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EUROPEAN COMMISSION

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2011/0036 (NLE)

Proposal for a

COUNCIL DECISION

Amending and extending the period of application of Decision 2007/641/EC concluding consultations with the Republic of Fiji Islands under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument

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. Hereby, 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 illegal. Fiji is also under a state of emergency and freedom of expression has been 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 for Fiji established 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.
4. No further positive development as regards the fulfilment of agreed commitments can be noted.
5. While the 2010 allocation under accompanying measures for former Sugar Protocol Countries, conditional on progress in the continuation of the democratic process, was cancelled in May 2010, part of the allocation was set aside to provide direct assistance through the EU Delegation in Suva to the population directly dependent on sugar production in order to mitigate the adverse social consequences.
6. For the period 2011-2013 Fiji's indicative allocation was established at €1.094 million under Commission Decision C(2010)8130. The availability of this allocation (wholly or in part) is, however, conditional on progress in the consultation process under Article 96 ACP-EC Partnership Agreement (Art. 37 DCI), in the absence of such progress only social mitigation interventions will be considered.
7. Taking into account the above considerations, the EU should at this stage, consider an extension of the current policy and appropriate measures.
8. Therefore, the Commission is proposing to the Council to extend the current Decision for a further 6 months ending on 31 October 2011.
9. However the EU should continue to keep a regular dialogue and permanent political engagement with Fiji, and therefore the Decision should continue to be kept under constant review.

10. It is proposed to notify this Decision to the interim Government of Fiji, on the basis of the annexed draft letter to President Nailatikau, and to inform him (a) that the EU remains committed to pursuing the enhanced political dialogue under Article 8 of the Cotonou Agreement, (b) that the assessment of progress made towards return to constitutional rule will continue to guide the EU following the decisions concerning Fiji on accompanying measures for former Sugar Protocol countries and on its 10th EDF National Indicative Programme and finally, (c) that new consultations under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument are a distinct possibility at the disposal of Fiji.
11. The modifications to the appropriate measures should thus be limited to what is strictly required to take account of relevant developments, while the substance of measures – even where outdated – remains untouched.

Conclusion

12. 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 Islands.

Proposal for a

COUNCIL DECISION

Amending and extending the period of application of Decision 2007/641/EC concluding consultations with the Republic of the Fiji Islands under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 217 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 2000¹ and revised in Luxemburg on 25 June 2005² (the ACP-EC Partnership 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 ACP-EC Partnership 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) Decision 2007/641/EC⁵ concluding consultations with the Republic of the Fiji Islands under Article 96 of the ACP-EC Partnership Agreement and Article 37 of the Development Cooperation Instrument was adopted to implement appropriate measures following the violation of the essential elements referred to in Article 9 of the ACP-EC Partnership Agreement, and the values referred to in Article 3 of the Development Cooperation Instrument.

¹ OJ L 317, 15.12.2000, p.3.

² OJ L 287, 28.10.2005, p.4.

³ OJ L 317, 15.12.2000, p. 376.

⁴ OJ L 378, 27.12.2006, p. 41-71.

⁵ OJ L 260, 5.10.2007, p. 15

- (2) Those measures have been extended by Decision 2009/735/EC⁶ of 24 September 2009, and subsequently by Decisions 2010/208/EU⁷ of 29 March 2010 and 2010/589/EU⁸ since, not only are important commitments agreed by Fiji in consultations held in April 2007 concerning essential elements of the ACP-EC Partnership Agreement and the Development Cooperation Instrument yet to be implemented by Fiji, but there have also been important regressive developments concerning a number of these commitments,
- (3) The period of application of the measures in Decision 2007/641/EC expires on 31 March 2011. It is appropriate to prolong its validity, and to update the content of the appropriate measures accordingly.

HAS DECIDED AS FOLLOWS:

Article 1

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

- (1) In Article 3, the second paragraph is replaced by the following :

'It shall expire on 31 October 2011. It shall be reviewed regularly at least once every six months.';

- (2) The Annex is replaced by the Annex to this Decision.

Article 2

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

Article 3

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

Done at Brussels,

*For the Council
The President*

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.10-15

ANNEX

Draft letter

H.E. Ratu Epeli NAILATIKAU

President of the Republic of the Fiji Islands

Suva

Republic of the Fiji Islands

Excellency,

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

On 11 December 2006 the Council of the EU condemned the military takeover in Fiji.

Under Article 96 of the ACP-EC Partnership Agreement, and considering that the military takeover on 5 December 2006 constituted a violation of the essential elements listed in Article 9 thereof, the EU invited the Republic of the Fiji Islands (Fiji) to consultations, as provided for in the ACP-EC Partnership Agreement, in order to thoroughly examine the situation and, where necessary, take steps to remedy it.

