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European Union

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## PROPOSAL

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From: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 17 December 2015

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of  
the European Union

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No. Cion doc.: JOIN(2015) 35 final

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Subject: Joint Proposal for a COUNCIL DECISION on the signing, on behalf of the  
European Union, of the Cooperation Agreement on Partnership and  
Development between the European Union and the Islamic Republic of  
Afghanistan

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Delegations will find attached document JOIN(2015) 35 final.

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Encl.: JOIN(2015) 35 final



HIGH REPRESENTATIVE  
OF THE UNION FOR  
FOREIGN AFFAIRS AND  
SECURITY POLICY

Brussels, 17.12.2015  
JOIN(2015) 35 final

2015/0303 (NLE)

Joint Proposal for a

**COUNCIL DECISION**

**on the signing, on behalf of the European Union, of the Cooperation Agreement on  
Partnership and Development between the European Union and the Islamic Republic of  
Afghanistan**

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

The Decision proposed constitutes the legal instrument for authorising the signature of the Cooperation Agreement on Partnership and Development between the European Union and the Islamic Republic of Afghanistan ('the Agreement').

In July 2011, the Foreign Affairs Council expressed '*its willingness to negotiate an ambitious and balanced EU-Afghanistan agreement reflecting its long-term commitment to the country's development as well as the principles and conditions on which the future partnership will be based*'. It invited the EEAS and the Commission to draft a negotiation mandate for a cooperation agreement ahead of the Bonn Conference,<sup>1</sup> held on 5 December 2011. In November 2011, the Council adopted a Decision authorising the Commission and the High Representative to negotiate a Cooperation Agreement on Partnership and Development (CAPD) with Afghanistan<sup>2</sup>. Three rounds of negotiations were held over the year that followed (the last ending in November 2012). After a break of over two years, talks were resumed in 2015, with the new Afghan Government. The fourth and final round of negotiations took place in Brussels on 29 April 2015 and was concluded successfully. The two sides initialled the Agreement in Kabul on 2 July 2015 in the presence of President Ghani.

The Agreement is the first contractual relationship between the European Union and Afghanistan and underpins the EU's commitment to supporting Afghanistan's future development during its 'decade of transformation' agreed at the Bonn conference in 2011. By strengthening political dialogue and improving cooperation in a broad range of areas, the Agreement consolidates the European Union's engagement with Afghanistan. It acknowledges the results of the international conferences on Afghanistan held in Bonn, Chicago, Kabul, Tokyo and London.

The Agreement includes provisions on political dialogue and on cooperation in a broad range of areas. It draws on the EU's standard political clauses on human rights and the International Criminal Court, and includes commitments related to the rights of women and children. The Agreement builds on the principles of mutual accountability and reiterates the willingness of the parties to address shared concerns, including: 1) the fight against terrorism, international crime and illegal trafficking; 2) non-proliferation, disarmament and nuclear security; 3) Weapons of Mass Destructions (WMD); 4) Small Arms and Light Weapons (SALW); and 5) counter-narcotics. The provisions on cooperation cover the following sectors: infrastructure development, energy, transport, health, natural resources, tax, education and culture, employment and social affairs, science and technology, and environment and climate change. The Agreement also emphasises the importance of legal cooperation and affirms the parties' commitment to fighting organised crime, money laundering and corruption.

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<sup>1</sup> Foreign Affairs Council Conclusions of 18 July 2011 (doc. st12865/11)

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

## **2. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES 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.... ..

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.

## **3. LEGAL ELEMENTS OF THE PROPOSAL**

### ***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.

The Agreement covers political cooperation (Title II), development cooperation (Title III), cooperation on trade and investment (Title IV), cooperation in matters of freedom, security and justice (Title V), sectoral cooperation (Title VI) and regional cooperation (Title VII). In addition, the Agreement includes provisions on the institutional set-up (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***

The legal bases referred to above confer power on the EU to enter into agreements with third parties in the areas that the Agreement covers. 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 conclude agreements in the area of common commercial policy. Article 3(1) TFEU gives the EU 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 case-law, the question of whether a particular provision from 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*'. Therefore, and to the extent that the Treaties have attributed competence to the Union in a policy area, the Union may exercise such competence externally.

Pursuant to Article 3(2) TFEU, the EU also has 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 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"*. Recent case-law also clarifies that any analysis of a competence, especially an exclusive competence, must take into account not only the existing Union rules but also the *'foreseeable future development [...] of those rules"*.

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

Joint Proposal for a

## COUNCIL DECISION

### **on the signing, on behalf of the European Union, of the Cooperation Agreement on Partnership and Development between the European Union and the Islamic Republic of Afghanistan**

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 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 Development<sup>3</sup>.
- (2) Negotiations on the Cooperation Agreement were successful, and the Agreement was initialled on 2 July 2015 in Kabul.
- (3) The Agreement should therefore be signed on behalf of the EU, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The signing of the Cooperation Agreement on Partnership and Development between the European Union and the Islamic Republic of Afghanistan 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.

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<sup>3</sup> Council Decisions of 10 November 2011 (doc. st 16146/11 and st16147/11)

*Article 2*

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 3*

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

Done at Brussels,

*For the Council*

*The President*