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2026/0127 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Trade Committee set up by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the revision of the list of individuals who are willing and able to serve as arbitrators in accordance with Article 14.18 of the Agreement and the revision of the list of experts who are willing and able to serve as panellists in accordance with Article 13.15 of the Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Decision establishing the position to be taken on behalf of the European Union in the Trade Committee set up by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (hereinafter referred to as "Agreement"), as regards the envisaged adoption of two decisions of the Trade Committee concerning the revision of the list of individuals who are willing and able to serve as arbitrators in accordance with Article 14.18 of the Agreement (general dispute settlement procedure) and the revision of the list of experts who are willing and able to serve as panellists in accordance with Article 13.15 of the Agreement (dispute settlement procedure under the trade and sustainable development provisions).

2. CONTEXT OF THE PROPOSAL

2.1. The Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part

The Agreement, which was provisionally applied since July 2011 and entered into force on 13 December 2015, aims to liberalize and facilitate trade in goods and services between the Parties to the Agreement (hereinafter referred to as "the Parties"); promote economic competition; mutually open government procurement markets; protect intellectual property rights; enhance global trade through barrier removal and encourage investment; commit to sustainable development within international trade practices; and promote foreign direct investment without compromising environmental, labour, or health and safety standards. In case of disputes between the Parties, the Agreement foresees specific dispute settlement proceedings to resolve the matter.

2.2. The Trade Committee

The Trade Committee is established pursuant to Article 15.1 of the Agreement and has decision making powers under the framework of the Agreement.

2.3. The envisaged act of the Trade Committee and the Trade and Sustainable Development Committee

The Trade Committee is envisaged to adopt two Decisions ('the envisaged acts') either during its next meeting or through a written procedure, whichever is sooner.

The purpose of the envisaged acts is to update the lists of individuals who are willing and able to serve as arbitrators or panellists in accordance with Articles 14.18 and 13.15 of the Agreement.

The envisaged acts will become binding on the Parties in accordance with Articles 14.18 and 13.15 of the Agreement, which provide for the establishment of the two lists.

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

The Trade Committee is established pursuant to Article 15.1 of the Agreement and has decision making powers under the framework of the Agreement.

Pursuant to Article 14.18 of the Agreement the Trade Committee is to establish a list of 15 individuals to serve as arbitrators. On 23 December 2011, the EU-Korea Trade Committee

adopted Decision No 2¹ establishing a list of 15 individuals that may serve as arbitrators in the arbitration panel procedures pursuant to Article 14.18 of the Agreement. The Parties have expressed their wish to replace some of the Korean nationals, nationals of the Member States of the European Union and non-nationals serving as chairs on the list of arbitrators. In order for this amendment to take effect, the revised list of individuals should be approved by the EU-Korea Trade Committee.

Pursuant to Article 13.15 (3) of the Agreement, the Parties shall agree on a list of at least 15 persons willing and able to serve as panellists with regard to matters arising under Chapter 13 of the Agreement (Chapter on trade and sustainable development) and who have expertise in the issues covered by that Chapter. The list was first established on 27 June 2012 through the Decision No 2/2012² of the EU-Korea Committee on Trade and Sustainable Development, establishing a list of 18 experts that may serve as panellists. The list has been last revised in 2019 through Decision No. 1/2019³ of the same Committee. The Parties have expressed their wish to replace some of the non-nationals serving as chairs on the list of experts.

In case of a dispute, the Parties will consult with a view to agreeing on the arbitrators who would sit on an arbitration panel. Ensuring that the two lists are at all times updated is therefore essential in ensuring that the dispute settlement procedures under the Agreement are effectively available.

The attached proposal constitutes the proposal for a legal instrument approving the position that the European Union will be taking in the Trade Committee on the above mentioned two issues.

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’*⁴.

4.1.2. Application to the present case

The Trade Committee is a body set up by the Agreement.

¹ Decision No 2 of the EU-Korea Trade Committee of 23 December 2011 on the establishment of a list of arbitrators referred to in Article 14.18 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

² Decision No 2/2012 of the EU-Korea Committee on Trade and Sustainable Development of 27 June 2012 on the establishment of a Panel of Experts referred to in Article 13.15 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

³ Decision No 1/2019 of the EU-Korea Committee on Trade and Sustainable Development of 30 September 2019 on a revised list of experts willing and able to serve as panellists in accordance with Article 13.15 of the Agreement.

