

## EXPLANATORY MEMORANDUM FOR EUROPEAN UNION DOCUMENTS

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### **Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Committee on Government Procurement concerning the accession of the United Kingdom of Great Britain and Northern Ireland to the Agreement on Government Procurement in the context of its withdrawal from the European Union**

Submitted by the Cabinet Office on 8 February 2019

#### **SUBJECT MATTER**

1. This Explanatory Memorandum covers a proposal for a Council decision concerning the accession of the United Kingdom (UK) to the WTO Government Procurement Agreement (GPA) in the context of the UK's withdrawal from the European Union (EU).
2. The GPA is an agreement within the World Trade Organisation (WTO) framework between 19 WTO Members, including many of the major economies such as the United States, Canada, the EU and Japan. It aims to mutually open government procurement markets among its members, and seeks to address trade barriers, such as preferential treatment of domestic goods and services, in the government procurement sector.
3. Implementation of the GPA is administered by a WTO Committee on Government Procurement which comprises representatives from all Parties. All GPA committee decisions are made on a consensus basis.
4. The UK is currently a member of the GPA by virtue of being an EU member state. The UK needs to accede to the GPA in its own right in order to continue to participate in the GPA when the UK leaves the EU and aims to do so by replicating its existing commitments as an EU member state as far as possible.
5. The GPA sets out a framework of rules by which the parties should conduct the procurement process for GPA covered procurements, and the "coverage" is set out in schedules detailing the market sectors and bodies covered by each GPA party<sup>1</sup>, as well as threshold values above which procurements are covered. Without continued participation, UK suppliers would lose guaranteed access to GPA covered procurement opportunities, estimated to be worth £1.3 trillion annually for all members.

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<sup>1</sup> Armenia, Canada, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Montenegro, the Republic of Moldova, the Netherlands with respect to Aruba, Norway, Singapore, South Korea, Switzerland, Chinese Taipei, Ukraine, the US.

6. Following the commencement of the Article 50 withdrawal process to leave the EU, the UK commenced the accession process under Article XXII.2 of the GPA by formally circulating its initial market access offer to GPA parties on 5 June 2018 followed by a final market access offer on 2 October 2018. The Commission's proposal sets out that: 'The UK's final offer replicates the existing Union schedule in so far as it applies to the UK, with minor technical adaptations.' The draft decision of the Committee on Government Procurement relating to the UK's GPA accession in its own right was circulated to GPA parties on 24 January 2019 and it is anticipated that the decision will be adopted by the Committee in February 2019.

7. The Commission's proposal sets out how the UK's accession might proceed following an invitation from the other Parties to join in both a deal and no deal scenario. In a no deal scenario the timescales for the UK to deposit its instrument of accession would be:

*(a) not earlier than thirty days before the date on which the United Kingdom ceases to be a Member State of the Union; and*

*(b) within six months of the date of the decision of the GPA Committee, unless the period for submission of the instrument is extended by that Committee.*

8. In a deal scenario, the UK would not accede until the end of any transition period, subject to a further decision by the Committee on Government Procurement. The Commission's proposal states the EU will notify GPA Parties that the UK should be treated as a Member State during the transition period i.e. maintain reciprocal market access until the date of expiry of the agreed transition period when the UK would re-apply to accede to the GPA.

9. We anticipate the proposal will be adopted by the Council at a meeting on 18<sup>th</sup> February 2019 and that the decision of the Committee on Government Procurement will be adopted by GPA Parties at the scheduled GPA Committee meeting on 27<sup>th</sup> February 2019.

10. As all the GPA parties agreed to our final market access offer in November 2018, we do not anticipate there will be an issue with achieving the decision at the Committee meeting. However if the decision needs to be taken later we would expect a meeting would be called as soon as possible to invite the UK to accede. To mitigate the risk of a short gap in GPA membership, an amendment in the Public Procurement (Amendment etc.) (EU Exit) Regulations 2019, which was laid before Parliament on 13 December 2019, guarantees continued access, rights and remedies for suppliers from GPA countries for a time limited period from EU exit. This will facilitate UK suppliers being offered reciprocal rights to participate in procurements abroad. As indicated above, GPA committee decisions are usually taken by consensus.

## **SCRUTINY HISTORY**

11. There is no scrutiny history of the UK's proposed accession to the GPA.

## **MINISTERIAL RESPONSIBILITY**

12. The Minister for Implementation has responsibility for public procurement policy. The Secretary of State for International Trade is responsible for the UK's Trade Policy and is responsible for the negotiating strategy for the UK's accession to the GPA. The Department for Business, Innovation and Industrial Strategy and the Foreign Office will also have an interest from a wider business and foreign policy perspectives.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

13. International relations, including relations with the EU, and the regulation of international trade are reserved matters under the Scotland Act 1998 and excepted matters under the Northern Ireland Act 1998. However, the observation and implementation of international obligations (such as the GPA) is not reserved by this.

