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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the ACP-EU Council of Ministers as regards the delegation of powers to the ACP-EU Committee of Ambassadors on the decision to adopt transitional measures to extend the ACP-EU Partnership Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The Partnership Agreement between the EU and the African, Caribbean and Pacific (ACP) Group of States¹, signed in Cotonou on 23 June 2000, will expire on 29 February 2020. This Commission proposal concerns the Council decision on the position to be taken on the Union's behalf in the ACP-EU Council of Ministers in connection with the envisaged adoption of a decision concerning the delegation of powers to the ACP-EU Committee of Ambassadors on the possible application of transitional measures to extend the ACP-EU Partnership Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The “Cotonou” Partnership Agreement”

Since 2000, the Cotonou Partnership Agreement (the “Agreement” or “CPA”) has been the framework for the EU's relations with 79 ACP countries. The Agreement was concluded for a period of 20 years, from 1 March 2000 until 29 February 2020. It was subsequently revised in 2005 and 2010.

2.2. The ACP-EU Council of Ministers

The ACP-EU Council of Ministers is a ministerial level body, set up by the Agreement (Article 15 CPA). It comprises, on the one hand, members of the Council of the European Union and members of the European Commission and, on the other, a member of the government of each ACP State.

The office of the President of the Council of Ministers is held alternately by a member of the Council of the European Union and a member of the government of an ACP State. The Council of Ministers meets as a rule once a year on the initiative of the President and whenever it seems necessary, in a form and a geographical composition appropriate to the issues to be addressed.

The functions of the Council of Ministers include, amongst other things², taking the decisions necessary for the implementation and execution of the CPA.

The Council of Ministers takes its decisions by common agreement of the Parties. In order for the decisions to be valid,

- half the members of the Council of the European Union (i.e. 14 Ministers from EU Member States),
- one member of the Commission, and

¹ Council Decision of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 65, 08.03.2003, p.27).

² According to Article 15(2) CPA, the ACP-EU Council of Ministers shall “(a) conduct the political dialogue; (b) adopt the policy guidelines and take the decisions necessary for the implementation of the provisions of this Agreement, in particular as regards development strategies in the specific areas provided for by this Agreement or any other area that should prove relevant, and as regards procedures; (c) examine and resolve any issue liable to impede the effective and efficient implementation of this Agreement or present an obstacle to achieving its objectives; (d) ensure the smooth functioning of the consultation mechanisms”.

- two-thirds of the members representing the governments of the ACP States (i.e. government members from 55 different ACP States)

have to be present. Any member of the Council of Ministers unable to attend may be represented. The representative shall exercise all the rights of that member (Article 15(3) CPA).

Pursuant to Article 15(4) CPA, the Council of Ministers may delegate powers to the Committee of Ambassadors. The Council of Ministers can delegate the power to take decisions binding on the Parties. This delegation of powers shall take the form of a decision of the Council of Ministers.

2.3. The ACP-EU Committee of Ambassadors

The Committee of Ambassadors is established pursuant to Article 16 CPA. It comprises, on the one hand, the permanent representative of each Member State to the EU and a representative of the Commission and, on the other, the head of mission of each ACP State to the EU. The office of Chairman of the Committee of Ambassadors is held alternately by a Permanent Representative of a Member State designated by the Union, and a head of mission representing an ACP State, designated by the ACP States.

The Committee of Ambassadors assists the Council of Ministers in the fulfilment of its tasks and **carries out any mandate entrusted to it by the Council** (Article 16(2) CPA). In this context, it can adopt decisions binding on the parties within the mandate conferred on it by the Council of Ministers.

The Committee of Ambassadors also monitors the implementation of this Agreement and progress towards achieving the objectives set therein. The Committee of Ambassadors meets regularly, in particular to prepare the Council sessions and whenever it proves necessary.

2.4. Transitional measures

The Cotonou Partnership Agreement expires on 29 February 2020. In accordance with the first subparagraph of Article 95(4) of the Agreement, negotiations towards a new ACP-EU Partnership Agreement were launched in September 2018. In case the new Agreement is not ready to be applied by the above expiry date, measures need to be in place to avoid legal vacuum in the EU-ACP relations.

Article 95(4), second subparagraph CPA reads as follows: *“The Council of Ministers shall adopt any transitional measures that may be required until the new Agreement comes into force”*. As per Article 95(4) second subparagraph CPA, transitional measures can be applied to extend the applicability of all or parts of the CPA, until the date of application of the new Agreement (provisional application or entry into force after ratification by all Parties).

In order to maintain legal continuity with the ACP, should the new Agreement not become applicable before the expiry of the existing legal framework, it is necessary to adopt transitional measures to extend the application of the current Agreement.

The decision on transitional measures (i.e. which part(s) of the Agreement to apply transitionally and until when) can be either taken by the Council of Ministers itself or the latter can delegate the power to adopt such decision to the Committee of Ambassadors.

2.5. The envisaged act of the Council of Ministers

According to the Rules of Procedure of the Council of Ministers, it meets once a year. The 44th session of the Council of Ministers is to take place in Brussels on 23-24 May 2019. As the content and timing of transitional measures has not been discussed with the ACP side, it is impossible for the Council of Ministers to adopt the transitional measures.

