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RUSSIAN FEDERATION – CERTAIN MEASURES CONCERNING DOMESTIC AND FOREIGN PRODUCTS AND SERVICES

REQUEST FOR CONSULTATIONS BY THE EUROPEAN UNION

The following communication, dated 22 July 2021, from the delegation of the European Union to the delegation of the Russian Federation, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the government of the Russian Federation pursuant to Article 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article XXII of the General Agreement on Trade in Services (GATS) with regard to various measures favouring domestic products and services provided by domestic entities over foreign products and services provided by foreign entities.

1. The measures at issue

The Russian Federation has adopted several measures which form part of a broader import substitution programme aiming to replace, through a mix of restrictions and incentives, imported goods or services provided by foreign entities with domestic goods or services provided by Russian entities with respect to the procurement of goods and services for non-governmental purposes by certain State-related entities that are not governmental agencies, including State-owned enterprises, State-trading enterprises and legal entities implementing investment projects with State support.

The basic Russian legal acts governing import substitution with respect to procurement include Federal Law of 18 July 2011 No. 223-FZ on procurement of goods, works and services by certain types of legal entities (Law 223)¹ which regulates the procurement of certain entities, including State-owned enterprises and State-trading enterprises and Federal Law No 488-FZ of 31 December 2014 on industrial policy (Law 488)² which sets out the Russian Federation's import substitution policy for industrial products and covered by Law 223.³

The respective laws, decrees etc. have been applied, or may be applied, by the relevant State-related entities and/or by relevant Russian authorities. The EU challenges the respective measures both as such and as applied.

The measures at issue can be summarised as follows.

¹ <http://government.ru/docs/all/100084/>

² <http://government.ru/docs/all/101573/>

³ It is to be noted that State and municipal procurements of goods and services are ruled by another Russian legal act which is Law No 44-FZ of 5 April 2013 on contractual system in the sphere of public procurement of goods, works, services for state and municipal needs, and subordinate legal acts as enumerated in the replies to Trade Policy Review questions (WT/TPR/M/345/Add.1, question 60).

a. Price preference applied to procurements by State-related entities favouring Russian origin products and services from Russian entities

The Russian Federation is granting preference to goods of Russian origin and services supplied by Russian entities over goods originating in a foreign country and services performed or supplied by foreign entities in the framework of procurements by certain State-related entities, including State-owned enterprises and State-trading enterprises. This price preference is set out *inter alia* in Law 223, in particular Article 3(8.1) and in Governmental Decree No. 925 on granting preference to goods of Russian origin and works and services performed or supplied by Russian entities over goods originating in a foreign country and works and services performed or supplied by foreign entities of 16 September 2016 (Decree 925)⁴.

The measure provides for the application of a price preference of up to 30% for three different types of competitive tenders and auctions for the procurement of goods and services, by a wide range of State-related entities, including State-owned enterprises and State-trading enterprises. The EU challenges this measure insofar as it applies to non-governmental purchases by State-related entities that are not governmental agencies. The EU challenges this measure as such and also the instances of application as applied, notably the application of Decree 925 by the relevant State-related entities and by relevant authorities such as the Russian Federal Antimonopoly Service.

- Concerning tender procedures (or other method), Decree 925 provides that tender offers for Russian-origin goods and services provided by Russian entities are assessed by reducing by 15% (or by 30% for radio-electronic products) their purchase price offer, while imported goods and services provided by foreign entities are assessed on the basis of their actual (non-reduced) price offers, thus significantly increasing the chances of Russian providers to win the tender. Russian-origin goods and services supplied by Russian entities are effectively paid at the offered price, i.e. up to 30% more than the price used for assessing the offers.
- In relation to auctions (or other method) in which the winner is determined by reducing the initial (maximum) contract price specified in the procurement documentation by the value of the "step" referred to in the procurement documentation, if a provider of goods originating in foreign countries or a foreign provider of services wins the auction, the contract is concluded at a price 15% (or 30% for radio-electronic products) below the proposed contract price. This price reduction is not applied to Russian bidders.
- In relation to auctions (or other method) in which the winner is determined by reducing the initial (maximum) contract price specified in the notification of procurement by the value of the "step" referred to in the procurement documentation, if a provider of goods originating in foreign countries or a foreign provider of services wins the auction with a bid in which the contract price is reduced to zero and which leads to the right to conclude a contract, the contract is concluded at a price 15% above the proposed contract price which is not the case for Russian providers of the respective goods or services.

b. Requirement to obtain prior authorisation for the purchase of certain engineering products

The purchase of certain products outside of Russia is made subject by the Russian Federation on obtaining non-automatic and arbitrary authorisation by a government body (the "Government Commission on Import Substitution"). This measure applies to purchases for certain investment projects with state support (including private companies with no or limited State participation). The investment projects with State support concerned by this measure are defined by a minimum financial size and a minimum financial State support.

