



EUROPEAN
COMMISSION

HIGH REPRESENTATIVE OF THE
EUROPEAN UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

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Joint Proposal for a

COUNCIL DECISION

**on the signing, on behalf of the European Union, and provisional application of the
Enhanced Partnership and Cooperation Agreement between the European Union and
the Republic of Kazakhstan**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The attached proposal constitutes the legal instrument for authorising the signature and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and the Republic of Kazakhstan (hereinafter referred to as ‘the Agreement’).

Relations between the European Union (EU) and the Republic of Kazakhstan (Kazakhstan) are currently based on the Partnership and Cooperation Agreement signed in Brussels on 23 January 1995, which entered into force in June 1999.

On 13 April 2011, the Council adopted a Decision authorising the European Commission to negotiate the Enhanced Partnership and Cooperation Agreement between the European Union and Kazakhstan. Negotiation of the Agreement began in June 2011, but Kazakhstan halted talks between September 2012 and October 2013, most likely as a result of its membership of the Customs Union with Russia and Belarus. Following the eighth round of negotiations held on 12 September 2014, the EU and Kazakhstan finalised the text of the Agreement. Both parties initialled the Agreement on 20 January 2015.

For the EU, the Agreement constitutes an important step towards increased political and economic involvement in Central Asia. By strengthening political dialogue and improving cooperation in a broad range of areas, it will provide the basis for more effective bilateral engagement with Kazakhstan.

The Agreement includes the EU’s standard political clauses on human rights, the International Criminal Court, weapons of mass destruction, small arms and light weapons and counter-terrorism. It also contains provisions on cooperation in the areas of health, the environment, climate change, energy, taxation, education and culture, employment and social affairs, science and technology and transport. In addition, it covers legal cooperation, the rule of law, money laundering and terrorist financing, organised crime and corruption. Provisions on trade are also included in the Agreement. These will ensure a better regulatory environment for businesses in Kazakhstan, and thus bring substantial economic benefits for EU businesses.

2. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES AND OF IMPACT ASSESSMENTS

The Council has been kept informed at all stages of the negotiations. It has been consulted in the Working Party on Eastern Europe and Central Asia and in the Trade Policy Committee.

The European Parliament has also been kept immediately and fully informed throughout the negotiations.

The European External Action Service and the Commission consider that the objectives set by the Council in its negotiating directives have been met, and that the draft Agreement can be submitted for signature.

3. LEGAL ELEMENTS OF THE PROPOSAL

Legal basis

The choice of the legal basis ‘must rest on objective factors amenable to judicial review, which include the aim and content of that measure’¹. The legal basis of a measure depends on its predominant purpose. Provisions that are ancillary to a principal purpose do not require a separate legal basis. Measures that do not have a single predominant purpose may, however, be founded on multiple legal bases², provided that the decision-making procedures entailed under each legal basis are compatible with one another.

As described in Article 2 ‘Aims of this Agreement’, the Agreement aims to establish a partnership involving more extensive cooperation between the parties, on the basis of common interest. It is designed to develop the relationship between the two parties in all areas of its application. Such cooperation is described as a "process between the Parties that contributes to international and regional peace and stability, and economic development and is structured around principles that the Parties reaffirm also by their international commitments notably under the UN and the OSCE".

As regards its content, the Agreement builds essentially on a three-pillar structure:

- *Political dialogue and cooperation in the field of foreign and security policy*: Title I ‘General principles and aims of this Agreement’ and Title II ‘Political dialogue: cooperation in the field of foreign and security policy’. Title II contains provisions on political dialogue, democracy and the rule of law, foreign and security policy, space security, serious crimes of international concern, conflict prevention and crisis management and counter-terrorism .
- *Trade and business*: Title III ‘Trade and business’ includes provisions on trade in goods, customs, technical barriers to trade, sanitary and phytosanitary matters, services and establishment, capital movement and payments, intellectual property, government procurement, raw materials and energy, trade and sustainable development, competition and trade dispute settlement.
- *Sectoral cooperation*: Title IV ‘Cooperation in the area of economic and sustainable development’, Title V ‘Cooperation in the area of justice, freedom and security’, Title VI ‘Other cooperation policies’, Title VII ‘Financial and technical cooperation’. These Titles include provisions on cooperation in a wide range of areas such as migration, the environment, taxation, transport, education, the information society, agriculture and rural development.

