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OC 625

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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NOTE

From : General Secretariat of the Council
To : Delegations
Subject : Directives for the negotiation of a Free Trade Agreement with Japan

Delegations will find attached the final version of the Directives for the negotiation of a Free Trade Agreement with Japan, as adopted at the Foreign Affairs Council (Trade) on 29 November 2012.

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DIRECTIVES FOR THE NEGOTIATION OF A FREE TRADE AGREEMENT WITH JAPAN

A. NATURE AND SCOPE OF THE AGREEMENT

1. The Agreement will exclusively contain provisions on trade and trade-related areas applicable between the parties.
2. The Agreement shall be ambitious, comprehensive, balanced, and fully consistent with World Trade Organisation (WTO) rules and obligations. The negotiations will be conducted and concluded with due regard to commitments under WTO.
3. The Agreement shall provide for the progressive and reciprocal liberalisation of trade in goods and services, investment, as well as rules on trade-related issues.
4. The Agreement shall include obligations in areas falling under the competence of sub-central authorities and entities of both Parties to the Agreement.

B. PROPOSED CONTENT OF THE AGREEMENT

PREAMBLE AND GENERAL PRINCIPLES

5. The preamble will recall that the partnership with Japan is based on common principles and values as reflected in the 1991 Joint Declaration and the 2001 Action Plan (2001 EU-Japan Action Plan “Shaping our common future”) and in successive declarations and action plans that have followed it. It will also refer, inter alia, to:
 - The principles and objectives of the Union's external action;
 - The commitment of the parties to sustainable development and the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, full and productive employment and decent work for all as well as the protection and preservation of the environment and natural resources;
 - The commitment of the parties to an agreement in full compliance with their rights and obligations arising out of the WTO;

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- The right of the parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate, provided that such measures do not constitute a means of unjustifiable discrimination or a disguised restriction of international trade;
- The objective that the agreement will create a new climate for economic relations between the two parties and above all for the development of trade and investment;
- The shared objective of the parties to taking into account the particular challenges faced by small and medium-sized enterprises in contributing to the development of trade and investment;
- The commitment of the parties to communicate with all relevant interested parties, including the private sector and civil society organisations.

1. OBJECTIVES

6. The Agreement shall confirm the joint objective of progressively and reciprocally liberalising substantially all trade in goods and services and establishment, in full compliance with WTO rules, notably Articles XXIV GATT and V GATS. Specific focus should be placed on the removal of NTBs hindering access of one Party to the other Party's market.
7. The Agreement will recognise that sustainable development is an overarching objective of the parties and that they will aim at ensuring and facilitating respect of international environmental and social agreements and standards. The Agreement should recognise that the parties shall not encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation, and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

The Agreement's economic, social and environmental impacts will be examined by means of an independent Sustainability Impact Assessment (SIA) that the Commission should undertake in parallel with the negotiations and which will be finalised ahead of the initialling of any final agreement. The SIA will aim to clarify the likely effects of the Agreement on sustainable development, as well as to propose measures (in trade or non-trade areas) to maximise the benefits of the agreement to prevent or minimise potential negative impacts.

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2. TRADE IN GOODS

8. Customs duties on imports and exports

The aim of the Agreement will be to dismantle customs duties, charges having an equivalent effect on both sides or other barriers on the imports of all goods originating in the other Party. The aim will be to ensure the highest possible degree of trade liberalisation. Tariffs on most lines should be eliminated upon entry into force of the Agreement, while respecting the necessary parallelism between dismantling of tariffs and non-tariff barriers, which is a prerequisite to achieve a balanced and mutually beneficial agreement. The number of sensitive products that may benefit from transitional periods not exceeding, in principle, seven years, should be kept to a minimum and specific provisions will cover the most sensitive products, for instance cars, for which longer transitional periods will be considered.

Negotiations on tariff reduction shall take place on the basis of the duties applied by the EU *erga omnes* on the date of launch of negotiations and of the duties applied by Japan *erga omnes* on the date of launch of negotiations. As from the first day of the start of the negotiations, the Parties shall agree that any increase in tariff duties will not be taken into account during the negotiations. The Agreement shall provide for a maximum of frontloading of full liberalisation commitments, including environmental goods and services. The Agreement should ensure consistency with the benefits accorded by Japan in negotiations with other major trading partners. The Agreement shall grant at least equivalent treatment to EU products compared to benefits accorded by Japan in current and future agreements with other parties.

