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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2024) 252 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in nominating a Union representative to the Board of the Fund for Responding to Loss and Damage

Delegations will find attached document COM(2024) 252 final.

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EUROPEAN
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Brussels, 14.6.2024
COM(2024) 252 final

2024/0142 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in nominating a Union representative to the Board of the Fund for Responding to Loss and Damage

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the position taken by the Union in relation to the nomination of a Union representative to the Board of the Fund for Responding to Loss and Damage ('the Fund') established by the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA)[1].

2. CONTEXT OF THE PROPOSAL

2.1. The Governing Instrument of the Fund

The Governing Instrument of the Fund for responding to loss and damage ('the Agreement') operationalises a Fund to assist developing countries that are particularly vulnerable to the adverse effects of climate change in responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events. The Agreement was reached on 29 November 2023 when it was approved by consensus by the COP and the CMA, including with the approval of the European Union and its 27 Member States as Parties to the UNFCCC and the Paris Agreement

2.2. The Board of the Fund

The Board is the Fund's decision-making body and will govern and supervise the Fund. The Board will have responsibility for setting the strategic direction of the Fund and for the Fund's governance and operational modalities, policies, frameworks and work programme, including relevant funding decisions.

The Board is composed of 26 members, 12 of which are from developed countries, with each seat having an alternate seat. For the purposes of nominating members of the Board, the Union and its Member States are considered members of the developed country constituency. Decisions of the Board will be taken by consensus and if no consensus is reached, by a four-fifths majority of the members present and voting.

The Fund will operate as a World Bank Financial Intermediary Fund (FIF). By the time the Fund is fully operational, the recast of the Financial Regulation will have entered into force and the Union's participation in the Fund and other global initiatives will be covered by Article 240 of that regulation which addresses the Union's role in contributing to and participating in the governance of such initiatives as well as its duty to inform the Council. This decision is not considered a precedent for the Union's participation and appointments of the Union representative in future global initiatives covered by that Regulation.

2.3. The nomination of members to the Board of Fund

In the decision accompanying the approval of the Agreement, the Parties to the UNFCCC and the Paris Agreement were invited, through their regional groups and constituencies, to submit nominations of representatives for membership of the Board of the Fund to the UNFCCC secretariat as soon as possible, and requested the secretariat to initiate arrangements for convening the first meeting of the Board of the Fund once all voting member nominations have been submitted. In order to respond to this invitation, the Union invited and received

[1] 1/CP.28 5/CMA.5 Operationalization of the new funding arrangements, including the fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4

nominations from the Commission and 12 interested Member States, and began negotiations with other developed country Parties on the number of member and alternate seats that would be available to the Union and its Member States.

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

On 14th February 2024, the Council approved a 'Position of the Union to support a Union seat and seating arrangements for the Union and Member States in the Board of the Loss and Damage Fund (UNFCCC)'. In accordance with this position 'the Union, represented by the Commission, will seek a seat on the Board'.

On the basis of this decision, the Union subsequently negotiated with the other developed countries an initial composition of the Board that will include 7 members and 7 alternates to be shared amongst the Union, as represented by the Commission, and representatives from 12 Member States.

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 nomination of a Union representative to the Board of the Fund, is considered to qualify as an "act with legal effects", falling under the Article 218(9) TFEU procedure.

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

In the present case, the procedural legal basis for the decision to nominate a Union representative to the Board of the Fund is therefore 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.

[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.

4.2.2. Application to the present case

The main objective and content of the envisaged act is in the areas of development cooperation, as it relates to fostering the sustainable economic, social and environmental development of developing countries while also contributing to improving the quality of the environment and the sustainable management of global natural resources, to assisting populations, countries and regions confronting natural or man-made disasters, and to promoting an international system based on stronger multilateral cooperation.

Therefore, the substantive legal basis of the proposed decision is Article 208 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 208 TFEU in conjunction with Article 218(9) TFEU.

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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 208 in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Participation of the Union, as appropriate, in international organisations or boards thereof need to be decided on the basis of a case-by-case analysis, taking into account the rules governing the composition of such organisations or boards as well as the specific EU competences at stake.

(2) The Union is a Party to the UN Framework Convention on Climate Change (UNFCCC) and to the Paris Agreement and participated in the approval of the establishment of a Fund for Responding to Loss and Damage and its Governing Instrument ('the Agreement') by the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP) and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA)[3] on 29 November 2023.

(3) Pursuant to paragraph 17 of the Agreement, 12 members of the Board of the Fund will be representatives of developed country Parties. In the decision accompanying the approval of the Agreement, the Parties to the UNFCCC and to the Paris Agreement were invited, through their regional groups and constituencies, to submit nominations of representatives for membership of the Board of the Fund to the UNFCCC secretariat as soon as possible[4].

(4) Arrangements for convening the first meeting of the Board of the Fund will be initiated as soon as possible once all voting member nominations have been submitted.

(5) The Union has since agreed with other developed country Parties that the EU and its Member States will nominate representatives as 7 members and 7 alternates on the Board.

(6) It is appropriate to establish the position to be taken on the Union's behalf concerning the nomination of a Union representative to the Board and on the modalities with which the Commission and the Member States will, respectively, express and support Union positions in the Board, as the nomination of the Union representative on the Board will have legal effects.

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[3] 1/CP.28 5/CMA.5 Operationalization of the new funding arrangements, including the fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4

[4] Ibid, paragraph 8

(7) A Union seat in the Board, held by the Commission, does not alter whether or to what extent a Union position on matters discussed in the Board is needed, nor the procedures for adopting such a position, and must respect the principle of sincere cooperation.

(8) A Union seat in the Board does not affect the possibility of Member States represented in the Board to express support to any duly agreed Union position, or their position, on matters falling within their competence, while respecting the principle of sincere cooperation.

(9) The Commission will report back periodically to the Council on Board proceedings in line with the principle of sincere cooperation enshrined in the Treaties.

(10) The position on membership of the Board does not alter the representation of the EU and its Member States in the UNFCCC.

(11) The recast of the Financial Regulation is expected to enter into force in the autumn 2024, and this decision is not considered a precedent for the Union's participation in future global initiatives covered by that Regulation. The present Council decision is not a precedent for the further implementation of the Fund and participation in the Board, as well as for the Commission's own prerogatives to implement the Union budget, in accordance with Article 17 (1) TEU and Article 317 TFEU, to decide any possible Union contributions to the Fund or to further implement such contributions in accordance with point (c) of Article 62(1) of the Financial Regulation.

(12) In any event, any funding pledges by the Union to the Fund must be prepared in accordance with the applicable procedures under Union law,

HAS ADOPTED THIS DECISION:

Article 1

The position taken on the Union's behalf in nominating a Union representative to the Board is set out in the Annex.

Article 2

This Decision is addressed to the Commission and to the Member States.

Done at Brussels,

For the Council
The President