The procedure for granting an authorisation to purchase imported products is composed of *inter alia*:

- the obligation for the entities covered by the measure to draw up and submit lists of investment projects to the Russian government which includes these investment projects in a specific registry;

⁴ <http://government.ru/docs/all/108260/>

- the obligation to indicate in the lists certain engineering products which are required for the project;
- the examination of the investment projects in this registry and the authorisation to purchase certain imported engineering products necessary for these investment projects by the Government Import Substitution Commission without any clear, transparent, objective criteria apart from the apparent objective to substitute imported engineering products with domestic like-products.

The EU challenges this measure as such and also the instances of application by the Government Commission on Import Substitution and by any other relevant authority as applied.

This authorisation to purchase imported products is based *inter alia* on the following Russian legal acts:

- Federal Law of 18 July 2011 No. 223-FZ on procurement of goods, works and services by certain types of legal entities and in particular Article 3.1 of this law;
- Federal Law of 31 December 2014 No. 488-FZ on industrial policy of the Russian Federation and in particular Article 18(1);
- Government Decree of the Russian Federation No 1132 of 2014 on the Procedure for Maintaining the Register of Contracts Concluded by Customers Based on Procurement Results' (together with the 'Rules for Maintaining the Register of Contracts Concluded by Customers Based on Procurement Results')⁵;
- Government Decree of the Russian Federation No 1516 of 30 December 2015 on approval of the rules for selecting investment projects for inclusion on the register of investment projects and maintaining the register of such investment projects⁶;
- Government Decree of the Russian Federation No 1485 of 29 December 2015 on approving the rules for determining the unit prices of mechanical engineering products which are required for the implementation of investment projects by legal entities⁷;
- Government Decree of the Russian Federation No 1521 of 31 December 2015 on approving the criteria for assigning goods to mechanical engineering products and the unit prices of mechanical engineering products above which information on these products is included in the lists to be drafted by clients or legal entities of future requirements on mechanical engineering products required for the implementation of investment projects⁸;
- Government Decree of the Russian Federation No 785 of 4 August 2015 on the Government Commission for Import Substitution⁹;
- Governmental Order No 2744-r of 29 December 2015¹⁰;
- Governmental Order No 2781-r of 31 December 2015¹¹.

c. Minimum quotas for domestic products in procurement procedures of certain State related entities favouring Russian origin products

The Russian Federation has adopted quotas reserved for Russian-origin products in the context of the procurement of goods by State-owned enterprises, State-trading enterprises and other State-related entities. In particular, this measure requires for minimum shares of Russian-origin products as a percentage of the volume of the total purchased products on a yearly basis per client in a given

⁵ <http://government.ru/docs/all/93472/>

⁶ <http://government.ru/docs/all/105194/>

⁷ <http://government.ru/docs/all/105068/>

⁸ <http://government.ru/docs/all/105196/>

⁹ <http://government.ru/docs/all/102958/>

¹⁰ <http://government.ru/docs/all/105107/>

¹¹ <http://government.ru/docs/all/105223/>

year. The minimum share ranges between 1% and 90% of the purchases depending on the specific products and for many products these percentages will increase in 2022 and for the years "2023 and beyond" with 2021 being the base year. The Russian Federation currently applies these quotas on around 250 products. The EU challenges this measure insofar as it applies to non-governmental purchases by State-related entities that are not governmental agencies. The EU challenges this measure as such and also the instances of application as applied, notably the application of the minimum quotas by the relevant State-related entities and by relevant authorities.

This measure is based *inter alia* on the following Russian legal acts:

- Federal Law of 18 July 2011 No. 223-FZ on procurement of goods, works and services by certain types of legal entities, in particular Articles 3(5.2) and 3(8.1);
- Federal Law of 31 December 2014 No. 488-FZ on industrial policy of the Russian Federation and in particular Article 18(1);
- Resolution of the Government of the Russian Federation of 3 December 2020 No 2013 on the Mandatory Minimum Share of Procurement of Russian Goods and Their Attainment by Clients¹²;
- Resolution of the Government of the Russian Federation dated 30 April 2020 No. 616 Prohibiting the Use of Industrial Goods Originating from Foreign States in Procurement for State or Municipal Needs and Prohibiting the Use of Industrial Goods Originating from Foreign States and Works (Services) Performed (Rendered) by Foreign Persons in Procurement for the Needs of State Defence and National Security¹³;
- Resolution of the Government of the Russian Federation dated 10 July 2019 No. 878 on Measures for Stimulating Radio electronic Production on the Territory of the Russian Federation in Procurement of Goods, Works, or Services for State or Municipal Needs, Amending Resolution of the Government of the Russian Federation dated 16 September 2016 No. 925 and Repealing Certain Regulations of the Government of the Russian Federation¹⁴.

This request also covers any annexes or schedules thereto, amendments, supplements, replacements, renewals, extensions, implementing measures or any other related measures.

