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Proposal for a

COUNCIL DECISION

establishing the position to be taken by the European Union within the Committee on Government Procurement on the withdrawal of the Union objections to the delisting of three entities from Japan's Annex 3 to Appendix I to the Agreement on Government Procurement

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In 2001 Japan notified to the GPA Secretariat its intention to withdraw from its coverage under the WTO Agreement on Government Procurement (GPA) the three Japanese Railway (JR) Honshu companies- the East Japan Railway Company, Central Japan Railway Company and West Japan Railway Company which are railway companies previously owned in majority by the Japanese government.

At that time the EU, other Parties filed in objections to the delisting of those companies which were lifted between 2002 and 2006.

Various consultations took place between the EU and Japan but concerns remained on the EU side, whereas all other GPA Parties lifted their objections. Taking into account this situation, Annex 3 of Japan's schedule under the revised GPA does not list the three companies but includes a note specifying that the companies are nevertheless deemed to remain covered until the EU withdraws the objection against the delisting of these companies.

During the scoping exercise for the EU-Japan Free Trade Agreement the EU expressed its readiness to lift the objection to the delisting of the three Japanese companies, against the background of the FTA negotiations on government procurement. This was the approach adopted by the Council in the Roadmap on Railways and Urban Transport that it endorsed together with the negotiating directives.

In the light of the positive development of the FTA negotiations on railways procurement, in particular the confirmation by Japan of its intention to significantly revise the terms of application of its GPA reservation on railways ("Operational Safety Clause" as stipulated under note 4 to Annex 2 and note 3(a) of Annex 3 of Japan) and to promote transparent and non-discriminatory procurement practices by the three JR Honshu companies, the European Union can withdraw its objections to the delisting of those companies from the GPA coverage of Japan.

2. LEGAL ELEMENTS OF THE PROPOSAL

Both the 1994 and the revised GPA¹ lay down simplified decision making procedures for the modification of the lists of entities of each contracting party ("delisting"). Those modifications take place through the GPA Committee, as the body responsible for the operation of the GPA. Where there is no objection to the proposed modification in the GPA Committee, the changes in the GPA parties' schedules are accepted. This decision will have legal effects for the GPA parties concerned as it changes the rights and obligations of the parties constituted under the agreement.

In the case of Japan's proposed "delisting" of the three railway companies, all contracting parties accepted the modification by abstaining from communicating objections to the Committee, with the exception of two other GPA parties, which subsequently lifted their objections by means of notifications.

It follows that all contracting parties but the EU have taken a positive position in the context of the GPA Committee (either by abstaining from formulating objections or by lifting objections). This amounts to acceptance of Japan's proposed modification. However, since the

¹ 2014/115/EU: 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. 1–1.

EU maintains its objection, the Committee as such cannot be said to have accepted the modification. For this to happen, the EU must take a positive position in the context of the GPA Committee, since the other contracting parties have already done so.

The revised GPA includes a transitional provision to deal with the situation in the GPA Committee. This is note 5 of Annex 3 to Japan's schedule in Appendix I of the GPA. By virtue of the note, the three railway companies are deemed to be provisionally included as entities covered by the GPA. However, the note shall cease to have effect once the EU notifies to the GPA Committee that it withdraws its objection. There is therefore a continuum between the events in the GPA Committee before the revised GPA entered into force and afterwards. The non-objection by the other contracting parties has furthermore been confirmed by means of their acceptance of the revised GPA package as adopted by the GPA Committee.

A possible notification to the GPA Committee to lift the objections should therefore be regarded as a change of the EU position (which so far has been to object to Japan's modification) in the GPA Committee. A notification from the EU constitutes the last requirement for the GPA Committee procedure to come to an end with the collective acceptance of Japan's modification, which would have legal effects for all GPA contracting parties, not only the EU.

Upon receipt of the EU notification, the matter will be on the agenda on the GPA Committee meeting. In that meeting, the GPA Committee is expected to act on the issue as to reflect the fact that in the light of the change in the position by the EU as regards the railways companies, note 5 of Annex 3 of Japan's schedule ceases to have effect and to declare the completion of the "delisting procedure". Later, the Committee would be expected to receive a true and certified copy of Annex 3 to Japan's schedule from the GPA Secretariat, reflecting the new situation.

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. In the light of the above, the lifting of the objections of the Union to the withdrawal of the three entities from Japan's Annex 3 to Appendix I of the Agreement on Government Procurement falls under this provision as the decision is taken in a body set up by an international agreement affecting the rights and obligations of the EU.

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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 29 August 2001 the notification of Japan under Article XXIV:6(b) of the 1994 Agreement on Government Procurement, ('the GPA') on the withdrawal of East Japan Railway Company, Central Japan Railway Company and West Japan Railway Company from Annex 3 to Appendix I of Japan was circulated to the Parties to the GPA.
- (2) On 1 October 2001 the European Union objected, pursuant to Article XXIV:6(b) of the 1994 GPA, to the proposed modifications as notified by Japan in order to examine thoroughly the reasons for the intended delisting of those entities as some initial concerns occurred.
- (3) Despite the various consultations which took place between the Union and Japan, the Union did not withdraw its objections contrary to all other objecting Parties.
- (4) During the revision of the 1994 GPA, account was taken of this situation. Japan did not list the three concerned companies in its Annex 3 but included a note specifying that the companies are deemed to be included in its Annex 3 until such time as the European Union withdraws its objection against the delisting of these companies.
- (5) In the framework of the scoping exercise for the EU-Japan Free Trade Agreement and in line with the approach adopted by the Council on the Roadmap on railways and urban transport and without prejudice to any assessment of the level of competition on the Japanese railway market, the Union expressed its readiness to withdraw the objection to the delisting of the three Japanese companies, against the background of the FTA negotiations on government procurement.
- (6) In the light of the confirmation by Japan of its intention to significantly revise the terms of application of the operational safety clause as stipulated in note 4 to Annex 2 and note 3(a) to Annex 3 in Japan's schedule in Appendix I to the GPA and to promote transparent and non-discriminatory procurement practices by the three railway companies, the European Union should withdraw its objections to the delisting of those companies.

- (7) The withdrawal of the objections should be without prejudice to the Union's position in the GPA Committee on the decision on indicative criteria that demonstrate the effective elimination of government control or influence over an entity's covered procurement, pursuant to Article XIX (8) of the revised GPA, in particular whether government control or influence is effectively eliminated where the entities concerned are not operating in a competitive environment.
- (8) It is appropriate, therefore, to establish the position to be taken by the Union within the WTO Committee on Government Procurement in relation to the withdrawal of the objections,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken by the European Union within the Committee on Government Procurement of the World Trade Organization is that the European Union shall withdraw the objections to the withdrawal of the East Japan Railway Company, Central Japan Railway Company and West Japan Railway Company from Japan's Annex 3 to Appendix I to the 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*