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**PROGRESS REPORT ON THE REVIEW OF THE RULES OF
PROCEDURE OF THE POLICY ORGANS OF THE UNION**

PROGRESS REPORT ON THE REVIEW OF THE RULES OF PROCEDURE OF THE POLICY ORGANS OF THE UNION

A. INTRODUCTION

1. The Executive Council would recall that in its decision EX.CL/Dec.688 (XX) on the Report of the Ministerial Panel on the Election of Members of the Commission adopted at its Twentieth Ordinary Session held in Addis Ababa, Ethiopia in January 2012, the Executive Council requested the Commission “to review , in consultation with the Permanent Representatives Committee, the whole process of elections of Members of the Commission with a view of addressing the challenges, gaps and new developments in order to strengthen it, including through the review of existing rules and procedures.”

2. However, when the Commission presented a progress report on the implementation of decision EX.CL/Dec.688 (XX) during the January 2013 Summit, the Executive Council adopted decision EX.CL/Dec.735 (XXII), wherein the Executive Council acknowledged the need to adopt a holistic approach in reviewing the rules of procedure. Accordingly, the Executive Council widened the scope of the review and did not only limit it to the rules relating to the process of elections. The Executive Council also directed that the review process must take into account the importance of the two-thirds qualified majority in the balanced functioning of AU organs.

3. It would also be recalled that the Assembly during the Twenty-Third Ordinary Session held in Malabo, Equatorial Guinea adopted decision Assembly/AU/Dec.542 (XXIII) relating to the official opening of its ordinary sessions. During the January 2015 Summit, the Assembly considered the issue of streamlining of its summits and requested the Commission to make proposals on the number of invitees, length of agenda and opening ceremony, the number of decisions and parallel events and the methods of work as well as the Rules of Procedure.

4. It should be recalled that the Rules of Procedure of the Assembly and the Executive Council were adopted in Durban, South Africa during the first Ordinary Sessions of the Policy Organs in July 2002 vide decisions Assembly/AU/Dec.1 (I) and EX.CL/Dec. 1 (I) respectively. During the same session, the Assembly adopted the Statutes of the Commission. The Rules of Procedure were reviewed from 2003. Initially, the scope was limited to the process of elections of Members of the Commission but it was later expanded to a holistic review of the rules of procedure. The Assembly and the Executive Council adopted the reviewed rules of procedure for the Assembly and the Executive Council respectively as well as the Statutes of the Commission in January 2007 (See EX.CL/Dec. 317 (X)).

5. This report has been prepared in accordance with the above decisions. It outlines the challenges, gaps which have been identified in the Rules of Procedure and, where

possible, proposed solutions. Since the procedures for electing Members of the Commission are provided in the Rules of Procedure of the Assembly and the Executive Council as well as the Statutes of the Commission, the provisions of the Statutes of the Commission on elections of Members of the Commission have also been reviewed.

B. ACTIONS UNDERTAKEN BY THE COMMISSION

6. In implementing the decisions of the Executive Council EX.CL/Dec 688 (XX) and EX.CL/Dec. 735 (XXII), the Commission in April 2013 invited Member States, organs of the Union and experts to submit proposals on amendments of the rules of procedure of the policy organs. The Commission kept on extending the deadline for submission of proposals up to April 2014 in view of the low number of submissions received.

7. During the Third Retreat of the Commission held from 14 to 16 February 2015, the Commission considered the issue of streamlining the work of the Union and its organs including the Regional Economic Communities. It was observed that the streamlining of summits should be viewed from the perspective of what is doable within the Constitutive Act and the existing rules of Procedure. It was therefore agreed that issues that can be changed in the rules of procedure without changing the Constitutive Act should be identified.

C. CHALLENGES FOR THE REVIEW PROCESS

8. The Commission would like to inform the Executive Council that despite the importance of the process, very few Member States, organs and experts submitted proposals to the Commission. In this regard, the Commission would like to inform the Executive Council that the following Member States, organs and experts submitted proposals on amendments to the rules of procedure:

a) Member States

- i) Burkina Faso;
- ii) Gabon;
- iii) Malawi;
- iv) Namibia;
- v) Senegal;
- vi) South Africa; and,
- vii) Uganda.

b) Organs

African Commission on Human and Peoples' Rights

c) Experts

Two experts¹ submitted proposals on the procedure for electing Members of the Commission.

D. PROPOSALS FOR AMENDMENTS TO THE RULES OF PROCEDURE OF THE ASSEMBLY

9. The following are the proposals for amendments for the Rules of Procedure of the Assembly:

a) Rule 1 (Definitions)

10. One of the definitions provided in Rule 1 is for the term “Court”. The Court is defined as the “Court of the Justice of the Union”. However, it should be recalled that even though the Protocol of the Court of Justice of the Union entered into force in 11 February 2009, the Court of Justice has not been operationalized following a decision of the Assembly to merge the Court of Justice and the African Court on Human and Peoples’ Rights into the African Court of Justice and Human Rights. It should also be recalled that during the Twenty-Third Ordinary Session held in Malabo, Equatorial Guinea, the Assembly adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. This Protocol creates the African Court of Justice and Human and Peoples’ Rights.

