



HIGH REPRESENTATIVE
OF THE UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

Brussels, 3.7.2018
JOIN(2018) 20 final

2018/0269 (NLE)

Joint Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, and provisional application 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 High Representative and the Commission consider 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 has thereafter been discussed and agreed in principle with the Malaysian negotiators.

The present joint proposal concerns the legal instrument that authorises the signing and provisional application of the PCA as a mixed agreement.

2. LEGAL ELEMENTS OF THE PROPOSAL

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 and provisional application of an agreement. Moreover, the second subparagraph of Article 218(8) TFEU provides that the Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act.

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, unless the procedure laid down for each legal basis are incompatible with each other (Case C-490/10 Parliament v Council, ECLI: EU:C:2012:525, paragraph 46).

The Agreement pursues objectives and has components in the areas of the Common Foreign and Security Policy, the common commercial policy and development cooperation. These aspects of the Agreement are inseparably linked without one being incidental to the other.

The Common Foreign and Security Policy is a field for which unanimity is required for the adoption of a Union act.

The legal basis of the proposed decision should therefore be Article 37 TEU, Article 207 TFEU and Article 209 TFEU read in conjunction with Article 218(5) TFEU and the second subparagraph of Article 218(8) TFEU. No additional provisions are required as legal basis (see Case C-377/12 Commission v Council, ECLI: EU: C: 2014:1903).

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 will be held up in the Council, the Commission and the High Representative have decided to negotiate an adjustment to the Agreement and to change their proposal for signing the Agreement.

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

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 Articles 37 TEU, 207 TFEU and 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, including strengthening 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.

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 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, read 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) On November 2004, the Council authorised the Commission to open negotiations with Malaysia for a Framework Agreement on Partnership and Cooperation between the European Union and the Government of Malaysia ('the Agreement').
- (2) The negotiations were successfully concluded by the initialling of the Agreement on 6 April 2016 in Putrajaya, Malaysia.
- (3) 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.
- (4) Therefore, the Agreement should be signed on behalf of the Union, subject to its conclusion at a later date.
- (5) In view of the importance of implementing the Agreement as soon as possible after signature, parts of the Agreement should be applied provisionally,

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 ('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 negotiators of the Agreement.

Article 3

1. Pending its entry into force, and in accordance with Article 58 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 Malaysia:

- Title I 'Nature and scope';
- Title II 'Bilateral, regional and international cooperation';
- Title III 'Cooperation on international peace, security and stability';
- Title IV 'Cooperation on trade and investment';
- Title V 'Cooperation on justice and security' (with the exception of Articles 21 and 24);
- Title VI 'Cooperation in other sectors' (with the exception of Article 28);
- Title VII 'Cooperation on science, technology and innovation' (with the exception of Article 37 to the extent that it concerns cooperation on maritime transport);
- Title VIII 'Means of cooperation';
- Title IX '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 X '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 are 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 of its adoption.

Done at Brussels,

For the Council
The President