

ADVISORY LETTER

EU-UKRAINE ASSOCIATION AGREEMENT

THE NEED FOR RATIFICATION

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Members of the Advisory Council on International Affairs

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Introduction

By letter of 31 October 2016 (Parliamentary Paper 21501-20, no. 1162), the government provided the House of Representatives with further information on its response to the outcome of the consultative referendum of 6 April 2016 on the ratification of the Association Agreement between the European Union (which for the purposes of this advisory letter includes the European Atomic Energy Community), its member states and Ukraine (Dutch Treaty Series 2014, 160, and 2015, 92). Contrary to what is sometimes suggested in the media, the issue at stake is no longer whether the treaty will be 'signed' by the Kingdom of the Netherlands (referred to hereafter, for brevity's sake, as 'the Netherlands'). It was signed on 21 March 2014 and 27 June 2014, and the Netherlands was one of the signatories. The agreement's signature has the legal consequences set out in articles 18 and 25 of the Vienna Convention on the Law of Treaties. What is now at stake is the entry into force of the act of approval and – as a corollary – the agreement's ratification. All the other parties to the agreement have already ratified it.¹

The crux of the letter to parliament is the government's announcement that it intends to seek its European partners' support for a legally binding solution that could pave the way for the entry into force of the act of approval, which both houses of parliament have already passed, and to subsequent ratification of the agreement. In the government's view, the most appropriate solution would be a decision by the heads of state and government, assembled in the European Council.

To accommodate the presumed main objections of the 'no' voters, such a decision should above all stipulate that the Association Agreement is not a stepping stone to membership of the EU and does not confer any right to such membership. The decision should also state that the agreement does not entail a collective security guarantee for Ukraine or oblige member states to cooperate militarily with that country. In addition, it should make clear that the agreement does not give Ukrainian workers access to the EU labour market and does not oblige member states to provide financial support to Ukraine. Lastly, the European Council decision should emphasise that strengthening the rule of law, and particularly fighting corruption, is a central element of the agreement.²

The government's objective is to engage in further negotiations in the run-up to the European Council of 15 and 16 December so that the other 27 EU member states approve the desired 'clarification' of the Association Agreement. The government's letter prompted a debate in the House of Representatives on 8 November 2016, in which the majority of MPs backed the government's efforts to reach an agreement in Brussels. If the government succeeds, it will of course be up to the two houses of the States General to give a final verdict on an act ratifying the Association Agreement.

1 See: <<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2014045>>.

2 The report *Het Oekraïne-referendum. Nationaal Referendum Onderzoek 2016* (The Ukraine referendum: national referendum survey 2016) (p. 18) shows that the main reason for voting 'no' in the referendum was corruption in Ukraine (34.1%), followed by the fear that Ukraine will join the EU (16.6%).

The Advisory Council on International Affairs (AIV) is issuing this advisory letter mainly to facilitate further decision-making in the Dutch parliament.

The AIV values the government's efforts to find a solution that does justice to the outcome of the referendum. The AIV would also note that the outcome does not carry decisive weight since the voters' choice is not binding. The explanatory memorandum (p. 19) to the Consultative Referendums Bill clearly states that the referendum result can lead only to an 'obligation to review' and that 'the primacy of the representative system' should be upheld. This means that the importance of respecting the sentiments of the majority of those who voted (around 32%) should be weighed against other compelling interests. In this regard, the AIV would first note that the Netherlands' reputation as a reliable treaty partner in general and in the EU in particular is at stake. Any decision not to ratify the agreement would impact not only the Netherlands' relations with the EU but also the interests of the other member states. This is because those member states are faced with the possibility that a 'no' vote by the Netherlands will jeopardise, in whole or in part, the implementation of the Association Agreement, which they consider to be of fundamental importance in creating greater stability in Ukraine. This is despite parliament's earlier approval, which led other EU member states to expect that the Netherlands would ratify the agreement.

The second compelling interest relates to the implications of rejecting the agreement for security in Europe and Russia's political intentions under President Putin. The uncertainty surrounding the consequences of the election of Donald J. Trump as president of the United States has created a new situation that has made ratification of the Association Agreement even more important from a general foreign policy and security standpoint.

The above points will be considered in more detail below.

