

EU-Japan: how far does higher education feature in the recent agreements?

The EU hopes to conclude a series of trade deals in the near future. Its new agreement with Japan follows hard on the heels of its deal with Canada (CETA),¹ which is now being provisionally implemented.

This **briefing note** summarises three developments which bring European and Japanese higher education closer together:

1. **The EU-Japan strategic partnership agreement**
2. **The EU-Japan policy dialogue on education, culture and sport**
3. **The EU-Japan economic partnership agreement (JEEPA)**

EUA opposes the inclusion of higher education in trade deals

In 2015, the EUA Board and Council resolved that ‘higher education benefits individuals, society and the world at large in ways that are not easily quantifiable. It is a public responsibility to which all citizens have right of access and not a commodity to be transacted by commercial interests on a for-profit basis. It should not be subject to international trade regimes.’²

1. The EU-Japan strategic partnership agreement³

1.1 The strategic partnership agreement (SPA) signed in July features **shared commitments** to human rights, international law, multilateralism, peace and security. The EU and Japan declare their support for the UN, UNESCO, the International Criminal Court, the International Labour Organisation, the Nuclear Non-Proliferation Treaty and the Paris Agreement on climate change.

1.2 They also make commitments on **research and education**. Article 14 promises enhanced cooperation on science, technology and innovation. Article 40 encourages, ‘where appropriate, cooperative activities in the areas of education, youth and sport, such as joint programmes, exchanges of persons, and exchange of knowledge and experiences’. The Agreement is subject to formal ratification by both parties, but both these Articles have immediate effect.

2. The EU-Japan policy dialogue on education, culture and sport

2.1 To bolster the Agreement, the EU and Japan envisage a range of sectoral policy dialogues. EU Commissioner Navracsics duly met Japanese Minister Yoshimasa Hayashi on July 6. Together they launched the **EU-Japan Policy Dialogue on Education, Culture and Sport**.

1 See the EUA’s briefings posted at <http://www.eua.be/policy-representation/higher-education-policies/trade-agreements>

2 http://www.eua.be/Libraries/publication/EUA_Statement_TTIP.pdf?sfvrsn=2

3 https://www.mofa.go.jp/erp/ep/page22e_000707.html

Commission STATEMENT/18/4365 noted that ‘both leaders confirmed the importance of promoting international cooperation in higher education. Erasmus+ was highlighted as a flagship programme, offering an excellent tool to promote international mobility and allow students to develop essential transversal skills, while contributing to enhancing the relevance and quality of education.’⁴

2.2 The Statement also announced a **joint call for proposals** ‘to co-finance consortia of excellent European and Japanese universities to develop highly integrated master programmes and provide scholarships for talented students from Europe and Japan to study abroad’. The call will be published in the framework of the EU Erasmus Mundus Joint Master Degree action and the Japan Inter-University Exchange Project (IUEP). It will probably be in October that the EU will call for proposals for 2019.

Japan’s position in relation to ERASMUS and the framework research programmes

2.3 Japan is not an Associated Country in **Horizon 2020**. As a third country it can participate in certain actions, on condition that Japanese participants secure funding from the Japan Science and Technology Agency. In ERASMUS+, Japan is a partner country in the category of ‘other industrialised countries’, which also includes Australia, Brunei, Canada, Hong Kong, Korea, Macao, New Zealand, Singapore, Taiwan, and the USA.

The participation of third countries in **Horizon Europe**, the future framework research programme, depends on whether they satisfy the criteria laid down in EU legislation. These criteria are not yet finalised; all that is available so far is Article 12.1(d) of the Commission’s draft Regulation.⁵ The situation regarding the **successor programme to ERASMUS+** (i.e. from 2020 onwards) is slightly more complicated. The Commission’s draft Regulation⁶ proposes providing for two principal categories of participation. In principle, third countries would be able to come in fully if they satisfied conditions similar to those of Horizon Europe and if they also agreed to fulfil all the obligations imposed on EU Member States. Failing this, Article 17 suggests that their participation would be limited.

