

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS WITHIN THE SCOPE OF THE UK/EU WITHDRAWAL AGREEMENT

COM(2021)594

12277/21

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 amendment of the decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement

Submitted by the Cabinet Office on 12 October 2021.

SUBJECT MATTER

1. The European Commission's proposal seeks a Decision from the Council of the EU ('Council') on the position to be adopted on behalf of the EU in the Withdrawal Agreement Joint Committee with regard to amending a Joint Committee Decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel in accordance with Article 171 of the Withdrawal Agreement.
2. In accordance with Article 171(1) of the Withdrawal Agreement, the Joint Committee established a list of 25 persons to serve as members of an arbitration panel which took effect on 1 January 2021. The EU and the UK each proposed ten persons and jointly agreed five persons to act as chairperson of the arbitration panel (see scrutiny history below). The Joint Committee is required to ensure that the list complies with the relevant requirements at all times.
3. Pursuant to Article 171(2) of the Withdrawal Agreement, the list must not 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. One of the persons on the list proposed by the EU, Ms. Tamara Čapeta, has been appointed as a member of a Union institution, namely as Advocate General to the Court of Justice of the EU, and therefore no longer fulfils the requirements of Article 171 of the Withdrawal Agreement.

5. On 23 September 2021, the European Commission proposed that the Council adopt a Decision that Ms. Čápetová be replaced by Mr. Ezio Perillo on the EU's list of 10 members.
6. A joint decision on the European Commission's proposed arbitrator replacement will be considered at the next Joint Committee and if adopted, will be binding.

SCRUTINY HISTORY

7. FCDO submitted an EM dated 4 January 2021 on *EU Document 13919/20: 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*. The European Scrutiny Committee published its Forty-first Report of Session 2019-21, Northern Ireland Protocol: Withdrawal Agreement Joint Committee Decisions and declarations of 17 December 2020 (HC 1343), on 9 April 2021. The Government response to this report was provided by Lord Frost (Minister of State at the Cabinet Office) on 11 June 2021. The Committee also wrote separately on 9 April to Lord Frost and Rt Hon. Dominic Raab MP (First Secretary of State and Secretary of State for Foreign, Commonwealth and Development Affairs) on the linked issue of the appointment of arbitration panel members under the UK/EU Withdrawal Agreement and the UK/EU Trade and Cooperation Agreement. The Ministers replied jointly on 19 May. The Government's EM was examined by the House of Lords European Affairs Committee and following correspondence with FCDO Ministers, completed scrutiny on 23 March 2021.

MINISTERIAL RESPONSIBILITY

8. The Minister of State in the Cabinet Office, Rt Hon Lord Frost CMG of Allenton has responsibility for the Withdrawal Agreement Joint Committee.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

9. The European Commission's proposal relates to the dispute settlement process as set out in Title III of Part Six of the Withdrawal Agreement. The Devolved Administrations issued no comments when consulted on the preparation of this explanatory memorandum.

LEGAL AND PROCEDURAL ISSUES

I. Legal basis.

The legal bases for the proposal are Article 166(2), with reference to Article 171 in the Withdrawal Agreement. The European Commission cites Article 166 of the Withdrawal Agreement but distinguishes it from their procedural legal bases, namely Article 50(2) of the Treaty on European Union and Article 218(9) of the Treaty on the Functioning of the European Union.

II. Voting procedure.

A qualified majority is required for the adoption of the proposal.

III. Timetable for adoption and implementation

We expect the Council to formally adopt the Commission's proposal on 15 October. The list will be amended following the adoption of the Decision at a forthcoming Joint Committee meeting.

POLICY IMPLICATIONS

10. There are no substantial policy impacts to the forthcoming Council Decision.

11. As background, the Joint Committee was established by Article 164(1) of the Withdrawal Agreement and is composed of representatives of both the UK and the EU. Its mandate is set out in Article 164 of the Withdrawal Agreement, and includes;

- supervising and facilitating the implementation and application of the Withdrawal Agreement;
- deciding on the tasks of the specialised committees and supervising their work;
- seeking appropriate ways and methods of preventing problems that might arise in areas covered by the Withdrawal Agreement or of resolving disputes that may arise regarding the interpretation and application of this Agreement;
- considering any matter of interest relating to an area covered by the Withdrawal Agreement;
- adopting decisions and making recommendations by mutual consent in respect of all matters for which the Withdrawal Agreement so provides and to make appropriate recommendations to the UK and the EU; and
- adopting amendments to the Withdrawal Agreement in the cases provided for in this Agreement.

12. The proposal relates to the dispute settlement procedure set out in Title III of Part Six of the Withdrawal Agreement. Under the dispute settlement procedure of the Withdrawal Agreement (Articles 167- 169), the UK and the EU must seek to resolve any disputes arising from the agreement through cooperation and entering consultations in the Joint Committee in good faith. Both parties should aim to reach a mutually satisfactory solution.
13. If a resolution is not reached in the Joint Committee, Parties can request the establishment of an arbitration panel which will comprise four ordinary members of a panel and one chairperson.
14. Alongside the list of persons to serve as members of an arbitration panel, the UK and EU separately publish their reserve lists to replace a person that no longer fulfils the requirements for being an arbitrator as set out in the Withdrawal Agreement.

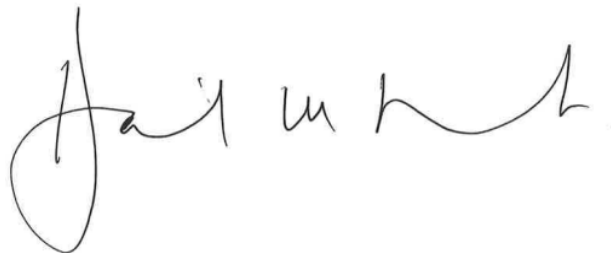
CONSULTATION

15. No external consultation on this Commission proposal is required.

FINANCIAL IMPLICATIONS

16. None.

MINISTERIAL NAME AND SIGNATURE

A handwritten signature in black ink, appearing to read 'Jay M. H. Frost', written in a cursive style.

The Rt Hon Lord Frost CMG

Minister of State in the Cabinet Office