

EPA Negotiations: The honeymoon is over...

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Introduction

The European Commission (EC) finally announced on 30 September 2011² that countries that have concluded an Economic Partnership Agreement (EPA) but not taken the necessary steps to ratify it would no longer benefit from the EPA market access to Europe as from 1 January 2014.

The EC Market Access Regulation (MAR) 1528³ of 1 January 2008 provides duty free quota free market access for African Caribbean and Pacific (ACP) countries that have concluded an EPA. The Regulation requires countries to initiate the ratification process of the Agreement within a “reasonable period of time”. At it currently stands, the MAR is a temporary, unilateral instrument of the EU to ensure that, pending the implementation of the agreement by ACP countries, there would be no trade disruption.

The new Commission’s proposal reveals the following facts: Only 18 island countries⁴ from the 36 ACP countries that had initialled or signed an arrangement have consummated their marriage. The other remaining countries are yet to complete the nuptial contract, with the risk of seeing their marriage cancelled (see Annex 1 for the list of countries covered by the Commission’s Proposal).

The announcement of this Proposal is no surprise: Trade Commissioner Karel De Grucht and other representatives of the European Commission have constantly been warning that this situation was not sustainable and would therefore have to end at some point in time.

The timing is also not surprising: 1 January 2014 is also the date at which the new Generalised System of Preferences (GSP) Regulation of the EU should come into effect. It is also the date at which countries that have signed and initiated the ratification process of an EPA will have to start implementing their respective trade liberalisation commitments (remember some countries had a 5-year moratorium before starting liberalisation).

¹ This Briefing Note is based on a blog posted on ECDPM weekly compass and available with related discussion in *ECDPM Talking Points*, available at www.ecdpm-talkingpoints.org/epa-negotiations-the-honeymoon-is-over/. For further comments, please email at mj@ecdpm.org

² See European Commission Proposal for a Regulation of the European Parliament and of the Council amending Annex 1 to the Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations, COM(2011) 598 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0598:FIN:EN:PDF>

³ See Council Regulation No 1528/2007 of 20 December 2007 applying arrangements for products originating in certain states which are part of Africa, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements.

⁴ This includes 14 Caribbean countries, Mauritius, Seychelles, Madagascar and Papua New Guinea.

What does this imply?

The message is therefore clear: if countries want to continue to benefit from EPA market access, either they have to sign and start the ratification of their existing EPA or conclude a new regional EPA. For others, either they will fall under one of the schemes of the new GSP (i.e. Everything but Arms, Standard GSP or GSP Plus) or they will have no preferences (as might be the case for Botswana and Namibia).

The Proposal should come into effect on 1 January 2014. It is worth mentioning that although MAR 1528 was adopted in 2007, prior to the entry into force of the Lisbon Treaty, it is nevertheless subject to the Ordinary Legislative Procedures⁵. The Proposal has now been submitted to the Council and to the European Parliament, who will both have to give their approval before the amendments to the Regulation enter into force. It is important to note that the Council and the European Parliament are asked by the Commission to agree on the exclusion of the 18 countries, which have not started ratification of their EPA from Annex 1 of the MAR 1528. By accepting this proposal, they will also empower the Commission to adopt delegated acts to reinstate countries that would take steps towards ratification, in line with the requirements of the Regulation.

There have been some legal arguments as to whether the EU can exclude unilaterally a country from Annex 1 of MAR 1528. Indeed, it might not be enough for the Commission to seek the approval of the Council and the Parliament for amending the Regulation. It also needs to make sure that it does not violate Article 25(2) of the Vienna Convention on the Law of Treaties (VCLT) that governs MAR 1528, which is a “unilateral provisional application” of the EPAs by the EU. In that sense, unless the EU notifies the respective ACP countries of its intention not to become a party to these respective EPAs, it may not be legally permitted to terminate this provisional application of the Treaty⁶. Something it has not done yet.

What next?

This coming year will be a political litmus test for the relationship between the EU and its African and Pacific partners. If from a legal and a “coherence” perspective the Proposal of the EU is well understood, there are also good reasons why, four years down the road, since the MAR in 2008, nothing has happened. First, some compromise on many issues, including on the accompanying development measures, are yet to be agreed. Moreover, most countries are also engaged in building their regional integration agenda: many are either consolidating their existing customs union or setting it up. And Europe is well placed to know that regional integration takes time. So while a deadline by 1 January 2014 might seem a reasonable time, it has been perceived by some African countries to be a rather short period for the proper sequencing of regional agenda with trade negotiations with third countries. Finally, some might have simply lost interest in the process.

So, like in 2007, expect some tensions in the coming months: some countries might be pressured to sign, ratify and implement the EPA that might not fulfil their ambitions and interests in terms of content, timing and geographical configuration by fear of market disruption, in particular if they risk losing preferential access to the EU. Others might simply walk out. If no common position can be found at the regional level, the EPAs could seriously disrupt any regional integration effort.