As no further meetings of the Council of Ministers are foreseen before the expiry of the Agreement it is necessary that the decision to adopt transitional measures pursuant to Article 95(4) CPA be delegated to the ACP-EU Committee of Ambassadors. The Committee of Ambassadors can ensure that the decision on transitional measures is taken in a timely manner.

Therefore, during its 44th session the ACP-EU Council of Ministers is to adopt a decision to delegate the powers to adopt transitional measures to the ACP-EU Committee of Ambassadors ('the envisaged act').

The purpose of the envisaged act is to delegate powers to the ACP-EU Committee of Ambassadors, on the decision to apply transitional measures, in accordance with Article 15(4) of the Agreement, which provides: '*The Council of Ministers may delegate powers to the Committee of Ambassadors*'. The envisaged act will become binding on the Parties.

When the content and duration of the transitional measures will have been determined by the Parties, the Committee of Ambassadors will exercise its delegated powers and adopt the decision on transitional measures as foreseen in Article 95(4) CPA. In order to prepare that decision by the Committee of Ambassadors, another Council decision under Article 218(9) TFEU would be required to define the position of the Union.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

In view of the above, the proposed position of the Union is to adopt at the 44th session of the ACP-EU Council of Ministers the envisaged act and thus entrust the ACP-EU Committee of Ambassadors to adopt the decision on transitional measures pursuant to Article 95(4) CPA.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'³.

4.1.2. Application to the present case

The ACP-EU Council of Ministers is a body set up by an agreement, namely Article 15(1) of the ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000.

The act which the ACP-EU Council of Ministers is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 15(3) of the Agreement.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

³ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to, generally, the functioning of the international bodies set up on the basis of the CPA and the functioning of the CPA as a whole (potentially extending its application beyond the foreseen expiry date). The substantive legal basis of the Council decision must be determined in the light of the Cotonou Partnership Agreement as a whole.⁴

The CPA has been concluded as an association agreement and thus was based on Article 310 of the Treaty establishing the European Community, the equivalent of Article 217 TFEU. It follows that the substantive legal basis of the proposed decision is Article 217 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 217 TFEU, in conjunction with Article 218(9) TFEU.

⁴ See, in particular, judgment in case *C-244/17 Commission v Council* (“Kazakhstan”) [ECLI:EU:C:2018:662], p. 40 and the case law referred to.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 217, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Partnership Agreement between the members of the African, Caribbean and Pacific Group of States ('ACP') of the one part, and the European Community and its Member States, of the other part ('the ACP-EU Partnership Agreement')⁵ was signed in Cotonou on 23 June 2000. The ACP-EU Partnership Agreement entered into force on 1 April 2003 and is to be applied until 29 February 2020.
- (2) In accordance with the first subparagraph of Article 95(4) of the of the ACP-EU Partnership Agreement, negotiations towards a new ACP-EU Partnership Agreement were launched in September 2018. In case the new Agreement is not ready to be applied by the expiry date of the current legal framework, it is necessary to adopt transitional measures to extend the application of the current Agreement.
- (3) The second subparagraph of Article 95(4) of the ACP-EU Partnership Agreement provides for the Council of Ministers to adopt transitional measures to extend the applicability of all or parts of the ACP-EU Partnership Agreement, until the provisional application or entry into force of the new Agreement.
- (4) Pursuant to Article 15(4) of the ACP-EU Partnership Agreement, the ACP-EU Council of Ministers may adopt a decision to delegate powers to the ACP-EU Committee of Ambassadors, including the power to adopt the decision on transitional measures.
- (5) The ACP-EU Council of Ministers is to have its yearly ordinary meeting on 23-24 May 2019 in Brussels. The transitional measures have not been agreed and can therefore not be adopted by the ACP-EU Council of Ministers at its ordinary meeting. As no further meetings of the ACP-EU Council of Ministers are foreseen before the expiry of the ACP-EU Partnership Agreement, in order to ensure that the decision on transitional measures is taken in a timely manner, it is necessary that the decision to

⁵ Agreement (OJ L317, 15.12.2000, p. 3) as amended by the Agreement signed in Luxembourg on 25 June 2005 (OJ L209, 11.8.2005, p.27) and by the Agreement signed in Ouagadougou on 22 June 2010 (OJ L287, 4.11.2010, p 3).

adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement, be delegated to the ACP-EU Committee of Ambassadors.

- (6) During its 44th session the ACP-EU Council of Ministers is to adopt a decision delegating the powers to adopt transitional measures to the ACP-EU Committee of Ambassadors ('the envisaged act').
- (7) It is appropriate to establish the position to be taken on the Union's behalf in the ACP-EU Council of Minister, as the envisaged act is binding on the Union.
- (8) The position of the Union to approve the envisaged act in the ACP-EU Council of Ministers should be set out in this decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 44th session of the ACP-EU Council of Ministers shall be to approve the delegation of powers to the ACP-EU Committee of Ambassadors, in accordance with Article 15(4) of the ACP-EU Partnership Agreement, on the decision to adopt, pursuant to Article 95(4) of the ACP-EU Partnership agreement, any transitional measures that may be required until the new Agreement comes into force.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*