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Proposal for a

COUNCIL DECISION

Amending Council Decision 2007/641/EC, concerning the republic of Fiji Islands and extending the period of application thereof

EXPLANATORY MEMORANDUM

1. The military take-over in December 2006 led to consultations under Article 96 of the revised Cotonou Agreement. These resulted in April 2007 in agreed commitments concerning human rights, democratic principles and the rule of law. On 1 October 2007 the Council, in its Decision 2007/641/EC decided on appropriate measures for Fiji to establish a degree of parallelism between Fiji's respect for the agreed commitments and development cooperation.
2. On 10 April 2009, Fiji's President abrogated the Constitution, removed all judges and declared that elections would take place at the latest in September 2014. In doing so, Fiji unilaterally broke key commitments it had given to the EU in April 2007. This happened the day after the Appeals Court had ruled the appointment of the military-led government following the coup in 2006 to be illegal. Fiji was also placed under a state of emergency and freedom of expression substantially curtailed.
3. Following these negative developments, the Council decided, on 24 September 2009, in its Decision 2009/735/EC, to extend until 31 March 2010 the validity of the appropriate measures laid down in Decision 2007/641/EC, which was due to expire on 1 October 2009. Due to further delays in implementing the commitments agreed with the EU the Council decided, on 29 March 2010 in its Decision 2010/208/EU, to extend until 1 October 2010, the validity of the appropriate measures for Fiji established in Decision 2007/641/EC, and then again on 27 September 2010 in its Decision 2010/589/EU until 31 March 2011, on 31 March 2011 in its Decision 2011/219/EU until 30 September 2011, and on 26 September 2011 in its Decision 2011/637/EU until 30 September 2012.
4. Following some positive developments in early 2012, i.e. the lifting of the Public Emergency Regulations on 7 January 2012 and the launch on 9 March 2012 of a political process with a view to having a new Constitution by March 2013 and the re-establishment of a constitutional democracy in the wake of new parliamentary elections by September 2014, the Council decided on 24 September 2012 in its Decision No 2012/523/EU to open prospective reengagement toward the programming of future development assistance whilst extending the validity of the appropriate measures until 30 September 2013.
5. The main source of funding for Fiji is the Accompanying Measures for Former Sugar Protocol Countries (AMSP). Assistance is channelled through non-governmental bodies (regional organisations and NGOs) to cushion the economic and social impacts of the sugar sector restructuring by supporting a diversified market-driven agriculture, promoting alternative livelihoods and income generating activities for the worst affected populations and alleviating risks to natural disasters. Of the total allocation of EUR 60 million under MIP 2008-10 of the 10th EDF, only EUR 8 million were committed for the Social Mitigation programme (AAP 2010). EUR 52 million have been lost due to the lack of progress in Fiji's return to democratic rule. Another allocation of EUR 49 million was approved under the 10th EDF for MIP 2011-13, EUR 17 million were committed in 2011 and 2012 for the Key Services to Agriculture and Alternative Livelihood programmes and EUR 31 million are to be committed before the end of 2013 for Support for the Sugar Industry.
6. A Constitution Commission was established in June 2012. After extensive public consultations, it finalised a draft Constitution in December 2012. The police then confiscated the draft Constitution and the Prime Minister tasked the government's legal team with drafting a new Constitution to be reviewed and completed by a

Constituent Assembly by end March 2013. In mid-January 2013 a new controversial decree on (re-) registration of political parties was published introducing a number of restrictions many of which are not in line with customary international law. The decree was amended in mid-February to introduce even further restrictions. On 21 March in an address to the nation, the Prime Minister presented the new draft Constitution to the people, and informed the country that the Constituent Assembly would not be formed, due to the lack of registration of political parties under the new decree. Instead the people were invited to convey directly, by different means, their comments on the draft Constitution. Currently the government is finalising the draft after having received some 1100 comments. It is still not clear to what extent the public comments will be taken on board in the new Constitution.

