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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**COMMENTS**

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

***AMICUS CURIAE* BRIEF**

**FOR THE CONSTITUTIONAL COUNCIL  
OF KAZAKHSTAN**

by

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

The Constitutional Council of the Republic of Kazakhstan has asked the Venice Commission for an *amicus curiae* opinion on a case pending before the Constitutional Council.

According to Article 72 para. 4 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.

Article 4 of the Constitution of Kazakhstan reads as follows:

“Article 4

1. The provisions of the Constitution, the laws corresponding to it, other normative legal acts, obligations based on international treaties and other obligations of the Republic as well as normative resolutions of the Constitutional Council and the Supreme Court of the Republic shall be the law valid 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 applied except in cases if it follows from an international treaty that its application requires the adoption of a law.
4. All laws, international treaties of which the Republic is a party shall be published. Official publication of normative legal acts concerning the rights, freedoms and duties of citizens shall be a necessary condition for their application.”<sup>1</sup>

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

The Parties to the Treaty have raised the question of how to implement the binding decisions of the Commission. According to the view of the Prime Minister of the Republic of Kazakhstan this question has to be solved on the basis of Article 4 of the Constitution of the Republic of Kazakhstan. The official interpretation required has therefore to be focussed on this question.

The main controversial issue is in how far decisions taken by the Commission can be part of the legal system of the Republic of Kazakhstan.

It is not clear in which way these decisions are taken. It is assumed that the Commission is composed of representatives of the Contracting Parties. As to the decision-making mechanism there are several options. One option would be that the decisions have to be taken unanimously. In this case every Contracting Party would have a right to a veto. Another option would be that the decisions are taken by a majority vote. Thus sovereign powers would be transferred to the Commission. Such a model would be similar to what is called “supranational” in the European context.

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<sup>1</sup> Unofficial translation of the author of the opinion.

If the Commission can take decision on the basis of a majority vote the problem is much more difficult. In this case sovereign rights would be transferred on a Commission founded on the basis of an international treaty. The question would therefore be in how far such a transfer of sovereign rights is allowed by the Constitution of the Republic of Kazakhstan.

Article 4 enumerates all the legal acts valid (“dejstujušcie”) in the Republic of Kazakhstan: the provisions of the Constitution, laws, other normative legal acts, obligations based on international treaties and other obligations 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.

According to Article 4 international law can be part of the law of the Republic of Kazakhstan. The wording of the article is significant in this context. The provision mentions international treaty obligations and “other obligations”: “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 “meždunarodnye dogovornye i inye objazatel'stva”.

It can be assumed that the notion “international treaty obligations” only refers to the obligations contained directly in an international treaty. This would be in line with the majority of constitutional systems accepting the obligations fixed in international treaties as part of national law. Another interpretation would be at odds with the principle of legal certainty.

Yet, the Constitution of the Republic of Kazakhstan also provides for “other international obligations” that are not specified in detail.

One (narrow) interpretation would be that the article refers to international obligations not based on a treaty, but on another source of international law such as international customary law or international agreements (contrary to ratified treaties). Such an interpretation would be comparable to the regulation in the Constitution of the Russian Federation enumerating “the universally-recognized 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).

Yet, as long as the Republic of Kazakhstan is not directly involved in the decision-making process it is not possible to consider the decisions of the Customs Union Commission as “international agreements”. Decisions taken by an international Commission within its competence in an independent manner 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.

Another possibility would be to interpret the notion “another (international) obligation” 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 wording of the provision. The implementation of the decisions of the Customs Union Commission can be considered as an “international obligation” as it is based on an international treaty. Yet, if the Republic of Kazakhstan has no right to veto the Commission's decisions, it could be argued that such a reading would imply a transfer of sovereign powers of the Republic of Kazakhstan to a sort of

supranational body that was never intended and would be in contradiction to Article 3 para. 1 of the Constitution of Kazakhstan (“The people shall be the only source of power”).

In the context of an *amicus curiae* opinion it might be helpful to provide some information on how other constitutional systems have solved this problem..

Generally, it can be said that the transfer of sovereign rights is made explicit in the Constitution. 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.<sup>2</sup>

Therefore it is suggested to differentiate according to the legal nature of the decisions taken by the Commission: If 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.

If the Republic of Kazakhstan can be bound by the Commission’s decisions against its will, it is doubtful if such a transfer of sovereign powers can be covered by Article 4 of the Constitution of Kazakhstan. For the sake of clarity it would be recommendable to change the Constitution accordingly and include an explicit provision on the transfer of power to an independent international body.

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<sup>2</sup> 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...