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PROPOSAL

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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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 taken on behalf of the European Union within the ACP-EU Committee of Ambassadors regarding the amendment of Decision No 3/2016 of the ACP-EU Committee of Ambassadors on the Centre for the Development of Enterprise (CDE)

Delegations will find attached document COM(2021) 150 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union within the ACP-EU Committee of Ambassadors regarding the amendment of Decision No 3/2016 of the ACP-EU Committee of Ambassadors on the Centre for the Development of Enterprise (CDE)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the ACP-EU Committee of Ambassadors in connection with the envisaged adoption of a decision amending ACP-EU Committee of Ambassadors Decision No 3/2016, with the aim to allow the Curator to ensure the implementation of the passive phase of the Centre for Development of Enterprise (CDE) until the CDE has settled all its liabilities and realised all its assets.

2. CONTEXT OF THE PROPOSAL

2.1. The Cotonou Partnership Agreement

Since 2000, the Cotonou Partnership Agreement (CPA)¹ 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.

On 4 December 2020, the application of the provisions of the Cotonou Partnership Agreement was, for the second time, extended through a decision of the ACP-EU Committee of Ambassadors on transitional measures, until 30 November 2021 or until entry into force of the new Agreement or until the provisional application between the Union and the ACP States of the new Agreement, whichever comes first².

2.2. 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 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 that regard, the Council of Ministers may delegate powers to the Committee of Ambassadors (Article 15(4) CPA). It also monitors the implementation of the Agreement and progress towards achieving the objectives set therein.

According to Article 1 of the Rules of Procedure of the Committee of Ambassadors³, it shall meet regularly, in particular to prepare meetings of the Council of Ministers and, whenever it

¹ Agreement amending for the second time the Partnership Agreement between the Members of 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 2000 L 317, 15.12.2000, p. 3; OJ L 287, 28.10.2005, p. 4; OJ L 287, 4.11.2010, p. 3)

² Decision No 2/2020 of the ACP-EU Committee of Ambassadors of 4 December 2020 to amend Decision No 3/2019 of the ACP-EU Committee of Ambassadors to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement (OJ 2020 L 420, 14.12.2020, p. 32).

³ 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).

proves necessary, at the request of one of the parties. Article 5 of the Rules of Procedure of the Committee of Ambassadors also provides for a written procedure.

2.3. The envisaged act of the ACP-EU Committee of Ambassadors

At its 39th session held on 19 and 20 June 2014 in Nairobi, the ACP-EU Council of Ministers agreed, in a Joint Declaration, to proceed with the orderly closing of the CDE, a joint technical body of the ACP-EU Partnership Agreement established in its Annex III. In this Joint Declaration, the Council of Ministers, pursuant to Article 15(4) CPA, delegated powers to the ACP-EU Committee of Ambassadors to take the necessary decisions, *'including the relevant amendment to Annex III of the Cotonou Agreement'*⁴.

The ACP-EU Committee of Ambassadors, in its Decision No 4/2014⁵, authorised the CDE Executive Board to take all appropriate measures to prepare for the closure of the CDE. Subsequently, the CDE Executive Board signed a contract with a Curator until 31 December 2016.

Pursuant to ACP-EU Committee of Ambassadors Decision No 3/2016 (hereinafter referred to as the 'Decision No 3/2016')⁶, the closure phase has been followed by a 'passive phase' in which the CDE solely exists for the purposes of its liquidation.

Decision No 3/2016 has introduced the necessary changes in Annex III to the ACP-EU Partnership Agreement and constitutes the new legal framework of the CDE as from 1 January 2017 (Article 3(1) Decision No 3/2016).

The passive phase, managed by a Curator, comprises administrative tasks, amongst other things, keeping the archives of the CDE, replying to any administrative formality, or managing residual litigations that could not have been settled during the closure phase. The passive phase started on the day after the closure phase, namely on 1 January 2017. According to the recitals of Decision No 3/2016, it was the ACP-EU Committee of Ambassadors' intention that the passive phase should end after a period of 4 years or when the CDE has settled all its liabilities and realised all its assets, whichever happens earlier.

According to Article 2(1) Decision No 3/2016, before the end of the closure phase, namely 31 December 2016, the European Commission should contract a Curator to ensure the implementation of the passive phase as from 1 January 2017 for a period of four years, or until the CDE has settled all its liabilities and realised all its assets, whichever happens earlier. The Commission subsequently signed a service contract with the Curator on 21 December 2016 for an initial implementing period of four years.

In the last months of 2020, it appeared that the CDE would not have settled all its liabilities and realised all its assets by 31 December 2020.

Therefore, the ACP-EU Committee of Ambassadors is to adopt an amendment to Article 2(1) of Decision No 3/2016, in view of allowing the Curator to ensure the implementation of the

⁴ Joint ACP-EU Declaration on the Centre for Development of Enterprise (CDE), 3 July 2014, ACP-UE 2120/14.

