

**RE: THE EU-ACP ECONOMIC PARTNERSHIP AGREEMENTS AND  
RE: THE COTONOU AGREEMENT 2000**

---

**ADVICE**

---

1. I am asked to advise ActionAid as to whether the European Union (EU) is currently in breach of its treaty obligations to African, Caribbean and Pacific (ACP) countries in respect of the stance it has taken on the negotiation of Economic Partnership Agreements (EPAs) under the Cotonou Agreement (the Agreement). I am specifically asked to advise on whether the failure on the part of the European Commission to start work on possible alternatives to the EPAs constitutes a breach of the Agreement and in particular Article 37.6 of that Agreement. The issue is addressed in a draft ActionAid report entitled “The Trade Escape: WTO rules and alternatives to free-trade Economic Partnership Agreements”, a copy of which is included with my instructions.
  
2. In summary my view is as follows:
  - Article 37.6, read in the light of Articles 2, 4 and 34, aims to ensure that any non-LDC which considers that it is not in a position to enter into an EPA, is offered a meaningful alternative to an EPA, which provides that country with a new framework for trade which is equivalent to their existing situation and is WTO compatible and which is consistent with the objectives of the Agreement. It is for the ACP country concerned, and not the Community, to judge whether the alternative is preferable to an EPA;
  - In such cases, Article 37.6 of the Agreement places the Community under a duty, actively and in good faith, to examine possible alternatives to EPAs which fulfil the requirements laid down in the Agreement, bearing in mind the central objective of reducing and eradicating poverty in ACP countries. This

entails, in my view, consideration of new types of arrangements as well as existing alternatives;

- Any failure by the Commission to examine possible alternatives actively, in good faith and in such a way as to ensure that the objectives of the Agreement are met, would in my view constitute a breach of Article 37.6 of the Agreement;
- Any action on the part of the Community which tended to undermine the Agreement's central objective of reducing poverty, in particular by failing to find alternatives which ensure that market access is no worse than under current arrangements would in my view breach the terms of the Agreement and Article 37.6 in particular;
- A failure on the part of the Community to carry out a thorough social and economic impact assessment (or sustainability impact assessment) of the likely effects of both the EPAs and of any possible alternatives being considered under Article 37.6 would in my view be likely to constitute a breach of Article 3 of the Agreement, read with Article 9.1.

## FACTUAL BACKGROUND

3. The Agreement is a Partnership Agreement signed by EU and ACP countries on 23 June 2000. It provides for cooperation in the areas of development strategy and economic and trade cooperation. In relation to the latter, provision is made for the negotiation of EPAs during a preparatory period which must conclude by 31 December 2007 at the latest (Article 37)<sup>1</sup>. Those negotiations are currently ongoing. They are being conducted by the European Commission on behalf of the EU, on the basis of negotiating directives agreed by the Council in 2002<sup>2</sup>.

---

<sup>1</sup> This period has been laid down to take account of the coming to an end of a WTO waiver in respect of ACP preferences at the end of 2007, see Joint DfID/DTI Memorandum submitted to the Select Committee on International Development.

<sup>2</sup> I have not been referred to the text of these negotiating directives.

4. The current negotiations for EPAs have been the subject of criticism and concern by non-governmental organisations and by the House of Commons Select Committee on International Development (“the Select Committee”). These criticisms have touched on a number of areas, including the issue of possible alternatives to the EPAs, in relation to which specific provision is made in Article 37.6 of the Agreement.
5. In March 2005, the Select Committee produced a report examining progress on the negotiation of the EPAs. The Committee had heard evidence from a range of interested parties including the EU Commissioner for Trade, Mr Peter Mandelson. On the issue of alternatives to EPAs, Mr Mandelson was asked by the Committee whether the Commission’s original promise to ACP countries, that if they did not want to sign up to an EPA they could have an alternative which would provide no worse market access, still stood. Mr Mandelson confirmed that it did but described the option of an alternative as being “second best”<sup>3</sup>.
6. Under further questioning, he went on to state that, for non-LDCs, the alternative would be the Generalised System of Preferences (GSP) and that this was inferior to an EPA because it was unilateral and related only to market access, without any developmental dimension or content. He indicated that no ACP country had yet indicated that they wished to opt for an alternative to the EPA. He was then pressed on the question of whether the ACP countries were in a position to make a fair comparison between the two alternatives or whether, in the case of the non-LDCs, the terms of a GSP alternative were too unclear for such a comparison to be made. In response, Mr Mandelson stated that the alternative, the existing GSP was available for consideration now but he added that he was seeking to revise and simplify both the GSP and the Rules of Origin (RoO) (the latter to be included in the former). He emphasised however that the GSP was simply a

