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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT *AMICUS CURIAE* BRIEF

**ON THE INTERPRETATION OF THE KAZAKH CONSTITUTION
CONCERNING THE PARTICIPATION IN THE CUSTOMS UNION
WITHIN THE EURO-ASIAN ECONOMIC COMMUNITY**

**FOR THE CONSTITUTIONAL COUNCIL
OF KAZAKHSTAN**

**on the basis of comments by
Ms Angelika NUSSBERGER (Substitute member, Germany)
Mr Evgeni TANCHEV (Member, Bulgaria)**

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Table of contents

I.	Introduction	3
II.	The request.....	3
III.	Types of norms in the legal system of Kazakhstan – the possible nature of the decisions of the Customs Union Commission.....	4
IV.	The nature of the decisions of the Customs Union Commission.....	5
V.	The Relationship between national and supranational legal orders.....	6
VI.	The relationship between the legal system established by the Eurasian Economic Community and the Kazakh legal system	7
VII.	Conclusions.....	7

I. Introduction

1. *At the 80th Plenary Session of the Venice Commission (9-10 October 2009), the Chairman of the Constitutional Council of Kazakhstan, Mr. Rogov, requested the Venice Commission to provide an amicus curiae brief on a case pending before the Constitutional Council on the conformity of the Treaty on the Customs Union Commission with the Constitution of Kazakhstan.*

2. *The Commission invited Ms Nussberger and Mr Tanchev to act as rapporteurs. Their comments figure in documents CDL(2009)177 and 178 respectively. The Constitutional Council provided Russian versions of the Constitution, relevant treaties and decisions of the Council. In view of the urgency of the case to be decided by the Kazakh Constitutional Council, Mr. Rogov asked for the comments by the rapporteurs by 26 October 2009 at the latest. The Council handed down its decision, available in Russian, on 5 November 2009.*

3. *The present amicus curiae brief was approved by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. The request

4. According to Article 72, para. 4 of the Constitution of Kazakhstan, the Constitutional Council has the competence to give an official interpretation of the Constitution. This procedure has been initiated by the Prime Minister of the Republic of Kazakhstan asking for an official interpretation of Article 4 the Constitution of Kazakhstan.

5. Article 4 of the Constitution of Kazakhstan reads as follows:

"Article 4

1. The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan.

2. The Constitution shall have the highest juridical force and direct effect on the entire territory of the Republic.

3. International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.

4. All laws, international treaties of which the Republic is a party shall be published. Official publication of regulatory legal acts dealing with the rights, freedoms and responsibilities of citizens shall be a necessary condition for their application.."¹

6. The official interpretation of this article is required in the context of the implementation of the Customs Union Treaty between Belarus, Kazakhstan and the Russian Federation, signed in Dushanbe on 6 October 2007. The Treaty on the Customs Union Commission was ratified by the Republic of Kazakhstan on 24 June 2008. According to Article 7 of the Treaty, within its competence the Customs Union Commission takes decisions, which are binding for the Parties to the Treaty.

¹ Available at the web-site of the Parliament of Kazakhstan:
<http://www.parlam.kz/Information.aspx?doc=2&lan=en-US>.

7. According to the Prime Minister of Kazakhstan, the question on how to implement the binding decisions of the Customs Union Commission has to be solved on the basis of Article 4 of the Constitution of the Republic of Kazakhstan. The official interpretation requested from the Constitutional Council therefore focuses on this question.

8. The main controversial issue is if and to what extent decisions issued by the Customs Union Commission and can be part of the constitutional and legal system of the Republic of Kazakhstan.

III. Types of norms in the legal system of Kazakhstan – the possible nature of the decisions of the Customs Union Commission

9. Article 4 of the Constitution enumerates all types of valid legal acts (“dejstujuščie”) in the Republic of Kazakhstan: the provisions of the Constitution, laws, other normative legal acts, obligations based on international treaties and other commitments of the Republic as well as normative resolutions of the Constitutional Council and the Supreme Court of the Republic. Decisions of a Commission based on an international treaty are not explicitly mentioned. Therefore it is necessary to analyse in how far the legal acts enumerated in Article 4 can be interpreted in such a way as to include the decisions taken by the Customs Union Commission.

10. According to Article 4, international law can be part of the law of the Republic of Kazakhstan. This provision mentions norms of international treaties and “other commitments”: (“normy ... meždunarodnych dogovorov i inych objazatel'stv”). The problem is that the decisions taken by the Customs Union Commission are not themselves part of an “international treaty” concluded by Kazakhstan, but arise out of a mechanism set up by a treaty. It is therefore necessary to interpret the notion “international treaties and other commitments”.

11. While it can be assumed that the clause “international treaty” [obligations] only refers to the obligations contained directly in an international treaty, the Constitution also provides for “other commitments” that are not specified in detail.