14. The Scottish Government has implemented the EU procurement Directives, whereas the UK Government has implemented those Directives on behalf of Wales and Northern Ireland. Welsh Government Ministers have been designated<sup>2</sup> under section 2(2) of the European Communities Act 1972 in relation to public procurement by contracting authorities whose functions are wholly or mainly Welsh devolved functions.

15. Ministers of the Devolved Administrations have an interest in the accession of the UK to the GPA as UK membership will ensure businesses from other GPA parties will continue to have access to public procurement markets across the UK in respect of covered procurement activities and associated remedies. Equally, businesses based across the UK will have access to public procurement markets in respect of covered procurement activities of GPA parties and associated remedies. The Government has engaged with the Devolved Administrations in the preparation of this EM.

## **LEGAL AND PROCEDURAL ISSUES**

### **Legal basis**

16. The legal basis for the proposed Council Decision is quoted as being Article 207 (4), in conjunction with Article 218(9) of the Treaty on the Functioning of the EU (TFEU). The proposal clearly falls within the boundaries of this Article.

17. This proposal does not trigger the Justice and Home Affairs (JHA) opt-in.

### **European Parliament Procedure**

18. This proposal does not require any European Parliament procedure.

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<sup>2</sup> The European Communities (Designation) (No 2) Order 2015.

## **Voting procedure**

19. This proposal is subject to Qualified Majority Voting in Council.

## **Impact on United Kingdom Law**

20. The UK's obligations as an independent party to the GPA will be implemented in the UK by the Public Contracts Regulations 2015, the Concessions Contracts Regulations 2016 and the Utilities Contract Regulations 2016 for procurements covered by those Regulations (which implement EU Directives 2014/24/EU, 2014/23/EU, and 2014/25/EU respectively). These Regulations are being amended by Regulations to be made under section 8 of the European Union (Withdrawal) Act 2018. The effect of these amendments will be that UK contracting authorities will continue to afford the same rights and remedies as the UK currently gives to economic operators established in GPA parties on the basis of the European Union's coverage schedules for a time limited period after the UK's withdrawal from the European Union.

21. The UK's obligations will be implemented for procurements covered by the Public Contracts (Scotland) Regulations 2015, the Concessions Contracts (Scotland) Regulations 2016 and the Utilities Contracts (Scotland) Regulations 2016 by those Regulations (which also implement EU Directives 2014/24/EU, 2014/23/EU, and 2014/25/EU respectively), as they will be amended by Regulations to be made under section 8 of the European Union (Withdrawal) Act 2018. It is currently anticipated that such amendments will provide for the same effect as those described above but with respect to procurements covered by the Scottish Regulations.

22. Clause 1 of the Trade Bill, currently before Parliament, provides bespoke powers to implement the UK's obligations under the GPA. These obligations are sufficiently similar to the UK's obligations under the EU's current GPA membership that we are of the view that retaining our obligations under the EU's GPA membership for a limited period allows us to demonstrate compliance with the UK's independent GPA obligations. This is subject to one exception (described further below). However, if it does transpire that there are areas where compliance is not complete, the Bill (which has nearly completed Report Stage in the second House) will provide sufficient legislative powers to remedy that.

23. There is one area where the UK coverage under the GPA schedules materially differs from its obligations under the EU Schedules and that relates to updates to the UK's list of entities under Annex I of its Schedule. There may be some instances where central government bodies are included in the UK list, which did not exist under the EU Schedules, for example because they were created after the EU list was compiled. This might include, for example, the Department for International Trade. However as these bodies are all central Government entities, the UK Government can use administrative measures to ensure these bodies comply with our obligations under the GPA, pending legislation under the Trade Bill which will put the matter beyond doubt.

24. Parliamentary scrutiny of the UK's accession to the GPA will be in accordance with the Constitutional Reform and Governance Act 2010 (CRaG) prior to ratification.

25. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until 29 March 2019, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.

### **Application to Gibraltar**

26. Gibraltar has included GPA obligations in their procurement regulations which transpose the 2014 EU Procurement Directives. The UK's independent membership of the GPA will not extend to Gibraltar.

### **Fundamental rights analysis**

27. This proposal has no substantive fundamental rights implications.

28. This proposal does not impose restrictions or obligations on UK citizens, affect the relationship of citizens with government or other public authorities, nor create or impose criminal offences or sanctions.

### **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

29. The GPA applies to all European Economic Area (EEA) Agreement countries<sup>3</sup>. The EU public procurement acquis covers the EEA countries.

### **SUBSIDIARITY**

30. The subject matter of the GPA falls within exclusive EU competence under the Common Commercial Policy since it involves setting the terms of access of non-EU countries to the EU public procurement market. Whilst the EU is a party to the GPA, the Member States are not independent parties, although the EU's commitments under the GPA include commitments in relation to each Member State.

31. As this falls within the area of exclusive EU competence, the principle of subsidiarity does not apply as provided for in Article 5(3) TFEU.