---

<sup>3</sup> See the Report of the House of Commons Select Committee on International Development “Fair Trade? The European Union’s trade agreements with African, Caribbean and Pacific Countries”, published 6 April 2005, Sixth Report of Session 2004-5, see the minutes of Oral Evidence pages 18-20.

market access arrangement and trade instrument and therefore bore no comparison to the EPAs which were intended to be developmental instruments<sup>4</sup>.

7. The Select Committee also took evidence from senior officials from DfID and DTI. On the issue of alternatives, they referred to work undertaken with ACP countries look in detail at the alternatives to EPAs (whilst emphasising the drive to ensure that EPAs were development-led agreements)<sup>5</sup>.
8. In its published report, entitled “Fair Trade? The European Union’s trade agreements with African, Caribbean and Pacific Countries” the Committee made a number of criticisms of the stance taken by the EU in the negotiations and recommended that:

“The UK Government should continue to push the Commission to ensure that the alternatives for non-LDC ACP states guarantee the same level of market access as the Lome arrangements. They should not face higher levels of tariffs in the EU market than they do at present.

We are concerned that in presenting the alternatives as a second best option, with no developmental component, the Commission is going against the spirit of what was agreed in Cotonou. It places the ACP in the position of having no real choice, and reinforces their unequal position in the negotiating process. Development should be integral to any trade options presented to the ACP, even when they are not the first choice of the EU. The UK Government should work to ensure this is the case” (Conclusions and recommendations paragraphs 9 and 10).

9. I am also referred to a copy of a leaked memo addressed to Heads of Delegation in ACP countries from M P Carl who, I am instructed, is a senior trade official in the Commission. That memo, which is stamped 11 April 2005, refers to a joint statement issued on 21 March 2005 by the UK Department for International Development (DfID) and the Department for Trade and Industry (DTI) (a copy of the statement is attached to the memo). The memo describes the statement as a

---

<sup>4</sup> Page 19 *ibid.*

<sup>5</sup> See page 3 of the minutes of Oral Evidence, *ibid.*

“major and unwelcome shift in the UK position as it focuses on the potential risks of EPAS and how the Commission must limit these and makes no mention of the opportunities...” The memo goes on to set out a number of lines to take on the UK statement. Attached to the memo is an Annex containing sections of the UK statement together with accompanying “EC” commentary.

10. In relation to the issue of alternatives to EPAs, the extract from the UK statement calls on the Commission to be ready to provide an alternative to an EPA at the request of any ACP country and states that any such alternative should provide no worse market access than currently enjoyed under Cotonou preferences. In response, the commentary from the Commission refers to the request from ACP states to delay the examination provided for in 2004 and states that “EPA’s are our best alternative ... any other options will be less valuable for trade and development.” The commentary goes on to refer to the need for WTO compatibility and states that alternatives will not generate the supply-side response that the EPAs can generate.

## LEGAL FRAMEWORK

11. Article 1 of the Cotonou Agreement sets out the objectives of the partnership between the European Community and its Member States and the ACP states. The Agreement is concluded in order to “promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic environment”. The second paragraph provides:

“The partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy”.

Article 1 goes on to state, inter alia, that these objectives and the Parties international commitments shall inform all development strategies and shall be tackled through an integrated approach.

