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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	28 September 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 559 final
Subject:	Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the Republic of Kenya, Member of the East African Community of the one part, and the European Union of the other Part

Delegations will find attached document COM(2023) 559 final.

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EUROPEAN
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Brussels, 28.9.2023
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2023/0337 (NLE)

Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the Republic of Kenya, Member of the East African Community of the one part, and the European Union of the other Part

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The attached proposal for a Council Decision constitutes the legal instrument for the signing of the Economic Partnership Agreement (EPA) between the Republic of Kenya, member of the East African Community (EAC), of the one part, and the European Union (EU) ('EU-Kenya EPA' or 'the Agreement').

The negotiated texts of the EPA have been made public and can be found on the following link: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac/eu-kenya-agreement/text-agreement_en.

The Agreement aims at the bilateral implementation of the provisions of the EPA between the EU and the EAC Partner States (Burundi, Kenya, Rwanda, Tanzania, and Uganda), the 'EU-EAC EPA', for which negotiations were finalized on 16 October 2014. The EU, Kenya and Rwanda signed the EU-EAC EPA in September 2016, and Kenya ratified it the same month. However, the regional EU-EAC EPA was never provisionally applied, as not all EAC members signed and ratified the agreement (which was a requirement of the EU-EAC EPA for its entry into application).

In February 2021, the EAC Ordinary Summit of Heads of State decided to allow individual EAC countries to proceed with the bilateral implementation of the EU-EAC EPA under the principle of 'variable geometry'. On 4 May 2021, Kenya notified the European Commission requesting to move forward in this sense.

On 17 February 2022, Executive Vice-President Valdis Dombrovskis, on behalf of the EU, and Ambassador Raychelld Omamo, on behalf of Kenya, signed a Joint Statement at the margins of the EU-African Union Summit agreeing to advance negotiations on the EU-Kenya EPA, which will remain open for other EAC Partners States.

Negotiations aiming at introducing the necessary adjustments to bilaterally implement between Kenya and the EU the provisions of the EU-EAC EPA were concluded on 24 May 2023 at technical level, and on 19 June 2023 at political level during EVP Dombrovskis' visit to Kenya. In the course of the negotiations, the Parties agreed to some adjustments to the original agreement that make it possible to implement it on a bilateral basis, including in the area of Rules of Origin (RoO) and development assistance. Moreover, a new Annex on Trade and Sustainable Development was added to the Agreement.

The foreseen conclusion of this Agreement comes at a timely moment.

Firstly, Kenya is a growing economy and a key regional economic player. Kenya is the ninth largest economy of the African continent and East Africa's main economic hub. It achieved broad-based growth averaging 4.8% per year between 2015-2019, significantly reducing poverty, from 36.5% in 2005 to 27.2% in 2019. The economy staged a strong recovery after the COVID-19 pandemic, with GDP growth projected at 5.5% in 2022 and the poverty rate resuming its trend decline after rising earlier in the pandemic. Looking ahead, Kenya's medium-term growth remains bright according to World Bank. Real GDP is anticipated to rise to 5.0 % in 2023 and 5.2 % on average in 2024-25. This near-term growth forecast is above Kenya's estimated potential GDP growth rate of 4.9 % and the pre-pandemic average (2010-2019) of 5.0 %. Real per capita incomes are expected to grow, increasing from 2.8 percent in 2022 to 3.1 %.

Secondly, the economic relations between the EU and Kenya are well established. The EU is Kenya's second largest trading partner. Total trade between the EU and Kenya reached €3.3 billion in 2022, with an increase of 27% compared to 2018. EU's imports from Kenya are €1.2 billion and are mainly vegetables, fruits, and flowers, with Kenya's intention to increasingly export more complex goods and increase value addition in exported goods. EU exports to Kenya amount to €2.02 billion and are mainly mineral products, chemical products, and machinery. Those are important inputs to Kenya intention to deepen their industrial sectors. The EU is the first export destination for Kenya, with 16% of its total exports in 2022, followed by Uganda (12%) and USA (8%). EU is ranked in the third place with 10% of total Kenyan imports.

A trade agreement with Kenya – covering trade in goods, development cooperation and sustainability – would preserve and even boost EU's market share in a booming market and will strengthen Kenya's position in the region ¹. The EU's engagement with Kenya would encourage the country to promote trade liberalisation within the EAC region (as the Agreement will remain open to accession of other EAC Partner States).

Thirdly, from a more geo-political perspective, Kenya increasingly plays a leading regional and international role – notably in promoting peace and security in the neighbouring countries and supporting the global sustainability agenda. The EU has identified Kenya as a key player for more engagement in regional affairs, notably in Ethiopia and Sudan². Kenya hosts the only UN headquarters on the African continent (UN Environment Programme/UNEP and UN Human Settlements Programme/UN-Habitat) and had a temporary seat at the UN Security Council (2021-2022). Besides, Kenya has a pioneering role in sustainability efforts on the African continent and is a reliable ally in the fight against climate change. It co-leads the Coalition of Trade Ministers on Climate initiatives launched in 2023 together with the EU and other international partners.

