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2018/0378 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Trade and Development Committee established under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part as regards the adoption of the Roster of Arbitrators

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 Trade and Development Committee established under the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, in connection with the envisaged adoption of the List of individuals who are willing and able to serve as arbitrators.

2. CONTEXT OF THE PROPOSAL

2.1. The Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part

The Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part ('the Agreement') aims to

- (a) contribute to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement;
- (b) promote regional integration, economic cooperation and good governance to establish and implement an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC EPA States;
- (c) promote the gradual integration of the SADC EPA States into the world economy in conformity with their political choices and development priorities;
- (d) improve the SADC EPA States' capacity in trade policy and trade-related issues;
- (e) support the conditions for increasing investment and private sector initiatives and enhancing supply capacity, competitiveness and economic growth in the SADC EPA States; and
- (f) strengthen the existing relations between the Parties on the basis of solidarity and mutual interest.

The Agreement is provisionally applied between the European Union and its Member States, of the one part, and Botswana, Lesotho, Namibia, Eswatini and South Africa, of the other part, from 10 October 2016, and between the European Union and its Member States, of the one part, and Mozambique, of the other part, from 4 February 2018.

2.2. The Trade and Development Committee

Article 100 of the Agreement establishes a Joint Council and provides that it "shall oversee and administer the implementation of this Agreement". Article 103 of the Agreement provides that "the Joint Council shall be assisted in the performance of its duties by a Trade and Development Committee composed of representatives of the Parties, normally at the level of senior officials".

Article 94 of the Agreement foresees that the Trade and Development Committee shall "establish a list of twenty-one (21) individuals who are willing and able to serve as arbitrators".

2.3. The envisaged act of the Trade and Development Committee

During the first meeting of the Trade and Development Committee taking place after the adoption of the Rules of procedure of that Committee by the Joint Council is to adopt a decision regarding the establishment of the List of individuals who are willing and able to serve as arbitrators under Article 94 of the Agreement ('the envisaged act').

The purpose of the envisaged act is to establish a list of twenty-one individuals that could serve as arbitrators in case of a dispute settlement procedure in accordance with Part III of the Agreement. The adoption of this list is an essential element for finalising the operational framework for the Agreement's provisions on Dispute Settlement and Dispute Avoidance.

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

This proposal for a Decision by the Council establishes the position to be taken on the Union's behalf in the Trade and Development Committee set up by the EU-SADC EPA with regard to the establishment of the List of individuals who are willing and able to serve as arbitrators under Article 94 of the Agreement.

The Parties to the Agreement agreed on the list of individuals who are willing and able to serve as arbitrators in accordance with Article 94 of the Agreement and, subject to the EU's decision making procedures, the draft decision of the Trade and Development Committee establishing the list should be adopted at the first meeting of the Trade and Development Committee taking place after the adoption of the Rules of procedure of that Committee by the Joint Council, foreseen for the first semester of 2019.

This decision is essential for rendering the Agreement's provisions of Part III on Dispute Avoidance and Settlement operational 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*'¹.

4.1.2. Application to the present case

The Trade and Development Committee is a body set up by an agreement, namely the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part.

¹ 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 act which the Trade and Development Committee is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 94 of the 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 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 Article 207 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 207 TFEU in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Economic Partnership Agreement between the European Union and its Member States, of the one part, and the Southern African Development Community ('SADC') EPA States, of the other part, was signed by the European Union and its Member States on 10 June 2016 ('the Agreement'). It is provisionally applied between the European Union and its Member States, of the one part, and Botswana, Lesotho, Namibia, Eswatini and South Africa, of the other part, from 10 October 2016, and between the European Union and its Member States, of the one part, and Mozambique, of the other part, from 4 February 2018.
- (2) Pursuant to Article 94(1) of the Agreement, the Trade and Development Committee shall establish a list of individuals who are willing and able to serve as arbitrators.
- (3) The Trade and Development Committee, during the first meeting of the Trade and Development Committee taking place after the adoption of the Rules of procedure of that Committee by the Joint Council, is to adopt a decision establishing the list of individuals who are willing and able to serve as arbitrators.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Trade and Development Committee, as the envisaged decision will be binding on the Union.
- (5) The establishment of the list of individuals who are willing and able to serve as arbitrators is foreseen by the Agreement in its Article 94(1),

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Trade and Development Committee shall be based on the draft decision of the Trade and Development Committee with regard to the list of individuals who are willing and able to serve as arbitrators which is attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*