EUROPEAN
COMMISSION

Brussels, 22.8.2013
COM(2013) 597 final

2013/0287 (NLE)

Proposal for a

# COUNCIL DECISION

**on the position to be taken by the European Union within the ACP-EU Council of Ministers regarding the revision of Annex IV to the ACP-EC Partnership Agreement**

## EXPLANATORY MEMORANDUM

The Commission aims at having a coherent set of implementing rules regarding the external financial instruments under the Budget and the European Development fund (EDF) as of 1 January 2014, as soon as the transitional measures of the 11th EDF start applying. The new Financial Regulation and the Commission's legislative proposals regarding external actions under the next Multi-Annual Financial Perspective (2014-2020) contain a number of elements which require that technical adjustments be made to Annex IV to the ACP-EC Partnership Agreement.

These technical adjustments aim at introducing innovations proposed regarding the implementation of external financial instruments under the Budget, worth extending to the ACP-EU Partnership, however without compromising the specific objectives it pursues. It is expected that following these adjustments, the implementation of the EDF will become simpler and more efficient.

In particular, the proposed amendments target the rules of nationality and origin (Articles 20 and 22 of Annex IV), as well as the regime of preferences (Article 26).

While the revision of the ACP-EC Partnership Agreement in 2010 resulted in the participation to grant and procurement procedures financed both under Budget and the EDF being widely open, the Commission is of the view that some progress could still be made in line with the evolving political context. Taking into account the EU commitments taken in Busan[1], Accra[2] and at the OECD-DAC in Paris in 2010, a harmonised simplification has already been suggested regarding the rules of nationality and origin of external financial instruments under the Budget. While maintaining the core of the current regime of Annex IV, it is suggested to complement this regime with the harmonised and simplified rules proposed under the Budget.

As an example, it is suggested that entities of ACP countries become eligible to procurement procedures for projects in any developing country. In return for the market gain of ACP countries, that the entities of all developing countries, with the exception of G20 members, would also become eligible for procurement under the EDF.

As regards the regime of preferences, previous modifications have altered the text of Article 26 in such a way that undermines the coherence and applicability of the regime. As a result, it is suggested to make the necessary technical adjustments to reinstate the integrity of the Article.

In accordance with Article 100 of the ACP-EC Partnership Agreement, Annex IV may be revised by a decision of the ACP-EU Council of Ministers. In order to make sure that by 1 January 2014 a coherent set of implementing rules for the Budget and the EDF is in place, it is suggested that the ACP-EU Council of Ministers take the decision through an exchange of letters between the Chair of the ACP Council and the Chair of the Council of the European Union.

---

[1] See the Busan Outcome Document, 29 November – 1 December 2011, available at http://www.oecd.org/dac/effectiveness/busanpartnership.htm

[2] See the Accra Agenda for Action(2008), available at http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm

The Commission proposes that the Council of the European Union adopts the attached Decision.

2013/0287 (NLE)

Proposal for a

# COUNCIL DECISION

## on the position to be taken by the European Union within the ACP-EU Council of Ministers regarding the revision of Annex IV to the ACP-EC 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) 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, signed in Cotonou on 23 June 2000[3] (hereinafter referred to as 'the ACP-EC Partnership Agreement'),

Having regard to the proposal from the European Commission,

Whereas:

(1) Article 100 of the ACP-EC Partnership Agreement states that Annexes Ia, Ib, II, III, IV and VI to the ACP-EC Partnership Agreement 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;

(2) International commitments toward aid effectiveness were taken by the Parties to the ACP-EC Partnership Agreement in Busan, Accra and at the OECD-DAC in Paris in 2010.

(3) The rules of nationality and origin could be further improved in line with the abovementioned international commitments.

(4) Clarification and simplification of the provisions of Annex IV to the ACP-EC Partnership Agreement could improve the efficiency of the implementation of the EDF.

[3] OJ L 317, 15.12.2000, p. 3. Agreement as amended by the Agreement signed in Luxembourg on 25 June 2005 (OJ L 287, 28.10.2005, p. 4) and by the Agreement signed in Ouagadougou on 22 June 2010 (OJ L 287, 4.11.2010, p. 3).

