



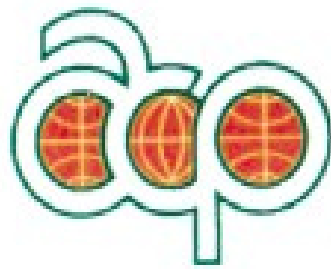
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The proposed EC Regulation relating to ACP Countries that do not ratifies the Economic Partnership Agreement (EPA) with the European Union (EU) by January 2014: possible implications for the African Countries

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On September 30th, 2011, the European Commission (EC) adopted a proposed Regulation (COM/2011/0598)², which is likely to reconfigure the European Union (EU) trade relations with African Caribbean Pacific (ACP) countries, in particular the ones currently negotiating the Economic Partnership Agreement with the EU. The proposed Regulation provides that of the 36 ACP countries that have concluded an Economic Partnership Agreement (EPA) or interim EPA (iEPA) with the EU, all the eighteen (18) that have not taken the necessary steps to sign and ratify, or which have signed but not ratify the agreement, would be removed from the list of countries allowed to benefit duty free quota free access into the EU market, which resulted from the provisional application of the iEPA by the EU through the EC Market Access Regulation 1528/2007 of 20 December 2007³. The proposed Regulation is now transmitted to the European Council and the European Parliament for discussion and eventual adoption, before it can take legal effect. If adopted, the Regulation would apply on January 2014.

Two issues arising from the proposed EC Regulation are discussed in this note: the first is the implication of the proposed Regulation on African countries that have concluded the iEPA with the EU, and the second is the potential impact on ongoing negotiations for the conclusion of the comprehensive EPA. This note does not look at the legality of proposed EC Regulation, which is whether the EC can unilaterally terminate the provision application

of iEPA, and which is covered by a recent analysis conducted by L. Bartels and P. Goodison⁴; rather it focuses on options left to African countries as they pursue negotiations for the comprehensive EPA.

I. African countries targeted by the proposed EC Regulation would see their trading regime with the EC modified if they do not ratify the Agreement before January 2014.

In order to fully appreciate the implications of the proposed EC Regulation on African countries, it is worth considering two elements: the first is the scope of application of the proposed EC Regulation. In effect, the proposed EC Regulation lists eighteen (18) ACP countries that have concluded an iEPA with the EU, but have not ratified the Agreement, of which sixteen (16) are African countries: Burundi, Botswana, Cameroon, Comoros, Côte d'Ivoire, Ghana, Kenya, Lesotho, Mozambique, Namibia, Uganda, Rwanda, Swaziland, Tanzania, Zambia, and Zimbabwe⁵. Of the 16 African countries targeted by the proposed EC Regulation, nine (09) have concluded, but not sign or ratify an iEPA with the EU⁶; meanwhile seven (07) others have concluded and signed an iEPA with the EU, but not yet ratified the agreement⁷. It is these countries that would be directly affected by the proposed EC Regulation, if they fail to sign and ratify the

² The text of the proposed regulation is available at www.ipex.eu/IPEXLWEB/dossier/dossier.do?code=COD&year=2011&number=0260 [accessed on October 13th, 2011].

³ The text of the Regulation is available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:349:0007:0101:en:PDF> [accessed on October 13th, 2011].

⁴ L. Bartels and P. Goodison, "EU proposal to end preferences of 18 African and Pacific States: An assessment," (2011) *Trade Hot Topic*, Issue 91. See also L. Bartels, "Legal constraints on the EU's ability to withdraw EPA preferences", (2011), *Trade Negotiations Insights*, Vol. 10, N° 8, p. 1 et 3.

⁵ The other two targeted countries are Fiji (Pacific Region), and Haiti (Caribbean Region).

⁶ Burundi, Comoros, Ghana, Kenya, Namibia, Rwanda, Tanzania, Uganda, and Zambia.

⁷ Botswana, Cameroon, Côte d'Ivoire, Lesotho, Mozambique, Swaziland, and Zimbabwe.



iEPA that was concluded with the EU. Starting from January 2014, those of the above mentioned 16 African countries that would not ratify the iEPA, would be removed from the list of the beneficiaries of EC Regulation 1528/2007. This means that they would lose the trade preferences resulting from the provisional application of the iEPA by the EU, which provides them with duty quota free access into the EU market and thus allow their products to be traded at a comparative cost compare to like products originating from other regions that do not have similar type of agreement with the EU.

