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2025/0082 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EPA Council and in the Committee of Senior Officials established by the Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, as regards the adoption of the Rules of Procedure for the EPA Council, of the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators and Mediators, and of the Rules of Procedure for the Committee of Senior Officials

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 two bodies of the EU-Kenya Economic Partnership Agreement (EPA) – the EPA Council and the Committee of Senior Officials – in connection with the envisaged adoption of: the Rules of Procedure for these two bodies, and the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators and Mediators.

While the proposal relies on digital means for the implementation of the introduced procedures, it does not introduce any specific binding requirements mandating their use. The proposed procedures entirely rely on the technical and digital systems already in place and the proposal does not imply any substantial modification with respect to these systems. The ‘digital by default’ principle is considered to the extent possible, namely by the recognition of digital means as valid in the light of this proposal.

2. CONTEXT OF THE PROPOSAL

2.1. The EU-Kenya Economic Partnership Agreement

The Economic Partnership Agreement (EPA) between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community (EAC), of the other part (‘the Agreement’) aims to bilaterally implement the EU-EAC EPA which never entered into force as not all the EAC Member States signed and ratified it. The EU-Kenya EPA provides for asymmetric trade liberalisation of goods and for provisions on sustainable development and development cooperation. The Agreement entered into force on 1 July 2024.

2.2. The EPA Council and the Committee of Senior Officials

Art. 104 of the Agreement establishes an EPA Council (the highest body), and Art. 104.3 provides that its functions shall include “determining its own rules of procedures”. According to Art. 105.3 and Art. 120 of the Agreement, the EPA Council will adopt the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators and Mediators.

The Committee of Senior Officials is established by Art. 106 of the Agreement to assist the Council in the performance of its functions and Art. 107.3 provides that its functions shall include “determining its own rules of procedures”.

2.3. The envisaged acts of the EPA Council and the Committee of Senior Officials

In the second quarter of 2025, during the first meetings of the EPA Council and the Committee of Senior Officials, these bodies are to adopt the following decisions:

1. EPA Council decision adopting its own Rules of Procedure;
2. EPA Council decision adopting the Rules of Procedure for Dispute Settlement and Code of Conduct for Arbitrators and Mediators; and
3. Committee of Senior Officials decision adopting its own Rules of Procedure.

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

This proposal for a Council Decision establishes the position to be taken on the Union's behalf in the EPA Council and the Committee of Senior Officials set up by the EU-Kenya EPA, with regard to the adoption of: the Rules of Procedure for the EPA Council and the Committee of

Senior Officials, and the Rules of Procedure for Dispute Settlement and Code of Conduct for Arbitrators and Mediators.

The Parties to the Agreement discussed these rules of procedures and the above mentioned draft EPA Council and Committee of Senior Officials decisions and agreed that, subject to the EU's decision making procedures, these should be adopted at the first meetings of the EPA Council and the Committee of Senior Officials.

The substance of the attached Rules of Procedure and Rules of Procedure for Dispute Settlement is very similar to that of rules of procedure of other Economic Partnership Agreements or other trade agreements.

Rules of Procedure of the above mentioned two EPA bodies and for Dispute Settlement are essential for completing the institutional framework of the Agreement and hence for ensuring its smooth implementation.

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. Finally, the notion of *'acts having legal effects'* also includes acts of an organisational nature that influence the way in which decisions are made within the body, for instance if a body with decision-making powers adopts or modifies its rules of procedure.

4.1.2. Application to the present case

The EPA Council and the Committee of Senior Officials are bodies set up by an agreement, namely the EU-Kenya EPA.

The respective acts which the two committees are called upon to adopt constitute acts having legal effects because they are acts of an organisational nature which influences the way in which decisions are made within the relevant bodies. The envisaged acts will be binding under international law in accordance with Articles 104, 105, 107, 108, 120 and 125 of the Agreement.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

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.

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(4), first subparagraph, of the TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207(4), first subparagraph, 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(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Economic Partnership Agreement (EPA) between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part ('the Agreement'), entered into force on 1 July 2024.²
- (2) Pursuant to Articles 104 and 106 of the Agreement, the EPA Council and the Committee of Senior Officials are, respectively, established upon entry into force of the Agreement.
- (3) Pursuant to Article 104.3 of the Agreement, the EPA Council is to determine its Rules of Procedure.
- (4) Pursuant to Articles 105.3 and 120 of the Agreement, the EPA Council is to determine the Rules of Procedure for Dispute Settlement and the Code of Conduct for Arbitrators and Mediators.
- (5) Pursuant to Article 107.3 of the Agreement, the Committee of Senior Officials is to determine its Rules of Procedure.
- (6) It is appropriate to establish the position to be taken on the Union's behalf within these two committees, as the decisions establishing their respective Rules of Procedure, and the Rules of Procedure for Dispute Settlement and Code of Conduct for Arbitrators and Mediators will be binding on the Union.
- (7) The position of the Union within these two committees as regards the adoption of their respective Rules of Procedure and Rules of Procedure for Dispute Settlement and Code of Conduct for Arbitrators and Mediators should be based on the respective draft Decisions of the two committees attached to this Decision,

² Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part (OJ L 2024/1648, 1.7.2024).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the first meeting of the EPA Council, established under Article 104 of the Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, regarding its Rules of Procedure shall be based on the draft Decision of the EPA Council attached to this Decision.

Article 2

The position to be taken on the Union's behalf in the first meeting of the EPA Council, established under Article 104 of the Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, regarding the Rules of Procedure for Dispute Settlement and Code of Conduct for Arbitrators and Mediators shall be based on the draft Decision of the EPA Council attached to this Decision.

Article 3

The position to be taken on the Union's behalf in the first meeting of the Committee of Senior Officials, established under Article 106 of the Economic Partnership Agreement between the European Union, of the one part, and the Republic of Kenya, Member of the East African Community, of the other part, regarding its Rules of Procedure shall be based on the draft Decision of the Committee of Senior Officials attached to this Decision.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*