In the light of the current international political context, the timely conclusion of these negotiations with a key partner like Kenya also sends a strong signal of the joint commitment to a rules-based trading system and sustainability.

- **Consistency with existing policy provisions in the policy area**

The above objectives are consistent with the Treaty on the European Union (TEU) that provides that the EU should “*encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade*”.³

The conclusion of this Agreement is fully in line with the EU's ambition to foster its trade relations with African partners as laid down in the EU's Africa strategy (2020)⁴, the Trade

¹ Over 2015-2019, Kenya's economic growth averaged 5.7%, making it one of the fastest growing economies in Sub-Saharan Africa. The performance of the economy has been boosted by a stable macroeconomic environment, positive investor confidence and a resilient services sector. (source: World Bank).

² In May 2021, the Council Conclusions on the Horn of Africa have identified Kenya as a key partner to pursue an agenda of shared values and interests, promoting peace and security, prosperity and democratic stability in the region, as well as multilateralism.

³ Article 21(2)(e) TEU.

⁴ JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL “Towards a comprehensive Strategy with Africa”, [communication-eu-africa-strategy-join-2020-4-final_en.pdf](https://european-council.europa.eu/media/146844/attachment/data/2020/04/146844.pdf) ([european-council.europa.eu](https://european-council.europa.eu/media/146844/attachment/data/2020/04/146844.pdf))

Policy Review (2021)⁵ and the Sustainable Trade Policy Review Communication (2022)⁶.

In particular, this proposal implements the Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) Group of States of the one part, and the European Union and its Member States, of the other part⁷ ('ACP-EU Partnership Agreement'), which calls for the conclusion of WTO-compatible Economic Partnership Agreements.

In fact, this Agreement aims at bilaterally implementing the provisions the EU- EAC EPA under the principle of 'variable geometry'. The Agreement will remain open to accession of other EAC Partner States.

The EPA between the EU and Kenya was also explicitly integrated as a key deliverable of the EU-Kenya Strategic dialogue, launched in June 2021, and it is a crucial component of EU's Africa engagement strategy.

- **Consistency with other Union policies**

The objectives are consistent with other EU policies, notably the EU's development and environmental policies.

The Kenya EPA is a development-oriented trade agreement. It offers asymmetric market access to Kenya, which allows it to shield sensitive sectors from liberalisation; it provides a large number of safeguards and a clause for infant industry protection; and it eliminates the use of export subsidies in trade between the Parties. These provisions contribute to the objective of Policy Coherence for Development and are consistent with Article 208(2) of the Treaty on the Functioning of the European Union (TFEU).

Besides, the Agreement includes an ambitious Trade and Sustainable Development annex covering environmental, social, labour, human rights and gender equality issues. Hence, the objectives of the Agreement are in line with EU's environmental, climate and social policies and with internationally agreed commitments.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

In accordance with Opinion 2/15 on the EU-Singapore FTA of the Court of Justice of 16 May 2017, all the areas covered by the EPA would fall within the exclusive competence of the EU and, more particularly, within the scope of Article 207 TFEU.

As a result, this Agreement is to be signed by the Union pursuant to a decision of the Council based on Article 218(5) TFEU.

⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Trade Policy Review – An open, sustainable and assertive trade policy [EUR-Lex - 52021DC0066 - EN - EUR-Lex \(europa.eu\)](#)

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0409&qid=1656586727707>

⁷ OJ L 317, 15.12.2000, p. 3 Agreement as amended by the Agreement signed in Luxembourg on 25 June 2005 (OJ L 209, 11.8.2005, p. 27) and by the Agreement signed in Ouagadougou on 22 June 2010 (OJ L 287, 4.11.2010, p. 3).

- **Subsidiarity (for non-exclusive competence)**

This EPA as presented to the Council does not cover any matters that fall outside the EU's exclusive competence.

- **Proportionality**

Trade agreements are the appropriate means to govern market access and the related areas of comprehensive economic relations with a third country outside the EU. No alternative exists to render such commitments and liberalisation efforts legally binding.

This initiative pursues directly the Union's objective in external action and contributes to the political priority of 'EU as a stronger global actor'. It is in line with the EU Global Strategy's orientations to engage with others and revamp its external partnerships in a responsible way, in order to attain the EU's external priorities. It contributes to the EU's trade and development objectives.

- **Choice of the instrument**

This proposal is in accordance with Article 218(5) TFEU, which envisages the adoption by the Council of decisions on signing of international agreements. No other legal instrument exists that could be used in order to achieve the objective expressed in this proposal.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

This EPA aims at the bilateral implementation of the provisions of an already concluded regional free trade agreement (the EU-EAC EPA). It is in line with the updated negotiating directives⁸. For these reasons, the Better Regulation requirements do not apply.