However, if a country is removed from a list of beneficiaries of EC Regulation 1528/2007, it would nevertheless continue to export into the EU market under a different trade regime which would be either less favorable or at best equal to the regime offered by the Regulation depending on their status.

1. African countries that have the status of Least Developed Countries (LDCs)⁸ would not be affected by the proposed EC Regulation, even if they do not ratify and implement the iEPA by January 2014.

This is because they would be able to continue export into the EU market under the *Everything But Arms (EBA)* scheme, which is a scheme that allows duty-free/quota free to products originating from LDCs, with few exceptions. Of the 16 African countries targeted by the proposed EC Regulation, 08 are LDCs (Burundi, the Comoros, Lesotho, Mozambique, Rwanda, Tanzania, Uganda, and Zambia). This means that even if these 08 countries, for one reason or another, are not able to ratify and implement the iEPA before January 2014, they would still have the possibility to trade with the

⁸ Burundi, the Comoros, Haiti, Lesotho, Mozambique, Rwanda, Tanzania, Uganda, and Zambia.

EU under a regime similar to what they are currently provided under the iEPA. The major constraint with the EBA is in relation to the conditions attached to it⁹, and its unpredictability, which is not a source of certainty for producers and exporters¹⁰.

2. The situation of those African countries that have the status of lower middle income countries (LMICs)¹¹ would be significantly affected, if they do not ratify and start implementing the iEPA before January 2014.

The reason is that unlike LDCs, LMICs are not eligible to the EBA Scheme, and therefore would not have an alternative option to continue exporting into the EU market duty-free/quota-free. Those countries (Cameroon, Côte d'Ivoire, Ghana, Kenya, Swaziland and Zimbabwe) would simply be relegated to the Generalized System of preferences (GSP); which means that exports originating from those countries into the EU market would lose a significant margin of preference, compare to the current regime under the iEPA. One major implication is that unless Cameroon, Côte d'Ivoire, Ghana, Kenya, Swaziland and Zimbabwe ratify and implement the iEPA before January 2014, their export products from would become less competitive into the EU market, which might significantly affect not only their trade with the EU, but also Government and producers revenues in those countries.

⁹ In order to be eligible to the EBA Scheme, a country has to ratify and effectively implement a number of Human Rights Conventions and Treaties.

¹⁰ The assessment of effective implementation of Human Rights is done by the EU, which has the discretion to exclude a country from the list of EBA beneficiaries.

¹¹ The criteria used by the World Bank are outlined at <http://data.worldbank.org/about/countryclassifications> [accessed on October 13th, 2011].



3. Countries classified by the World Bank as Upper Middle Income Countries (UMICs) would be the most affected by the proposed EC Regulation, if the current status quo remains after January 2014, and if their status remains unchanged¹².

The reason is that under the reform of the GSP, which would enter into force in January 2014, countries categorized as UMICs would no longer benefit from the GSP, unlike LMICs discussed in the previous paragraph. This means that UMICs that would like to retain their margin of preferences into the EU market would have to enter into a new trade regime with the EU; which simply implies they would have no alternative to ratify and implement the iEPA before January 2014, unless their status changes from UMICs to LMICs before now and 2014. Presently, two (02) of the 16 African countries targeted by the proposed EC Regulation are UMICs (Botswana and Namibia), and would pay a high cost if they if they do not ratify the iEPA before January 2014. As it stands now, all remaining African countries that did not conclude the iEPA would be directly affected by the proposed Regulation.

4. The situation of African countries that sign the iEPA between now and December 2013 remains ambiguous.

The issue here is whether the 2014 deadline sets by the proposed EC Regulation would apply to countries that sign the iEPA between now and December 2013. The proposed EC Regulation expressly lists 18 specific countries, which from a literal interpretation means that the 2014

¹² The World Bank classification is available at http://data.worldbank.org/about/countryclassifications/country-and-lending-groups#Upper_middle_income [accessed on October 13th, 2011].

deadline only applies to countries targeted in the proposed Regulation. If this strict interpretation is adopted, the implication would be that, unless the proposed Regulation is amended to expressly include one country, it would be bound by the 2014 deadline.