12. One (narrow) interpretation would be that the article refers to international commitments not based on a treaty but on international agreements (as opposed to ratified treaties). Such an interpretation would be comparable to the regulation in the Constitution of the Russian Federation enumerating “the universally-recognised norms of international law and international treaties and agreements of the Russian Federation” as “a component part of its legal system” (Article 15 of the Russian Constitution).

13. However, decisions taken by an international Commission within its competence are not comparable to international agreements. This means that a narrow interpretation of Article 4 would not allow the direct implementation of the Commission’s decisions as they are not part of the catalogue of legal sources in the Republic of Kazakhstan.

14. Another possibility would be to interpret the notion “other [international] commitments” in a broad sense such as to encompass all international obligations of the Republic of Kazakhstan, whatever their origin. Such an interpretation would be covered by the open wording of the provision. The implementation of the decisions of the Customs Union Commission can be considered as an international “commitment” as it is based on an international treaty, which has been ratified by Kazakhstan. Consequently, decisions of the Customs Union Commission could be directly applicable norms in Kazakhstan.

IV. The nature of the decisions of the Customs Union Commission

15. The Customs Union Commission is composed of representatives of the contracting parties. Its members are not independent but represent their country (on the level of deputy prime ministers or ministers, Article 4 of the Treaty).

16. The competence of the Customs Union Commission to take decisions is set out in Article 7 of the Treaty on the Customs Union Commission, which reads:

“Article 7

Within its competence the Commission takes decisions, which are binding on the Parties.

The Commission may adopt recommendations of a non-binding nature.

Each member shall have one vote. The decisions of the Commission shall be taken by simple majority, while decisions on sensitive issues are taken by consensus. The list of issues to be adopted by consensus is approved by the Supreme Body of the Customs Union in accordance with the treaties forming the legal basis of the Customs Union.

Each Party shall have the right to make a proposal to the Supreme Body of the Customs Union to revise a decision of the Commission.

If a decision has not achieved the required number of votes, the Commission may refer the matter to the Supreme Body of the Customs Union.”²

17. Thus, Article 7 provides for two methods of decision making. According to the first one, decisions can be taken unanimously. In this case each contracting party has a *de facto* right to a veto. However, Article 7 also provides for the possibility for decisions to be taken by a majority of two-thirds of the votes and such a decision could be taken against the vote of the Kazakh representative in the Commission. *A priori*, such a decision could imply a transfer of sovereign powers to the Customs Union Commission and could be in contradiction to Article 3 para. 1 of the Constitution of Kazakhstan (“The people shall be the only source of power”). Other Articles of the Constitution, which could be affected are Article 40, paragraph 1, according to which the President determines the main directions of foreign policy and represents Kazakhstan in international relations and Article 66 according to which the Government develops measures for the conduct of the foreign policy of the Republic of Kazakhstan.

18. However, Article 7 also provides for an appeal procedure in case of disagreement. Each party can request that the issue be referred to the Supreme Organ of the Customs Union, the Heads of States.

19. According to Article 16 of the Treaty on the Customs Union Commission disputes connected with the interpretation or enforcement of the treaty are to be decided in consultation of or negotiation with the parties. However, if an agreement cannot be achieved they are referred to the Court of the Eurasian Economic Community, which has been established according to Article 8 of the Treaty Establishing the Eurasian Economic Community signed in Astana on 10 October 2000.

20. The Court has jurisdiction to secure uniform interpretation and enforcement of the treaties and to adjudicate disputes between the Parties on issues of enforcement of the Eurasian Economic Community institutions’ decisions. The Court has also been vested with the power to decide on the conformity of the acts issued by the Customs Union’s institutions with the founding treaties and to interpret the treaties forming the basis of the Customs Union and acts adopted by the Customs Union’s institutions. The Court is also vested with the power to decide

² Non-official translation by the Venice Commission. Russian Text of the treaty available at http://www.ipaeurasec.org/docsdwn/komissia_tam_soyuz.pdf.

disputes between the Customs Union Commission and the Contracting Parties and on the obligations of the Parties according to the treaties.

21. Again, if a final decision of the Court of the Eurasian Economic Community were directly binding on Kazakhstan, this could imply a transfer of sovereignty.

22. It may be useful to look into how other countries have dealt with the transfer of sovereign powers to international bodies, especially the legal order of the European Union, which is often described as 'supranational', distinguishing it from the relationship between national and international law in general.

V. The Relationship between national and supranational legal orders

23. The implementation of EU legislation with a supranational direct, immediate and horizontal effect is quite different from that of the obligations stemming from other treaties, which require ratification and often implementing national legislation (unless the treaties are self-executing and the constitutional system allows direct effect - monism).³

24. According to the case-law of the European Court of Justice⁴, the treaty law or primary law (forming the so called 'unwritten constitution of the EU'), and even the secondary law enacted by EU institutions (regulations and under certain conditions also directives), prevail over national constitutional norms. Contrary to international treaties, secondary EU law (regulations, recommendations after the elapse of the time given for their transformation) applies directly in the member states; the implementation of regulations through national law is even excluded.