An ex-post evaluation of the Agreement might be foreseen in the future.

- **Stakeholder consultations**

Not applicable.

A presentation of the Trade and Sustainable Development Annex of the Agreement (which constitutes the main novelty compared to the EU-EAC EPA) was held for stakeholders in the context of a Civil Society Dialogue in March 2023.

- **Collection and use of expertise**

Not applicable.

⁸ COUNCIL DECISION (EU) 2020/13 of 19 December 2019 amending the negotiating directives for the negotiation of Economic Partnership Agreements with the African, Caribbean and Pacific countries and regions, to the extent that they fall within the competence of the Union, OJ L6/101, 10.1.2020. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.006.01.0101.01.ENG&toc=OJ%3AL%3A2020%3A006%3ATOC

- **Impact assessment**

An impact assessment is not required at this stage. As this Agreement it aims at the bilateral implementation of the provisions of an already concluded regional free trade agreement (EU-EAC EPA), conducting additional impact assessments is not required by the Better Regulation toolbox.

Previously, a Sustainability Impact Assessment (SIA) for all EPAs was launched in 2002. The outcome of this SIA covered both the negotiations, for the Framework EU-EAC EPA, concluded in 2007 (FEPA), and for the comprehensive trade in goods EU-EAC EPA concluded in October 2014.

Following the conclusion of the EU-EAC EPA in October 2014, an ‘Economic analysis of negotiated outcome’ was carried out in 2018 to assess the economic impact of the EU-EAC EPA on the Parties.

- **Regulatory fitness and simplification**

This Agreement is not subject to REFIT procedures; it does not imply any costs for the Union SMEs; and it does not raise any issues from the viewpoint of the digital environment.

- **Fundamental rights**

The proposal does not affect the protection of fundamental rights in the Union.

4. BUDGETARY IMPLICATIONS

Kenya already benefits from the Market Access Regulation (MAR) which offers duty-free quota-free market access into the EU like under an EPA. The MAR aimed at granting market access to the EU to those ACP countries having made the effort to conclude, sign and ratify an EPA which eventually could not be provisionally applied for reasons going beyond their willingness. This was the case for Kenya with the 2014 EU-EAC EPA, which could not be provisionally applied due to the lack of signature and ratification of the EPA by all EAC members.

Therefore, there will be no budgetary implications given that the Agreement will continue Kenya’s market access into the EU in the same terms.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Agreement includes institutional provisions which set up ministerial, senior official and technical bodies to oversee, steer and support its implementation, operation and impact and take necessary action.

At ministerial level, the EPA Council will be established and will have powers to take decisions and adopt recommendations. It will be assisted by a Committee of Senior Officials in supervising the implementation and application of the EPA and assessing its impact on the parties.

At technical level, the Committee of Senior Officials may set up any specialised committees, working sessions, task forces or bodies to deal with matters arising under the agreement. The provisions of the agreement further set up on entry into force a Special Committee on

Customs and Trade Facilitation which will monitor the implementation and administration of the Customs Cooperation and Trade Facilitation and Rules of origin (RoO) provisions. Besides, a Comprehensive Dialogue on Agriculture and Rural Development Policy will be established with the task of monitoring progress made in implementing the Agricultural chapter and providing a forum for exchange and cooperation on the Parties' respective domestic agricultural policies. On Trade and Sustainable Development, a Special Committee on Trade and Sustainable Development will be set up upon entry into force and tasked to facilitate, monitor and review the implementation of the respective annex.

The Agreement will give civil society representatives (private sector, business associations, trade unions, non-governmental organisations) a role in its implementation, including on the provisions on trade and sustainable development. Domestic Advisory Groups (DAGs) will be established, comprising a balanced representation of independent civil society organisations including non-governmental organisations, business, and employers' organisations as well as trade unions active on economic, sustainable development, social, human rights, environmental and other matters. They will meet regularly and advise the respective party on the implementation of the Agreement. A Consultative Committee - a *joint* civil society advisory body in which the DAGs shall participate - will furthermore be set up and will assist the Committee of Senior Officials with a view to promoting dialogue and cooperation between representatives of civil society, the private sector and social and economic partners on matters arising under the Agreement.

Finally, the Commission's Annual Implementation and Enforcement Report will cover the EU-Kenya EPA as of its entry into force.

- **Explanatory documents (for directives)**

Not applicable

- **Detailed explanation of the specific provisions of the proposal**

This Agreement aims *de-facto* at the implementation of the provisions of the former agreement negotiated with the EAC members in 2014. It introduces the necessary adjustments for the implementation of the regional EPA by an individual EAC member and is open to any other EAC country to join in the future. It has also been updated to align it with current challenges, such as promoting sustainability by including an ambitious Trade and Sustainable Development annex and updating the Economic Cooperation and Development chapter.