I Referendums on treaties, and their consequences

In the context of a representative democracy, a consultative referendum is a contradictory phenomenon. On the one hand, it creates the expectation that the outcome will influence decision-making. On the other, the outcome does not relieve the government and parliament of their constitutional responsibility for the decision to be taken. To truly put that responsibility in the hands of the voters would require a constitutional amendment with a two-thirds majority at the second reading. Since the constitution has not been amended, the government and the States General remain responsible for the decision on whether to give statutory approval to the Association Agreement (possibly subject to conditions) or to refrain from doing so.

That is also the system laid down in the Consultative Referendums Act. The legal consequence of a valid referendum (a turnout of at least 30% of eligible voters) in which the majority reject an act of parliament that has already been passed is laid down in section 11: 'If it is determined irrevocably that a referendum has led to an advisory decision to reject the act, a bill is to be submitted as soon as possible for the sole purpose of repealing the act or regulating its entry into force.' It was not possible to include an obligation in this provision; that would have been unconstitutional. The AIV would point out that no such obligation should therefore be assumed or feigned. The government and MPs should of course reconsider the arguments and supplement them where necessary in the light of the referendum outcome. Their political responsibility requires them to publicly explain the arguments relating to the content of the bill as part of the public legislative procedure. Simply invoking the outcome of the vote is not enough, because this would turn a consultative referendum into a binding referendum without first amending the constitution.

Moreover, a referendum on a treaty has a number of complicating features compared with a referendum on an act of parliament. Unlike the situation with national legislation on a discretionary matter, the Dutch legislature has no control over what would take the place of a rejected treaty. That is even more true of a multilateral treaty, such as the Association Agreement with Ukraine. If the other treaty parties, all of which have already completed the approval and ratification procedure, are willing to append a joint declaration to the treaty, the AIV considers that to be a respectable diplomatic result for the government. Even though a declaration cannot contain anything incompatible with the treaty, it would not apparently be superfluous given that during the political debate preceding the referendum the idea took hold that the treaty was a stepping stone to EU membership and military assistance. The status of such a declaration in international law can be further enhanced by referring to it when depositing the instrument of ratification on behalf of the Kingdom of the Netherlands.

The only alternative seems to be for the Netherlands not to ratify the agreement. But the AIV would point out in this regard that the Association Agreement is a 'mixed agreement', i.e. a treaty that deals partly with the EU's own competences and partly with the competences of the member states. Article 486, paragraph 2 of the Association Agreement states that entry into force depends on ratification by the EU, all member states and of course Ukraine. For the other treaty parties, which have already ratified the agreement, rejection by the Netherlands would mean that their approval would remain without consequence.

In this connection, the AIV would also recall the principle of sincere cooperation (article 4, paragraph 3 of the Treaty on European Union), which requires the Union and the member states, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. The fact that every member state has the power to invalidate the result of the negotiations for all other member states and also in respect of the EU's own competences (specifically that concerning trade) means that further negotiation after the government has accepted the desired negotiating result, with the knowledge and support of a large parliamentary majority, is extremely objectionable. It would even jeopardise the Association Agreement's provisional application in accordance with article 486, paragraph 3 of the agreement and article 25 of the Vienna Convention on the Law of Treaties, because it would no longer be possible for the existing agreement to enter into force. In the AIV's view, the credibility of those representing the state in the international arena will be seriously undermined if, despite regular reports to the Dutch parliament on treaties under negotiation, a treaty that has already been signed can be rejected.

II International context: foreign and security policy considerations

In the letter to parliament referred to above, the government listed a number of geopolitical and regional considerations that call for ratification of the Association Agreement. For instance, it pointed out that the EU has used this agreement and others like it to promote stability and prosperity on its eastern borders and Russia has consistently sought to thwart the agreement. A refusal by the Netherlands to ratify the agreement would play into the hands of Russia and – the AIV would add – could encourage it to challenge the EU as a serious actor in the region. After all, it would create a picture of a divided EU that is incapable of exercising meaningful influence in a neighbouring region and shaping its relations with neighbouring countries in accordance with the principles of the European Neighbourhood Policy. Maintaining European unity is the best response to Russia's foreign policy, which is aimed at destabilising Europe's borders. As far as Ukraine is concerned, if EU efforts to support the country's transition to a stable democracy fail to materialise, this would increase the risk of disorder. The government believes that this in turn would increase the risk of undesirable Russian influence and interference.