⁵ Decision No 4/2014 of the ACP-EU Committee of Ambassadors of 23 October 2014 regarding the mandate to be given to the Executive Board of the Centre for the Development of Enterprise (CDE) (OJ L 330, 15.11.2014, p. 61).

⁶ Decision No 3/2016 of the ACP-EU Committee of Ambassadors regarding the revision of Annex III to the ACP-EU Partnership Agreement (OJ L 192, 16.7.2016 p. 77).

CDE's passive phase until the CDE has settled all its liabilities and realised all its assets. This will ensure the proper closure of the implementation of the passive phase under the Curator's management. The members of the Committee of Ambassadors of the Organisation of ACP States signalled their agreement to such an amendment in January 2021.

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

The Commission proposes that the Union agree to the envisaged amendment of Article 2(1) Decision No 3/2016. The proposed position of the Union is to be taken at a session of the ACP-EU Committee of Ambassadors or by written procedure, as appropriate.

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'*⁷.

4.1.2. Application to the present case

The ACP-EU Committee of Ambassadors is a body set up by an agreement, namely the Cotonou Partnership Agreement.

The act which the ACP-EU Committee of Ambassadors is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Articles 15 and 16 CPA. Pursuant to Article 15(3) CPA, the Council of Ministers may take decisions that are binding on the Parties of the Agreement, while in accordance with Article 15(4) CPA, the Council of Ministers may delegate powers to the Committee of Ambassadors. The Committee of Ambassadors is set up under Article 16 of the CPA. Pursuant to Article 16(2) CPA, the Committee of Ambassadors can adopt or amend decisions binding on the parties within the mandate conferred on it by the Council of Ministers.

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.

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

⁷ 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 substantive legal basis of the Council decision should be the same as that for the adoption of Council Decision (EU) 2016/1098 of 4 July 2016 on the position to be taken on behalf of the European Union within the ACP-EU Committee of Ambassadors regarding the revision of Annex III to the ACP-EU Partnership Agreement⁸, that is Article 209(2) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 209(2) TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the ACP-EU Committee of Ambassadors will amend Decision No 3/2016 of the ACP-EU Committee of Ambassadors, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

⁸ OJ L 182, 7.7.2016, p. 39–43.

Proposal for a

COUNCIL DECISION

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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 209(2) thereof, in conjunction with Article 218(9) thereof,

Having regard to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, (hereinafter referred to as the ‘ACP-EU Partnership Agreement’),

Having regard to the proposal from the European Commission,

Whereas:

- (1) Article 15(4) of the ACP-EU Partnership Agreement states that the ACP-EU Council of Ministers may delegate powers to the ACP-EU Committee of Ambassadors.
- (2) At its 39th session held on 19 and 20 June 2014 in Nairobi, the ACP-EU Council of Ministers agreed, in a Joint Declaration, to proceed with the orderly closing of the Centre for the Development of Enterprise (hereinafter referred to as CDE). For this purpose, the ACP-EU Council of Ministers decided to grant a delegation of powers to the ACP-EU Committee of Ambassadors to take the matter forward with a view to adopting the necessary decisions.
- (3) The revision of the Annex III of the ACP-EU Partnership Agreement has been adopted with the Decision No 3/2016 of the ACP-EU Committee of Ambassadors of 12 July 2016⁹ which has introduced the necessary changes in Annex III to the ACP-EU Partnership Agreement, as well as established the new legal framework of the CDE as from 1 January 2017, during which its legal personality is maintained solely for the purposes of its liquidation.
- (4) Article 2(1) of Decision 3/2016 stipulates that a Curator should ensure the implementation of the passive phase as from 1 January 2017 for a period of 4 years or until the CDE has settled all its liabilities and realised all its assets, whichever happens earlier.

⁹ Decision No 3/2016 of the ACP-EU Committee of Ambassadors regarding the revision of Annex III to the ACP-EU Partnership Agreement (OJ L 192, 16.7.2016 p. 77).

- (5) The CDE shall not have settled all its liabilities and realised all its assets before 31 December 2020. It is therefore deemed necessary to amend Decision 3/2016 ACP-EU Committee of Ambassadors to ensure the proper closure of the implementation of the passive phase under the Curator's management.
- (6) At one of its meetings, or by written procedure, the ACP-EU Committee of Ambassadors is to adopt the amendment to Decision No 3/2016.
- (7) 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.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted by the Union in the ACP-EU Committee of Ambassadors regarding the CDE is:

- to replace Article 2(1) of Decision 3/2016 of the ACP-EU Committee of Ambassadors by the following: 'The European Commission shall contract a Curator to ensure the implementation of the passive phase until the CDE has settled all its liabilities and realised all its assets';
- that the decision of the ACP-EU Committee of Ambassadors amending Decision 3/2016 of the ACP-EU Committee of Ambassadors applies as of 1 January 2021.

Article 2

This Decision is addressed to the Commission.

After its adoption, the Decision of the ACP-EU Committee of Ambassadors shall be published in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*