⁴ 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.

The act which the Trade Committee is called upon to adopt constitutes an act having legal effects.

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 common commercial policy.

Therefore, the substantive legal basis of the proposed decision is first subparagraph of Article 207(4) TFEU.

4.3. Conclusion

The legal basis of the proposed Decision should be first subparagraph of Article 207(4) TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Trade Committee will amend the existing lists of individuals who are willing and able to serve as arbitrators in accordance with Article 14.18 of the Agreement and the list of experts willing and able to serve as panellists in accordance with Article 13.15 of the Agreement, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

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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 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 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, ('the Agreement') was concluded by the Union by Council Decision of 6 October 2010⁵ and was provisionally applied since July 2011 and entered into force in December 2015.
- (2) Pursuant to Article 14.18 of the Agreement, the Trade Committee shall establish a list of 15 individuals who are willing and able to serve as arbitrators in possible disputes between the Parties. On 23 December 2011, the EU-Korea Trade Committee adopted Decision No 2⁶ establishing a list of 15 individuals that may serve as arbitrators in the Panel procedures pursuant to Article 14.18 of the Agreement.
- (3) The Parties have expressed their wish to replace some of the Korean nationals, nationals of the Member States of the European Union and non-nationals serving as chairs on the list of arbitrators. In order for this amendment to take effect, the revised list of individuals should be approved by the EU-Korea Trade Committee.
- (4) Pursuant to Article 13.15(3) of the Agreement, the Parties shall establish a list of at least 15 persons willing and able to serve as panellists with regard to matters arising under Chapter 13 of the Agreement (Chapter on trade and sustainable development) and who have expertise in the issues covered by that Chapter. On 27 June 2012, the EU-Korea Committee on Trade and Sustainable Development adopted Decision No 2/2012⁷ establishing a list of 18 experts that may serve as panellists. This list has been last revised in 2019 through Decision No. 1/2019⁸ of the same Committee.

⁵ OJ L 127, 14.5.2011, p. 6.

⁶ Decision No 2 of the EU-Korea Trade Committee of 23 December 2011 on the establishment of a list of arbitrators referred to in Article 14.18 of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

⁷ Decision No 2/2012 of the EU-Korea Committee on Trade and Sustainable Development of 27 June 2012 on the establishment of a Panel of Experts referred to in Article 13.15 of the Free Trade

- (5) The Parties have expressed their wish to replace some of the non-nationals serving as chairs on the list of experts. In order for this amendment to take effect, the revised list of individuals should be approved by the EU-Korea Trade Committee.
- (6) The Trade Committee is to adopt the updated lists of arbitrators and experts either during its next meeting or through a written procedure, whichever is sooner.
- (7) It is appropriate to establish the position to be taken on the Union's behalf in the Trade Committee, as the decisions will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the European Union in the Trade Committee, set up by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the revised list of individuals who are willing and able to serve as arbitrators in accordance with Article 14.18 of the Agreement shall be based on the draft decision of the Trade Committee attached in Annex 1 to this Decision.

Article 2

The position to be taken on behalf of the European Union in the Trade Committee, set up by the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, as regards the revised list of experts willing and able to serve as panellists in accordance with Article 13.15 of the Agreement shall be based on the draft decision of the Trade Committee attached in Annex 2 to this Decision.

Article 3

Minor changes to the draft Decision may be agreed to by the representatives of the Union in the Trade Committee without further decision of the Council.

Article 4

After its adoption, the Decision of the Trade Committee shall be published in the *Official Journal of the European Union*.

Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part.

⁸ Decision No 1/2019 of the EU-Korea Committee on Trade and Sustainable Development of 30 September 2019 on a revised list of experts willing and able to serve as panellists in accordance with Article 13.15 of the Agreement.

Article 5

This Decision is addressed to the Commission and shall enter into force on the date of its adoption.

Done at Brussels,

*For the Council
The President*