



Brussels, 3.7.2019
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2019/0147 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Joint Committee established under the Agreement between the European Union and Japan for an Economic Partnership as regards the adoption of the List of Arbitrators

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Joint Committee set up by the Agreement between the European Union and Japan for an Economic Partnership, in connection with the envisaged adoption of the List of individuals who are willing and able to serve as arbitrators.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Union and Japan for an Economic Partnership

The Agreement between the European Union and Japan for an Economic Partnership ('the Agreement') aims to liberalise and facilitate trade and investment, as well as to promote a closer economic relationship between the Parties.

The Agreement was concluded by the Council of the European Union on 20 December 2018 after ratification by the European Parliament on 12 December 2018. The Agreement entered into force on 1 February 2019.

2.2. The Joint Committee

Article 22.1 (1) of the Agreement establishes the Joint Committee comprising representatives of both Parties. All decisions and recommendations of the Joint Committee shall be taken by consensus and may be adopted either by meeting in person or in writing (Article 22.2 (3)).

Pursuant to subparagraph 4(f) of Article 22.1 of the Agreement, the Joint Committee has adopted at its first meeting on 10 April 2019 the Rules of Procedure of a Panel and the Code of Conduct for Arbitrators as referred to in Article 21.30 in the Chapter on Dispute Settlement.

2.3. The envisaged act of the Joint Committee

Pursuant to paragraph 1 of Article 21.9, the Joint Committee shall also establish a list of at least nine individuals who are willing and able to serve as arbitrators ('the envisaged act').

Such a decision by the Joint Committee should have been made in principle at its first meeting pursuant to paragraph 2 of Article 22.1 of the Agreement. It can however also be made in writing, pursuant to paragraph 3 of Article 22.2 of the Agreement.

Pursuant to paragraph 1 of Article 21.9 the list shall be composed of three sub-lists: a sub-list for each Party and a sub-list of individuals who are not nationals of either Party and who shall act as the chairperson of the panel. Each sub-list shall include at least three individuals. For the establishment or an update of the sub-list of chairpersons, each Party may propose up to three individuals.

A draft list of fifteen individuals who are willing and able to serve as arbitrators has been prepared between the parties.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

This proposal for a Council Decision establishes the position to be taken on the Union's behalf in the Joint Committee set up by the Agreement between the European Union and Japan for an Economic Partnership with regard to the adoption of the List of individuals who are willing and able to serve as arbitrators.

A draft list of fifteen individuals who are willing and able to serve as arbitrators has been prepared between the parties. The list meets the requirements of paragraph 1 of Article 21.9 of the Agreement, whereby each sub-list shall include at least three individuals. The sub-list for the EU includes four individuals, the sub-list for Japan includes five individuals and the sub-list of jointly agreed chairpersons includes six individuals.

The adoption of these documents is essential for rendering the Agreement's provisions in Chapter 21 (Dispute Settlement) operational and hence for ensuring a smooth implementation of the Agreement.

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.'*

The concept of *'acts having legal effects'* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *'capable of decisively influencing the content of the legislation adopted by the EU legislature'*¹.

4.1.2. Application to the present case

The Joint Committee is a body set up by an agreement, namely the Agreement between the European Union and Japan for an Economic Partnership.

The act which the Joint Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 102 of the Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is 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 taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 TFEU.

¹ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207 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 Article 207(3) and 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) The Agreement between the European Union and Japan for an Economic Partnership ('the Agreement') was concluded by the Union by Council Decision (EU) 2018/1907 of 20 December 2018² and entered into force on 1 February 2019. Pursuant to Article 22.1(4) of the Agreement, the Joint Committee shall ensure that this Agreement operates properly and effectively.
- (2) Article 21.9(1) of the Agreement foresees that the Joint Committee during its first meeting establishes a list of at least nine individuals who are willing and able to serve as arbitrators. Pursuant to paragraph 3 of Article 22.2 of the Agreement, decisions of the Joint Committee may be adopted also in writing.
- (3) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the envisaged decision will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Joint Committee established under the Agreement between the European Union and Japan for an Economic Partnership with regard to the adoption of the List of Arbitrators shall be based on the draft decision of the Joint Committee attached to this Decision.

² OJ L 330, 27.12.2018, p. 1.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*