However, at the present time all this is largely hypothetical. It is too early to say precisely how third countries might be accommodated. Too early, too, to say whether Japan might express an interest, whether the EU might choose to follow up and what form of political and technical negotiations might then ensue.

3. The EU-Japan economic partnership agreement (JEEPA)

Background

3.1 Talks between the EU and Japan date back to 2013. At that time, Japan was anxious not to be outflanked by the EU’s agreement with Korea. The talks stalled when Japan shifted its focus to the Transpacific Partnership (TPP), but they regained momentum once the US had pulled out of TPP under the Trump administration. It was only in 2017 that the EU mandate⁷ was finally published, and then after strong representations by Commissioner Malmström, no doubt assisted by Dutch Greenpeace which leaked large tracts of the JEEPA draft.

4 http://europa.eu/rapid/press-release_STATEMENT-18-4365_en.htm

5 <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:435:FIN>

6 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A367%3AFIN>

7 <http://www.consilium.europa.eu/en/press/press-releases/2017/09/14/eu-japan-trade-negotiating/>

3.2 The JEEPA has been hailed as a major triumph by those who defend multilateralism and the international rule-based order in the face of American protectionism. It is certainly a major deal, involving two of the world's largest economies (totalling 30% of global GDP) and creating a free trade area of 600 million people. Its main liberalising thrusts are in the fields of agriculture and automotive industries, but there are a number of developments in the service sectors which are of interest to higher education institutions. These are summarised in the following sections of this briefing.

Ratification

3.3 In mid-July 2018 the JEEPA was signed by both parties. Following this political agreement, there may subsequently be some technical modifications, but the expectation is that the ratification process will be smooth. The aim is to complete it before Brexit at the end of March 2019 (see para.4.1). Unlike the CETA, the JEEPA is not a 'mixed agreement'. Ratification is by qualified majority in the European Council and by simple majority in the European Parliament; national and regional parliaments are not involved.

Trade in services

3.4 Chapter 8 of the JEEPA is constructed on the basis of a negative list, i.e. all services are included unless otherwise stated. As always in EU deals, there is a carve-out of the audio-visual sector. Certain transport services are also excluded, along with – as per the General Agreement on Trade in Services (GATS) – services provided 'in the exercise of government authority, neither on a commercial basis nor in competition with any other provider', i.e. 'public' services. These exclusions apply both to services delivered in-country by the other party and to services delivered across their international borders. In principle, there are otherwise no restrictions on market access. The negative list means that higher education services are included.

What of higher education services which are generally regarded as public? The GATS definition quoted above is insufficient to guarantee protection. DG Trade's JEEPA factsheet promises that the deal will 'maintain our right to keep public services public. Europeans will continue to decide for themselves how they want, for example, their healthcare, education and water delivered.'⁸ The European Parliament's rapporteur on the International Trade committee (INTA) – the Portuguese Socialist Pedro Silva Pereira – has said that the 'Parliament would not accept an agreement that would lower EU standards on food safety, health, environment and labour matters or that would not protect public services nor the right to regulate in the public interest'.⁹

Such protection is afforded by sets of 'non-conforming measures' which each party concedes to the other. Reservations which limit trade can be 'taken' (i.e. placed) by competent authorities at national, regional, and local levels. These reservations are specified in the schedules drawn up by the EU and Japan and attached to the text of the JEEPA in Annexes 8B-I (those which protect their existing measures) and 8B-II (those which will inform any future measures they may put in place).

The EU's reservations for existing measures concern privately-funded education services. Member States set conditions as boxed below. Unless indicated, they replicate those taken in the CETA.