HAS ADOPTED THIS DECISION:

*Article 1*

The position to be taken by the European Union within the ACP-EU Council of Ministers regarding the revision of Annex IV to the ACP-EC Partnership Agreement shall be based on the draft Decision of the ACP-EU Council of Ministers attached hereto.

*Article 2*

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

Done at Brussels,

*For the Council*
*The President*

**ANNEX**

Draft

**DECISION OF THE ACP-EU COUNCIL OF MINISTERS**

**regarding the revision of Annex IV to the ACP-EC Partnership Agreement**

THE ACP-EU COUNCIL OF MINISTERS,

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, signed in Cotonou on 23 June 2000[4] as amended in Luxembourg on 25 June 2005[5] and in Ouagadougou on 22 June 2010[6] (the 'ACP-EC Partnership Agreement'), and in particular Article 100 thereof,

Whereas:

(1) Article 100 of the ACP-EC Partnership Agreement states that Annexes Ia, Ib, II, III, IV and VI to the ACP-EC Partnership Agreement 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.

(2) International commitments toward aid effectiveness were taken by the Parties to the ACP-EC Partnership Agreement in Busan, Accra and at the OECD-DAC in Paris in 2010.

(3) The rules of nationality and origin could be further improved in line with the abovementioned international commitments.

(4) Clarification and simplification of the provisions of Annex IV to the ACP-EC Partnership Agreement could improve the efficiency of the implementation of the EDF.

HAS ADOPTED THIS DECISION:

*Article 1*

Annex IV to the ACP-EC Partnership Agreement is amended as follows:

1. In Article 19C, paragraph 5 is replaced by the following:

'Pursuant to the commitment referred to in Articles 49 and 50 of this Agreement, contracts and grants financed from resources from the multi-annual financial framework of cooperation with the ACP shall be performed in accordance with internationally recognised basic standards in the field of labour law and applicable environmental legislation including multilateral environmental agreements.'

---

4 OJ L 317, 15.12.2000, p. 3. Agreement as rectified by OJ L 385, 29.12.2004, p. 88.
5 OJ L 209, 11.8.2005, p. 27.
6 OJ L 287, 4.11.2010, p. 3.

2. In Article 20, paragraph 1 is replaced by the following:

‘Save where a derogation is granted in accordance with Article 22, and without prejudice to Article 26:

Participation in procedures for the awarding of procurement contracts or grants financed from the multi-annual financial framework of cooperation under this Agreement shall be open to all natural persons who are nationals of, or legal persons who are established in:

(a) an ACP State, a Member State of the European Community, an official candidate country of the European Community or a Member State of the European Economic Area;

(b) developing countries and territories, as included in the OECD-DAC list of ODA Recipients, which are not members of the G-20 group, without prejudice to the status of the Republic of South Africa, as governed by Protocol 3, and overseas countries and territories covered by Council Decision [2001/822/EC of 27 November 2001][7]

(c) countries for which reciprocal access to external assistance has been established by the Commission.

Reciprocal access may be granted, for a limited period of at least one year, whenever a country grants eligibility on equal terms to entities from the Community and from countries eligible under this Article;

(d) Member State of the OECD, in the case of contracts implemented in a Least Developed Country or a Highly Indebted Poor Country (HIPC), as included in the OECD-DAC list of ODA Recipients published by the OECD-DAC.’

3. In Article 20, paragraph 1a is deleted.

4. In Article 20, paragraph 3 is replaced by the following:

‘All supplies and materials purchased under a procurement contract, or in accordance with a grant agreement, financed from the multi-annual financial framework of cooperation under this Agreement shall originate from an eligible country, as defined in this Article.

However, they may originate from any State when the amount of the supplies and materials to be purchased is below the threshold for the use of the competitive negotiated procedure.

In this context, the definition of the concept of "originating products" shall be assessed by reference to the relevant international agreements, and supplies originating in the Community shall include supplies originating in the Overseas Countries and Territories.’

5. In Article 20, paragraph 5 is replaced by the following:

[7] OJ L 314 of 30.11.2001, p. 1

‘Whenever the multi-annual financial framework of cooperation under this Agreement finances an operation implemented through an international organisation, participation in procedures for the awarding of procurement contracts or grants shall be open to all natural and legal persons who are eligible under paragraph 1, and to all natural and legal persons who are eligible according to the rules of the organisation, care being taken to ensure equal treatment of all donors.The same rules apply for supplies and materials.’