11. In this regard, the name of the Court should be amended accordingly to “African Court of Justice and Human and Peoples’ Rights” in Rule 1 and subsequently wherever it occurs in the Rules.

b) Rule 4 (Powers and Functions)

12. This rule provides for powers and functions and functions of the Assembly. It has been observed that the list of powers and functions is too long unlike the list provided in Article 9 of the Constitutive Act. On appointment of members of organs of the Union, Rule 4 only mentions the appointment and termination of appointment of Members of the Commission and the Judges despite the fact that the Assembly appoints other members of the AU organs. Lastly, it has been proposed that the Assembly should advance African cooperation and should institute a mechanism of African cooperation allowing willing Member States to advance in the fields of political, economic and social integration.

13. Accordingly, it is proposed that Rule 4 (m) and (n) be deleted and be replaced with one provision specifying that the Assembly shall appoint and terminate the

¹ Professor Tiyanjana Maluwa and Dr. Mehari Taddele Maru.

appointment of members of the organs of the Union in conformity with the relevant rules².

14. The Commission observes that the long listing of the powers and functions should be retained considering that this rule is aimed at implementing Article 9 of the Constitutive Act and should therefore be expansive.

c) Rule 5 (Venue)

15. This rule provides for the venue of the sessions of the Assembly. Sub rule 1 provides that the January sessions shall be held at the Headquarters of the Union while the July sessions shall be held at the Headquarters of the Union unless a Member State invites the Assembly to hold a session in its country.

16. It has been observed that some Member States would prefer hosting the January Session instead of the June Session but cannot do so considering the current wording of Rule 5 (1).

17. It has therefore been proposed that the rule should be amended to allow Member States to host the January session. The proposed amendment is as follows, “The Session(s) of the Assembly shall be held at the Headquarters of the Union unless a Member State invites the Assembly to hold a session in its country”

d) Rule 7 (Ordinary Sessions)

18. The Commission received two contradicting proposals on this rule. One proposal is to take into account the practices of the Assembly and to provide that the Assembly shall meet in ordinary session twice a year. The other proposal is to provide that the Assembly should meet in ordinary session once a year.

19. The issue of the number of ordinary sessions of the Assembly has been raised many times including in the Report of the Audit of the African Union. The High Level Panel of the Audit of the African Union recommended that the Assembly should revert to the old system of one summit at the Headquarters of the Union. The Panel noted that this would³:

- i) ensure cost effectiveness as two sessions are costly for both the Union/Commission and Member States;
- ii) smoothen the operations of the Union, and,

² All the existing organs may be listed, if need be.

³ Page 31 of the Audit Report

iii) allow sufficient time for implementation of Summit decisions.

20. It should be noted, however, that the Commission, during its Third Retreat held from 14 to 15 February 2015 still envisages the holding of two Sessions. The June Session is particularly important for the adoption of the budget of the Union.

21. The issue to be considered is whether there should be one or two ordinary sessions of the Assembly.

e) Rule 8 (Agenda of Ordinary Sessions)

22. This rule provides for items that may be on the agenda of the Assembly during its ordinary sessions.

23. It has been observed that on some occasions, the agenda of the Assembly appears to be loaded with issues that can be dealt with at lower levels. The Assembly is the supreme organ of the Union and therefore it is expected that the Assembly should provide leadership and general direction on the functioning of the Union. The High Level Panel of the Audit of the African Union recommended that the Assembly should adopt a thematic approach to its annual meetings.

24. It has also been proposed that the Agenda of the Assembly should only contain strategic issues focusing on the political and socio-economic integration of the continent in accordance with the Constitutive Act.

25. In addition, under the Rule 8 (2) (d), Member States may propose items to be included on the agenda of the Assembly. Some have argued that such items should be for information only while others have argued that Member States may propose substantive items for the consideration of the Assembly. Furthermore, it has been proposed that the number of items proposed by Member States should be limited i.e. not to exceed four.

26. Lastly, sub rule 3 provides that the provisional agenda shall be divided into two parts, namely Part A and Part B depending on whether debate is required on the item before its approval by the Assembly. It has been noted that in practice, the provisional Agenda of the Assembly is not divided into two parts as provided in this Rule.

27. Under this rule, it should be considered whether the provisional agenda of the Assembly should be limited, and if so, to what extent; whether the items proposed by Member States should be limited, and if so, to what extent; and whether the division of the provisional Agenda into Part A and Part B should be retained.

f) Rule 10 (Opening and Closing Ceremonies)

28. This rule provides for the personalities entitled to address the Assembly. It should be noted that in practice, newly elected Heads of State and Government also address the Assembly during the opening ceremony despite not being mentioned under the Rule.

29. It should be recalled that during the June 2014 Malabo Summit, the Assembly expressed concern over the length of the programme of the official opening ceremony and noted that it was too long. Consequently, the Assembly adopted decision Assembly/AU/Dec.542 (XXIII) wherein the Assembly requested the Commission to establish a Task Force to review the programme of the official opening of the sessions of the Assembly in order to make them efficient and effective. Furthermore, during the January 2015 Summit, the Assembly adopted decision Assembly/AU/Dec.567 (XXIV) on the streamlining of the summits.

