Council of the European Union

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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	12 May 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 193 final
Subject:	Proposal for a COUNCIL DECISION establishing the position to be taken on behalf of the European Union in the EPA Committee set up by the stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, in connection with the adoption of the list of arbitrators

Delegations will find attached document COM(2020) 193 final.

Encl.: COM(2020) 193 final

EUROPEAN
COMMISSION

Brussels, 12.5.2020
COM(2020) 193 final

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Proposal for a

COUNCIL DECISION

establishing the position to be taken on behalf of the European Union in the EPA Committee set up by the stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, in connection with the adoption of the list of arbitrators

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Decision establishing the position to be adopted on behalf of the European Union ('the Union') in the EPA Committee set up by the stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part ('the Agreement')[1], in connection with the envisaged adoption of the list of persons who are willing and able to serve as arbitrators.

2. CONTEXT OF THE PROPOSAL

2.1. EU-Côte d'Ivoire Stepping Stone Economic Partnership Agreement

The aim of the Agreement is to establish an initial framework for an economic partnership agreement in accordance with the Cotonou Agreement. Since 3 September 2016, the Agreement has been applied on a provisional basis.

2.2. EPA Committee

The EPA Committee is the joint institutional body of the Agreement. Article 73 of the Agreement provides that the EPA Committee is to be responsible for the administration of all the fields covered by the Agreement and for the achievement of all the tasks mentioned therein. The EPA Committee is to reach its decisions by consensus. The operation of the EPA Committee is laid down in its Rules of Procedure[2].

2.3. Act envisaged by the EPA Committee

At its fifth meeting on [*date*], the EPA Committee must adopt a decision concerning the adoption of the list of arbitrators ('the envisaged act') in accordance with Article 64 of the Agreement.

Article 64(1) of the Agreement provides that 'the EPA Committee shall [...] establish a list of 15 individuals who are willing and able to serve as arbitrators.'

The purpose of the envisaged act is to establish a list of fifteen persons that could serve as arbitrators in dispute settlement proceedings in accordance with Title V of the Agreement. The adoption of this list is essential to finalising the operational framework for the Agreement's provisions on dispute avoidance and settlement.

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

This proposal for a Council Decision establishes the position to be taken on behalf of the Union in the EPA Committee set up by the stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, regarding the establishment of the list of persons who are willing and able to serve as arbitrators under Article 64 of the Agreement.

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1 OJ L 59, 3.3.2009, p. 2.

2 OJ L 194, 31.7.2018, p. 158.

The Parties to the Agreement have approved this proposal for a decision, initialled it at the fourth EPA Committee meeting on 27 and 28 November 2019 and, subject to the EU's decision-making procedures, should adopt it at the next EPA Committee meeting due to take place at the end of 2020.

This decision is essential for rendering operational the provisions of Title V of the Agreement on dispute avoidance and settlement and hence for ensuring the smooth implementation of the Agreement.

4. PROCEDURAL 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*'[3].

4.1.2. Application to the present case

The EPA Committee is a body set up by an agreement, namely the stepping stone Economic Partnership Agreement between the Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part.

The act which the EPA Committee is called upon to adopt is an act having legal effects. The envisaged act will be binding under international law in accordance with Article 64 of the Agreement.

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

Accordingly, the procedural legal basis of the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis of 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 behalf of the Union. 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

[3] 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.

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

Since the arbitration procedure is in essence applicable to the trade sector, the main objective and content of the envisaged act relate to the common commercial policy. Therefore, the substantive legal basis of the proposed decision is Article 207 TFEU.

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

As the decision of the EPA Committee will amend the Agreement, it must be published in the Official Journal of the European Union once it has been adopted.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union ('TFEU'), and in particular the first subparagraph of Article 207(4), in conjunction with Article 218(9) thereof,

Having regard to the stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part ('the Agreement')[4],

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement was concluded on behalf of the European Union ('the Union') by Decision 2009/156/EC[5] and has been applied on a provisional basis since 3 September 2016.

(2) In accordance with Article 64(1) of the Agreement, the EPA Committee establishes a list of persons who are willing and able to serve as arbitrators.

(3) The EPA Committee, at its annual meeting on [date], is to adopt a decision establishing the list of persons who are willing and able to serve as arbitrators in accordance with Article 64(1) of the Agreement.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the EPA Committee, as the envisaged decision will be binding on the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on behalf of the Union in the EPA Committee shall be based on the EPA Committee's draft decision on the list of individuals who are willing and able to serve as arbitrators, annexed to this Decision.

[4] OJ L 59, 3.3.2009, p. 3.
[5] OJ L 59, 3.3.2009, p. 1.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President