The formal part of those consultations began in Brussels on 18 April 2007. The EU was pleased that at the time the Interim Government confirmed a number of key commitments regarding human rights and fundamental freedoms, respect for democratic principles and the rule of law, as noted below, and proposed positive steps regarding their implementation.

Regrettably, there have since been a series of regressive developments, in particular in April 2009, meaning that Fiji is now in breach of a range of its commitments. This concerns notably the abrogation of the Constitution, the very substantial delay in holding the parliamentary elections, and human rights violations. Although implementation of the commitments has been substantially delayed, the majority of those commitments remain highly relevant to Fiji's present situation, and are therefore attached to this letter. As Fiji has unilaterally decided to break a number of key commitments, this has led to losses for Fiji in terms of development funds.

However, in the spirit of partnership forming the cornerstone of the ACP-EC Partnership Agreement, the EU expresses its readiness to engage in new formal consultations as soon as there is a reasonable prospect for a positive conclusion to such consultations. On 1 July 2009 the Interim Prime Minister presented a roadmap for reforms and for a return to democratic order. The EU stands ready to engage in dialogue regarding this roadmap, and to consider whether it may serve as a basis for new consultations. Accordingly, the EU has decided to extend the existing appropriate measures for Fiji in order to create a window of opportunity for new consultations. While some of the appropriate measures are now out-of-date, it has been concluded that rather than update them unilaterally the EU prefers to further explore possibilities for new consultations with Fiji. Consequently, it is of particular importance that the Interim Government commits to an inclusive domestic political dialogue and to flexibility concerning the time-frame for the roadmap. While the EU's position is and always will be

guided by the essential elements of the ACP-EC Partnership Agreement as well as its fundamental principles, notably regarding the pivotal role of dialogue and the fulfilment of mutual obligations, it is stressed that there are no foregone conclusions on the EU's side regarding the outcome of future consultations.

If new consultations result in substantial commitments from Fiji, the EU is committed to an early, positive review of these appropriate measures. Conversely, if the situation in Fiji does not improve, then further losses of development funds for Fiji are set to continue. In particular, the assessment of progress made towards return to constitutional rule will guide the EU in the upcoming decisions on accompanying measures for Sugar Protocol countries and Fiji's National Indicative Programme under the 10th European Development Funds.

Until new consultations have taken place the EU invites Fiji to continue and intensify the enhanced political dialogue.

The appropriate measures are as follows:

- humanitarian aid and direct support to civil society may continue;
- the cooperation activities under way, in particular under the 8th and 9th EDFs, may 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 may 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 preparation and eventual signing of the multi-annual indicative programme for sugar reform accompanying measures for 2011-2013 can proceed;
- the finalisation, signing at technical level and implementation of the Country Strategy Paper and National Indicative Programme for the 10th EDF with an indicative financial envelope, as well as the possible allocation of an incentive tranche of up to 25 % of this sum, will be subject to respect of the commitments made with regard to human rights and the rule of law, notably: that the Interim Government upholds the Constitution, that the independence of the judiciary is fully respected, that the Public Emergency Regulations, reintroduced on 6 September 2007, are lifted as soon as possible, that all allegations of human rights infringements are investigated or dealt with in accordance with the various procedures and forums under the laws of Fiji, and that the Interim Government shall use best endeavours to prevent statements designed to intimidate being issued by security agencies;
- 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 availability of the indicative allocation under the multi-annual programme for sugar reform accompanying measures 2011-2013 will be conditional to an agreement in the consultation process; in the absence of such an agreement only social mitigation interventions will be considered for funding through this allocation.
- 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;
- cooperation with the European Investment Bank and the Centre for the Development of Enterprise may continue subject to the timely fulfilment of commitments made.

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.

Furthermore, the EU expects Fiji to cooperate fully with the Pacific Islands Forum regarding the implementation of the recommendations by the Eminent Persons' Group, as endorsed by the Forum Foreign Ministers at their meeting in Vanuatu on 16 March 2007.

The European Union will continue to follow the situation in Fiji closely. Under Article 8 of the Cotonou Agreement, an enhanced political dialogue will be conducted with Fiji to ensure respect for human rights, 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.

If there is a slowing down, breakdown or reversal in the implementation by the Interim Government of the commitments made, the EU reserves the right to adjust the appropriate measures.

The EU stresses that Fiji's privileges in its cooperation with the EU depend on respect for the essential elements of the Cotonou Agreement and the principles set in the Development Cooperation Instrument. In order to convince the EU that the Interim Government is fully prepared to follow up on the commitments given, it is essential that early and substantial progress is made in the fulfilment of the agreed commitments.

Yours sincerely,

Done at Brussels,

For The EU

COMMITMENTS AGREED WITH THE REPUBLIC OF THE FIJI ISLANDS

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.