30. Whereas it appears that there is no controversy on sub rule 1, issues have been raised relating to sub rule 3 which is on other personalities that the Assembly might invite to address the Assembly.

31. During the Third Retreat of the Commission, the Commission recommended that guest speakers should speak to the theme of the year and should be invited only for the January Summits and not the July Summits.

32. It would appear that apart from adding newly elected Heads of State and Government to the list of those entitled to address the Assembly and possibly indicating that the Assembly might invite other personalities only for the January Summits, no other amendment is envisaged to this Rule.

g) Rules 11 and 12 (Extra ordinary sessions and agenda of extraordinary sessions)

33. The above rules deal with the process for holding extraordinary sessions of the Assembly as well as the agenda items for those sessions.

34. The application of the above rules has not been controversial. However, it should be noted that whereas Rule 12 (2) provides that the agenda of extraordinary sessions shall comprise only the item(s) submitted for consideration in the request for convening the session, in practice the Assembly has sometimes used the opportunity to deal with some pending urgent matters. For example, it should be recalled that during the extraordinary session of the Assembly held in October 2013 on Africa's Relationship with the International Criminal Court, the Assembly also elected the Commissioner for Peace and Security Council even though this was not in the request for convening the session.

35. In this regard, consideration should be given to amend Rule 12 (3) to read: “The agenda of an extraordinary session shall comprise only the item (s) requiring the urgent attention of the Assembly”.⁴

h) Special Summits

36. Furthermore, the Assembly has also been holding Special Summits. For example, the Assembly held a Special Summit in Kampala, Uganda in October 2009 on internally displaced persons and another one in Abuja, Nigeria in July 2013 on HIV/AIDS, tuberculosis and other related infectious diseases.⁵

37. Special Summits are not provided for in the Constitutive Act and the Rules of Procedure of the Assembly and as the name suggests, the special summits are treated differently from extraordinary sessions.⁶

38. Therefore, there is need to insert a new rule after extraordinary sessions providing for the holding of special summits. The proposed rule might read as follows: “The Assembly may decide to hold Special Summits dedicated to a thematic issue affecting the political and socio-economic integration of the continent”

i) Rule 14 (Working Languages)

39. It should be noted that Article 25 of the Constitutive Act provides that the working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese. However, under the Protocol on Amendments to the Constitutive Act of the African Union which was adopted in July 2003 and is yet to enter into force, Article 11 provides for an amendment to Article 25 of the Constitutive Act. In Article 11 of the Protocol on Amendments to the Constitutive Act, “working languages” has been replaced by “official languages” and Spanish and Kiswahili has been added to the list provided for in Article 25 of the Constitutive Act. In addition, the Executive Council has been given the power to determine the process and practical modalities for the use of official languages as working languages.

40. Accordingly, Rule 14 provides that the official languages of the Union and all its institutions shall be Arabic, English, French, Portuguese, Spanish and Kiswahili and any other African language. It should be noted that Spanish and Kiswahili appears in Rule 14 in line with Article 11 of the Protocol on Amendments Constitutive Act even though the Protocol has not yet entered into force.

⁴ The same approach has been taken by the STC on Justice and Legal Matters in Rule 13 (2) of its Rules of Procedure

⁵ The special Summit on Employment, Poverty Alleviation in Inclusive Development that was scheduled to take place in Ouagadougou, Burkina Faso in September 2014 was postponed

⁶ The Assembly adopts a declaration at the end of the Special Summit

41. Rule 14 (2) gives the power to the Executive Council to determine the process and practical modalities for the use of official languages as working languages. At the moment, the working languages of the African Union are Arabic, English, French and Portuguese.

42. In terms of proposed amendment, the title of Rule 14 should be amended to read “Official and Working Languages”.

j) Rule 15 (Election of Chairperson)

43. The rule provides that the Assembly shall, on the basis of rotation and agreed criteria, elect a Chairperson for a period of one year. The Chairperson is assisted by four Vice-Chairpersons. This is in conformity with provisions of Article 7 of the Constitutive Act which provides that the chairperson/chairman of the Assembly shall be held for a period of one year. However, both Article 7 of the Constitutive Act and Rule 15 do not indicate if the term is renewable or non-renewable. The practice has been that it is non-renewable.⁷

44. In addition, in practice the Assembly only elects three Vice Chairpersons and one Rapporteur (the outgoing Chairperson). The Rule may therefore need to be amended to reflect the practice of the Assembly.

45. Article 6 (5) of the Protocol on Amendments to the Constitutive Act aforesaid provides that the Chairperson shall be elected for a period of one year renewable.

46. The High Level Panel of the Audit of the African Union recommended that the post of Chairperson of the Assembly should be held for a period of two years in order to ensure policy continuity, pro-active leadership and full implementation of decisions.

