



Brussels, 6.10.2023  
COM(2023) 573 final

2023/0346 (NLE)

Proposal for a

## **COUNCIL DECISION**

**on the position to be taken on behalf of the European Union within the Cooperation Committee in Trade configuration established by Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part as regards a decision establishing a list of 15 persons who are willing and able to serve as arbitrators in dispute settlement proceedings**

## EXPLANATORY MEMORANDUM

### **1. SUBJECT MATTER OF THE PROPOSAL**

This proposal concerns a decision establishing the position to be taken on the Union's behalf in the Cooperation Committee in Trade configuration established pursuant to Article 269(5) of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, in connection with the envisaged adoption of a list of 15 individuals who are willing and able to serve as arbitrators pursuant to Article 196(1) of this Agreement.

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1. The EU-Kazakhstan Enhanced Partnership and Cooperation Agreement**

The Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part ('the Agreement') establishes an enhanced partnership and cooperation between the Parties within the limits of their respective competences, based on common interest and on the deepening of the relationship in all areas of its application.

The Agreement was concluded by the Council of the European Union on 20 January 2020 after obtaining the consent of the European Parliament on 12 December 2017. The Agreement entered into force on 1 March 2020.

#### **2.2. The Cooperation Committee in Trade configuration**

Article 269(5) of the Agreement establishes the Cooperation Committee in Trade configuration composed of representatives of the Parties. Article 269(4) of the Agreement stipulates that all decisions of the Cooperation Committee shall be taken by agreement between the Parties, following the completion of their respective internal procedures.

#### **2.3. The envisaged act of the Cooperation Committee in Trade configuration**

Pursuant to Article 196(1) of the Agreement, the Cooperation Committee in Trade configuration shall establish a list of at least 15 individuals who are willing and able to serve as arbitrators.

This list shall be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals who are not nationals of either Party and who may serve as chairperson of the arbitration panel.

A draft list fulfilling these requirements of 15 individuals who are willing and able to serve as arbitrators has been prepared between the parties and should be adopted by the Cooperation Committee in Trade configuration.

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

The position to be adopted on behalf of the Union should be to support the adoption of the list of arbitrators. The position should be based on the draft decision of the Cooperation Committee in Trade configuration attached to the proposed Council Decision establishing the position of the Union.

## **4. LEGAL BASIS**

### **4.1. Procedural legal basis**

#### *4.1.1. Principles*

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 concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’<sup>1</sup>.

#### *4.1.2. Application to the present case*

The Cooperation Committee in Trade configuration is a body set up by the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part.

The act which the Cooperation Committee in Trade configuration is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 196 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.

### **4.2. Substantive legal basis**

#### *4.2.1. Principles*

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

#### *4.2.2. Application to the present case*

The main objective and content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207 TFEU.

### **4.3. Conclusion**

The legal basis of the proposed decision should be Article 207 TFEU, in conjunction with Article 218(9) TFEU.

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<sup>1</sup> Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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## COUNCIL DECISION

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part<sup>2</sup> ('the Agreement'), entered into force on 1 March 2020.
- (2) In accordance with Article 196(1) of the Agreement, the Cooperation Committee in Trade configuration, as set out in Article 269(5) of the Agreement, is to establish, no later than 6 months after the entry into force of the Agreement, a list of at least 15 individuals to serve as arbitrators in dispute settlement proceedings.
- (3) A draft list of individuals to serve as arbitrators in dispute settlement proceedings has been discussed between the Parties. In accordance with Article 196(1) of the Agreement, that draft list provides for five candidate arbitrators proposed by the Union, five candidate arbitrators proposed by the Republic of Kazakhstan and five third-country nationals who may serve as chairpersons to an arbitration panel.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Cooperation Committee in Trade configuration with regard to the list of individuals to serve as arbitrators in dispute settlement proceedings,

HAS ADOPTED THIS DECISION:

### *Article 1*

The position to be taken on the Union's behalf within the Cooperation Committee in Trade configuration with regard to the establishment of a list of individuals to serve as arbitrators in

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<sup>2</sup> OJ L 29, 4.2.2016, p. 3–150.

dispute settlement proceedings shall be based on the draft Decision of that Committee attached to this Decision.

Minor technical corrections to the draft Decision may be agreed to by the representatives of the Union within the Cooperation Committee in Trade configuration without further decision of the Council.

*Article 2*

After its adoption, the Decision of the Cooperation Committee in Trade configuration shall be published in the Official Journal of the European Union.

*Article 3*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*