25. Generally, it can be said that the transfer of sovereign rights to the EU is made explicit in the Constitutions of the EU member states. Thus, in the context of the accession of the new member countries to the European Union in 2004 almost all the constitutions have been changed in such a way as to include a specific clause on the transfer of sovereign rights on an international body.⁵ Older member states too have introduced special 'EU clauses' in their Constitution providing for a transfer of sovereign powers to the EU and its institutions.⁶

³ These characteristics of European Union law were formulated by the European Court of Justice as early as the beginning of the 1960s, *N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration*; Case 26/62; *Costa v. ENEL*; Case 6/ 64. See in detail, E. Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, *American Journal of International Law*, vol.75, January 1975, N. 1, 1-27; P. Pescatore, *The Doctrine of Direct Effect*, *European Law Review*, 8, 1983, 155-157 ; J. Weiler, *The Community System: the Dual Character of Supranationalism*, *Yearbook of European Law* 1, 1981; A. Easson, *Legal Approaches to European Integration in Constitutional Law of the European Union*, F. Snyder, EUJ , Florence, 1994-1995

⁴ Not all national constitutional courts share this interpretation.

⁵ Cf. e.g. Article 90 para. 1 Constitution of Poland: The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters., Article 3 a Constitution of Slovenia: Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values....., Article 10 a Constitution of the Czech Republic: (1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum, Article 7 para. 2 Constitution of Slovakia: (2) The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120, para. 2., § 2 a Constitution of Hungary: (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities; these powers may be exercised independently and by way of the institutions of the European Union. (2) The ratification and promulgation of the treaty referred to in Subsection (1) shall be subject to a two-thirds majority vote of the Parliament, Article 68 para. 2 Constitution of Latvia: Upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competencies to international institutions. The Saeima may ratify international agreements in which a part of State institution competencies are delegated to international institutions in sittings in which at least two-thirds of the members of the Saeima participate, and a two-thirds majority vote of the members present is necessary for ratification...

⁶ e.g. Article 23 of the German Basic Law, Articles 88-1 to 88-7 of the French Constitution.

VI. The relationship between the legal system established by the Eurasian Economic Community and the Kazakh legal system

26. The intensity of the penetration of national law by the decisions of the Customs Union Council cannot be compared to that of secondary EU legislation in the national law of EU member states. However, an analysis of the founding treaties of the Eurasian Economic Community⁷, reveals the intention of the parties to provide for a direct application of the decisions of the Customs Union Commission in the legal systems of the Contracting Parties.

27. Decisions issued by the Customs Commission are in a certain sense less and in another sense more legally binding than usual international treaties. Their direct legal force is more intense and less 'mediated' by national bodies than that of international treaties. Article 2 of the Treaty on the Customs Commission provides for a voluntary, gradual stage by stage transfer of parts of powers of the contracting parties' governments to the Commission. On the other hand, the safeguards in Article 7 (referral to the Supreme Body of the Customs Union) provide for some protection of sovereignty, although a final decision may be taken by an independent court.

28. Two interpretative decisions of the Kazakh Constitutional Council on Article 4, para. 3 (see postanovlenie N18/2 2000 and postanovlenie N2 2006⁸) explicitly state that only ratified international treaties have priority over national legislation and are directly enforceable and, in case of conflict, should prevail over a provision of national legislation. Two important conclusions that can be related to the current case have been made in these two decisions of the Kazakh Constitutional Council.

A. If there is a contradiction between the international treaty and the Kazak Constitution, the Constitution should prevail and the treaty provision not be enforced.

B. If a treaty has not been ratified, international law should be obeyed and enforced as long as it does not contradict the domestic legislation. In case of contradiction between domestic legislation and a treaty provision, national law should prevail and international law should not be enforced.

This case-law of the Constitutional Council emphasises the significance of ratification under a monist system. It is necessary to clarify contradictions between the treaty, the Constitution and domestic legislation before the entry into force of the treaty as a *sine qua non* to the principle of primacy of international law.

VII. Conclusions

29. It is suggested to differentiate according to the legal nature of the decisions taken by the Customs Union Commission: In as far as the Republic of Kazakhstan has a right to veto the Commission's decisions and cannot be bound against its will, the decisions taken by the Commission can be considered as "other international obligations" in the sense of Article 4 of the Republic of Kazakhstan. They are not subject to ratification themselves, but are based on a ratified treaty. Therefore they are enforceable even if they contradict national legislation.

30. However, in as far as the Republic of Kazakhstan is bound by the Commission's decisions against its will, it is doubtful if such a transfer of sovereign powers could be covered by Article 4 of the Constitution. In such a case, it would be recommendable to change the Constitution accordingly and include an explicit provision on the transfer of power to an independent international body.

⁷ Available in Russian on the website of the Eurasian Economic Community: Евразийское экономическое сообщество (ЕврАзЭС) - Договор об учреждении Евразийского экономического сообщества www.ipaeurasec.org/evra/?data=evra.

⁸ <http://www.constcouncil.kz>