



Brussels, 27.1.2021
COM(2020) 841 final/2

2020/0373 (NLE)

COM(2020) 841 final of 14.12.2020 downgraded on 27.1.2021

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the adoption of a decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement and on a reserve list of persons who are willing and able to serve as Union members of an arbitration panel under the Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The Commission proposes that the Council establishes the position to be adopted on the Union's behalf in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement') on a Joint Committee decision to amend that Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

The Withdrawal Agreement sets out the arrangements for the orderly withdrawal of the United Kingdom from the Union and Euratom. The Withdrawal Agreement entered into force on 1 February 2020.

2.2. The Joint Committee

The Joint Committee established under Article 164(1) of the Withdrawal Agreement comprises representatives of the Union and of the United Kingdom. It is co-chaired by the Union and the United Kingdom. Annex VIII to the Withdrawal Agreement lays down the rules of procedure of the Joint Committee. The Joint Committee meets at least once a year or at the request of the Union or the United Kingdom and it sets its meeting schedule and agenda by mutual consent.

The tasks of the Joint Committee are laid down in Article 164 of the Withdrawal Agreement and consist principally of:

- overseeing the implementation and application of the Agreement directly or through the work of the specialised committees reporting to it;
- adopting decisions and recommendations, including amendments to the Agreement in the cases provided therein;
- preventing problems and resolving disputes that may arise regarding the interpretation and application of the Agreement.

2.3. The envisaged act of the Joint Committee

In accordance with Article 171(1) of the Withdrawal Agreement, the Joint Committee shall establish, no later than by the end of the transition period, a list of 25 persons who are willing and able to serve as members of an arbitration panel. The Joint Committee shall also ensure that the list complies with the specific requirements established by the Withdrawal Agreement at any moment in time.

The purpose of the envisaged decision is to establish the list of persons who are willing and able to serve as members of arbitration panels under the Withdrawal Agreement.

The envisaged decision will become binding on the Parties in accordance with Article 166(2) of the Withdrawal Agreement. In accordance with Rule 9 of the Rules of Procedure, decisions adopted by the Joint Committee will specify the date at which they take effect.

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

The transition period foreseen under the Withdrawal Agreement expires on 31 December 2020. The vast majority of the Withdrawal Agreement provisions, including those on dispute settlement under Title III of Part Six, will enter into effect on 1 January 2021. It is necessary that a list of arbitrators be in place by 1 January 2021 in the event of a dispute on the interpretation of the Withdrawal Agreement, as from that moment on either party can refer disputes to binding arbitration.

The Union and the United Kingdom have agreed jointly on five persons to act as chairperson of the arbitration panel. The Union and the United Kingdom have proposed each 10 persons for the function of members of the arbitration panel.

The position of the Union should therefore be to support the adoption of a decision by the Joint Committee pursuant to Article 171(1) of the Withdrawal Agreement establishing a list of 25 persons willing and able to serve as arbitrators under the Agreement, in line with the draft decision attached to this proposal.

In addition, the Union has selected a reserve pool of 17 persons who can be contacted as needed by the Union when the Joint Committee will update the list of 25 persons in accordance with the last sentence of Article 171(1).

4. LEGAL BASIS

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 decision which the Joint Committee is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding on Parties in accordance with Article 166(2) 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.

The objective and content of the envisaged act relates to establishing the Union’s position on the list of persons who are willing and able to serve as members of arbitration panels under the Withdrawal Agreement. The conclusion of the Agreement was based on Article 50(2) of the Treaty on European Union.

The legal basis of the proposed decision should therefore be Article 50(2) of the Treaty on European Union, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the purpose of the decision of the Joint Committee is to establish a list of persons who are willing and able to serve as members of arbitration panels under the Withdrawal Agreement, it is appropriate to publish the decision of the Joint Committee in the Official Journal of the European Union after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 50(2) thereof,

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the ‘Withdrawal Agreement’) was concluded by means of Council Decision (EU) 2020/135¹ and entered into force on 1 February 2020.
- (2) Pursuant to Article 171(1) of the Withdrawal Agreement, the Joint Committee is to establish, no later than by the end of the transition period set under the Withdrawal Agreement, a list of 25 persons who are willing and able to serve as members of an arbitration panel. The Joint Committee is to ensure that the list complies with the requirements at any moment in time.
- (3) Pursuant to Article 171(2) of the Withdrawal Agreement, the list is to only comprise persons whose independence is beyond doubt, who possess the qualifications required for appointment to the highest judicial office in their respective countries or who are jurisconsults of recognised competence, and who possess specialised knowledge or experience of Union law and public international law. The list is not to comprise persons who are members, officials or other servants of the Union institutions, of the government of a Member State, or of the government of the United Kingdom.
- (4) The Union and the United Kingdom have jointly proposed five persons for the position of chairperson of the arbitration panel, and have each proposed ten persons for the position of member of the arbitration panel,
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee.

¹ Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Text with EEA relevance) (OJ L 29, 31.1.2020, p.1).

- (6) It is also appropriate to establish a reserve pool of experts who are willing and able to serve as arbitrators under the Withdrawal Agreement and who can be contacted in order to keep the list of 25 persons up to date from the Union side,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Joint Committee established by Article 164(1) of the Withdrawal Agreement shall be based on the draft Decision of the Joint Committee attached to this Decision in Annex I.

The position to be taken on the Union's behalf at the meeting of the Joint Committee taking the decision referred to in the above subparagraph shall be to support attaching to the minutes of that meeting a note setting out procedures to nominate in the future chairpersons in the list of chairpersons for the Withdrawal Agreement arbitration panel, as set out in Annex II.

Article 2

A reserve list of persons who may be proposed by the Union in the future to fill in vacancies in the list of 25 persons is established as set out in Annex III.

Article 3

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

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*