2. Legal basis for the complaint in respect of the Russian measures

The various measures described above appear to be inconsistent with Russia's obligations under the covered agreements, in particular:

a. Price preference rules for State-related entities

- Paragraph 2 of the Protocol on the Accession of the Russian Federation (WT/MIN(11)/24 WT/L/839) in conjunction with the Report of the Working Party on the accession of the Russian Federation to the WTO (WT/ACC/RUS/70, WT/MIN(11)/2), and in particular paragraphs 98, 99 and 1450 because, with this Russian measure, State-owned and State-controlled enterprises that conduct commercial activity do not make purchases (not intended for governmental use) in accordance with commercial considerations, including *inter alia* price, and enterprises of other WTO Members are not afforded adequate opportunity in conformity with customary business practice, to compete for participation in such purchases.
- Article III:4 of the GATT 1994 read in conjunction with Article III:8(a) GATT 1994, because by providing for a price preference to goods of Russian origins in competitive tenders and auctions for the procurement of goods for non-governmental purposes, by a wide range of

¹² <http://government.ru/docs/all/131253/>

¹³ <http://government.ru/docs/all/127752/>

¹⁴ <http://government.ru/docs/all/122858/>

State-related entities that are not governmental agencies including State-owned enterprises and State-trading enterprises, the Russian measure accords to imported products a treatment less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

- Article XVII:1 of the GATS, read in conjunction with Article XIII GATS, because by providing for a price preference to domestic services and service suppliers for the procurement of services for non-governmental purposes by State-related entities that are not governmental agencies, the Russian measure accords to foreign services and service suppliers a less favourable treatment than that accorded to its own like services and service suppliers.
- Article XVII:1(c) of the GATT 1994, read in conjunction with Article XVII:2 of the GATT 1994 because by providing that a wide range of State-related entities including State-owned enterprises and State-trading enterprises apply a price preference in favour of domestic goods for non-governmental use, this Russian measure prevents such entities from acting in a manner consistent with the general principles of non-discriminatory treatment prescribed by the GATT.

b. Import Substitution Government Commission procedure for foreign products

- Paragraph 2 of the Protocol on the Accession of the Russian Federation (WT/MIN(11)/24 WT/L/839) in conjunction with the Report of the Working Party on the accession of the Russian Federation to the WTO (WT/ACC/RUS/70, WT/MIN(11)/2), and in particular paragraphs 98, 99 and 1450 because, with this Russian measure, State-owned and State-controlled enterprises that conduct commercial activity do not make purchases which are not intended for governmental use in accordance with commercial considerations, including price, quality, availability, marketability, and transportation, and would not afford enterprises of other WTO Members adequate opportunity in conformity with customary business practice, to compete for participation in such purchases.
- Article III:4 of the GATT 1994, read in conjunction with Article III:8(a) GATT 1994, because the requirement to notify planned future purchases of certain foreign engineering products and to obtain prior authorization of such purchases by the Government Import Substitution Commission for non-governmental purposes, the measure accords to imported products a treatment less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
- Article XI of the GATT 1994, because by imposing a requirement of prior approval by the Government Import Government Commission for the purchase of certain imported goods, this Russian measure provides for a restriction on the importation of certain foreign products into its territory.
- Article XVII:1(c) of the GATT 1994, read in conjunction with Article XVII:2 of the GATT 1994 because by providing that purchases of certain engineering products for non-governmental use of a wide range of State-related entities including State-owned enterprises and State-trading enterprises depend on the authorisation of the Government Import Substitution Commission, this Russian measure prevents such entities from acting in a manner consistent with the general principles of non-discriminatory treatment prescribed by the GATT.

c. Minimum quotas for domestic products in procurement procedures

- Paragraph 2 of the Protocol on the Accession of the Russian Federation (WT/MIN(11)/24 WT/L/839) in conjunction with the Report of the Working Party on the accession of the Russian Federation to the WTO (WT/ACC/RUS/70, WT/MIN(11)/2), and in particular paragraphs 98, 99 and 1450 because, with this Russian measure, State-owned and State-controlled enterprises that conduct commercial activity do not make purchases (not intended for governmental use) in accordance with commercial considerations, including availability, and enterprises of other WTO Members are not afforded adequate opportunity in conformity with customary business practice, to compete for participation in such purchases.

- Article III:4 of the GATT 1994, read in conjunction with Article III:8 of the GATT of 1994, because, by requiring Russian State-owned enterprises, State-trading enterprises and other State-related entities that are not governmental agencies, for the procurement of goods for non-governmental purposes, to purchase certain quantities of products of Russian origin in their procurement activities, the measure accords to imported products a treatment less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.
- Article XVII:1(c) of the GATT of the 1994, read in conjunction with Article XVII:2 of the GATT 1994, because by requiring that State-owned enterprises, State-trading enterprises and other State-related entities purchase certain quantities of products of Russian origin for non-governmental use, the Russian measure provides for a discriminatory treatment of goods of foreign origin compared to goods of Russian origin.

The various measures by the Russian Federation relating to procurement practices of State-related entities identified in this request appear to nullify or impair the benefits accruing to the European Union directly or indirectly under the covered agreements.

The European Union reserves the right to address additional measures and claims, including under other provisions of the covered agreements, regarding the above matters during the course of the consultations.