The EU-Kenya EPA contains provisions on trade in goods, customs and trade facilitation, technical barriers to trade, sanitary and phytosanitary measures (SPS), agriculture and fisheries, development cooperation, dispute avoidance and settlement, and a trade and sustainable development (TSD) annex. The Agreement also includes two Joint Statements concerning the applicability respectively of the TSD and RoO provisions.

In particular, the Agreement foresees:

- Asymmetric removal of tariffs: whereas the EU grants free access to its market by removing tariffs and quotas (except arms), Kenya will open its market gradually, benefitting from transitional periods and exclusion of sensitive products from liberalisation.
- Temporary application to both parties' trade of RoO of the Market Access Regulation (already applying to Kenya) until a new RoO Protocol will be negotiated

upon entry into force of the Agreement and within five years of the implementation of the EPA. This new RoO Protocol will be based on EU-EAC EPA RoO, as foreseen by the Joint Statement on RoO.

- Provisions that consider Kenya's development needs such as special safeguards on agriculture, measures on food security and infant industry protection.
- Customs-related provisions aiming at facilitating trade, promoting better customs legislation and procedures, providing support to the Kenyan customs administration and enhancing cooperation between customs institutions.
- Provisions on SPS to promote the harmonisation of intra-regional standards and to enhance Kenya's technical capacity.
- An Economic and Development Cooperation chapter with provisions aiming to enhance the competitiveness of the Kenyan economy by building supply capacity and assisting Kenya in implementing the EPA smoothly. The original chapter of the EAC EPA has been largely preserved, with the necessary updates. An Annex specific to Kenya and the EU has been added and captures the changes to the regional agreement text.
- A dedicated TSD annex covering labour, gender equality, as well as environmental and climate matters with binding and enforceable (through a specific dispute settlement mechanism) commitments. The possibility to temporarily suspend obligations under the TSD annex (i.e. impose 'sanctions') is not included in the Agreement. However, in the Joint Statement on TSD the EU and Kenya explicitly committed to continue negotiations on this aspect in the context of the 'rendez-vous clause'.

This Agreement will be reviewed after every five years from the date of its entry into force. The text of the EPA includes an undertaking to negotiate new areas to be included in the EPA ('rendez-vous clause'), including provisions on trade in services, and trade-related rules addressing sustainable development, competition policy, investment and private sector development, intellectual property rights, transparency in public procurement. The results of the negotiations of these areas shall be envisaged to be added within five years following the entry into force of the Agreement.

Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the Republic of Kenya, Member of the East African Community of the one part, and the European Union of the other Part

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 12 June 2002 the Council authorised the Commission to open negotiations for Economic Partnership Agreements (EPAs) with the African, Caribbean and Pacific Group of States.
- (2) The negotiations between the European Union (EU) and the East African Community ('EAC') Partner States (Republic of Burundi, Republic of Kenya, Republic of Rwanda, the United Republic of Tanzania, and the Republic of Uganda) for an Economic Partnership Agreement (EPA) were concluded on 14 October 2014 and the EAC EPA was initialled on 16 October 2014.
- (3) Kenya ratified and signed the EU-EAC EPA in September 2016. For the regional EPA to enter into force, all EAC members need to sign and ratify the agreement. To this date, signatures and ratification of three EAC members are still missing, preventing the regional agreement from entering into force.
- (4) On 19 December 2019, the Council updated 2002 Commission's negotiating directives by including the conclusion of a Trade and Sustainable Development chapter in EPAs.
- (5) On 27 February 2021 the EAC Summit allowed individual EAC countries to proceed with the bilateral implementation of the EAC EPA under the principle of 'variable geometry'. On 4 May 2021 Kenya notified the Commission requesting to move forward in this sense.
- (6) On 17 February 2022, Executive Vice-President Valdis Dombrovskis, on behalf of the EU, and Ambassador Raychelld Omamo, on behalf of Kenya, signed a Joint Statement at the margins of the EU-African Union Summit agreeing to advance negotiations on the EU-Kenya EPA ('the Agreement'), which will remain open for other EAC Partners States.
- (7) On 24 May 2023, the negotiations for the Agreement between the European Union and Kenya were successfully concluded.
- (8) Therefore, the Agreement should be signed on behalf of the Union, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The Commission is authorised to sign, on behalf of the Union, the Economic Partnership Agreement between the Republic of Kenya, Member of the East African Community, of the one part, and the European Union, of the other part, subject to the conclusion of the said Agreement at a later stage.

The text of the Agreement is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Agreement on behalf of the Union, subject to its conclusion, for the person(s) indicated by the negotiator of the Agreement.

Article 3

The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals.

Article 4

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

*For the Council
The President*