12. Article 2 sets out and elaborates four fundamental principles on which ACP-EU cooperation is to be exercised:

- equality of the partners and ownership of the development strategies (which entails that ACP States determine the development strategies for their economies and societies “in all sovereignty and with due regard for the essential elements described in Article 9”);
- participation (including of civil society and the private sector);
- dialogue and the fulfilment of mutual obligations
- differentiation and regionalisation (cooperation arrangements and priorities shall vary according to a partner’s level of development, its needs, its performance and its long term strategy).

13. Article 3 requires each Party to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from the Agreement and to facilitate the objectives thereof. They are to refrain from any measures liable to jeopardise these objectives.

14. Part 3 of the Agreement is concerned with cooperation strategies which include: development strategies (Title I) and economic and trade cooperation (Title II). Provision for economic partnership agreements is made in Title II. It should be noted that Article 18 which provides the chapeau to Part 3 provides that “The cooperation strategies shall be based on development strategies and economic and trade cooperation “which are interlinked and complementary”. The Parties are required to ensure that the efforts undertaken in both areas are “mutually reinforcing.”

15. Article 19 sets out the principles and objectives of the development strategy and provides:

“The central objective of ACP-EU cooperation is poverty reduction and ultimately its eradication; sustainable development; and the progressive integration of the ACP countries into the world economy. In this context, cooperation framework and orientation shall be tailored to the individual circumstances of each ACP country, shall promote local

ownership of economic and social reforms and the integration of the private sector and civil society actors into the development process.”

16. The objectives for economic and trade cooperation are set out in Article 34:

“(1) Economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, with due regard for their political choices and development priorities, thereby promoting their sustainable development and contributing to poverty eradication in ACP countries.

(2)The ultimate objective of economic and trade cooperation is to enable the ACP states to play a full part in international trade....Given the current level of development of the ACP countries, economic and trade cooperation shall be directed at enabling the ACP States to manage the challenges of globalisation and to adapt progressively to new conditions of international trade thereby facilitating their transition to the liberalised global economy

(3) To this end economic and trade cooperation shall aim at enhancing the production, supply and trading capacity of the ACP countries as well as their capacity to attract investment. It shall further aim at creating a new trading dynamic between the Parties, at strengthening the ACP countries trade and investment policies and at improving the ACP countries’ capacity to handle all issues related to trade....”

17. The principles for economic and trade cooperation are set out at Article 35 which provides inter alia that cooperation shall be based on “a comprehensive approach which builds on the strengths and achievements of the previous ACP-EU Conventions, using all means available to achieve the objectives set out [in Article 34] by addressing supply and demand side constraints....”

18. In view of the objectives and principles set out above<sup>6</sup>, Article 36 provides for the conclusion by the Parties of “new [WTO compatible] trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade”.

---

<sup>6</sup> It is not stated whether these are the objectives and principles set out in Part 3 Title 2 or throughout the Agreement.

19. Article 37 the sets out the procedures for agreeing these arrangements. Economic partnership agreements are to be negotiated during the preparatory period which shall end by 31 December 2007. The new trading arrangements are to enter into force by 1 January 2008, unless earlier dates are agreed by the Parties (paragraph 1). The preparatory period is also to be used for capacity building (paragraph 3). The Parties are to regularly review the progress of the preparations and negotiations and will in 2006 carry out “a formal and comprehensive review of the arrangements planned for all countries to ensure that no further time is needed for preparations or negotiations.”(paragraph 4).

20. 37.6 of the Cotonou Agreement provides that:

“In 2004, the Community will assess the situation of the non-LDC which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements and will examine all alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.”