47. However, apart from providing for the election of a Rapporteur, no amendment is proposed on the period that Chairperson serves as its wording stems directly from the Constitutive Act. A consequential amendment will be made to the rule once the Protocol on Amendments to the Constitutive Act enters into force.

k) Rule 22 (Closure of Debate)

48. The above rule has not been controversial in practice. However, under the Rules of Procedure (s) being adopted recently, the Rule has been simplified to read as follows:

⁷ Attempts has been made in the past to renew the term of the Chairperson (without success) in order for the Chairperson to complete ongoing programmes

“When a matter has been sufficiently discussed, the Chairperson shall close the debate at his/her discretion.”⁸

49. Rule 22 may similarly have to be simplified as above.

l) Rules 23 and 24 (adjournment of debate and suspension or adjournment of the meeting)

50. The two rules provide for the adjournment of debate and for the suspension of the meeting respectively.

51. However, it has been proposed that the two rules should be amended to refer to “adjournment of the meeting” and “suspension of debate” .⁹ Consequential amendments will again be made to rule 25 (Order of Procedural Motions).

m) Rule 27 (Vote on Decisions)

52. This Rule provides that the Chairperson shall put the proposed decision to a vote after the debate has been closed on an item under discussion. However, in practice, decisions are only put to a vote when there is no consensus.

53. The STC on Justice and Legal Matters has modified this rule as follows: “After the debate has been closed, **and there is no consensus**, the Chairperson shall immediately put the proposal with all the amendments to a vote. The vote shall not be interrupted except on a point of order related to the manner in which the vote is being taken.”¹⁰

n) Rule 28 (Vote on Amendments)

54. This rule provides for the procedure of voting on amendments.

55. The rule has in recent times been simplified as follows: “When there is no consensus, the Chairperson shall put all amendments to vote. A proposal shall be considered as an amendment to a text if it adds or removes there from”¹¹

o) Rule 33 (Categorization of Decisions)

56. The rule provides for the form that the decisions of the Assembly might take, namely, regulations, directives, and recommendations/declarations,

⁸ Rule 23 of the Rules of Procedure of STC of Justice and Legal Matters

⁹ This was observed during the consideration of the AGA Rules of procedure by members of the AGA Platform. However, Rule 33 of the Provisional Rules of Procedure refers to suspension of the meeting

¹⁰ Rule 27

¹¹ Rule 28 of the Rules of Procedure of the STC on Justice and Legal Matters

resolutions/opinions. It should be noted, inter alia, that Treaty establishing the Common Market for Eastern and Southern Africa adopts the same approach as in Rule 33 for decisions of its Council of Ministers.¹²

57. Article 7 of the Constitutive Act does not indicate any categorization of the Assembly decisions. The Article simply states that the Assembly shall take decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. It should be noted that under the Treaty establishing the African Community, Article 10 (1) provides that the Assembly shall act by decisions while Article 13 (1) provides that the Council of Ministers shall act by regulations.¹³ However, sanctions may be imposed for failure to abide by both decisions or regulations of the African Economic Community.¹⁴ This is similar to the approach under the Economic Community of West African States Treaty.¹⁵

58. For the United Nations, while its organs may adopt resolutions, only the decisions/resolutions of the UN Security Council are binding on Member States.¹⁶ Under the UN Charter, the question of whether a resolution is binding or not does not depend on the terminology used but it depends on the body that has made the decision i.e. the UN Security Council. For the European Union, its institutions may adopt regulations, directives, decisions, recommendations and opinions.¹⁷ Regulations and decisions are binding in their entirety. The only difference between regulations and decisions is that decisions may not only apply to all Member States as the decision may specify to whom it is addressed. The scope of EU directives, recommendations and opinions is the same as provided for in Rule 33 of the Rules of Procedure of the Assembly.

59. It should be noted that in practice, the Assembly does not use the above categorization. The Assembly uses decisions (without any categorization) which are binding and declarations/resolutions which are not binding. Other non-binding measures have also been used. For example, during the Twenty-Fourth Ordinary Session held in Addis Ababa, Ethiopia in January 2015, the Assembly adopted a Solemn Commitment to the Implementation of the Yamoussoukro Decision Towards the establishment of a single African Transport Market. This is allowed because the list of non-binding decisions in Rule 33 (1)(c) is not exhaustive.

¹² Article 10 of the Treaty. The EAC uses the terms regulations, directives and decisions and stipulates that they shall be binding, See Article 16 of the Treaty

¹³ Article 33 (2) of the Constitutive Act provides that the Act supersedes any inconsistent provisions in the Treaty establishing the African economic Community

¹⁴ Article 5 (3) of the Treaty establishing the African Economic Community.

¹⁵ See article 9 (1) and 12 (1) of the ECOWAS Revised Treaty

¹⁶ Article 25 of the UN Charter

¹⁷ See Article 288 of the Treaty on the Functioning of the European Union (Consolidated Version)

60. In this regard, considering the practice of the Assembly, a reflection on whether to retain the categorization of decisions in Rule 33 must be undertaken. The Commission proposes that the rule might need to be amended to take into account of the current practice by the Assembly.

p) Rule 37 (Sanctions for Unconstitutional Changes of Government)

61. This rule is on sanctions that may be imposed by the Assembly whenever unconstitutional changes have occurred in a Member State.