However, in practice, things might be different. In effect, if an African country signs the iEPA between now and December 2013, there would still be a need for a Regulation to allow provisional application by the EU, and this would therefore give the EU the possibility to introduce a timeframe for that African country to ratify and implement the EU. The EU could even chose, rather than creating a new regulation, simply amend Regulation 1528/2007 so as to include any new signatory as well as the proposed Regulation; so as to ensure that the 2014 deadline also applies to that country. Thus, even though the 2014 deadline expressly identifies certain countries, there is nothing preventing the EU from expanding the list to new iEPA signatories.

II. In practice, African countries targeted by the proposed EC Regulation would face economic implications if they do not ratify the iEPA before January 2014.

Because of the change in the trading regime that would occur if the African countries targeted by the proposed EC Regulation do not ratify before January 2014, exports of those countries into the EU market would, to varying degree, be affected. L. Bartels and P. Goodison (2011), in a preliminary perspective of commercial effect of the proposed EC Regulation¹³, identify key number of export products that would be affected, including: fresh banana, prepared and

¹³ Op. cit, p.4.



preserved tuna and skipjack, raw cane sugar, fresh and chilled peas and beans, pineapple prepared and preserved, citrus prepared and preserved, fresh and chilled bovine meat, sweat orange, frozen monkfish, to name but just a few.

In the case of raw cane sugar and raw cane sugar for refining, a reintroduction of import duties would lead to re-imposing respectively €19 and €39 on every tone of export into the EU market. For banana, a duty of €79/t would be re-imposed. This means that these products would no longer enjoy the same margin of preference and competitiveness in the EU market, which in turn would affect their level of export and production. The ultimate effect local producers and farmers would be affected; which in the long term would impact the local economies of the targeted countries.

In terms of volume of trade that would be likely to be affected, Botswana would be the most hit. In effect based on the 2009 data, 81.7% of Botswana export to EU currently enjoy duty free quota free under the EC Regulation 1528/2007. This means that if the proposed Regulation were adopted, and assuming that the flow of trade remains constant, the EU would reintroduce import duties on that volume of trade. Other countries whose exports would also be severely affected are Swaziland and Zimbabwe, as their current exports into the EU under the EC Regulation 1528/2007 represent respectively 52% and 30.1% of total exports to the EU¹⁴.

From an investment and economic perspectives, this could have far reaching consequences on investments that were made on the assumption that those countries would enjoy duty free quota

free into the EU market. In effect, the volume of exports would most likely fall, and some companies would likely be forced to reduce their level of production and lay off workers. For countries like Zimbabwe, which is just recovering from a major economic crisis, this would be very complicated. This is also the case for Côte d'Ivoire, where a major political crisis, which has severely damaged the country's economic infrastructure, has just ended. For other countries, it would mean looking for alternative trade policy measures and options to remain competitive and maintain the current level of exports into the EU market.

III. The proposed EC Regulation is likely to exert some pressure on African countries to conclude the ongoing negotiations for the comprehensive EPA

The second issue, which is whether the proposed EC Regulation would affect the ongoing negotiations for the comprehensive EPA is more complex. Indeed nothing in the proposed EC Regulation refers the ongoing EPA negotiations, which suggests that there is no direct link between the two. However, things might prove to be different in practice.

In effect, negotiations for the comprehensive EPA have stalled since the iEPA was concluded in 2007, and the EU has been pressuring ACP countries to wrap up the negotiations. As such, the EC move can be interpreted as signaling the end of the game if the negotiations for the comprehensive EPA do not come to a conclusion by 2014¹⁵. As such, the 2014

¹⁴ Calculations were made by DG Trade and available at www.ipex.eu/IPEXLWEB/dossier/dossier.do?code=COD&year=2011&number=0260.