## ISSUES

### Does the Commission’s Stance on Alternatives to EPAs Breach the Terms of the Cotonou Agreement?

21. In his evidence to the Select Committee, the Commissioner for Trade, Peter Mandelson stated that alternatives to EPAs were “second best”. He also referred to the alternatives as being the current GSP, whilst also stating that he was seeking to revised and improve the GSP inter alia in relation to the RoO). In the leaked memo, the Commission also describes the alternatives provided for in the Agreement as “less valuable for trade and development”. This negative approach to alternatives on the part of the Commission, which was the subject of criticism by the Select Committee, falls to be considered against the requirements of Article 37.6 in particular and the provisions of the Agreement in general.



22. *Interpretation of Treaties*: It is a general rule of international law that a treaty should to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (see Article 31(1) of the Vienna Convention on the Law of Treaties (“the Vienna Convention”)<sup>7</sup>. In determining the scope of the Commission’s specific obligations under Article 37.6 of the Agreement therefore, it is necessary to consider the principles and objectives of the Agreement as a whole, and Part 3 in particular, as well as the language used and the context.

23. It is also a basic principle of the international law relating to treaties, perhaps the most basic principle, that treaties must be performed in good faith by the parties<sup>8</sup>.

24. *The Language of Article 37.6*: The ordinary meaning of the terms of Article 37.6 clearly in my view impose obligations on the Community to pursue alternatives to EPAs under the conditions laid down in that Article. The language is mandatory not discretionary. The two specific obligations placed on the Community are (1) to assess the situation of the non-LDC’s which decide they are not in a position to enter into EPAs and (2) to “examine all alternative possibilities in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules”.

25. This means in my view that the Commission (as the responsible institution) must actively take steps to assess the situation of the non-LDCs (albeit, at the request of the ACP countries themselves, in 2006 rather than 2004) and in good faith examine *all* alternative possibilities. This entails examining possible new arrangements as well as those existing under the current GSP/GSP+ for example

---

<sup>7</sup> The Vienna Convention on the Law of Treaties was adopted in 1969 and entered into force on 27 January 1980. The Convention sets out the law and procedure for making, operating and terminating a treaty. It applies only to agreements between states. Not all states have ratified the Convention, but it is frequently relied on even by states which are not party to it. On many occasions its provisions have been found to constitute customary international law and many leading commentators consider that the modern law of treaties is now authoritatively set out in the Convention, see for example Aust “Modern Treaty Law and Practice” (Cambridge 2000) at pages 10-11.

<sup>8</sup> See Article 26 of the Vienna Convention.

in order to provide the countries concerned with a new framework which fulfils the dual requirements laid down in Article 37.6: equivalence to their existing situation (no worse market access) and WTO conformity.

26. An attitude which appears to prejudge the examination called for in Article 37.6 violates the terms of Article 37.6 because it is likely to undermine the prospects of finding appropriate alternative possibilities. This publicly expressed attitude on the part of the Commission may even deter some non-LDC's from pursuing the possibility of an alternative when they might otherwise have sought to do so within the terms of Article 37.6. This approach of the Commission in my view violates the principle of effectiveness which is a feature of both international and Community law. In relation to international law, this principle is reflected in Articles 26 and 31 of the Vienna Convention referred to above and has also been applied by the International Court of Justice in its decisions<sup>9</sup>. In relation to Community law, the principle has been confirmed by the European Court of Justice on numerous occasions, as a general rule of interpretation and as a requirement in the application of national remedies for breaches of Community law. In this context, the principle of effectiveness requires in my view that the Community act in such a way as to ensure the fulfilment of the objectives of the Agreement, and in particular offers non-LDCs who require it, a *meaningful* alternative to an EPA in the light of the objectives of the Agreement and the conditions laid down in Article 37.6.

27. To the extent that the Commission is seeking to make improvements to the current alternatives such as the GSP and GSP+, as confirmed by the Commissioner in his evidence to the Select Committee, it would appear to be acting consistently with the requirements of Article 37.6. However this effort appears very likely to be undermined by its view that such alternatives are bound to be inferior to the EPAs

---

<sup>9</sup> See for example the Reparation for Injuries Case ICJ Rep (1949) 174 in which the ICJ held, in interpreting the Charter of the United Nations, that the United Nations possessed not only the powers expressly conferred but also such implied powers as were necessary to enable to achieve the purposes for which it was set up.

as they will not be sufficiently development oriented in comparison. As the Commissioner himself pointed out, the GSP is unilateral. To that extent, it is not only open to the Community to ensure that the GSP is adapted to ensure that it is more development oriented, it is in my view incumbent on the Community to ensure that this is the case, if it is to fulfil the requirements of Article 37.6 in particular and the Agreement in general.