6. In Article 20, paragraph 6 is replaced by the following:

‘Whenever the multi-annual financial framework of cooperation under this Agreement finances an operation implemented as part of a regional initiative, participation in procedures for the awarding of procurement contracts or grants shall be open to all natural and legal persons who are eligible under paragraph 1, and to all natural and legal persons from a country participating in the relevant initiative. The same rules apply for supplies and materials.’

7. In Article 20, paragraph 7 is replaced by the following:

‘Whenever the multi-annual financial framework of cooperation under this Agreement finances an operation jointly co-financed with a partner or other donor or implemented through a Member State in shared management or through a Trust Fund established by the Commission, participation in procedures for the awarding of procurement contracts or grants shall be open to all natural and legal persons who are eligible under paragraph 1 and to all natural and legal persons eligible under rules of that partner, other donor or Member State or determined in the Trust Fund constitutive act.

In the case of actions implemented through entrusted bodies, which are Member States or their agencies, the European Investment Bank or through international organisations or their agencies, natural and legal persons who are eligible under the rules of that entrusted body, as identified in the agreements concluded with the co-financing or implementing body shall also be eligible. The same rules apply for supplies and materials.’

8. In Article 20, a new paragraph 8 is added:

‘Whenever the multi-annual financial framework of cooperation under this Agreement finances an operation co-financed under another external financial Instrument, participation in procedures for the awarding of procurement contracts or grants shall be open to all natural and legal persons who are eligible under paragraph 1, and to all natural and legal persons eligible under any of these Instruments. The same rules apply for supplies and materials.’

9. In Article 20, a new paragraph 9 is added:

‘Eligibility as defined in this Article may be restricted with regard to the nationality, localisation or nature of tenderers, applicants and candidates, where required by the nature and the objectives of the action and as necessary for its effective implementation.’

10. In Article 22, paragraph 1 is replaced by the following:

‘Tenderers, applicants and candidates from third countries not eligible under Article 20 may be authorised to participate in procedures for the awarding of procurement contracts or grants financed by the Community from the multiannual financial framework of cooperation under this Agreement or supplies and materials from non-eligible origin may be accepted as eligible at the justified request of the ACP States or the relevant organisation or body at regional or intra-ACP level in the case of:

(a) countries having traditional economic, trade or geographical links with neighbouring beneficiary countries, or

(b) urgency or unavailability of products and services in the markets of the countries concerned, or other duly substantiated cases where the eligibility rules would make the realisation of a project, a programme or an action impossible or exceedingly difficult.

The ACP State or the relevant organisation or body at regional or intra-ACP level shall, on each occasion, provide the Commission with the information needed to decide on such derogation.’

11. In Article 26, paragraph 1, point a.) is replaced by the following:

‘for works contracts of a value of less than EUR 5 000 000, tenderers of the ACP States, provided that at least one quarter of the capital stock and management staff originates from one or more ACP States, shall be accorded a 10% price preference during the financial evaluation;’

12. In Article 26, paragraph 1, point b.) is replaced by the following:

‘for supply contracts of a value of less than EUR 300 000, tenderers submitted by ACP firms, either individually or in a consortium with European partners, shall be accorded a 15% price preference during the financial evaluation’

13. In Article 26, paragraph 1, point c.) is deleted.

14. In Article 26, paragraph 2 is replaced by the following:

‘Where two tenders are acknowledged to be equivalent preference shall be given:

(a) to the tenderer of an ACP State; or

(b) if no such tender is forthcoming, to the tenderer who:

i) allows for the best possible use of the physical and human resources of the ACP States;

ii) offers the greatest subcontracting possibilities for ACP companies, firms or natural persons; or

iii) is a consortium of natural persons, companies and firms from ACP States and the Community.’

*Article 2*

The present Decision shall be adopted within the ACP-EC Council of Ministers through an exchange of letters between the Chair of the ACP Council and the Chair of the Council of the European Union.

This Decision shall enter into force upon completion of the above mentionned procedure.

Done at […], […]

*For the Council of the European Union*
*The Chair*

*For the ACP Council of Ministers*
*The Chair*