¹⁵ In effect, following a meeting between the EC and the EAC States early this month, Mr. Harvey Rouse, the head of trade section at the European Union delegation to Uganda said, "we are hopeful that if EAC takes active engagement in the remaining few months, we would



deadline set forth by the proposed EC Regulation, is a sort of soft power exerted by the EU on the 16 African countries that are pursuing negotiations for the comprehensive EPA; but which have not ratified the iEPA concluded in 2007. Those countries are now faced with a dilemma: either to wrap the negotiations for the comprehensive EPA, or to ratify and implement the iEPA.

From a negotiations' perspective, the proposed EC Regulation does not fully take into consideration the dynamic of EPA negotiations. In effect, the main reason why most ACP countries concluded the iEPA in 2007 was to avoid ACP's trade disruption into the EU market. However, at the time the iEPA was concluded, there was a general feeling that the outcomes of the negotiations were imperfect; and that some aspects of the legal text would have to be reconsidered in the context of the negotiations for the comprehensive EPA¹⁶. These aspects, also labeled as contentious issues include for most iEPAs: substantially all trade and transition periods for tariff liberalization, standstill and export taxes, national treatment principle in goods, free circulation of goods, regional preference, safeguards and infant industry provisions, safeguards, infant industry provisions, most favored nation, non-execution clause, rules of origin. It was therefore anticipated at that time that negotiations for the comprehensive EPA would be speedy, and that the Parties would move quickly with the implementation of their obligations under the agreement.

In practice, all these assumptions did not materialize: first, discussions over the contentious issues in the iEPA have proven difficult and complex. Though the Parties have reached a compromise in many areas, the number of contentious issues remains important; and African countries continue to believe that for the EPA to be truly a development agreement some of the current iEPA text would need some improvements and flexibilities in particular with regard with the contentious issues, including in relation to the definition of substantially all trade and transition periods for tariff liberalization, export taxes, most favored nation, non-execution clause, fisheries rules of origin, and most importantly development cooperation so as to ensure that countries would have adequate resources available to implement the agreement. Thus, the 2014 deadline might do very little in terms of pressuring countries to move quickly with the conclusion of the EPAs, unless there are some movements from the EU, as expressed by some ACP negotiators¹⁷. Conversely, this also means that the negotiations for the comprehensive EPA could be concluded even before 2014, if there were some serious progress over the contentious issues by then.

Secondly, the implementation of the iEPAs itself has proven to be more complex than anticipated; and this has led many ACP to delay the signing and ratification of the agreement, as well as the implementation of their obligations nearly four years after the conclusion of the iEPA.¹⁸ The main reason to this is the lack of

deliver the required results before the end of the year as the European Commission mandate to negotiate EPAs runs out at the end of this year".

¹⁶ Dan Lui and Sanoussi Bilal, "Contentious issues in the interim EPAs. Potential flexibilities in the negotiations", *ECDPM Discussion Paper*, March 2009.

¹⁷ As the Namibian Trade and Industry Minister indicated, there must first be progress in action regarding the outstanding issues before a deadline can be set. www.namibian.com.na/news/fullstory/archive/2011/october/article/eu-angers-government/ [accessed on October 11th, 2011].

¹⁸ Even the comprehensive EPA between the EU and the Cariforum has been criticized for similar reasons; and there have been voices suggesting that the CARIFORUM



adequate resources to meet iEPA obligations, which include among other things undertaking institutional and legal reform, establishing infrastructure to comply with technical requirements to export into the EU market. This is further exacerbated by the magnitude of adjustment cost resulting from ratifying the iEPA. In effect, at the time the iEPA were signed in 2007, few African undertook a comprehensive costs benefits analysis because of the amount of pressure they were facing, and because they wanted to avoid trade disruption into the EU market. Since then, studies and further consultations with relevant stakeholders have revealed the magnitude of implications, and have prompted the 18 ACP countries targeted by the EC proposed Regulation to hold on, whilst continuing negotiations on the outstanding contentious issues, with the hope that they would be addressed.

This is exacerbated by the fact that the iEPA did not contain specific provisions on resources to implement obligations arising from the agreement, and also the fact that few ACP countries prioritize trade in their annual budgets. This means that in the absence of additional resources, most African countries would face significant challenges in implementing the iEPA. Presently, the focus in most African regions is on finalizing the EPA Development Programme, which if agreed by both the EU and African countries, could provide an opportunity to address issues related to the implementation of the EPA. From this perspective, some progress on the finalization of the EPA Development Program would help progressing quickly towards the conclusion of the negotiations.