All customs duties or taxes on exports, or any measures of equivalent effect, shall be prohibited and no new ones shall be introduced.

9. Import and export restrictions

The Agreement shall forbid any prohibition or restriction on trade between the Parties which is not justified by the general exceptions set out below, and shall contain enhanced disciplines on import and export licensing.

10. Non Tariff Barriers

The comprehensive and effective elimination of non-tariff barriers (NTBs), as a means of improving market access and creating a level playing field for European business in Japan, is one of the most important goals of the EU-Japan FTA negotiations.

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In order to achieve this objective, the Agreement shall include specific and substantive provisions and procedures, in key sectors of EU interest to effectively remove existing NTBs prevent the erection of new NTBs and ensure market access at a level greater than that delivered through horizontal rules.

Issues requiring particular attention include, but are not limited to, those identified in the sample list of NTBs attached to the Joint Report of the EU-Japan Scoping Exercise on Trade and Economic Matters.

In sectors where the removal of NTBs is of utmost importance to ensure market access, the Agreement should include specific NTB annexes wherever necessary or useful to achieve these objectives. Such sectors should include, for instance, automotive, railways, electrical and electronic products, medical devices, pharmaceuticals, chemicals and agri-food products.

In particular, as regards the automotive sector, the Parties will adopt the necessary UNECE regulations to ensure that motor vehicles, parts, systems, and components originating in one side will be accepted on the market of the other side without additional testing, certification, or marking requirements. In particular, a certificate of conformity issued by the exporting side will be considered sufficient proof of type approval.

The Agreement will contain provisions concerning the prohibition of tax discrimination. It should also envisage a mediation mechanism to facilitate the resolution of differences on specific NTBs issues.

The Agreement shall foresee a clear and strict parallelism between the reciprocal elimination of import duties by the European Union and the elimination of NTBs by Japan. This will mean that elimination of import duties will be preceded by a verification that NTBs have been effectively eliminated.

11. Rules of origin

A Protocol setting out the rules of origin and providing for administrative co-operation will be attached to the Agreement. Its content will take into account the standard preferential Rules of Origin of the EU and the interests of the European Union producers.

12. Anti-fraud measures

A clause in the Agreement concerning enhanced administrative co-operation will set out the procedures and appropriate measures that the parties may take where a lack of administrative co-operation in customs matters, irregularities or fraud are established.

13. Management of administrative errors

Provisions should also be included to examine jointly the possibility of adopting appropriate measures in case of errors committed by the competent authorities in the application of the preferential rules of origin.

14. Technical regulations, standards and conformity assessment procedures

Apart from reaffirming the Parties' obligations under the WTO Agreement on Technical Barriers to Trade, the Agreement shall also include additional provisions that facilitate access to each other's markets. In particular, the Agreement should contain general principles (such as proportionality, no undue restrictions, non-discrimination) and provisions that build on and complement WTO rules with the aims, *inter alia*, of increasing transparency, promoting good regulatory practice, adopting relevant international standards, seeking the compatibility and convergence of technical regulations on the basis of international standards, streamlining testing and certification requirements through, for example, the application of a risk-based approach to conformity assessment (including the application of self-certification in sectors where this is possible and appropriate) and promoting the use of accreditation. The Agreement will also aim at improving dissemination of information to importers and exporters.

The negotiation should explore the possibility of further cooperation in the area of standards, technical regulations and conformity assessment procedures.

The functioning of the existing Mutual Recognition Agreement should be reviewed with a view to enhancing its implementation and providing for more efficient cooperation. The Mutual Recognition Agreement could be amended to simplify its administration and procedures and expand its coverage in terms of products, requirements and conformity assessment procedures.

15. Sanitary and phytosanitary measures

The negotiations shall follow the provisions of the negotiating directives adopted by the Council on 20 February 1995 (Council document 4976/95). Furthermore, the Agreement will refer to a number of general principles of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures including proportionality, undue delays, transparency and non-discrimination, to be applied by the parties in their mutual trade, with the objective of facilitating access to each other's market while safeguarding public, animal and plant health. The Agreement should aim to reaffirm bilaterally the rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

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The Agreement should foresee a mechanism to prevent and eliminate unnecessary barriers to trade, to apply SPS rules smoothly and effectively by improving transparency and bringing certainty and consistency to the application of SPS measures. The Agreement should in particular seek to minimize the negative effects of SPS measures through regulatory cooperation, promoting the exchange of information in the use of international standards (Office International des Epizooties, International Plant Protection Convention, Codex Alimentarius) and confidence building as regards sanitary and phytosanitary measures applicable to trade, on issues such as pre-listing of food-producing establishments, recognition of disease-free and pest free health status of the parties and the principle of regionalisation for both animal and plant diseases, while maintaining essential minimal checks at the external border. The Agreement should also foresee appropriate arrangements to address market access issues and to facilitate the resolution of differences.