8 <http://trade.ec.europa.eu/doclib/html/155684.htm>

9 Interview with Borderlex, June 26 2017

| EU MS | Reservations for existing measures |
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| AT | The provision of privately funded university level education services in the area of applied sciences requires an authorisation from the competent authority, the Council for Higher education (<i>Fachhochschulrat</i>). An investor seeking to provide an applied science study programme must have his primary business being the supply of such programmes, and must submit a needs assessment and a market survey for the acceptance of the proposed study programme. The competent Ministry may deny an authorisation where the programme is determined to be incompatible with national educational interests. The applicant for a private university requires an authorisation from the competent authority (the Austrian Accreditation Council). The competent Ministry may deny the approval if the decision of the accreditation authority does not comply with national educational interests. |
| BE | No reservation taken |
| BG | No reservation taken |
| CY | No reservation taken |
| CZ | No reservation taken [the reservation taken in the CETA has not been taken in the JEEPA] |
| DE | No reservation taken |
| DK | No reservation taken |
| EE | No reservation taken |
| EL | Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. However, Law 3696/2008 permits the establishment by European Union residents (natural or legal persons) of private tertiary education institutions granting certificates which are not recognised as being equivalent to university degrees. |
| ES | An authorisation is required in order to open a privately funded university which issues recognised diplomas or degrees. An economic needs test is applied. Main criteria: population and density of existing establishments. The procedure involves obtaining the advice of the Parliament. |
| FI | No reservation taken |
| FR | Nationality of a Member State of the European Union is required in order to teach in a privately funded educational institution. However, nationals of Japan may obtain an authorisation from the relevant competent authorities in order to teach in primary, secondary and higher level educational institutions. Nationals of Japan may also obtain an authorisation from the relevant competent authorities in order to establish and operate or manage primary, secondary or higher level educational institutions. Such authorisation is granted on a discretionary basis. |
| HR | No reservation taken |
| HU | No reservation taken |
| IE | No reservation taken |

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| IT | An authorisation is required in order to open a privately funded university which issues recognised diplomas or degrees. An economic needs test is applied. Main criteria: population and density of existing establishments. This is based on a three year programme and only Italian juridical persons may be authorised to issue state-recognised diplomas. |
| LT | No reservation taken |
| LU | No reservation taken |
| LV | No reservation taken |
| MT | Service suppliers seeking to provide privately funded higher or adult education services must obtain a licence from the Ministry of Education and Employment. The decision on whether to issue a licence may be discretionary. |
| NL | No reservation taken |
| PL | No reservation taken |
| PT | No reservation taken |
| RO | No reservation taken |
| SE | No reservation taken |
| SI | No reservation taken |
| SK | No reservation taken [the reservation taken in the CETA has not been taken in the JEEPA] |
| UK | No reservation taken |

Japan Reservations for future measures

1. Higher educational services supplied as formal education in Japan are required to be supplied by formal education institutions. Formal education institutions must be established by school juridical persons.¹⁰
2. “Formal education institutions” means elementary schools, lower secondary schools, secondary schools, compulsory education schools, upper secondary schools, universities, junior colleges, colleges of technology, schools for special needs education, kindergartens and integrated centres for early childhood education and care.
3. “School juridical person” means a non-profit legal person established for the purposes of supplying educational services under the laws and regulations of Japan.

¹⁰ EU higher education institutions contemplating establishment in Japan should refer, in due diligence, to Japan’s ‘existing measures’: Fundamental Law of Education (Law No.120 of 2006), Article 6; School Education Law (Law No. 26 of 1947), Article 2; and Private School Law (Law No. 270 of 1949), Article 3.