62. With the entry into force of the Protocol relating to the establishment of the Peace and Security Council of the African Union in December 2003, the imposition of sanctions for unconstitutional changes of government is now done by the Peace and Security Council. It may therefore be argued that the rule should be deleted as it is not used anymore.

63. However, if the Assembly decides to retain the rule, there are two proposed amendments to the rule. The first amendment is to take into account the provisions of the African Charter on Democracy, Elections and Governance on the definition of unconstitutional changes of government. It is proposed that the following definition should be added to the list in rule 37 (2): “Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government”.

64. The second proposal relates to clarification on whether the nationals/citizens of Member States which have been suspended for unconstitutional changes of government may be recruited as staff of the Commission or any of its organs. It was accepted practice that nationals/citizens of Member States under suspension for unconstitutional changes of government were not eligible for recruitment in any of the organs of the Union. However, a review of the relevant rules revealed that the citizens/nationals of Member States under sanctions for unconstitutional changes may be eligible for recruitment in the organs of the Union as the sanctions appears to be targeted only at the perpetrators of the unconstitutional change.

65. There is need for the Assembly to consider the issue of recruitment of citizens/nationals of Member States under sanctions for unconstitutional changes and bring clarity in light of the observations above.

q) Rule 44 (Saving Clause)

66. The purpose of this rule was to facilitate the implementation of the decisions of the OAU Assembly of Heads of State and Government. It is now over ten years since the establishment of the African Union. This rule may therefore be deleted.

E. PROPOSALS FOR AMENDMENTS TO THE RULES OF PROCEDURE OF THE EXECUTIVE COUNCIL AND THE PERMANENT REPRESENTATIVES COMMITTEE

67. Once the proposals for amendments to the Rules of Procedure of the Assembly have been adopted, consequential amendments will accordingly have to be made to the Rules of Procedure of the Executive Council and the Permanent Representatives Committee. The only exception relates to Rule 9 (3) of the Rules of Procedure of the Executive Council. This rule need not be amended, as in practice, the Executive Council's agenda is divided into Parts A and B as provided under Rule 9 (3).

68. A proposal has been submitted for the deletion of Rule 4 (Accreditation) of the Rules of Procedure of the Executive Council as it has been noted that the rule has never been used by the Executive Council used in practice.

69. The Commission also received a proposal relating to the Chairperson of the Executive Council (Rule 16) to the effect that the Minister of Foreign Affairs of the Host country must have the right to preside over the meetings of the Executive Council. However, the Commission notes that the issue has been sufficiently discussed in the past when the issue of chairperson was delinked from hosting as well as considering a similar provision in the Rules of Procedure of the Assembly.

F. PROPOSALS FOR AMENDMENTS RELATING TO THE PROCESS OF ELECTING MEMBERS OF THE COMMISSION

70. The Commission is composed of ten Members, namely, a Chairperson, a Deputy Chairperson and eight Commissioners. Each region is entitled to have two Members at least one whom shall be a woman. The Chairperson and the Deputy Chairperson shall not be from the same region.¹⁸

71. It should be recalled that in the Report of the Ministerial Panel for Election of Commissioners in January 2012 (Doc. EX.CL/713 (XX)), the Ministerial Panel recommended, inter alia, that there was "need to review the whole process of elections with a view to addressing the challenges, gaps and new developments in order to strengthen it, including through the review of the existing rules and procedures." This recommendation was approved by the Executive Council in its decision EX.CL/Dec.688 (XX) adopted in Addis Ababa, Ethiopia, in January 2012.

72. It should also be recalled that in January 2012, the Assembly decided to suspend the elections of the Members of the Commission in view of the fact that neither of the candidates for the post of Chairperson of the Commission obtained the required two-thirds majority (Assembly/AU/Dec. 414 (XVIII)). Consequently, the term of office of the

¹⁸ Rule 38 (4) of the Rules of Procedure of the Assembly.

then Members of the Commission was extended until the July 2012 session. The Assembly also decided to establish an Ad-hoc Committee of Heads of state and Government with the mandate to address the issues relating to the elections of Members of the Commission¹⁹.

73. The procedure for electing members of the Commission is governed by the Rules of Procedure of the Assembly and the Executive Council as well as the Statutes of the Commission. In addition, it has been the practice of the Union that the Executive Council adopts modalities for election of Members of the Commission.²⁰

74. The Assembly elects the Chairperson and Deputy Chairperson and thereafter appoints the eight Commissioners who are elected by the Executive Council.²¹

75. Article 12 of the Statutes provides for the eight portfolios of the Commission, namely:

- a) Peace and Security;
- b) Political Affairs;
- c) Infrastructure and Energy;
- d) Social Affairs;
- e) Human Resources, Science and Technology;
- f) Trade and Industry;
- g) Rural economy and Agriculture; and
- h) Economic Affairs.

