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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	25 October 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be adopted by the European Union within the ACP-EU Committee of Ambassadors, with regard to the adoption of a decision to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement

Delegations will find attached document COM(2019) 550 final.

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Brussels, 25.10.2019
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Proposal for a

COUNCIL DECISION

On the position to be adopted by the European Union within the ACP-EU Committee of Ambassadors, with regard to the adoption of a decision to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The present Commission decision contains a proposal on a Council decision on the position to be taken by the Union in the ACP-EU Committee of Ambassadors, on the adoption of transitional measures pursuant to Article 95(4) of the Partnership Agreement between the EU and the African, Caribbean and Pacific (ACP) Group of States¹, signed in Cotonou on 23 June 2000 ('Cotonou Partnership Agreement' or 'CPA'). The Commission proposes the extension of the application of the entirety of the provisions of the Cotonou Partnership Agreement until 31 December 2020, or until entry into force of the new Partnership Agreement between the Union and the ACP States, whichever is sooner.

2. CONTEXT OF THE PROPOSAL

2.1. The Cotonou Partnership Agreement

Since 2000, the Cotonou Partnership Agreement 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.

The Cotonou Partnership Agreement expires on 29 February 2020. Negotiations towards a new ACP-EU Partnership Agreement were launched in September 2018 and are currently ongoing. However, it has become clear that those negotiations will not result in a new Agreement ready to be applied by the above expiry date. The situation would result in a vacuum in the EU-ACP relations that must be filled.

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 functions of the Council of Ministers include, amongst other things, 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, (i) half the members of the Council of the European Union (i.e. 14 Ministers from EU Member States), (ii) one member of the Commission, and (iii) 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.

2.3. Transitional measures

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

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).

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). These transitional measures will therefore need to be in place in order to avoid a political, institutional, and legal vacuum in EU-ACP relations.

In order to maintain legal, political, and institutional continuity with the ACP, given that the new Agreement will 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.

2.4. The adoption of transitional measures by the ACP-EU Committee of Ambassadors

In accordance with Article 95(4) CPA, the decision on transitional measures is to be taken by the ACP-EU Council of Ministers.² However, pursuant to Article 15(4) CPA, the Council of Ministers may delegate powers to the Committee of Ambassadors.³ To this end, on 23 May 2019, the Council of Ministers delegated the power to adopt the decision on transitional measures to the Committee of Ambassadors.⁴ Pursuant to Article 16(2) CPA, the Committee of Ambassadors can adopt decisions binding on the parties within the mandate conferred on it by the Council of Ministers.

According to the Rules of Procedure of the Committee of Ambassadors, it shall meet regularly, in particular to prepare meeting of the Council of Ministers, and whenever it proves necessary, at the request of one of the parties.⁵ Given this flexibility, the Committee of Ambassadors can ensure that the decision on transitional measures is taken in a timely manner, and no later than January 2020.

Therefore, at one of its meetings, the ACP-EU Committee of Ambassadors is to adopt the decision on transitional measures. This decision should serve the purpose of extending the application of the provisions of the Cotonou Partnership Agreement ('the envisaged act'), as foreseen in Article 95(4) CPA.

² The ACP-EC 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 functions of the Council of Ministers include, amongst other things, 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, (i) half the members of the Council of the European Union (i.e. 14 Ministers from EU Member States), (ii) one member of the Commission, and (iii) 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.

³ 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 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.

⁴ Decision No 1/2019 of the ACP-EU Council of Ministers of 23 May 2019 on the delegation of powers to the ACP-EU Committee of Ambassadors on the decision to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement [2019/920] (OJ L146, 05.06.2019, p. 114).

⁵ Article 1(1) Decision No 3/2005 of the ACP-EU Council of Ministers of 8 March 2005 concerning the adoption of the Rules of Procedure of the ACP-EC Committee of Ambassadors (OJ L95, 14.04.2005, p. 51).

The purpose of the envisaged act is to extend the application of the Cotonou Partnership Agreement, in its entirety, until 31 December 2020, or until the entry into force or provisional application of the new Partnership Agreement between the Union and the ACP States, whichever comes first.

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

The decision on transitional measures must define (i) what part(s) of the Agreement to apply transitionally and (ii) until when the transitional measures are applied. The Commission proposes that the current CPA be extended until 31 December 2020, unless the new Agreement enters into force or is applied before that date. The proposed date, 31 December 2020 coincides with the expiry of the current multi-financial framework, as well as the expiry of the 11th European Development Fund.

In view of the above, the proposed position of the Union is to be adopted at a session of the ACP-EU Committee of Ambassadors.

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*’⁶.

4.1.2. Application to the present case

Pursuant to Article 95(4), second subparagraph of the of the ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000, 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). Notably, “*The Council of Ministers shall adopt any transitional measures that may be required until the new Agreement comes into force*”.

It is therefore clear that the act which the ACP-EU Committee of Ambassadors is called upon to adopt constitutes an act having legal effects. The envisaged decision of the Committee of Ambassadors will be binding under international law in accordance with Articles 15 and 16 of the Agreement.

⁶ 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.

The Committee of Ambassadors is a body set up under Article 16 of the Cotonou Partnership Agreement.

The European Union is a contracting party alongside its Member States to the Cotonou Partnership Agreement and will thus be bound by the envisaged decision of the Committee of Ambassadors.

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 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 the functioning of the CPA as a whole, notably extending its application beyond the foreseen expiry date. Thus the substantive legal basis of the Council decision must be determined in the light of the Cotonou Partnership Agreement as a whole.⁷

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

⁷ 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.

Proposal for a

COUNCIL DECISION

On the position to be adopted by the European Union within the ACP-EU Committee of Ambassadors, with regard to the adoption of a decision to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement

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 Union and its Member States, of the other part ('the ACP-EU Partnership Agreement')⁸ 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. The new Agreement will not be ready to be applied by the expiry date of the current Partnership Agreement. It is therefore deemed necessary to adopt transitional measures to extend the application of the provisions 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) CPA, on 23 May 2019, the ACP-EU Council of Ministers delegated the powers to adopt the transitional measures to the ACP-EU Committee of Ambassadors.⁹ The ACP-EU Committee of Ambassadors is to have a regular meeting

⁸ 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).

⁹ Council Decision of 22 May 2019 concerning 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 pursuant to Article 95(4) of the ACP-EU Partnership Agreement (OJ L142, 29.05.19, p. 67)

prior to January 2020, where it will take the decision to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement.

- (5) It is appropriate to establish the position to be taken on the Union's behalf in the ACP-EU Committee of Ambassadors, as the envisaged act is binding on the Union.
- (6) The position of the Union to approve the envisaged act in the ACP-EU Committee of Ambassadors should be set out in this decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the ACP-EU Committee of Ambassadors, pursuant to Article 95(4) of the ACP-EU Partnership agreement, is to extend the application of the provisions of the ACP-EU Partnership signed in Cotonou on 23 June 2000 in their entirety, until 31 December 2020, or until the entry into force or provisional application of the new Partnership Agreement between the Union and the ACP States, whichever comes first.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*