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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Government of Malaysia, of the other part

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In November 2004, the Council authorised the Commission to negotiate individual Framework Agreements on Partnership and Cooperation (PCA) with Thailand, Indonesia, Singapore, the Philippines, Malaysia and Brunei. Negotiations with Malaysia started in February 2011 following an agreement to launch the negotiations in October 2010 by Commission President Barroso and Prime Minister Najib Razak. The negotiations were concluded following the 11th round of negotiations on 12 December 2015. Both sides initialled the PCA in Putrajaya on 6 April 2016.

The European External Action Service and the Commission services have been involved in the negotiating process. Member States have been consulted throughout the negotiating process at meetings of the relevant Council Working Parties. The European Parliament has been kept regularly informed throughout the negotiations.

The Commission considers that the objectives set by the Council in its directives on the negotiation of the Agreement have been met and that the draft Agreement can be submitted for signature and conclusion.

On 5 August 2016 the High Representative and the Commission presented to the Council the Joint Proposals for Council Decisions on the signing and conclusion of the PCA, as an agreement between the European Union and Malaysia ('EU-only'). While agreeing with the substance of the Agreement, Member States in COASI unanimously took the view that the Agreement should be signed and concluded as a 'mixed' Agreement. This position has been confirmed formally by COREPER on 17 March 2017, which asked the Commission and the High Representative to revise the proposal accordingly to take into account mixity and provisional application. The change of the PCA to 'mixed' and the insertion of new provisions on provisional application and the definition of Parties to reflect mixity was thereafter discussed and agreed in principle with the Malaysian negotiators.

On 4 July 2018, the High Representative and the Commission presented to the Council a new Joint Proposal for a Council Decision on the signing of the Framework Agreement (as a mixed agreement) and its provisional application. However, while agreeing on the mixity of the Agreement, Malaysia preferred not to apply the Agreement provisionally. Member States formally accepted not to apply the PCA provisionally in the COREPER meeting of 3 April 2019 and an agreement in principle was subsequently reached with the Malaysian negotiators using the 2016 initialled Agreement with the insertion of a new definition of Parties to reflect mixity.

It is important to note that the new Commission proposal comes following an exchange of letters between Chief Negotiators whereby it is clarified that the signature of the Agreement by the Government of Malaysia is made on behalf of Malaysia, as a whole, meaning both federal level and state level. By its signature the Government of Malaysia would be expressing the intention to bind the whole Malaysia, including States of Sabah and Sarawak. Following the entry into force of Agreement as stated in Article 58 of the Agreement, Malaysia as a whole would be bound by the Agreement.

The present proposal concerns the legal instrument that authorises the signing of the PCA as a mixed agreement without provisional application.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

2.1. The aim and content of the agreement

The PCA is the first-ever bilateral agreement between the EU and Malaysia and supersedes the current legal framework of the 1980 Cooperation Agreement between the European Economic Community and member countries of the Association of South-East Asian Nations.

The PCA contains legally binding commitments which are central to the EU's foreign policy, including provisions on human rights, non-proliferation, counter-terrorism, the International Criminal Court, migration and taxation.

The PCA broadens considerably the scope for mutual engagement in the economic and trade domain as well as justice and home affairs. The Agreement strengthens the cooperation across a wide spectrum of policy fields, including human rights, non-proliferation of weapons of mass destruction, counter-terrorism, the fight against corruption and organised crime, trade, migration, the environment, energy, climate change, transport, science and technology, employment and social affairs, education, agriculture, culture, etc. It also includes provisions to protect the EU's financial interests. The PCA also has an important trade cooperation section, which paves the way for the conclusion of the ongoing free trade agreement (FTA) negotiations.

Politically, the PCA with Malaysia marks an important step towards strengthening the EU's role in South-East Asia, based on shared universal values such as democracy and human rights. It paves the way for enhancing political, regional and global cooperation between two like-minded partners. The implementation of the PCA will entail practical benefits for both sides, forming a basis for the promotion of the EU's broader political and economic interests.

