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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	28 October 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 686 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the ACP-EU Committee of Ambassadors, with regard to amending Decision No 3/2019 of the ACP-EU Committee of Ambassadors of 17 December 2019 to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement

Delegations will find attached document COM(2021) 686 final.

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EUROPEAN
COMMISSION

Brussels, 28.10.2021
COM(2021) 686 final

2021/0358 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the ACP-EU Committee of Ambassadors, with regard to amending Decision No 3/2019 of the ACP-EU Committee of Ambassadors of 17 December 2019 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 an amendment of the Decision No 3/2019 on transitional measures pursuant to Article 95(4) of the Partnership Agreement between the EU and the African, Caribbean and Pacific (ACP) Group of States[1], signed in Cotonou on 23 June 2000 ('Cotonou Partnership Agreement' or 'CPA') ('decision on transitional measures')[2]. The latter was amended for the first time by Decision No 2/2020 of the Committee of Ambassadors of 4 December 2020[3] extending the application of the Cotonou Partnership Agreement until 30 November 2021. The Commission proposes the further extension of the application of the entirety of the provisions of the Cotonou Partnership Agreement until 30 June 2022, or until the entry into force or provisional application 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 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 17 December 2019, the application of the provisions of the Cotonou Partnership Agreement was extended through the Decision No 3/2019 of the ACP-EU Committee of Ambassadors until 31 December 2020 or until entry into force of the new Partnership Agreement between the Union and the ACP States, whichever is sooner. The latter was amended for the first time by Decision No 2/2020 of the ACP-EU Committee of Ambassadors of 4 December 2020[4] extending the application of the Cotonou Partnership Agreement until 30 November 2021.

Negotiations towards a new ACP-EU Partnership Agreement were launched in September 2018. On 15 April 2021, the chief negotiators initialled the text of a new Partnership Agreement between the Union and the members of the Organisation of African, Caribbean and Pacific States (OACPS). The Commission later sent its proposal for signature to the Council. The negotiations were however reopened and are currently ongoing for what concerns the legal nature of the agreement. It has become clear that the negotiations will not result in a new Agreement ready to be applied by the current expiry date of the application of the Cotonou Partnership Agreement on 30 November 2021. The situation would result in a vacuum in the EU-ACP relations that must be filled.

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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).

2 Decision No 3/2019 of the ACP-EU Committee of Ambassadors of 17 December 2019 to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement [2020/2].

3 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.

4 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.

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 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). 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 extend the adopted transitional measures in view of continuing the application of the current Agreement.

2.4. The amendment 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. However, pursuant to Article 15(4) CPA, the Council of Ministers may delegate powers to the Committee of Ambassadors. 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[5]. 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.

According to Article (1) of the Rules of Procedure of the Committee of Ambassadors[6], 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. Given this flexibility, the Committee of Ambassadors can ensure that the amendment of the decision on transitional measures is taken in a timely manner, and no later than mid November 2021.

Therefore, at one of its meetings, the ACP-EU Committee of Ambassadors is to adopt the amendment to the decision on transitional measures ('the envisaged act'). The purpose of the envisaged act is to further extend the application of the Cotonou Partnership Agreement, in its entirety, until 30 June 2022, or until the entry into force or provisional application of the new Partnership Agreement between the Union and the ACP States, whichever comes first.

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5 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).

6 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).

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

The Commission proposes that the current decision on transitional measure of the CPA is amended in view of extending the application of the Cotonou Partnership Agreement until 30 June 2022, unless the new Agreement enters into force or is provisionally applied before that date.

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

4.4. 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

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.

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

[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.

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.[8]

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 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.[9]

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.

[8] 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.

[9] 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.

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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 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')[10] 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 30 November 2021 in accordance with Decision No 3/2019 of the ACP-EU Committee of Ambassadors of 17 December 2019 to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement ('decision on transitional measures')[11] as amended by 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.

(2) Pursuant to the first subparagraph of Article 95(4) 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 ACP-EU Partnership Agreement. It is therefore deemed necessary to amend the Decision No3/2019 on transitional measures to further extend the application of the provisions of the current ACP-EU Partnership 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 that may be required until the new Agreement comes into force.

(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. The ACP-EU Committee of Ambassadors is to have a regular meeting

[10] 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).

[11] Decision No 3/2019 of the ACP-EU Committee of Ambassadors of 17 December 2019 to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement [2020/2]

where it will take the decision to amend 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 provisions of the ACP-EU Partnership Agreement will continue to be applied with the aim of maintaining continuity in relations between the Union and its Member States, on the one hand, and the ACP States, on the other. Accordingly, the amended transitional measures are not intended for amendments to the ACP-EU Partnership Agreement as provided for in Article 95(3) thereof,

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 amend the Decision No 3/2019 on transitional measures to extend the application of the provisions of the ACP-EU Partnership Agreement in their entirety, until 30 June 2022, 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