| EU MS | Reservations for existing measures |
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| EU | All educational services which receive public funding or State support in any form, and are therefore not considered to be privately funded. Where the supply of privately funded education services by a foreign provider is permitted, participation of private operators in the education system may be subject to concession allocated on a non-discriminatory basis. |
| AT | The supply of privately funded higher education services |
| BE | No reservation taken |
| BG | The supply of privately funded higher education services |
| CY | The supply of privately funded higher education services |
| CZ | The majority of the members of the board of directors of an establishment providing privately funded education services must be nationals of that country. |
| DE | No reservation taken |
| DK | No reservation taken |
| EE | No reservation taken |
| EL | No reservation taken |
| ES | No reservation taken |
| FI | No reservation taken |
| FR | No reservation taken |
| HR | No reservation taken |
| HU | No reservation taken |
| IE | No reservation taken |
| IT | No reservation taken [in the CETA, Italy reserved the right to require the establishment of higher education providers] |
| LT | No reservation taken |
| LU | No reservation taken |
| LV | No reservation taken |
| MT | The supply of privately funded higher education services |
| NL | No reservation taken |
| PL | No reservation taken |
| PT | No reservation taken |
| RO | The supply of privately funded higher education services |
| SE | Educational services suppliers that are approved by public authorities to provide education. This reservation applies to privately funded educational services suppliers with some form of State support, <i>inter alia</i> educational service suppliers recognised by the State, educational services suppliers under State supervision or education which entitles to study support. |
| SI | The majority of the members of the board of directors of an establishment providing privately funded secondary or higher education services must be Slovenian nationals. |

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| SK | The majority of the members of the board of directors of an establishment providing privately funded education services must be nationals of that country. EEA residency is required for providers of all privately funded education services other than post-secondary technical and vocational education services. An economic needs test may apply and the number of schools being established may be limited by local authorities. |
| UK | No reservation taken |

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| Japan | Reservations for future measures |
| No reservation taken | |

Mode 4

3.5 Mode 4 of the GATS covers the conditions set on the access of natural persons of one party to the territory of the other in the pursuit of trade. In common with other free trade agreements (FTAs), the JEEPA (Chapter 8, section D) lays down the agreed practice regarding ‘business visitors for establishment purposes, intra-corporate transferees, investors, contractual service suppliers, independent professionals and short-term business visitors’. Professional mobility between the EU and Japan is extensively liberalised. Interested higher education institutions should examine the detail set out in JEEPA Annexes 8B III-IV and C.

Professional qualifications

3.6 The CETA contains a separate chapter on the recognition of professional qualifications. It invites professional bodies in Canada and in the EU to agree in principle, whereupon they submit their case to a Mutual Recognition Agreement (MRA) committee. The MRA can come into effect if it is consistent with each party’s relevant legislation, as well as with Article VII of the GATS. The CETA provides non-binding guidelines on how to ascertain comparability. In respect, for example, of ‘equivalence’ and ‘substantial difference’, these are notably looser than in EU legislation.

Wisely, the JEEPA adopts a different procedure (Art.8.35). The Specialised Committee on Trade in Services receives a joint proposal from professional bodies, but then reviews (1) the extent to which EU and Japanese standards in the field concerned are converging, and (2) the ‘potential economic value’ of an MRA. If it is satisfied, it instructs the competent authorities in each party to negotiate the detail of mutual recognition. Unlike the CETA, this approach should ensure consistency with EU legislation.

Government procurement

3.7 Chapter 10 of the JEEPA concerns government procurement which, while it enables the delivery of a wide range of services, does not operate under the same principles as the commercial trade in services outlined above. It is based on the WTO’s Government Procurement Agreement (GPA),¹¹ the 2014 revision of which has been signed by 19 parties, including the EU and Japan.

The JEEPA therefore covers those services listed in the EU and Japan GPA schedules, as well as those added by JEEPA’s Annex 10.

11 https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

As far as Japan is concerned, higher and adult education were already listed in the GPA. The effect of JEEPA is to extend procurement possibilities to named sub-national and 'local independent administrative agencies', many of which are hospitals and universities. Japanese universities, therefore, may – once the JEEPA is ratified – invite tenders from EU service providers.¹²

The situation regarding the EU is different. Education does not figure in its GPA schedules. Annex 10 of the JEEPA, however, brings into the scope of government procurement 'bodies governed by public law that are hospitals or universities'; listed indicatively,¹³ by Member State, are categories of institutions or, in some cases, named institutions.