7. Fiji is embarking on a historical process of new democratisation. The forthcoming steps should lead to a transparent, credible and participatory electoral process and to democratic elections. The milestones towards achieving this have been shifting, which is why the Commission proposes to the Council to extend the current policy and appropriate measures by 18 months with a possibility at any stage to review the appropriate measures by way of a new Council decision.
8. With a view to encouraging Fiji to continue on its path towards the restoration of democracy, rule of law and full respect for human rights and fundamental freedoms, and with the final aim of normalising the situation with Fiji, the EU should step up political engagement with Fiji, and resume political dialogue with the aim to revise and update the commitments agreed with the Republic of Fiji in 2007 in order to delete obsolete items and ensure commitment requirements are in line with the new Constitution. An important part of this dialogue would be conducted during the crucial period in Fiji's democratisation process as the country moves towards the elections to be held at the latest in September 2014.
9. It is proposed to notify this Decision to the interim Government of Fiji, on the basis of the attached draft letter to President Nailatikau, and to inform him
 - a) that the EU looks forward to the next steps leading to a transparent, participatory and credible electoral process, to free and fair elections, and to Fiji returning to democratic rule;
 - b) that the progress made towards a return to constitutional rule will continue to guide the EU in its upcoming decisions on development cooperation, and that in this spirit the EU is willing to continue to engage in preparation for the 11th EDF programming process, and to notify in due course an indicative national financial allocation, while finalisation, signature and implementation of 11th EDF programming documents will be envisaged with the democratically elected government and
 - c) that the EU proposes to enhance political dialogue, with a view to reviewing the agreed commitments of 2007 and to adapting the appropriate measures accordingly, with the ultimate goal of normalising relationships with Fiji.
10. The changes to the appropriate measures will be a consequence of the revision and updating of the 2007 agreed commitments by way of the political dialogue and will reflect the present political and legal context of Fiji. The programming discussions for the 11th EDF can continue in line with the Council Decision of 2012 and the notification of Fiji's indicative financing allocation, once the necessary decisions on the establishment of the next EDF so allow.

Conclusion

In the light of the foregoing, the Council is requested to adopt the attached draft proposal for a Council Decision amending and extending the period of application of the appropriate measures for the Republic of Fiji.

Proposal for a

COUNCIL DECISION

Amending Council Decision 2007/641/EC, concerning the republic of Fiji Islands and extending the period of application thereof

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

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 2000¹, as revised at Ouagadougou, Burkina Faso on 22 June 2010² (hereinafter referred to as the Cotonou Agreement), and in particular Article 96 thereof,

Having regard to the Internal Agreement between the representatives of the governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the Cotonou Agreement³, and in particular Article 3 thereof,

Having regard to Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation (the Development Cooperation Instrument)⁴, and in particular Article 37 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Council Decision 2007/641/EC⁵ was adopted to take appropriate measures following the violation of the essential elements referred to in Article 9 of the Cotonou Agreement, and the values referred to in Article 3 of the Development Cooperation Instrument.
- (2) Those measures have been extended by Council Decision 2009/735/EC⁶, and subsequently by Council Decisions 2010/208/EU⁷, 2010/589/EU⁸, 2011/219/EU⁹, 2011/637/EU¹⁰, and 2012/523/EU¹¹, since not only has the Republic of Fiji yet to implement important commitments it made in consultations held in April 2007 concerning essential elements of the Cotonou Agreement, but there had also been important regressive developments concerning a number of these commitments.

¹ OJ L 317, 15.12.2000, p.3.

² OJ L 287, 4.11.2010, p. 3.

³ OJ L 317, 15.12.2000, p. 376.

⁴ OJ L 378, 27.12.2006, p. 41.

⁵ OJ L 260, 5.10.2007, p. 15.

⁶ OJ L 262, 6.10.2009, p. 43.

⁷ OJ L 89, 9.4.2010, p. 7.

⁸ OJ L 260, 2.10.2010, p.10.

⁹ OJ L 93, 7.4.2011, p.2.

¹⁰ OJ L 252, 28.9.2011, p. 1.

¹¹ OJ L 263, 28.9.2012, p.2.

- (3) There have been considerable developments since April 2007 and the commitments agreed with the Republic of Fiji Islands will need to be revised accordingly. Political dialogue will be the context for reviewing the commitments with the light of the current legal situation. Prospective reengagement towards the programming of future development assistance should continue.
- (4) Decision 2007/641/EC expires on 30 September 2013. It is appropriate to update its content and to extend its validity accordingly.
- (5) The European Union will engage in a Political Dialogue in order to review and update the 2007 Agreed Commitments and adapt the appropriate measures accordingly.