The Agreement should also explore possibilities of establishing the appropriate conditions for co-operation on animal welfare between the two sides.

16. General exceptions

The Agreement will include a general exception clause based on Articles XX and XXI GATT.

17. Safeguards

To maximise liberalisation commitments and in order to ensure any necessary protection, taking into account specificities of sensitive sectors, for instance cars, the Agreement will contain a bilateral safeguard clause by which either party may remove, in part or in full, preferences where a rise in imports of a product from the other party is causing or threatening to cause serious injury to its domestic industry.

18. Anti-dumping and countervailing measures

The Agreement will include a clause on anti-dumping and countervailing measures providing that any of the parties may take appropriate measures against dumping and/or countervailable subsidies in accordance with the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or the WTO Agreement on Subsidies and Countervailing Measures. The Agreement will also integrate commitments that go beyond WTO rules in this area in line with EU rules and previous agreements (e.g. public interest test and lesser-duty rule, additional consultations).

3. TRADE IN SERVICES, ESTABLISHMENT AND INVESTMENT PROTECTION

Trade in Services and Establishment

19. The Agreement shall provide for the progressive, comprehensive and reciprocal liberalisation of establishment in all economic sectors and of trade in services with the aim to ensure the highest level of market access opportunities consistent with the relevant WTO rules, in particular Article V of the GATS. This should be without prejudice to the possible exclusion of a limited number of services sectors from the liberalisation commitments. Audiovisual services shall not be covered by this chapter.

The services supplied in the exercise of governmental authority as defined by Article I.3 of the GATS shall be excluded from these negotiations.

20. The parties shall agree to establish a framework for establishment, which will be based on principles of transparency, non-discrimination, market access, and stability.

Within this framework, the parties shall agree to grant treatment no less favourable for the establishment in their territory of the companies, subsidiaries or branches of the other party than that accorded to their own companies, subsidiaries or branches, taking due account of the sensitive nature of certain specific sectors.

21. The negotiations shall address barriers to market access and limitations on national treatment across all economic sectors and modes of supply, taking due account of the sensitive nature of certain specific sectors; they shall also aim to establish regulatory disciplines needed to underpin and facilitate trade. The Agreement should establish the necessary framework for the negotiation of agreements providing for the mutual recognition of professional qualifications.
22. EU investors and service suppliers shall be granted at least parity with the treatment granted to investors and service suppliers of any third country as regards cross-border supply of services and establishment.

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23. The Agreement will not preclude the enforcement of exceptions on the supply of services justifiable under the relevant WTO rules (Articles XIV and XIVbis GATS). The Commission should also ensure that nothing in the Agreement prevents the Parties from applying their national laws, regulations and requirements regarding entry and stay, work and labour conditions provided that, in doing so, they do not nullify or impair the benefits accruing from the Agreement.

Investment Protection

24. Objective: the respective provisions of the agreement should:

- provide for the highest possible level of legal protection and certainty for European investors in Japan,
- provide for the promotion of the European standards of protection which should increase Europe's attractiveness as a destination for foreign investment,
- provide for a level playing field for investors in Japan and in the EU,
- build upon the Member States' experience and best practice regarding their bilateral investment agreements, including in the field of dispute settlement,
- and should be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner. The agreement should respect the policies of the EU and its Member States for the promotion and protection of cultural diversity.

The aim is to include into the investment protection chapter of the FTA areas of mixed competence, such as portfolio investment, dispute settlement, property and expropriation aspects.

25. **Scope:** the investment protection chapter of the agreement should cover a broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the agreement.

26. **Standards of treatment:** the negotiations shall aim to include in particular but not exclusively the following standards of treatment and rules:

- a) fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures,
- b) unqualified national treatment,
- c) unqualified most-favoured nation treatment,
- d) protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation,

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- e) full protection and security of investors and investments,
- f) other effective protection provisions, such as an "umbrella clause",
- g) free transfer of funds of capital and payments by investors,
- h) rules concerning subrogation.