76. The details of the election procedure for the Members of the Commission will be discussed simultaneously with the proposals for amendments on the election process below.

a) Composition of the Commission

77. It should be recalled that at least one Member of the Commission from each region must be a woman. However, the practice of the Union has been that each region is entitled to have one man and one woman.

¹⁹ The Ad-hoc Committee reported to the July 2012 Summit that the Committee was not able to resolve the deadlock on the elections for the post of Chairperson. The Assembly proceeded to conduct the elections with the two candidates that were submitted for the January 2012 elections and elected Dr. Nkosazana Dlamini-Zuma as Chairperson of the Commission.

²⁰ The Modalities are just a compilation of the relevant rules as contained in the Rules of Procedure of the Assembly and the Executive Council as well as the Statutes of the Commission.

²¹ Rules 38 and 39 of the Rules of Procedure of the Assembly and Rules 37 and 38 of the Rules of Procedure of the Executive Council,

78. The language of Article 6 (3) of the Statutes of the Commission is unambiguous and it suggests that it is possible to have two female Members of the Commission from a region as the requirement is that at least one Member from each region should be a woman.

79. The policy organs might need to consider amending Article 6 (3) to reflect the practice of the Union i.e. one man and one woman or alternatively, a pronouncement needs to be made that the practice so far is contrary to the provisions of Article 6 (3) of the Statutes of the Commission.

b) Nomination Process

80. Regarding nominations for the post of Chairperson and Deputy Chairperson, the Rules of Procedure of the Assembly and the Executive Council and the Statutes of the Commission are silent on the role of the regions, if any, in the nomination process. In view of this, regions are encouraged to undertake consultations, in the absence of which, each Member State may submit candidatures for the two posts if it so wishes, directly to the Commission.²²

81. However, for the posts of Commissioners, Article 13 of the Statutes of the Commission provides that there shall be a pre-selection process at the regional level. Each region is required to nominate two (2) candidates, including a woman, for each portfolio. Each region shall determine the nomination modalities for its candidates. The candidates selected at the regional level form part of the continental pool. Accordingly, each region is required to nominate a total of sixteen candidates for the eight portfolios. The total for all the regions is eighty candidates, namely forty men and forty women.

82. It should be recalled that for the 2003 elections, a total of seventy-three candidates were submitted by the regions for the posts of Commissioners and the number dropped to forty-five during the 2008 elections. For the 2012 elections, a total of thirty-one candidates were submitted but one of the regions withdrew five candidates leaving the continental pool at twenty six.²³

83. In addition, it should be noted that for the 2012 elections of Commissioners, most of the candidates were submitted directly by Member States and not by the respective regions as stipulated in Article 13 of the Statutes of the Commission. The Rules of Procedure of the Assembly and the Executive Council as well as the Statutes of the Commission are silent on what should be done by the Commission when a region or Member States do not comply with the requirements on submission of candidatures.

²² This is usually provided in the Modalities for the elections. See for example paragraph 20-21 of the Modalities adopted for the 2012 Elections, Doc. EX.CL/674 (XIX)

²³ The number was further reduced to twenty five as one candidate was not evaluated as he did not meet the minimum educational requirements

The Executive Council has in the past only called on Member States to adhere to the Rules of Procedure on submission of candidatures without attaching any sanctions for non-compliance.²⁴ In addition, the Ministerial Panel for the 2012 elections has recommended that where there is only one candidate for a portfolio, the position should be advertised again.²⁵

84. A number of proposals have been received relating to the nomination process from Member States and experts. These are:

- i) Nominations for the positions of the Chairperson and Deputy Chairperson should be based on the principle of geographical rotation. In this regard, only regions which have not held the positions before should be allowed to submit candidatures. Thereafter, the positions would rotate among the regions in the order that will be agreed by the policy organs;
- ii) Regions should be allotted specific portfolios chosen by a lot. Regions will then only submit candidatures for the allotted portfolios. On the other hand, there is a counter proposal to the effect that candidatures should be submitted not on the basis of portfolios at all. Once the eight Commissioners have been elected, the Chairperson of the Commission will then have the responsibility for assigning portfolios to the Commissioners²⁶;
- iii) Member States should submit candidates directly and not through a regional pre-selection process. The argument is that this is what Member States have done in the past and no sanction was imposed for the non-compliance;
- iv) Mechanism should be put at the national level to ensure transparency and competition for all the positions;
- v) Appropriate sanctions should be imposed for non-compliance of the submission procedure;
- vi) That candidatures should in unforeseen circumstances be received even on the election day.

²⁴ See paragraph 2 of EX.CL/Dec.688 (XX).