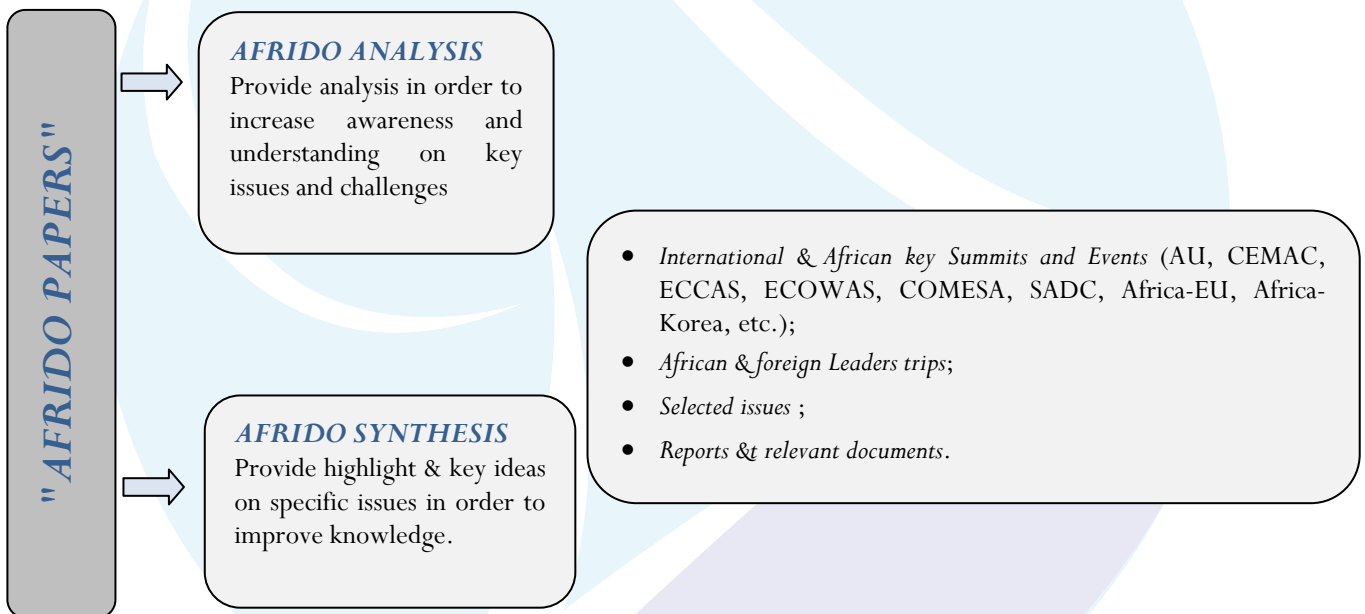
Nearly ten years after EPA negotiations began, the Parties are still sorting out ways to wrap up the discussions and move forward with the implementation, which would be another critical phase. Even if the proposed EC Regulation were eventually discussed and adopted by the EU Council and the EU Parliament, the issue of whether it would push African countries to rush and ratify the iEPA, or conclude the negotiations for the comprehensive is yet to be seen, given the potential implication for their economies. As African negotiators prepare for the next round of talks with their European counterpart, they need to clearly determine what they want out of the EPA negotiations. In this regard, they would have to bear in mind that just like in any other negotiations, what ultimately matters is the content of the agreement, the obligations, rights and preferences that come along with. In the meantime, there would be a need to understand where the EU is coming from, in particular at this juncture where the world economy is undergoing some rapid changes with a shift of power to new emerging economies. This means that an assessment of what both sides are receiving and offering, as well as how both sides envisage the future of their relationships, is necessary in order to move forward. This is because progress in any negotiations requires more than just deadlines; it requires the prospect of a win-win agreement.

EPA should be renegotiated. See to this effect, H. Brewster, N. Girvan and V. Lewis, "renegotiate the Cariforum EPA", (2008), *Trade Negotiations Insights*, Vol.7, N° 3, P.P. 8-10.



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