.

The Commission, on behalf of the Union, negotiated a series of market opening commitments as presented by New Zealand both in a bilateral format and within the WTO Committee on Government Procurement (“GPA Committee”).

New Zealand subsequently submitted a final offer on 21 July 2014. A summary of New Zealand's final offer and the Commission's assessment thereof are set out below.

2. SUMMARY OF THE TERMS OF NEW ZEALAND'S ACCESSION TO THE GPA

New Zealand's final offer

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

Entities

New Zealand's government entities; at the level of central government there is a continuum of entities exercising different degrees of public authority. These are the standard departments, overseen by Ministers, as well as various forms of “Crown entities”, a category which indicates different types of entities operating as instruments of the Crown for the Government and carrying out various public functions, for example in the fields of health, education, tourism, social housing. At the other end of the spectrum are State Owned Undertakings (“SOEs”), that are limited liability companies or corporations which operate as commercial businesses.

In Annex 1 (“Central entities”) New Zealand's offer includes the core government ministries and departments. In a note New Zealand agreed to specify that the entities subordinated to the ones laid down in Annex 1 are also covered.

In Annex 2 (“subcentral entities”) New Zealand includes most District Health Boards, which are Crown entities responsible for providing or funding the provision of health services in their territorial districts and the entities that procure for them. In addition, New Zealand agreed to offer coverage of the biggest city councils, Auckland Council, Wellington City Council and Christchurch City Council as well as those regional councils that exceed 250 000 inhabitants. Coverage is provided for “flown down grants” (this refers to the fact that central agencies when awarding grants might require the awardees to follow “flow down” procurement requirements). Coverage of city councils and regional councils is foreseen in relation to the procurement of goods, services and construction services relating to transport projects funded in whole or in part by the New Zealand Transport Agency where the total value of the project exceeds the relevant applicable thresholds for good, services and construction services.

In Annex 3 (“other entities”), New Zealand includes 14 Crown entities that operate in various fields including tourism, aviation, education and transport. In addition, New Zealand agreed

¹ Council Decision of 2 December 2013 on the conclusion of the Protocol Amending the Agreement on Government Procurement, OJ L 68, 7.3.2014, p. 1.

to also offer four SOEs operating in the utilities sectors of airways, meteorological services, railways, and electricity (Airways Corporation of New Zealand Limited, Meteorological Service of New Zealand Limited, KiwiRail Holdings Limited and Transpower New Zealand Limited). These are the SOEs that have been identified as operating in a monopolistic situation.

Goods

New Zealand commits to cover procurement of all goods by the covered entities.

Services

New Zealand offers a very comprehensive coverage of services, meaning all services by covered entities, with some very specific exclusions (for research and development, public health services, education services and welfare services).

Construction services

New Zealand offers all the construction services in Division 51 of the Central Product Classification, as it is commonly offered by all GPA Parties.

Thresholds

New Zealand applies thresholds that are commonly applied by GPA Parties for goods, services and construction services.

New Zealand's Legislation

New Zealand's Government Procurement Framework is non-discriminatory. There are no provisions granting domestic suppliers and suppliers more favourable treatment than that accorded to foreign suppliers or supplies. New Zealand's legislation on public procurement appears to be open, transparent and non-discriminatory in line with GPA requirements.

Commission's Assessment of New Zealand's Offer

New Zealand widely opens its procurement market to all GPA Parties as it has a very comprehensive offer in terms of entities, goods and services, and construction services and non-discriminatory legislation. In addition, New Zealand does not maintain any particular restriction against any GPA Party. However, considering that New Zealand'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 New Zealand) as the EU has done in the past for GPA Parties which offer only partial coverage.

The specific restrictions, which would be part of the terms of accession to the GPA for New Zealand to be adopted by the GPA Committee, are the following:

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

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

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

The EU will not offer to New Zealand the procurement by local contracting authorities (administrative units under NUTS 3 in Regulation (EC) No 1059/2003)² --as amended-- and smaller administrative units). Administrative units under NUTS 1 and NUTS 2 in Regulation 1059/2003, procurement by the contracting authorities of administrative units under NUTS 1 and 2 will not be offered to New Zealand, unless their procurement for urban transport projects is covered under Annex 3 of the EU GPA Schedule. Only the procurement of administrative units listed under NUTS 1 and NUTS 2 operating in the field of urban transport will be offered to New Zealand, in Annex 3 (in particular the activity “the provision or operation of networks providing a service to the public in the field of transport by urban railway, automated systems, tramway, trolley bus, bus or cable” referred to under point e) of Annex 3 of the EU GPA Schedule).

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

A more limited coverage will be offered to New Zealand for subcentral entities; only the procurement of administrative units listed under NUTS 1 and NUTS 2 in relation to urban transport (in particular the activity referred to under point e) of Annex 3 of the EU GPA schedule) will be offered to New Zealand. In addition, the EU will not offer to New Zealand procurement by entities operating in the sectors of: drinking water; in the field of maritime or inland port or other terminal facilities; and in the field of provisions of airports or other terminal facilities to air carriers.

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

3. LEGAL ELEMENTS OF THE PROPOSAL

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

The terms of New Zealand's accession will be set out in a decision of the GPA Committee which is expected to be adopted in the second half of 2014. This decision will include New Zealand's final offer for access to its public procurement market (which will become part of Appendix I to the GPA upon New Zealand's accession), as well as any specific terms of accession requested by other GPA Parties. The Decision will be adopted by consensus within the GPA Committee.

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 that will set out the terms of New Zealand's accession 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.

² Regulation (EC) No 1059/2003 of the European Parliament and of the Council on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 342, 18.12.2003, p. 1) .

4. RECOMMENDATION

New Zealand's accession to the GPA is expected to make a very positive contribution to further international opening of public procurement markets, by enlarging the number of parties to the GPA and thus encouraging other countries to accede to the GPA. The Commission recommends that the offer by New Zealand is accepted subject to the above mentioned restrictions to the Union's coverage with respect to New Zealand.

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 New Zealand's accession subject to the abovementioned restrictions, to be reflected in the GPA Committee Decision on New Zealand's accession.

Proposal for a

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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 28 September 2012, New Zealand applied for accession to the Agreement on Government Procurement (the “GPA”).
- (2) New Zealand’s commitments on coverage are laid down in its final offer, as submitted to the GPA Parties on 21 July 2014.
- (3) Although comprehensive, the offer by New Zealand does not provide full coverage. It is thus appropriate to introduce certain carve-outs specific to New Zealand 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 New Zealand and will be reflected in the decision adopted by the Committee on Government Procurement (“the GPA Committee”) on New Zealand's accession.
- (4) New Zealand'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 New Zealand,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union within the Committee on Government Procurement shall be to approve the accession of New Zealand to the Agreement on Government Procurement, subject to specific terms of accession set out in the Annex to this Decision.

Article 2

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

Done at Brussels,

*For the Council
The President*