The aim and content of the Agreement indicates that the provisions of the Agreement fall within the scope of Article 37 TEU and Articles, 207 and 209³ TFEU.

¹ Case C-155/07, *Parliament v Council*, EU:C:2008:605, paragraph 34.

² Case C-490/10, *Parliament v Council*, paragraph 46 ‘With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases’.

³ The Republic of Kazakhstan is classified as an upper middle income country in the most recent Development Assistance Committee’s list of Official Development Assistance recipients (to be used for reporting on 2014, 2015 and 2016 flows), as mentioned in Article 1(1) of Regulation (EU) No 233/2014

Legal nature:

The High Representative and the Commission note that the legal bases for signing the Agreement confer power on the EU to enter into agreements with third parties in the areas covered by the Agreement. In particular:

- Article 37 TEU grants the EU the power to conclude agreements with third parties in the area of common foreign and security policy.
- Article 207 TFEU grants the EU the power to enter into agreements in the area of common commercial policy. In accordance with Article 3(1) TFEU, the EU has exclusive competence in this area.
- Article 209 TFEU grants the EU the power to conclude agreements with non-EU countries in the area of development cooperation policy.

Pursuant to the case law, the question whether a provision of an agreement “comes within the competence of the [Union] is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature.”⁴ Therefore, to the extent that the Treaties have attributed competence to the Union in a policy area, the Union may exercise such competence externally.

It is necessary to note that, pursuant to Article 3(2) TFEU, the Union shall also have exclusive competence for the conclusion of an international agreement “in so far as its conclusion may affect common rules or alter their scope.” The Court of Justice has held in a recent ruling that negotiations “may affect common rules or alter their scope” to the extent that “the content of the negotiations ... falls within an area covered to a large extent by common EU rules... Therefore those negotiations fall within the exclusive competence of the European Union”⁵. Recent case-law also clarifies that an analysis of competence, especially exclusive competence, must take into account not only the existing Union rules but also the “foreseeable future development [...] of those rules”.⁶

The Treaties have thus conferred power on the EU to act in all the areas covered by the Agreement.

of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-20 (OJ L 77, 15.3.2014, p. 44).

⁴ Case C-459/03 *Commission v. Ireland*, paragraph 93

⁵ Case C-114/12 *Commission v Council*, paragraph 102.

⁶ Opinion 1/13, paragraph 74 and Case C-66/13 *Green Network*, paragraph 33.

Other legal considerations

The Agreement sets up an institutional framework composed of the Cooperation Council, the Cooperation Committee and the Parliamentary Cooperation Committee (see Title VIII ‘Institutional framework’ and Title IX ‘General and final provisions’). It also introduces a procedure for settling disputes, to be used should one of the parties fail to fulfil its obligations under the Agreement.

Article 281 of the Agreement stipulates that the EU and Kazakhstan may provisionally apply the Agreement in whole or in part, in accordance with their respective internal procedures and legislation.

The Agreement is concluded for an unlimited period, and can be terminated at six months’ notice.

As of its entry into force, the Agreement supersedes the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part, signed on 23 January 1995.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, in particular Article 37 thereof,

Having regard to the Treaty on the Functioning of the European Union, in particular Articles 207 and 209, in conjunction with Article 218(5) and the second paragraph of Article 218(8) thereof,

Having regard to the proposal from the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 13 April 2011, the Council authorised the Commission to open negotiations with the Republic of Kazakhstan on an Enhanced Partnership and Cooperation Agreement.
- (2) Negotiations on the Enhanced Partnership and Cooperation Agreement were successful, and the Agreement was initialled on 20 January 2015
- (3) Article 281 of the Agreement provides for the provisional application in whole or in part of the Agreement before its entry into force.
- (4) The Agreement should therefore be signed on behalf of the EU and applied on a provisional basis, pending its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

1. The signing of the Enhanced Partnership and Cooperation Agreement between the European Union and the Republic of Kazakhstan is hereby approved on behalf of the European Union, subject to the conclusion of the said Agreement.
2. The text of the Agreement to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Agreement, subject to its conclusion, for the person(s) indicated by the negotiators of the Agreement.

Article 3

1. In accordance with Article 281 of the Agreement and subject to the notifications provided for therein, the Agreement shall be applied provisionally in whole between the Union and the Republic of Kazakhstan, pending its entry into force.
2. The date from which the Agreement is to be provisionally applied shall be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

Article 4

This Decision shall enter into force on the day following that of its adoption.

Done at Brussels,

For the Council
The President