



Council of the
European Union

Brussels, 11 October 2018
(OR. en)

13043/18

**Interinstitutional File:
2018/0346(NLE)**

**COEST 195
WTO 258**

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	10 October 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2018) 672 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union within the Association Committee in Trade configuration established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

Delegations will find attached document COM(2018) 672 final.

Encl.: COM(2018) 672 final



Brussels, 10.10.2018
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2018/0346 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the Association Committee in Trade configuration established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf within the Association Committee meeting in trade configuration in connection with the envisaged adoption of a decision establishing the list of individuals to serve as arbitrators in dispute settlement proceedings.

2. CONTEXT OF THE PROPOSAL

2.1. The Association Agreement

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ('the Agreement') aims to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of the Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union. The Agreement entered into force on 1 September 2017.

2.2. The Association Committee in trade configuration

The Association Committee meeting in trade configuration as a specific configuration for addressing all issues related to Title IV (Trade and Trade-related Matters) of the Agreement is specified in Article 465(4) of the Agreement. Pursuant to Article 465(3) of the Agreement, the Association Committee has the power to adopt decisions in the cases provided for in the Agreement and in areas in which the Association Council has delegated powers to it. These decisions shall be binding upon the Parties, which shall take appropriate measures to implement them. The Association Committee shall adopt its decisions by agreement between the Parties.

2.3. The envisaged act of the Association Committee in trade configuration

The Association Committee in trade configuration shall adopt a decision establishing a list of individuals willing and able to serve as arbitrators in dispute settlement proceedings. The purpose of the envisaged act is to provide for a mechanism to resolve trade-related disputes between the Parties to the Agreement, concerning the application or interpretation of the trade part of that Agreement. The arbitration procedure set out in Chapter 14 of the Agreement provides that the complaining Party may request establishment of an arbitration panel to resolve a bilateral dispute.

Article 323 of the Agreement requires the Parties to prepare a list of possible arbitrators who are eligible and available for the composition of a panel. That list shall contain 15 qualified individuals who may serve as arbitrators. Accordingly, a draft list of arbitrators who are willing and able to serve on an arbitration panel has been discussed with the Government of Ukraine, providing for five candidate arbitrators from the Union, five candidate arbitrators from Ukraine and five third-country nationals who may serve as chairpersons of an arbitration panel.

The candidates proposed by the Union and by Ukraine and the selected chairpersons have specialised knowledge or experience of law and international trade as required by Article 323(2) of the Agreement. It can also be expected that the 14 listed individuals meet the requirement of independence in accordance with Article 323(3) of the Agreement and would

be able to comply with the Code of Conduct set out in Annex XXV of the Agreement if appointed as arbitrators by the Parties.

Ukraine could propose only 4 arbitrators for the list as the nominated fifth candidate died after the closure of the selection procedure. For the proposal of the fifth arbitrator Ukraine will have to launch a new selection procedure which may not be concluded within a short timeframe. To avoid further delays in the establishment of this list of possible arbitrators, which is essential for the functioning of the dispute settlement system of the Agreement, the best option is the earliest possible adoption of a list containing 14 individuals and to obtain the commitment by Ukraine to propose as soon as possible a fifth individual.

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

The position to be adopted on behalf of the Union aims at establishing a list of individuals who are willing and able to serve as arbitrators in dispute settlement proceedings, as provided for in the Agreement.

The decision constitutes the legal instrument establishing the Union's position to be adopted on its behalf in the Association Committee meeting in trade configuration.

This decision implements the Union's common commercial policy towards an Eastern Partner country, based on the provisions of the above-mentioned Association Agreement. The establishment of a list of arbitrators is a legal requirement for setting up the institutional structures which enable the Union and Ukraine to effectively address bilateral disputes concerning the application and interpretation of the trade title of the Agreement. It is consistent with the Union's approach to dispute settlement disciplines negotiated or implemented within free trade agreements with other trade partners.

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 Association Committee is a body established by the Association Agreement. The decision the Association Committee shall adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 465(3) 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.

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

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis is Article 207 in conjunction with Article 218(9) TFEU

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to ensuring the implementation of the Union's common commercial policy.

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

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

It is envisaged to publish the Decision of the Association Committee in the *Official Journal of the European Union* once adopted.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the Association Committee in Trade configuration established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) In accordance with Article 323(1) of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (the "Agreement"), not later than six months from the entry into force of the Agreement, the Association Committee meeting in trade configuration (the "Trade Committee), has to establish the list of individuals willing and able to serve as arbitrators in dispute settlement proceedings.
- (2) In accordance with Article 323(1) of the Agreement, the Union and Ukraine have proposed each their candidates willing and able to serve as arbitrators and have agreed on five third-country nationals who may serve as chairpersons to an arbitration panel.
- (3) Ukraine proposed only four individuals. The fifth Ukrainian candidate should be proposed by Ukraine as soon as possible.
- (4) To ensure the proper functioning of the Agreement, it is appropriate to establish a list of 14 individuals who are willing and able to serve as arbitrators in dispute settlement, without further delay.
- (5) The Decision of the Association Committee should be published after its adoption.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union in the Trade Committee of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part regarding the adoption of the list of individuals who are willing and able to serve as arbitrators, in accordance with Article 323(1) thereof, shall be based on the draft Decision of that Committee attached to this Decision.

Article 2

This Decision shall enter into force on the day of its adoption.

This Decision is addressed to the Commission.

The Decision of the Association Committee shall be published in the Official Journal of the European Union.

Done at Brussels,

*For the Council
The President*