

Japan - EU EPA

Following on the heels of an trade agreement between the European Union and South Korean, which has seen exports from the EU to South Korea increase by 55% since 2012 along with imports from South Korea to the EU increase by 53% over the same period¹, Japan and the European Commission recently concluded years of negotiations and presented what is more than likely to be the final version of the EU-Japan Economic Partnership Agreement (EPA).

The EU-Japan EPA will enter into effect no later than March 29, 2019. This trade agreement will further open the Japanese and European Union markets to each other's goods and services while protecting standards that both regions wish to maintain. In this report, we examine some of the major aspects addressed by this EPA and more specifically, how Intellectual Property Rights will be affected thereby.

Together, the EU and Japan represent 8.6% of the world population and 28.4% of the worldwide GDP². According to the IMF, trade between the EU and Japan in 2016 accounted for 21% of all worldwide trade.

From the start of these negotiations, the EU has been keen on reducing or eliminating importation tariffs (estimated to cost European companies approximately €1 billion per year) imposed by Japan, as well as the costs for compliance with Japanese regulations (especially with regards to the automotive industry) which often differ from EU standards. The EU has also hoped that the practice of not allowing foreign firms to bid on construction or other government contracts can be eliminated in some cases.

European firms believe that tariffs and other impediments to free trade cause prices of products imported into Japan to be 10-30% higher and exports to Japan could grow by as much as

¹European Commission "A New EU Trade Agreement with Japan" December 8, 2017

²Source: 2016 data from the IMF and World Bank

25% should these barriers be reduced or eliminated outright³. It is estimated that this trade agreement will allow for an almost 200% increase of processed foods to Japan particularly with a focus on well-known foods and beverages specific to certain regions of Europe⁴.

This agreement does not give a European company carte blanche to operate in Japan above the laws and regulations which govern safety, worker health and rights, environmental standards, working conditions, etc., in Japan. The same applies to Japanese companies operating in the EU. Additionally, laws and regulations regarding the environment and public safety and health will not be affected on either side by this partnership agreement⁵.

Most-favored nation treatment is granted between the signatories for non-discriminatory protection of another country's intellectual property. Transparency with regards to the manner and regulations through which intellectual property is administered in each country is also deemed to be critical.

Intellectual Property

The EPA describes the manner in which intellectual property will be protected thereunder. First and foremost, intellectual property is defined as in TRIPs, specifically Articles 7 and 8 and the EPA is designed to comply with the Paris, Rome, Berne, and 1991 UPOV Conventions, the WIPO Copyright Treaty, the Budapest Treaty governing the Deposit of Microorganisms, the Madrid Agreement regarding Trademarks, and the Patent Cooperation Treaty, among numerous other treaties and agreements.

While a large part of the agreement focuses on copyright and artistry and the rights related thereto (i.e., performances, phonograms, and broadcasting), we will mainly cover the manner in which the agreement pertains to trademarks and patents.

³Copenhagen Economics, Assessment of barriers to trade and investment between the EU and Japan, 2009

⁴European Commission 12/8/2017

⁵*Ibid*

I. Trademarks

The FTA ensures that trademarks held by Japanese firms will be protected from use in the EU by third parties, etc., and vice versa, unless consent is granted by the registered trademark owner. As with domestic trademark protections, the acts of the manufacture, importation, and the presentation (also known as assignment or offering) of items for which a registered trademark exists by an unlicensed third party are deemed to be infringing acts.

Trademarks bearing geographical indications, often referred to as well known "regional brands", specifically, but not limited to alcoholic beverages and agricultural products, are also protected by this agreement as they would be protected domestically.

II. Patents

The agreement ensures that a patent owner (of a patent protecting a product or a process) is protected against a third party lacking the consent of the patent owner from making, selling, using, or importing for such purposes the product or the product manufactured by the process.

The agreement also provides for enhancing the utilization of search and examination results between the EPO and the JPO, ostensibly to assist applicants in obtaining results faster, promotes further patent law harmonization and recognizes the importance of developing a unitary patent system in the future.

Additionally, both the EU and Japan agreed to permit patent term extensions to compensate for the lost coverage time during the marketing approval process for patents related to pharmaceutical and agrichemical patents. The patent term extension is set to a maximum of five (5) years.

Japan would like to quickly ratify and implement the EPA in a manner that allows for the UK to be included after Brexit, in order to ameliorate the risks to Japanese companies operating

in the UK. However, the independent states of the European Union are not themselves independent signatories to the EU-Japan EPA, thus, as with just about everything, how Brexit will effect the EU-Japan agreement is unclear at this time.

Note: In late December 2018, the European Data Protection Board (EDPB) issued a declaration that Japan had not succeeded in providing a framework which would ensure the protection of personal data. The EDPB stated that a third country which might receive personal information from the Japanese side may have not been previously assessed for their own data security measures by the EDPB. In addition, as the system/redress means by which citizens of the EU may lodge complaints against a Japanese entity is only available for those who understand the Japanese language, it was deemed insufficient. Furthermore, while a system by which a party may consent to the use and sharing of their personal information exists on both the EU and the Japanese sides, the Japanese side has not clarified whether or how the parties may opt-out of previously acknowledged consent to share data.

Lastly, according to an analysis by the EDPB, some of the mass surveillance protocols operated in secret by the Japanese government (specifically, the Japanese Directorate for Signals Intelligence) may be in conflict with the regulations specified in the EPA.