HAS ADOPTED THIS DECISION:

Article 1

Decision 2007/641/EC is hereby amended as follows:

In Article 3, the second paragraph is replaced by the following :

'It shall expire on 31 March 2015. It shall be reviewed regularly at least once every six months";

Article 2

The letter in the Annex to this Decision shall be addressed to the Republic of Fiji.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*

ANNEX

Draft letter

H.E. Ratu Epeli NAILATIKAU

President of the Republic of Fiji

Suva

Republic of Fiji

Your Excellency,

The European Union (EU) attaches great importance to the provisions of Article 9 of the Cotonou Agreement and Article 3 of the Development Cooperation Instrument. The ACP-EU partnership is founded on respect for human rights, democratic principles and the rule of law, which form the essential elements of the Cotonou Agreement, and are the basis of our relations.

Six years have elapsed since the EU took a decision on the appropriate measures following the military coup of 2006, and since a set of commitments were agreed with Fiji.

The EU notes that since 2007 some of the agreed commitments have become outdated and some are in need of revision in the light of Fiji's new legal framework. In order to have an appropriate basis for assessing Fiji's reform progress, we need to revise these commitments together, taking into account the current situation and the legal framework.

The EU has therefore decided to include in its new decision on appropriate measures a requirement that the EU engage with Fiji in an enhanced political dialogue under Article 8 of the Cotonou Agreement. This will be with a view to revise together the agreed commitments of 2007 and to adapt the appropriate measures (annexed to this letter) accordingly as necessary steps towards ensuring respect for human rights, the restoration of democracy and respect for the rule of law, until both parties conclude that the enhanced nature of the dialogue has served its purpose.

As some restrictions on certain human rights and fundamental freedoms remain in Fiji and in light of the necessary revision of the agreed commitments, the EU has decided to extend the appropriate measures by 18 months, until 31 March 2015. This will provide for the necessary flexibility and will give both the EU and Fiji the time they need to agree on the commitments, to adapt the appropriate measures accordingly, and for the government to hold its elections planned for September 2014.

The EU will monitor the progress made towards a return to constitutional rule and this will continue to guide our upcoming decisions on development cooperation. In this spirit the EU confirms its willingness to engage in preparations for the 11th EDF programming process, and to notify in due course an indicative national financing allocation in this process. The finalisation, signature and implementation of 11th EDF programming documents will be envisaged with the democratically elected government.

Once Fiji has held free and fair elections and met the revised agreed commitments, an Article 96 review mission, in line with the Cotonou Agreement, will be conducted in Fiji. Based on an agreement on the recommendations of this assessment, the article 96 appropriate measures can then be concluded for Fiji.

In order to advance cooperation under the Cotonou Agreement and the Development Cooperation Instrument, the EU invites the Interim Government to engage in an enhanced political dialogue with the EU, starting as soon as possible.

The EU also welcomes the engagement with the Pacific Island's Forum Ministerial Contact Group set up to monitor the progress of Fiji's preparations for the elections and its return to democracy and looks forward to the next steps for a transparent, participatory and credible electoral process, leading to free and fair elections and Fiji's return to democratic rule.

Yours sincerely,

Done at Brussels,

For the Council

C. ASHTON

President

For the Commission

A. PIEBALGS

Commissioner

The appropriate measures, which will be adapted following the revision of the agreed commitments under the enhanced political dialogue, are as follows:

- humanitarian aid and direct support to civil society and vulnerable populations may continue;
- the cooperation activities under way, in particular under the 8th and 9th EDFs, was allowed to continue;
- cooperation activities that would help the return to democracy and improve governance may be pursued, save under very exceptional circumstances;
- implementation of the sugar reform accompanying measures for 2006 was allowed to proceed. The Financing Agreement was signed at the technical level by Fiji on 19 June 2007. It is noted that the Financing Agreement includes a suspension clause;
- the 2007 sugar allocation is zero;
- availability of the 2008 sugar allocation was subject to evidence of credible and timely preparation of elections in accordance with the agreed commitments, notably regarding a census, the redrafting of boundaries and electoral reform in accordance with the Constitution, and measures taken to ensure the functioning of the Elections Office, including the appointment of a Supervisor of Elections by 30 September 2007 in accordance with the Constitution. This 2008 sugar allocation was lost on 31 December 2009;
- the 2009 sugar allocation was cancelled in May 2009 because the Interim Government decided to delay general elections until September 2014;
- the 2010 allocation was cancelled before 1 May 2010 as no progress was made in the continuation of the democratic process; however, given the critical situation of the sugar sector part of the allocation was set aside for direct assistance to the population directly dependent on sugar production in order to mitigate adverse social consequences. These funds are centrally managed by the EU's Delegation in Suva and not channelled through the Government;
- the preparation of programming for the 11th EDF may be launched, so that Fiji could expect to be notified of an indicative allocation in due course.
- specific support for the preparation and implementation of key commitments, in particular in support of the preparation and/or holding of elections, could be considered;
- regional cooperation, and Fiji's participation in it, is unaffected;
- monitoring of the commitments will be in accordance with the terms in the Annex to this letter concerning regular dialogue, and effective cooperation with assessment and monitoring missions and reporting.