### **POLICY IMPLICATIONS**

32. The UK Government has been a keen proponent of the aims of the GPA, since it came into effect in January 1996. It has supported and encouraged the EU and other GPA parties to achieve the revised GPA, which came into effect on 6 April 2014. It has also supported the accession of new members, with as wide "coverage" as possible. This stems from the policy approach of supporting fair and open markets, value for

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<sup>3</sup> Iceland, Liechtenstein and Norway are parties to the GPA in their own right.

money, probity and transparency in public procurement, support for growth in the global economy, and guarding against protectionism. The Government supports the proposal that the Council accepts the UK's offer.

33. The effect of the Commission's consequential amendments (set out in the Annex of 5740/19 ADD 1) will be that the UK will have access to the full range of procurements covered by the EU in its GPA schedules.

### **Evidence supporting the UK joining the GPA**

34. The GPA is an agreement within the WTO framework between 19 WTO Members, including many of the major economies such as the United States, Canada, the EU and Japan. It aims to mutually open government procurement markets among its members, and seeks to address trade barriers, such as preferential treatment of domestic goods and services, in the government procurement sector.

35. The advantages of being a member of the GPA can be summarised as follows:

- i. The GPA mutually opens government procurement markets among its parties, and seeks to address trade barriers in the government procurement sector.
- ii. The total GPA market is estimated to be worth over £1.3tn annually<sup>4</sup>. In particular, UK membership would provide guaranteed access to a large proportion of the EU's public procurement market, without the need for a specific UK-EU deal. Cabinet Office impact assessments on the revised GPA, which came into effect in 2014, and on subsequent GPA accessions estimated that these gave an additional £380m benefit to UK businesses on top of the estimated benefits of the original GPA coverage<sup>5</sup>.
- iii. The GPA also benefits UK suppliers established in GPA party jurisdictions competing in procurement markets by prohibiting discrimination on the basis of foreign affiliation, ownership, or the origin of goods and services offered by these suppliers.
- iv. The UK benefits from third country suppliers having access to the UK public procurement market through increased choice and value for money due to competition.
- v. Being a GPA member contributes to the UK's commitment to open markets, having a liberal and competitive trading environment and being a champion of free trade.
- vi. Conversely, if the UK does not become an independent party to the GPA, we will lose all the benefits of the GPA upon leaving the EU. Accessing to the GPA as an independent party will provide continuity for businesses in the UK, in line with our approach to existing trading relationships in the WTO, where we are seeking continuity via Free Trade Agreements on the substantially the same commitments, subject only to technical rectifications.

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<sup>4</sup> [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) converted from USD

<sup>5</sup> Cabinet Office impact assessment (IA). The revised GPA increased coverage over the original 1994 GPA, and the £380m is the benefits from this increased coverage. References: Cabinet Office EM 7915/13 and 7919/13 dated 9 May 2013; Cabinet Office EM 13281/14 dated 5 November 2014; Cabinet Office EM13257/14 dated 11 November 2014; Cabinet Office EM 10628/15 dated 27 July 2015; and Cabinet Office EM 11386/15 dated 13 September 2015

- vii. It has been estimated that total UK wins in foreign procurement markets covered by the GPA is between £1 billion to £1.4 billion per year<sup>6</sup>.

## **CONSULTATION**

36. The Government has not carried out a consultation on this proposal and has no plans to do so.

## **IMPACT ASSESSMENT**

37. The impact of the UK not acceding to the GPA is that UK businesses would no longer have legally guaranteed access to public procurement markets in GPA parties' jurisdictions under international law. Guaranteed market access means that suppliers from a given country have a legally guaranteed right to bid for covered procurements and legal rights and access to domestic review procedures in respect of those procurements. Covered procurements are those areas which have been opened on a reciprocal basis, which is described in detail in each party's schedules to the GPA.

## **FINANCIAL IMPLICATIONS**

38. There are no specific financial implications identified except the potential reciprocal access for UK businesses and suppliers from GPA parties to their respective public procurement markets.

## **TIMETABLE**

39. We anticipate the decision will be adopted by the Council at a meeting on 18<sup>th</sup> February 2019 and by GPA Parties at the scheduled GPA Committee meeting on 27<sup>th</sup> February 2019.

40. Parliamentary scrutiny of the UK's accession to the GPA will be in accordance with the Constitutional Reform and Governance Act 2010 (CRaG) prior to ratification.

41. The GPA will come into force for the UK thirty days after it deposits its instrument of accession to the GPA with the Director-General of the WTO.



**OLIVER DOWDEN CBE MP**

**Minister for Implementation**

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<sup>6</sup> This is based on DIT calculations which are provisional. In the 'high' scenario (£1.4 billion per year), 65% of the value of UK wins is from known contract awards and 35% is from estimated contract awards. In the 'low' scenario (£1 billion per year), 89% is known contract awards, 11% is estimated.