27. **Enforcement:** the agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors a wide range of arbitration fora as currently available under the Member States' bilateral investment agreements (BIT's).
28. **Relationship with other parts of the agreement:** the chapter on investment protection should be a separate one, not linked to the market access commitments taken elsewhere in the agreement. These market access commitments may include, when necessary, rules concerning performance requirements.
29. All sub-central authorities and entities (such as provinces or municipalities) should effectively comply with the investment protection chapter of this agreement.

4. PUBLIC PROCUREMENT

30. The Agreement should aim for maximum ambition complementing the outcome of the negotiations of the revised Government Procurement Agreement in terms of coverage (procuring entities, sectors, thresholds, services contracts including in particular public construction). The Agreement will aim at enhanced mutual access to public procurement markets at all administrative levels (national, regional and local) in the traditional sector as well as in the field of public utilities to cover relevant undertakings operating in this field, ensuring treatment no less favourable than that accorded to domestic suppliers. The Agreement shall also include rules and disciplines to address non tariff barriers having a negative impact on each other public procurement market including those applying to tendering procedures, technical specifications, remedy procedures and existing carve outs including preferential treatment schemes for SME's with a view to streamlining, simplifying and increasing transparency of the procedures and increasing market access. The Agreement should include a proper consultation mechanism. Particular attention should be given to non-discrimination and reciprocal openings of the procurement of railways, urban railways and urban transport sectors following the arrangement concluded between the EU and Japan on 15 December 2011 in the margins the GPA negotiations. In particular, negotiations should aim at the effective elimination of all arbitrary technical barriers or permanent carve out impeding the access for EU suppliers, including the ones deriving from the GPA operational safety clause, and the full submission of procurement for railways, urban railways and urban transport to disciplines based on transparency and non-discrimination.

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5. TRADE AND COMPETITION

31. The Agreement shall include provisions on competition addressing competition rules and their enforcement.
32. The Agreement shall contain provisions on State aid. Furthermore, it should also address state monopolies, state enterprises and enterprises entrusted with special and exclusive rights.
33. The Agreement should include a commitment by both Parties to maintain comprehensive laws as well as to maintain an authority for the effective enforcement of such laws in a transparent and non-discriminatory manner.

6. INTELLECTUAL PROPERTY RIGHTS

34. The Agreement will include rules to ensure effective and adequate protection and enforcement of intellectual property rights (IPR) and should complement and build upon the TRIPs. It should address topics such as copyright and related rights, trademarks, geographical indications, designs, patent related items, liability of internet services providers, as well as civil, administrative and border enforcement measures. The Agreement shall contain provisions on geographical indications ensuring a high level of effective recognition and protection based on Article 23 TRIPS for agricultural products, namely wines, spirits and foodstuffs, and the implementation of such protection. These provisions should provide for ex officio protection for GIs, as well as address possible conflicts related to prior use, generic names and translations. No later than by the entry into force of the agreement, all GIs falling under the scope of the agreement shall be effectively protected. The Agreement should foresee cooperation between the EU and Japan on intellectual property, including through a regular Dialogue on Intellectual Property, to promote exchange of information on respective legal frameworks and legislative progress, exchange of experiences on enforcement, outreach activities and consultations in relation to third countries, as well as to support the implementation of the commitments taken in the Agreement.

7. CAPITAL MOVEMENT AND PAYMENTS

35. The Agreement will aim at full liberalisation of current payments and capital movements, and include a standstill clause. It will entail carve-out provisions (e.g. in case of serious difficulties for monetary and exchange rate policy, or for prudential supervision, or taxation), which will be in accordance with the provisions of the EU Treaty on the free movement of capital. Negotiations shall take into account the sensitivities attached to the liberalisation of capital movements not linked to direct investment.

8. CUSTOMS AND TRADE FACILITATION

36. The Agreement shall include provisions to facilitate trade between the parties, while ensuring effective controls. To this end it shall include commitments on rules, requirements, formalities and procedures of the parties related to import, export and transit. These commitments should complement the existing Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters and the Mutual Recognition of Authorised Economic Operators Programmes.
37. The Agreement should promote the effective and coherent implementation and application of international rules and standards in the field of customs and other trade-related procedures, including WTO provisions and World Customs Organisation instruments and, inter alia, the revised Kyoto Convention.

The Agreement shall include provisions to promote the recognition and exchange of best practice and experience, relating to particular areas of mutual interest. These areas may include issues such as modernisation and simplification of rules and procedures, standardised documentation, tariff classification, transparency, mutual recognition and inter-agency co-operation. The Agreement shall promote convergence in the trade facilitation field, building on relevant international standards and instruments as appropriate.

