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PROPOSAL

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

date of receipt: 22 April 2022

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: COM(2022) 176 final

Subject: Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the EPA Committee established under the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Union and its Member States, of the other part, regarding the adoption of the Rules of Procedure for Dispute Settlement

Delegations will find attached document COM(2022) 176 final.

Encl.: COM(2022) 176 final



Brussels, 22.4.2022
COM(2022) 176 final

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EPA Committee established under the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Union and its Member States, of the other part, regarding the adoption of the Rules of Procedure for Dispute Settlement

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 EPA Committee established under the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Union and its Member States, of the other part, concerning the adoption of the Rules of Procedure for Dispute Settlement and the Code of Conduct.

2. CONTEXT OF THE PROPOSAL

2.1. The stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Union and its Member States, of the other part

The stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part ('the Agreement') aims at:

- (a) Allowing Ghana to benefit from the enhanced market access granted by the Union within the framework of EPA negotiations and thereby avoiding trade disruption between Ghana and the Union when the transitory trade regime of the Cotonou Agreement expired on 31 December 2007, while waiting for the conclusion of a full EPA;
- (b) Establishing the grounds for the negotiation of an EPA which contributes to poverty reduction, promotes regional integration, economic cooperation and good governance in West Africa and improves capacities of West Africa in the fields of trade policy and trade-related issues;
- (c) Promoting the harmonious and gradual integration of Ghana into the world economy in accordance with its political choices and its development priorities;
- (d) Strengthening existing links between the Parties on the basis of solidarity and mutual interest;
- (e) Creating an agreement compatible with Article XXIV of GATT 1994.

The Agreement is provisionally applied between Ghana, of the one part, and the European Union and its Member States, of the other part, from 15 December 2016.

2.2. The EPA Committee

Article 73 of the Agreement establishes the EPA Committee and provides that it is responsible for the administration in all fields covered by the Agreement and the achievement of all tasks mentioned in the Agreement. The Agreement also provides that the Committee will determine its organisation and functioning rules. The Committee has adopted its rules of procedure accordingly¹.

Under Title V (Dispute Avoidance and Settlement), Article 59 (Rules of procedure) provides that Dispute settlement procedures under Chapter 3 of this Title shall be governed by the Rules of Procedure which shall be adopted by the EPA Committee within three months after its establishment. Article 64(2) provides that a Code of Conduct is annexed to the Rules of

¹ Decision No 1/2021 of the EPA Committee established under the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, of 29 July 2021 regarding the adoption of the Rules of Procedure of the EPA Committee (OJ L 459, 22.12.2021, p. 3).

Procedure. It is appropriate that the Code of Conduct for arbitrators should be applicable to mediators.

2.3. The envisaged act of the EPA Committee

During the second half of 2022, the EPA Committee is to adopt a decision regarding the Rules of Procedure for Dispute Settlement ('the envisaged act'). The purpose of the envisaged act is to establish the Rules of Procedure governing Dispute Settlement and the related Code of Conduct.

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

This proposal for a Council Decision establishes the position to be taken on the Union's behalf in the EPA Committee set up by the Agreement with regard to the Rules of Procedure for Dispute Settlement and the related Code of Conduct. It is appropriate that the Code of Conduct for arbitrators should be applicable to mediators.

The Parties to the Agreement discussed the envisaged Rules of Procedure and Code of Conduct and agreed that, subject to the Union's decision-making procedures, the EPA Committee should adopt these Rules of Procedure and Code of Conduct in the second half of 2022.

The substance of the envisaged Rules of Procedure and the related Code of Conduct is similar to that of the Rules of Procedure and the Code of Conduct of other trade agreements of the Union.

The Rules of Procedure are essential for completing the institutional framework of the Agreement and hence for ensuring a smooth implementation of the Agreement.

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'².

4.1.2. Application to the present case

The EPA Committee is a body set up by an agreement, namely the EU-Ghana stepping stone EPA.

The act, which the EPA Committee is called upon to adopt, constitutes an act having legal effects, as it will establish binding legal rules governing the Dispute Settlement between the Parties.

² 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 envisaged act does not supplement or amend the institutional framework of the Agreement.

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

Pursuant to Article 46 of the Agreement, the Dispute avoidance and Settlement mechanism set out by the Agreement in Title V is not applicable to Title II of the Agreement ('Partnership for Development'). It follows that the Dispute avoidance and Settlement mechanism of Title V is applicable to disputes concerning trade matters, which from the Union perspective fall under the Common Commercial Policy. Therefore, also the Rules of Procedure and the related Code of Conduct to be adopted by the EPA Committee pursuant to Articles 59 and 64(2) of Title V of the Agreement will apply to dispute concerning trade matters.

In light of the above, it is clear that content of the envisaged act relate to the common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207(4), first subparagraph, TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207(4), first subparagraph TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EPA Committee will introduce the rules of procedure for Dispute Settlement under the Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

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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 207(4) first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The European Union and its Member States signed the stepping stone Economic Partnership Agreement ('EPA') between Ghana, of the one part, and the European Community and its Member States, of the other part, on 28 July 2016³ ('the Agreement'). The Agreement is provisionally applied between the EU and its Member States, of the one part, and Ghana, of the other part, from 15 December 2016⁴.
- (2) Pursuant to Article 73(3) of the Agreement, the EPA Committee is responsible for the administration in all fields covered by that Agreement and the achievement of all tasks mentioned in that Agreement.
- (3) Pursuant to Article 59, dispute settlement procedures shall be governed by the Rules of Procedure, which shall be adopted by the EPA Committee within three months after its establishment.
- (4) Pursuant to Article 64(2) a Code of Conduct is annexed to the Rules of Procedure. The function of the Code of Conduct is to set out guiding principles, rights and obligations with which arbitrators must comply. It is appropriate that the Code of Conduct for arbitrators is applicable to mediators, *mutatis mutandis*.
- (5) The EPA Committee is to adopt a decision with regard to the Rules of Procedure for Dispute Settlement in the second half of 2022.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the EPA Committee, as the envisaged EPA Committee decision will establish legally binding rules governing Dispute Settlement,

³ The stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, on the other part, (OJ L 287, 21.10.2016, p. 3).

⁴ Council Decision (EU) 2016/1850 of 21 November 2016 on the signature and provisional application of the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf shall be based on the annex to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*