But 2014 is not 2007. The world has changed and this time the response might be different. The financial crisis invited itself to the dance, Africa has gained a lot more confidence in its economic prospects and the increasing importance of “emerging” partners has brought in a new geopolitical dynamism, *de facto* reducing the leverage of the EU.

⁵ The Ordinary Legislative Procedures used to be called “co-decision” procedure under previous treaties. For more information, see Koeb E. and M. Dalleau (2010): “Trade relevant provisions in the Treaty of Lisbon. Implications for EPAs”, ECDPM Discussion Paper 98, available at www.ecdpm.org/dp98

⁶ For a full interpretation of the provisional application of the EPAs in accordance with the Vienna Convention on the Law of Treaties, see Bartels, L.: “Legal constraints on the EU’s ability to withdraw EPA preferences under Regulation 1528/2007”, ECDPM Briefing Note 27, available at www.ecdpm.org/bn27 and the non-technical summary in *Trade Negotiations Insights*, Vol. 10, Issue 8, November 2011, ECDPM and ICTSD, available at www.acp-eu-trade.org/tni, also available with related discussion in *ECDPM Talking Points* at www.ecdpm-talkingpoints.org/epa-negotiations-the-honeymoon-is-over/

Finally, it takes two to tango. African and Pacific countries now have to reveal their strategies, interests and preferences regarding their relationship with the EU. It is a question of political will in many cases and for those interested in an EPA, it will require some effort to reach a compromise.

At the same time, while one might understand the EU's logic to put an end to an instrument that has remained "temporary" for too long and is not compatible with rules of the WTO, there are still some "contentious issues" that remain unresolved⁷. Not much progress has been achieved so far on the "development" component of the EPAs, an area where expectations were quite high on the ACP side.

Therefore, the EU has also to reveal its cards on how far it would be willing to accommodate some genuine concerns that are blocking the negotiations. Setting a deadline is therefore not sufficient, the EU should also come up with concrete proposals on how to move the negotiations forward.

Just putting a deadline could open the way for a new impetus to the current negotiations towards the conclusion of regional EPAs. But it could well turn out to be a guillotine if no flexibility is provided to advance the negotiations.

⁷ See Bilal S. and I. Ramdoo (2010): "Options to address contentious issues in EPA negotiations: A question of political will", ECDPM Briefing Note 20, available at www.ecdpm.org/bn20 and Bilal S. and I. Ramdoo (2010): "Which way forward in EPA negotiations? Seeking political leadership to address bottlenecks", ECDPM Discussion Paper 100, available at www.ecdpm.org/dp100 as well as Lui, D. and S. Bilal (2009): "Contentious issues in the interim EPAs: Potential flexibility in the negotiations", ECDPM Discussion Paper 89, available at www.ecdpm.org/dp89 .

Annex 1

| Countries having taken steps towards ratifying EPAs | Countries that have not signed their EPAs or have not taken steps towards ratifying EPAs | | |
|---|--|--------|---------------------------------|
| | Countries | Status | Trade regime applicable in 2014 |
| 1. Antigua and Barbuda | 1. Botswana | UMIC | MFN |
| 2. Bahamas | 2. Burundi | LDC | EBA |
| 3. Barbados | 3. Cameroun | LMIC | Standard GSP |
| 4. Belize | 4. Comoros | LDC | EBA |
| 5. Dominica | 5. Cote d'Ivoire | LMIC | Standard GSP |
| 6. Dominican Republic | 6. Fiji | LMIC | Standard GSP |
| 7. Grenada | 7. Ghana | LMIC | Standard GSP |
| 8. Guyana | 8. Haiti | LDC | EBA |
| 9. Jamaica | 9. Kenya | LMIC | Standard GSP |
| 10. Madagascar | 10. Lesotho | LDC | EBA |
| 11. Mauritius | 11. Mozambique | LDC | EBA |
| 12. Papua New Guinea | 12. Namibia | UMIC | MFN |
| 13. Seychelles | 13. Rwanda | LDC | EBA |
| 14. St Kits and Nevis | 14. Swaziland | LMIC | Standard GSP |
| 15. St Lucia | 15. Tanzania | LDC | EBA |
| 16. St Vincent and Grenadines | 16. Uganda | LDC | EBA |
| 17. Suriname | 17. Zambia | LDC | EBA |
| 18. Trinidad and Tobago | 18. Zimbabwe* | LMIC | Standard GSP |

Source: COM(2011)/598 Final: European Commission Proposal for a Regulation of the European Parliament and of the Council amending Annex 1 of the Council Regulation (EC) no 1528/2007 as regards the exclusion of countries from the list of regions or states which have concluded negotiations.

Notes:

* Zimbabwe recently announced its intention to take steps towards ratifying the EPA.

LDC: Least-developed country

LMIC: Lower middle-income country

UMIC: Upper middle-income country

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