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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the ACP-EU Committee of Ambassadors regarding the implementation of Article 68 of the ACP-EU Partnership Agreement

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 of the Committee of Ambassadors concerning the implementation of Article 68 of the ACP-EU Partnership Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The ACP-EU Partnership Agreement ("the Cotonou Agreement")

The ACP-EU Partnership Agreement¹ ('the Agreement') aims to set up an association between the European Union and the ACP States. The Agreement entered into force on 01/04/2003.

Article 100 of the ACP-EU Partnership Agreement states that its Annexes Ia, Ib, II, III, IV and VI may be revised, reviewed and/or amended by the ACP-EU Council of Ministers on the basis of a recommendation from the ACP-EU Development Finance Cooperation Committee.

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.

The ACP-EU Council of Ministers decided to grant a delegation of powers to the ACP-EU Committee of Ambassadors in Dakar during the Joint Ministerial Council meeting of 6 May 2017, for the purpose of taking a decision on the implementation of Article 68 of the ACP-EU Partnership Agreement before 31 December 2017.

2.2. The ACP-EU Committee of Ambassadors

The ACP-EU Committee of Ambassadors can take decisions that are legally binding on the Parties. The Committee of Ambassadors comprises, on the one hand, the permanent representative of each Member State to the European Union and a representative of the Commission and, on the other, the head of mission of each ACP State to the European Union. The office of Chairman of the Committee of Ambassadors is held alternately by a Permanent Representative of a Member State designated by the Community, and a head of mission representing an ACP State, designated by the ACP States. The Committee assists the Council of Ministers in the fulfilment of its tasks and carries out any mandate entrusted to it by the Council. In this context, it monitors implementation of this Agreement and progress towards achieving the objectives set therein. The Committee of Ambassadors meets regularly, in particular to prepare the Council sessions and whenever it proves necessary.

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

Before 31/12/2017, the ACP-EU Committee of Ambassadors is to adopt a decision regarding the implementation of Article 68 of the ACP-EU Partnership Agreement ('the envisaged act').

The Decision will apply to Annex II Chapter 3 and aims at improving the functioning of the system of financing for support in case of exogenous shocks.

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).

The envisaged act will become binding on the parties in accordance with Article 15.3 of the Agreement which provides that 'The ACP-EU Council of Ministers may take decisions that are binding on the Parties' and with Article 15.4 of the Agreement, which provides: 'The ACP-EU Council of Ministers may delegate powers to the ACP-EU Committee of Ambassadors.'

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

According to Article 68 of the ACP-EU Partnership Agreement "*the parties recognise that macro-economic instability resulting from exogenous shocks may adversely affect the development of the ACP States and jeopardise the attainment of their development requirements. A system of additional support in order to mitigate the short-term adverse effects resulting from exogenous shocks, including the effects on export earnings, is therefore set up within the multi-annual financial framework of cooperation under this Agreement.*"

Chapter 3 of Annex II to the ACP-EU Partnership Agreement establishes the terms and conditions on financing short-term fluctuations in export earnings (FLEX). This Annex has been amended through the ACP-EC Council decision 1/2008 of 13/06/2008².

Developing countries are subject to large and recurrent adverse exogenous shocks that impose steep short-term output and welfare losses as well as prolonged growth slowdowns, not only related to fluctuations in export earnings. These exogenous shocks may relate to global economic developments, in particular downturn in global growth, as well as to natural disasters.

Based on the experiences of FLEX, including the specific financing after the world economic and financial crisis of 2008 (the Vulnerability-FLEX), and in line with the ACP-EU Partnership Agreement, a new approach for a support to help countries to absorb shocks with a macroeconomic impact has therefore been developed, that also takes into account the fiscal space, the macroeconomic capacity of the government to respond to exogenous shocks.

A harmonised treatment of requests within a single envelope for unforeseen needs would thus best ensure the flexibility to adapt the Commission's response on a case by case basis. Agreement was then found with the ACP side to cover support to macroeconomic shocks within the envelope for unforeseen needs of the 11th EDF.

The purpose of the envisaged act is thus to provide support in the event of exogenous shocks, as provided by Article 68 of the ACP-EU Partnership Agreement, to certain ACP countries. This support shall be covered under the single envelope for unforeseen needs.

In order to implement the above described new approach, a legally binding decision of the decision making bodies set up under the Cotonou Agreement should be adopted.

The ACP-EU Council of Ministers of 5 May 2017 decided that a proposal on support in the event of exogenous shocks, as provided by Article 68 of the ACP-EU Partnership Agreement, shall be covered under the envelope for unforeseen needs and granted a delegation of powers to the ACP-EU Committee of Ambassadors to adopt a decision by 31 December 2017, which will apply to chapter 3 Annex II of the ACP-EU Partnership Agreement.

The Commission is thus proposing the Council to adopt the present decision.

² OJ L 171, 1.7.2008, p. 63.

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*’³.

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 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 Article 15.3 and 15.4 of the Cotonou Agreement.

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

The main objective and content of the envisaged act relate to ‘development cooperation’. Therefore, the substantive legal basis of the proposed decision 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 apply to the annex II of the Cotonou Agreement, it is appropriate to publish it in the Official Journal of the European Union after its adoption.

³ Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the ACP-EU Committee of Ambassadors regarding the implementation of Article 68 of the ACP-EU Partnership Agreement

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')⁴,

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 Community and its Member States, of the other part ('the ACP-EU Partnership Agreement'), was signed in Cotonou on 23 June 2000. The ACP-EU Partnership Agreement entered into force on 1 April 2003.
- (2) Pursuant to Article 100 of the ACP-EU Partnership Agreement, its Annexes Ia, Ib, II, III, IV and VI may be revised, reviewed and/or amended by the ACP-EU Council of Ministers on the basis of a recommendation from the ACP-EU Development Finance Cooperation Committee.
- (3) Pursuant to Article 15(4) of the ACP-EU Partnership Agreement, the ACP-EU Council of Ministers may delegate powers to the ACP-EU Committee of Ambassadors.
- (4) The ACP-EU Council of Ministers decided to grant a delegation of powers to the ACP-EU Committee of Ambassadors in Dakar during the Joint Ministerial Council meeting of 6 May 2017, for the purpose of taking a decision on the implementation of Article 68 of the ACP-EU Partnership Agreement before 31 December 2017.
- (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 Decision will be binding on the Union.
- (6) The Decision will apply to Annex II Chapter 3 of the ACP-EU Partnership Agreement and aims at improving the functioning of the system of financing for support in case of exogenous shocks.

⁴ 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).

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf in the ACP-EU Committee of Ambassadors regarding the implementation of Article 68 of the ACP-EU Partnership Agreement shall be based on the draft act of the ACP-EU Committee of Ambassadors attached to this Decision.
2. Minor changes to the draft Decision may be agreed by the representatives of the Union in the ACP-EU Committee of Ambassadors without further decision of the Council.

Article 2

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

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President