The AIV endorses these arguments. They have become even stronger in the light of the upcoming presidency of Donald J. Trump. This particularly applies to the argument that unity among European countries must be preserved in times of great uncertainty. The new American president still has to set out his foreign policy plans. At present no far-reaching conclusions should be drawn about the content of his policies. However, his remarks during the election campaign give cause for concern. It is necessary to take into account that in the near future the United States may play less of a role in promoting global cooperation and act more as a country intent on pursuing politics at some distance from world events, based on a narrow interpretation of the national interest. It will also be necessary to reckon with a United States that no longer sees the transatlantic relationship as a cornerstone of its security policy, with all that this entails for the value it attaches to NATO. One will also have to reckon with a United States that is willing to make practical arrangements with authoritarian political leaders like President Putin over the heads of European countries. This will include arrangements based on a division of spheres of influence between the major powers, possibly at the expense of nations' right to self-determination and of human rights, which would be contrary to public international law.

Against this backdrop, the EU-Ukraine Association Agreement gains in political weight. If the new US President is indeed inclined to sacrifice the interest of less powerful European states in order to establish good relations with Russia, that would constitute a direct threat to Ukraine and other countries in the region. It is therefore very important for the EU to play a stabilising role in the region between its eastern borders and Russia. The Association Agreement with Ukraine gives the EU the tools it needs to carry out this task in relation to this strategically important country. The AIV believes that

Ukraine must not be abandoned to its fate.³ In view of its responsibility for maintaining a security order in Europe that is not based on the unilateral exercise of power but on generally accepted rules, the Netherlands should not be a source of division or dissent in a vital area of European cooperation involving relations with the countries to the east of the EU's borders.

3 The AIV would recall that in the Budapest Memorandum of 5 December 1994, in which Ukraine undertook to remove all nuclear weapons from its territory, the United States, Russia and the United Kingdom promised to respect the independence, sovereignty and existing borders of Ukraine. See: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/49/765>. This memorandum was flagrantly violated by Russia's annexation of Crimea and by its destabilising activities, military and otherwise, in eastern Ukraine.

III Conclusion

The fact that the legislature created the possibility of a consultative referendum means that MPs must take account of the voters' decision in their reassessment. However, it should be noted that, constitutionally, the Consultative Referendums Act *cannot* entail an obligation to automatically follow the advice given by the majority. The constitution confers legislative power on, *inter alia*, MPs. MPs could only be bound by a decision by referendum voters if the constitution were to be amended, but that has not happened. Furthermore, it is *the voters themselves* who chose these *MPs* as representatives to take decisions on their behalf. This means that, even after the outcome of a consultative referendum, MPs must understand the consequences of their decision and take account of any new developments.

If a majority of MPs – as the AIV recommends – support the likely new bill regulating the entry into force of the act of approval, which has already been passed, it would be beneficial for future purposes if they were to explain in unambiguous terms how consultative referendums work: their consequences are more limited than those of corrective referendums, which do not exist in our constitutional system.

Moreover, consultative referendums on treaties – especially multilateral treaties – do not work in practice because renegotiating such treaties on the basis of Dutch voters' views (or presumed views) is virtually impossible. It could therefore be concluded that an exception concerning treaties must be included in the Consultative Referendums Act.

The AIV concludes that the Netherlands should ratify the Association Agreement after it has received additional assurances in the European Council regarding issues such as fighting corruption and strengthening legal protections for the people of Ukraine. In addition to the opportunities that will arise for helping Ukraine strengthen the rule of law and achieve economic modernisation, there are also compelling geopolitical arguments for ratifying the agreement. The EU's pursuit of its neighbourhood policy with regard to Ukraine is being thwarted by Russia, which claims its own sphere of influence in the territory of the former Soviet Union. Rejection of the Association Agreement, which will not enter into force if the Netherlands declines to ratify it, would undermine the unity among European countries, which is a precondition for successful EU policy and international stability. Russia's President Putin will probably see such a rejection as a sign of Europe's weakness and it could encourage him to intensify activities aimed at destabilising Ukraine. The risk of Russia putting renewed pressure on Ukraine has only been increased by the uncertainty surrounding the United States' future stance following the election of Donald Trump as president. In these circumstances, the Netherlands should refrain from breaking solidarity with its EU partners.

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