The Agreement establishes a Joint Committee that will monitor the development of the bilateral relationship between the Parties. The Agreement includes a non-execution clause that provides for the possibility of suspending the application of the Agreement in case of violation of essential elements.

2.2. The legal basis for the proposed decision

Article 218(5) TFEU provides for the adoption of a decision authorising the signing of an agreement.

The substantive legal basis for a decision under Article 218(5) TFEU depends primarily on the objective and content of the Agreement. According to the case-law, if examination of an EU measure reveals that it pursues two purposes or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, on the other hand, that the measure simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, so that various provisions of the Treaty are applicable, the measure must be founded on the various corresponding legal bases (see, to that effect, judgments of 10 January 2006, *Commission v Parliament and Council*, C-178/03, EU:C:2006:4, paragraphs 42 and 43; of 11 June 2014, *Commission v Council*, C-377/12, EU:C:2014:1903, paragraph 34; of 14 June 2016, *Parliament v Council*, C-263/14, EU:C:2016:435, paragraph 44; and of 4 September 2018, *Commission v Council (Kazakhstan)*, C-244/17, ECLI:EU:C:2018:662, paragraph 40).

The Agreement's main aim or component fall within the area of development cooperation.

The legal basis of the proposed decision should therefore be Article 209 TFEU read in conjunction with Article 218(5) TFEU.

2.3. Legal nature

The analysis of the scope of the PCA indicates that the Treaties conferred power upon the EU to act in all areas falling under the scope of the PCA. On the basis of this legal analysis, the High Representative and the Commission have initially proposed the draft agreement, for signature and conclusion, as an 'EU-only' agreement. Moreover, the High Representative and the Commission considered that the far shorter and much more predictable ratification procedure for the entry into force of the PCA as an 'EU-only' agreement responded to the interests of the Union to proceed quickly with the implementation of the Agreement.

However, as stated above, Member States in the Council (COASI Working Groups on 21 September 2016 and COREPER on 17 March 2017) have unanimously requested the Commission and the High Representative to turn the Agreement into a mixed one with provisional application. Following this position and to avoid that the signature and conclusion by the European Union would be held up in the Council, the Commission and the High Representative decided to negotiate an adjustment to the Agreement and to change their proposal for signing the Agreement. Nonetheless, while Malaysia had initially agreed on provisional application, it later preferred not to apply the Agreement provisionally.

The attached draft therefore proposes the signing of the Agreement as a mixed agreement without provisional application.

2.4. The necessity of the proposed decision

Article 216 TFEU provides that the Union may conclude an agreement with one or more third country where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

The Treaties provide for the conclusion of agreements such as the PCA, namely in Article 209 TFEU. Moreover, the conclusion of the PCA is necessary for the purpose of achieving, within the framework of the Union's policies, objectives referred to in the Treaties.

The Agreement must be signed before it can be concluded on behalf of the Union.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, in particular Article 209, read in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On November 2004, the Council authorised the Commission to open negotiations with Malaysia on a Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Government of Malaysia, of the other part ('the Agreement').
- (2) The negotiations on the Agreement were successfully concluded by the initialling of the Agreement on 6 April 2016 in Putrajaya, Malaysia.
- (3) The negotiators have confirmed their common understanding that, in accordance with the Federal Constitution of Malaysia, by its signature the Government of Malaysia expresses the intention to bind Malaysia as whole in relation to the Agreement.
- (4) The objective of the Agreement is to strengthen the cooperation across a wide spectrum of policy fields including human rights, non-proliferation of weapons of mass destruction, counter-terrorism, the fight against corruption and organised crime, trade, migration, the environment, energy, climate change, transport, science and technology, employment and social affairs, education and agriculture.
- (5) The Agreement should therefore be signed on behalf of the Union, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Government of Malaysia, of the other part ('the Agreement'), is hereby approved on behalf of the Union, subject to the conclusion of the said Agreement.

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 Commission.

Article 3

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

Done at Brussels,

*For the Council
The President*