²⁵ See EX.CL/713 (XX), paragraph 18 (ii)

²⁶ This proposal was also made by the High Level Panel of the Audit of the African Union. It has been argued by one expert that this is the middle position between the practice of the UN and the EU. For the UN system, only the Secretary General is elected and he/she has the responsibility of appointing the other senior officers. For the EU, only the President of the EU Commission is elected. The President then allocates portfolios to Commissioners subject to approval of the European Parliament. There is a college of Commissioners designated by Member States

85. The Commission would like to observe that whatever mechanism will be put in place for the nomination of candidatures, the mechanism would not be effective if there are no sanctions attached for non-compliance. The policy organs should consider appropriate levels of sanctions that may be imposed for non-compliance. The Commission further notes that receiving candidatures on the election day, albeit in exceptional circumstances, may not be in the best interest of a fair and transparent electoral process. The candidatures will not have been circulated and the Commission will not be in a position to translate the candidate's CV.

c) Central Pre-selection Process

86. Article 14 of the Statutes of the Commission provides that a panel consisting of two representatives from each region for the central selection exercise. The panel is made up of Ministers²⁷ assisted by a team independent consultants.²⁸

87. The panel is required to submit a list of at least two candidates for each portfolio to the Executive Council for election.

88. The only proposal received is that the requirement for a panel and a team of consultants should be dispensed with. The proponent of the proposal has argued that the process of vetting and shortlisting the candidates over the years by the panel does not seem to have demonstrated any added value to the process of electing Commissioners. It has also been argued that the procedure is not used by any international organization. The proponent has further argued that the Executive Council seems not to have paid any attention to the ranking of candidates by the panel (assisted by the team of consultants) during the elections.²⁹

89. The policy organs should therefore reflect on the added value of the central pre-selection process *vis-à-vis* its financial implications to the Union.

d) Qualifications and Experience of Members of the Commission

90. Rule 38 (2) of the Rules of Procedure of the Assembly provides that the Chairperson and the Deputy Chairperson of the Commission shall be competent women or men with proven experience in the relevant field, commensurate leadership qualities and a good track record in government, parliament, international organizations or other relevant sectors of society. No educational or age qualification is indicated.

²⁷ In practice, the Ministers have been Ministers of Foreign Affairs and External Relations

²⁸ The team is made of ten consultants, two per each region

²⁹ It should be noted that due to the dwindling number of candidatures, the Panel did not conduct any shortlisting for the 2012 elections

91. Regarding Commissioners, the educational requirement is a qualification not below the first degree or its equivalent. They must also possess a significant and wide-ranging working experience with a good track record in government, parliament, international organizations, a recognized university, multinational or private sector organizations. A minimum age criteria of thirty-five applies to the candidates for the post of Commissioner. No maximum age criteria is provided.

92. It should be recalled that the Ministerial Panel for the 2012 elections agreed and requested the Commission to inform all candidates to submit a mission statement.³⁰ In addition, the High Level Panel of the Audit of the African Union recommended that holders of these high positions “should be men and women with a known vision of and commitment to pan-Africanism and continental integration”³¹

93. The policy organs might need to consider on whether there is need to put any educational and age requirement (minimum or maximum) for the Chairperson and Deputy Chairperson of the Commission, maximum age requirement for Commissioners and any other additional requirement i.e. known pan-Africanism.

e) Circulation of Candidatures

94. Rules 38 (3) of the Rules of Procedure of the Assembly and Article 16 (1) of the Statutes of the Commission provides that the Commission should circulate candidatures at least three months before the election.

95. This has proved difficult in the past due to non-compliance to the deadlines for the submission of candidatures, delays in translation of CVs due to the number of candidates for the different portfolios as well as the delays in the central pre-selection process by the Ministerial Panel (assisted by the team of consultants).

96. Policy organs need to consider reducing the period to two (2) months to accord the Commission sufficient time to process the candidatures received.

f) Voting Procedure

97. The voting procedure is provided under Rule 42 of the Rules of Procedure of the Assembly, Rule 38 of the Rules of Procedure of the Assembly and Article 16 of the Statutes of the Commission.

98. It should be recalled that the practice of the Union is that the Assembly elects the Chairperson, followed by the Deputy Chairperson and thereafter, the Assembly appoint the Commissioners elected by the Executive Council. Regarding the election of

³⁰ Some candidates submitted it while others did not. No sanctions imposed

³¹ Page 46 of the Audit Report

Commissioners by the Executive Council, the Executive Council elects them in the order that they are listed in Article 12 of the Statutes of the Commission.

99. Rule 48 of the Rules of Procedure of the Assembly provides for the Deputy Chairperson to act if there is an impasse in the election of the Chairperson and for the most senior Commissioner to act if the impasse is in respect of the Deputy Chairperson. Where the impasse is on the election of the Commissioner, Article 16 (5) of the Statutes of the Commission allows the Chairperson of the Commission, in consultation with the Chairperson of the Executive council, to appoint one Commissioner to act until a new Commissioner has been appointed.

