



HIGH REPRESENTATIVE
OF THE 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 Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

On 10 November 2011, the Council adopted a Decision authorising the European Commission to negotiate a Cooperation Agreement on Partnership and Development ('CAPD') between the European Union and the Islamic Republic of Afghanistan. The negotiations were concluded on 29 April 2015 following the 4th round of negotiations held in Brussels. The CAPD was initialled on 2 July 2015 in Kabul.

On 13 January 2016, the HR and the Commission presented to the Council the Joint Proposal for Council Decisions on the signing and conclusion of the CAPD, as an agreement between the European Union and Afghanistan ('EU- only')¹. While agreeing with the substance of the Agreement, Member States in COASI unanimously expressed preference for a 'mixed' Agreement with provisional application.

This position has been confirmed formally by COREPER on 7 September 2016, which asked the Commission and the High Representative to revise the proposals accordingly to take into account mixity and provisional application. The change of the CAPD to 'mixed' and the insertion of new provisions on provisional application has thereafter been discussed and agreed with the Afghan side.

The CAPD will be the first contractual relationship between the Union and Afghanistan, confirming the EU's commitment to Afghanistan's future development during the 'decade of transformation' (2014-2024). It is the legal framework for the substantial EU-Afghanistan cooperation developed since 2001 and enshrined in the current EU Afghanistan Strategy 2014-2016, adopted by the Council in June 2014, as well as in the Multiannual Indicative Program 2014-2020 under the Development Cooperation Instrument. The CAPD will form the basis of EU-Afghan relations for the next ten years, and could be automatically extended for periods of 5 years.

The CAPD reflects the principles and conditions on which the EU - Afghanistan future partnership will be based (Title I and II). It includes the essential elements clauses on human rights and non-proliferation. The CAPD equally provides for the possibility of cooperation in a broad range of area, including development (Title III), trade and investment (Title IV) and justice and the rule of law (Title V). The latter comprises not only extensive clauses on the fight against organized crime, money laundering and counter-narcotics but also the cooperation on migration, with the explicit reference to conclude a readmission agreement. The CAPD also includes chapters on a number of specific areas for sectoral cooperation (Title VI), all confirming that the CAPD is about cooperation.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

Legal basis

According to settled case-law, the choice of the legal basis must rest on objective factors amenable to judicial review, which include the aim and content of that measure.

The aim of the Agreement, as described in Article 2 *Nature and Scope*, is to establish a partnership between the parties that rests on a multipillar approach, in order to strengthen dialogue and cooperation.

¹ see JOIN (2015) 35 final and JOIN(2015) 36 final and Council documents st 15503/15 and 15504/15.

The Agreement covers political cooperation (Title II), development cooperation (Title III), cooperation on trade and investment matters (Title IV), cooperation in matters of justice and home affairs (Title V), sectoral cooperation (Title VI) and regional cooperation (Title VII). In addition, the Agreement includes provisions on the institutional framework (Title VIII) and final provisions (Title IX).

A detailed analysis of the aim and content of the Agreement indicates that some of the provisions of the Agreement fall within the scope of the common foreign and security policy, and some other elements fall under the trade policy, as well as under the development cooperation policy of the European Union. The analysis further shows that neither of these elements can be regarded as ancillary to any of the other mentioned elements and none of the three mentioned elements can be clearly identified as the main component. Consequently, the proposal should be based on multiple legal bases, namely Article 37 TEU and Articles 207 and 209 TFEU.

Legal nature

From a legal point of view, the analysis of the scope of the CAPD indicates that the Treaties conferred power upon the EU to act in all areas falling under the scope of the CAPD. On the basis of this legal analysis, the HR and the Commission have initially proposed the draft agreement, for signature and conclusion, as an 'EU-only' agreement. From a political point of view, the HR and the Commission considered that the far shorter and much more predictable ratification procedure for the entry into force of the CAPD as an 'EU-only' agreement responded to the interests of the Union to proceed quickly at this crucial juncture in Afghanistan's transition. The expeditious entry into force of the CAPD could signal the Union's full commitment to Afghanistan's successful transition.

However, as stated above, Member States in the Council (COASI Working Groups on 13 January and 20 July 2016 and COREPER on 7 September 2016) have unanimously requested the Commission and the HR to turn the Agreement into a mixed one with provisional application. Following this position and to avoid long delays in the agreement's ratification process, the Commission and the HR have decided to adjust the agreement and their proposal for signing is to be complemented by a proposal for partial provisional application accordingly, to reflect mixity and provisional application.

The attached draft therefore proposes the signing of the Agreement as a mixed agreement. It also includes the provisional application of a number of provisions which would be usefully applied on a provisional basis between the EU and Afghanistan pending the entry into force of the Agreement.

Other legal considerations

The Agreement sets up an institutional framework composed of the Joint Committee (see Title VIII, Article 49 *Institutional framework*). The Joint Committee may set up special committees or working groups to assist it with the performance of its tasks. Article 54 *Fulfilment of obligations* also sets out a procedure for settling disputes, to be used should one of the parties fail to fulfil its obligations under the Agreement.

The Agreement is valid for an initial period of ten years from its entry into force. It will automatically be extended for subsequent consecutive periods of five years unless, six months prior to the expiry of its validity, one of the parties notifies the other in writing of its intention not to extend it. The Agreement can be terminated at six months' notice.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

The Council has been kept informed at all stages of the negotiations. It has been regularly consulted in the relevant Working Party on Asia.

The European Parliament has also been kept fully informed throughout negotiations and the High Representative of the Union for Foreign Affairs and Security Policy (High Representative) sent a copy of the initialled agreement to the President of the European Parliament on 20 July 2015.

The High Representative 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 and provisional application.

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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 subparagraph of Article 218(8) thereof,

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

Whereas:

- (1) In November 2011, the Council authorised the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations with the Islamic Republic of Afghanistan on a Cooperation Agreement on Partnership and Development².
- (2) Negotiations on the Cooperation Agreement were successful, and the Agreement was initialled on 2 July 2015 in Kabul.
- (3) Article 59 of the Agreement provides for the provisional application of the Agreement before its entry into force.
- (4) The Agreement should therefore be signed on behalf of the EU and applied in part on a provisional basis, pending the completion of the procedures for its conclusion,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part, is hereby approved on behalf of the Union, subject to the conclusion of the said Agreement.

The text of the Agreement is attached to this Decision.

² Council Decisions of 10 November 2011 (doc. st 16146/11 and st16147/11)

Article 2

1. Pending its entry into force, in accordance with Article 59 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and the Islamic Republic of Afghanistan, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy:
 - Article 2 '*General principles*';
 - Article 3 '*Political dialogue*';
 - Article 4 '*Human rights*';
 - Article 5 '*Gender equality*';
 - Title III '*Development cooperation*';
 - Title IV '*Cooperation on trade and investment matters*';
 - Article 28 '*Cooperation on migration*';
 - Title VII '*Regional cooperation*';
 - Title VIII '*Institutional framework*', to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement;
 - Title IX '*Final provisions*', to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement;
2. The date from which the parts of 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 3

The Council General Secretariat 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 4

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

Done at Brussels,

For the Council
The President