The inevitable question arises once again: what is a body governed by public law? For the relevant definition, it is necessary to go back to the EU's GPA schedule (Annex 2):

2. All contracting authorities which are bodies governed by public law as defined by the EU procurement directive.

a. A "body governed by public law" means any body:

i. established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; and

ii. having legal personality; and

iii. financed, for the most part, by the State, or regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies, or having an administrative, managerial or supervisory board; more than half of whose members are appointed by the State, regional or local authorities or by other bodies governed by public law.

The GPA Annex provides a long indicative list of potential contracting authorities which are bodies governed by public law. The list, set out by Member State, runs to 30 pages.

The upshot is that much of the EU's higher education sector will be able to tender for Japanese services and will have access to the Japanese procurement market at local level. EUA members interested in this development and unsure of their status should consult the indicative lists given in the relevant GPA and JEEPA Annexes and, if necessary, check with their national or regional regulatory bodies.

Data flows

3.8 The issue of the freedom of data flows between the EU and Japan has been at the heart of the negotiations. Researchers will be disappointed that the two parties were unable to enshrine full reciprocity in the JEEPA. On the other hand, the Parliament is insistent that there must be no encroachment on the EU's principles of data protection (the GDPR). Instead, in a sort of half-way house, the EU has judged Japan's data protection legislation to be 'adequate', thus permitting at least the provisional flow of data.

¹² JEEPA, Annex 10, Part 2, Section B, para.1b

¹³ JEEPA, Annex 10, Part 2, Section A, para.3

There is an appreciable difference between the free flow of data as enshrined in a bilateral FTA and the free flow of data granted unilaterally by an EU decision on adequacy. In the latter case and as matters now stand, Japan is at the mercy of the EU decision which can be reversed at any time, a situation which creates uncertainty for all traders involved. Inscribed in the JEEPA is a welcome commitment to review the situation three years after its coming into effect.

4. Post-scripts

4.1 While still a Member State of the EU, the UK is party to the JEEPA. Japanese sources have stated a willingness to 'roll-over' the contents of the JEEPA into a parallel Japan-UK FTA following **Brexit**, if conditions allow. One of these conditions, it would appear, is that the UK remains within the Customs Union. If it does, a Japan-UK bilateral treaty will be needed to regularise the roll-over. Such a treaty would not be an FTA; within the Customs Union, the UK would have no power to seal FTAs. But of course, regarding Brexit, nothing can be usefully predicted at this stage.

4.2 2 In the background to all trade considerations is the crisis in the **World Trade Organisation** (WTO). A number of factors are in play here: the historic difficulty in reaching significant agreement on multilateral (i.e. involving all WTO members) initiatives and the consequent proliferation of plurilateral (i.e. involving only some members) and bilateral deals; the refusal of the US to refresh the membership of the Appellate Body, effectively paralysing the WTO's dispute settlement mechanism; and the dramatic raising of tensions, by the US, with China, the EU, Canada and Mexico.

4.3 As a consequence of this, the EU is pondering extensive reform of the WTO, in an effort to safeguard the international rule-based order now threatened by American protectionism. An internal memo circulated in July raises various issues, one of which is the need to clarify the **definition of a public body**.¹⁴ The main concern here is the way in which Chinese state-owned enterprises operate in the global market economy. Higher education institutions are no doubt far from the forefront of the Commission's mind. Nevertheless, any eventual revision of the GATS definition of a public service will be of major interest to the higher education sector. If indeed this issue rises up the WTO agenda, it is something that governments and sectoral bodies will want to follow closely.

Please feel free to comment on and to forward this briefing note to other interested parties.

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14 Note that this does not concern government procurement; the EU Procurement Directive provides its own definition – see para.3.7 above.

The European University Association (EUA) is the representative organisation of universities and national rectors' conferences in 47 European countries. EUA promotes cooperation between universities and plays a crucial role in the Bologna Process and in influencing EU policies on higher education, research and innovation. Thanks to its interaction with a range of other European and international organisations, EUA ensures that the independent voice of European universities is heard, wherever decisions are being taken that will impact on their activities.

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