100. It should be recalled that in January 2012, the Assembly extended the term of the Members of the Commission to July 2012³². Again, in 2012, the Permanent Representatives Committee approved the request to have one Commissioner whose term had expired to remain in office until his successor took office.³³

101. A number of proposals have been received on the voting procedure and are outlined hereunder:

- i) Where the incumbent Chairperson fails to obtain the required two-thirds majority, the term of office should not be extended and he/she should vacate the office. Connected to this proposal is another proposal that candidates who fail to obtain the required two-thirds majority should not be allowed to run again in the next election;
- ii) For continuity and to avoid problems of simultaneous elections of all Members of the Commission, the elections of the Members of the Commission should be staggered. Different proposals have been put forward on how the staggering should be done.
 - a) Elect the Chairperson and Deputy Chairperson six months prior to the election of Commissioners;³⁴
 - b) Elect the Deputy Chairperson and four Commissioners before the election of the Chairperson and the other remaining Commissioners.³⁵
- iii) The Chairperson of the Executive Council should cast a lot to determine the order in which the election of the Commissioners should be conducted as

³² A reservation was entered by a Member State to the effect that this was not in conformity with the Rules of Procedure of the Assembly.

³³ This is not provided in the Rules of Procedure or the Statutes of the Commission.

³⁴ Audit Report of the African Union

³⁵ To allow the Deputy Chairperson to take over if there is an impasse in the election of the Chairperson

the current practice of electing Commissioners in the order in which the portfolios are listed in Article 12 of the Statutes is unfair, sometimes pre-determines the result and has resulted into qualified candidates being eliminated in the process on account of regions and gender. However, it should be recalled that others have proposed that the Commissioners should not be elected by portfolios and that it should be the responsibility of the Chairperson of the Commission to assign the portfolios;

- iv) The requirement for a two-thirds majority should be reduced to simple majority after the third round of voting. However, others have argued that two-thirds majority should be maintained in all the rounds due to the importance of the positions. In addition decision EX.CL/Dec.735 (XXII) specifically referred to the need to take into account the importance of the two-thirds qualified majority in the balanced functioning of AU organs.

102. The policy organs need to pronounce themselves on the proposals raised above.

g) Term of Office of Members of the Commission

103. Article 10 of the Statutes of the Commission provides that the term of office of Members of the Commission shall be four years. They are eligible to compete for re-election for another term of four years.

104. Where a Commissioner is unable to take up office or to complete his/her term of office, the region from which that Commissioner was appointed, shall be given the opportunity to present a candidate to complete the remaining term.

105. A number of issues have been raised on this Article, namely:

- i) When does the term of office starts to run? Does it run from the date of the election or from the date of taking up office? It should also be recalled that sometimes, the Members of the Commission are not elected at the same time (due to reasons of regional and gender balance). It should be recalled that the practice of the Union has been that the term of office starts running for all the Members from the date that the Chairperson of the Commission takes up office.³⁶
- ii) When a Member of the Commission is elected to complete the remaining term of a Member who was unable to take up office or complete his/her term, whose term of office is it i.e. should that term be regarded as the term of the Member who is completing the remaining term or it will not count as a term?

³⁶ The Commission is a collegial body

- iii) Can a Member of the Commission return in a different capacity after serving the two terms?
- iv) The term of office should be increased to five years renewable once as is the case with the term of Office of the Un Secretary General

106. There is therefore need for clarity in Article 10 of the Statutes of the Commission depending on the preferred options to be agreed by the policy organs.

h) Termination of Appointment

107. Rule 41 of the Rules of Procedure of the Assembly provides that the Assembly may, by two-thirds majority and following due process conducted by the Executive Council, terminate the appointment of a Member of the Commission on grounds of incompetence, gross misbehavior or inability to perform the functions of his/her office by reason of permanent incapacity certified by a medical board. On the other hand, Article 10 (2) of the Statutes provides that when so required for the good functioning of the Union, the Assembly may terminate the appointment of a Member of the Commission, based on the provisions of the Statutes. However, nothing is provided in the Statutes as to how the termination may be done.

108. There is therefore need to harmonize the provisions of Rule 41 of the Rules of Procedure of the Assembly and Article 10 (2) of the Statutes of the Commission.

i) Performance Appraisal

109. A proposal has been submitted that the Assembly must conduct a performance evaluation of the Members of the Commission after every two years in order to assess their competence. The Ministerial Panel for the 2012 elections also observed that there is need for the Members of the Commission seeking re-election to submit performance appraisals reports for consideration by the panel.³⁷

G. CONCLUSION

110. The Commission has prepared this report in the implementation of various decisions by the Assembly and the Executive Council on the review of rules of procedure of the Policy Organs of the Union.

111. The report outlines the challenges and gaps identified in the Rules of Procedure of the Policy organs and the Statutes of the Commission (on election procedures for

³⁷ EX.CL/713 (XX), paragraph 15 (iv)

Members of the Commission). Where possible, the Commission has proposed some solutions or proposed amendments to the challenges identified.

112. The Commission would like to express its gratitude to the few Member States, organs and experts that submitted proposals for amendments.

RECOMMENDATIONS

113. The Commission would like to make the following recommendations to the Executive Council:

- i) To take note of the Progress Report and the proposals contained therein;
- ii) To request the Commission, in consultation with PRC, to conduct an in-depth review of the proposals contained in the Report and to make appropriate recommendations on amendments to the Executive Council;
- iii) To further request the Commission and the PRC to finalize the review before December 2015 with a view of submitting a comprehensive Report to the January 2016 Summit.

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