COMMITMENTS AGREED WITH THE REPUBLIC OF THE FIJI ISLANDS IN 2007

A. Respect for Democratic Principles

Commitment No 1

That free and fair parliamentary elections take place within 24 months from 1 March 2007, subject to the findings of an assessment to be carried out by the independent auditors appointed by the Pacific Islands Forum Secretariat. The processes leading to the holding of the elections will be jointly monitored, adapted and revised as necessary on the basis of mutually agreed benchmarks. This implies in particular that:

- by 30 June 2007 the Interim Government will adopt a schedule setting out dates for the completion of the various steps to be taken in preparation for the new parliamentary elections,
- the schedule specifies the timing of a census, the redrafting of boundaries and electoral reform,
- the determination of boundaries and electoral reform will be carried out in accordance with the Constitution,
- measures will be taken to ensure the functioning of the Elections Office, including the appointment of a Supervisor of Elections by 30 September 2007 in accordance with the Constitution,
- the appointment of the Vice-President will be in accordance with the Constitution.

Commitment No 2

That the Interim Government, when adopting major legislative, fiscal and other policy initiatives and changes, will take into account consultations with civil society and other relevant stakeholders.

B. Rule of Law

Commitment No 1

That the Interim Government will use its best endeavours to prevent statements by security agencies designed to intimidate.

Commitment No 2

That the Interim Government upholds the 1997 Constitution and guarantees the normal and independent functioning of constitutional institutions, such as the Fiji Human Rights Commission, the Public Service Commission, and the Constitutional Offices Commission. The substantial independence and functioning of the Great Council of Chiefs will be preserved.

Commitment No 3

That the independence of the judiciary is fully respected, that it is allowed to work freely and that its rulings are respected by all concerned parties, in particular:

- that the Interim Government undertakes to appoint the tribunal pursuant to Section 138(3) of the Constitution by 15 July 2007,
- that any appointment and/or dismissal of judges is henceforth carried out in strict conformity with constitutional provisions and procedural rules,
- that there will be no instances whatsoever of interference, of whatever form, by the military and the police or by the Interim Government with the judicial process, including full respect for the legal profession.

Commitment No 4

That all criminal proceedings in connection with corruption are dealt with through the appropriate judicial channels and that any other bodies that may be set up to investigate alleged cases of corruption will operate within constitutional boundaries.

C. Human Rights and Fundamental Freedoms

Commitment No 1

The Interim Government will take all necessary steps to facilitate that all allegations of human rights infringements are investigated or dealt with in accordance with the various procedures and forums under the laws of the Fiji Islands.

Commitment No 2

The Interim Government will lift the Public Emergency Regulations in May 2007, subject to any threats to national security, public order and safety.

Commitment No 3

The Interim Government is committed to ensuring that the Fiji Human Rights Commission functions with full independence and in accordance with the Constitution.

Commitment No 4

That freedom of expression and freedom of the media, in all forms, are fully respected as provided in the Constitution.

D. Follow-up of Commitments

Commitment No 1

That the Interim Government undertakes to maintain a regular dialogue to allow verification of the progress made and gives EU and European Commission authorities/representatives full access to information on all matters relating to human rights, the peaceful restoration of democracy and the rule of law in Fiji.

Commitment No 2

That the Interim Government cooperates fully with any missions from the EU to assess and monitor progress.

Commitment No 3

That the Interim Government sends progress reports every three months starting 30 June 2007 regarding the essential elements of the Cotonou Agreement and the commitments.

It is noted that certain issues can only be effectively addressed through a pragmatic approach that acknowledges the realities of the present and which focuses on the future.