38. The Agreement shall promote effective and efficient IPR enforcement by customs authorities, in all situations where goods are under customs supervision and for a wide range of IPRs.
39. The Agreement should take account, in the provisions on trade facilitation, of the challenges faced by small and medium-sized enterprises.

9. TRADE AND SUSTAINABLE DEVELOPMENT

40. The Agreement will include commitments by both sides in terms of the social and environmental aspects of trade and sustainable development. The Agreement will include provisions to promote adherence to and effective implementation of internationally agreed standards and agreements in the social and environmental domain as a necessary condition for sustainable development. The Agreement will also include mechanisms to support the promotion of decent work through effective domestic implementation of International Labour Organisation (ILO) core labour standards, as defined in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and relevant Multilateral Environment Agreements, as well as enhancing co-operation on trade-related aspects of sustainable development, including climate change. It should also include provisions in support of internationally recognised standards of corporate social responsibility.

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The Agreement should promote a greater contribution of trade and investment to sustainable development. It should also address conservation, sustainable management and the promotion of trade in legally obtained and sustainable forest and fishery resources.

Consideration will also be given to measures to facilitate and promote trade in environmental goods, services and technology. The Agreement will foresee the monitoring of the implementation of these commitments and of the social and environmental impacts of the Agreement through a mechanism involving civil society, as well as one to address any disputes.

10. REGULATORY COOPERATION

41. The Agreement will promote regulatory cooperation, with a view to removing obstacles to trade and investment through adequate consultation mechanisms, including, where appropriate, the reduction of unnecessary regulatory differences, through greater alignment with international regulations and standards, so as to facilitate trade while ensuring quality and effectiveness of regulations. The Agreement should support the widespread use of impact assessment and public consultations including the evaluation of specific impact of draft regulations on imports and their proportionality.

The Agreement will foresee the inclusion of provisions on corporate law and corporate governance including those concerning cross border mergers with a view to promoting investment.

11. OTHER AREAS

42. The Agreement may include provisions regarding cooperation in other areas relating to the trade relationship.

12. TRANSPARENCY OF REGULATIONS

43. The Agreement will include provisions regarding:

- The commitment to consult stakeholders in advance of the introduction of regulations with an impact on trade;
- The publication of, and public consultations on, all general rules with an impact on international trade in goods and services;

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- The procedures to avoid trade problems arising from regulations at an early stage;
- Transparency as regards the administration, implementation and application of regulations having an impact on international trade in goods or services, including appropriate review procedures;
- The creation of enquiry points and one-stop shops designed to provide specific information and to respond promptly to questions and enquiries regarding the operation of the Agreement.

13. INSTITUTIONAL FRAMEWORK AND FINAL PROVISIONS

44. A clear legal and institutional link should be established between the Agreement and the Framework Agreement to be concluded. This should ensure external coherence in particular in respect of the existence, application, suspension and termination of the respective provisions.
45. The Agreement will set up a specific Trade Committee to monitor the implementation of the Agreement. Committees on specific areas may be established as appropriate and will operate under the framework of the Trade Committee. The Trade Committee shall report to the Joint Committee established under the Framework Agreement.
46. Twelve months after the beginning of the negotiations, the Commission will take stock of the implementation of the commitments taken by Japan on the elimination of NTBs in sectors of EU interest, as foreseen in the roadmaps on EU illustrative list of Non-Tariff Measures, in particular those relating to the car sector and on the Roadmap on railways and urban transport. The Commission will report in writing on the results of its assessment with a view to determining, in consultation with the Trade Policy Committee pursuant to Article 207 (3) of the Treaty on the Functioning of the European Union, whether the implementation of these commitments is fully satisfactory. If this has not been achieved, the Commission should decide, having regard to the views expressed by Member States, to suspend the negotiations.

An important element in this assessment will be the progress made on implementation of the "Roadmaps on EU illustrative List of Non-Tariff Measures" annexed to the final Scoping Report .

47. Dispute settlement

The Agreement will include effective and binding dispute settlement mechanism, which will ensure that the parties observe mutually agreed rules.

The Agreement will include provisions for flexible and rapid problem-solving such as a mediation mechanism. This mechanism would be without prejudice to the parties' rights and obligations or to dispute settlement provided for under the Agreement. Dispute settlement and mediation should apply to most of the provisions of the Agreement, excluding notably provisions relating to cooperation in various areas covered by the Agreement. A state of the art Investor-to-State dispute settlement system should be included in respect of the chapter on investment protection.

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