28. The timetable for assessment of the position of non-LDCs under Article 37.6 has been delayed, apparently at the request of the ACP countries themselves. In my view however, this decision does not affect the substantive content of the obligations arising under Article 37.6. It remains open to a non-LDC to indicate that it is not in a position to enter into an EPA. There should be no prejudging of the possible alternatives in such a case and meaningful examination of them will only be possible if the Community has taken all necessary steps to maximise the potential of alternatives to meet the conditions laid down in Article 37.6 as well as the more general requirements of the Agreement. This may require action now in order to ensure that the overall deadline of the end of December 2007 can be met in any event.

29. It would have been open to the parties to the Agreement not to include provision for alternatives to EPAs but they have included it, under the conditions laid down in that Article, and it is nowhere stated in the Agreement that these possibilities are to be deemed “second best” or that ACP countries should be dissuaded from considering or adopting such alternative arrangements.

30. *The Principles and Objects of the Agreement:* The inconsistency of the Commission’s position with the requirements of Article 37.6 is confirmed in my view when one has regard to the principles and objects of Agreement. These are set out in some detail in the Treaty and in my view it is particularly important in construing any provision of the Agreement to bear in mind the centrality of the

objective of reducing poverty<sup>10</sup> and the emphasis on political choice and ownership of the development process by the ACP countries<sup>11</sup>.

31. In relation to the former, whilst poverty reduction is not the sole objective of the Agreement, the phrasing of Article 1 in particular clearly makes it the priority “The partnership shall be *centred* on the objective of reducing and eventually eradicating poverty *consistent with* the objectives of sustainable development and the gradual integration of the ACP countries into the world economy” (emphasis added). Taken together with Article 18, which requires the development strategies and economic and trade cooperation to be “interlinked and complimentary”, it is clear in my view that any action pursuant to the Agreement which tended to undermine the effort towards poverty eradication would be inconsistent with the central objective of the Agreement. Article 18 confirms, in my view, that action taken in the field of economic and trade cooperation must in any event aim to fulfil the objectives of the development strategy (set out in Article 19) as well as those set out in Article 34 (smooth and gradual integration into the economy). This means that the *central* objective of economic and trade cooperation is not integration into the world economy per se but integration into the world economy in a way which will best serve to reduce and eradicate poverty.

32. The Commission’s approach to Article 37.6 risks undermining the central objective of the Agreement (and therefore breaching its terms) because there appears to be good evidence that, in some cases, the EPA’s may not constitute the best way of reducing and eradicating poverty. Concerns have been raised as to the degree of reciprocity which may be required, the extent to which the agreements are constrained by the current rules of the WTO and in particular Article XXIV on Regional Trade Agreements and the inclusion of the so-called Singapore issues<sup>12</sup>. Whatever the general arguments as to the advantages and disadvantages of the

---

<sup>10</sup> See the Second Recital to the Preamble, Article 1 and Article 19(1).

<sup>11</sup> See Article 2, first indent, Article 4 (chapeau), Article 22(2)(a) and (c), Article 34(1).

<sup>12</sup> See the Select Committee Report, note 3 *infra* and the draft ActionAid Report “The Trade Escape: WTO Rules and alternatives to Economic Partnership Agreements”.

EPAs, it is clear that the parties intended non-LDCs to have a choice in circumstances where they decided that, in their particular case, an EPA was not the best vehicle for economic and social development. Whatever view the Commission takes as to the overall benefits of EPAs, the Agreement clearly leaves the final judgment to the ACP country concerned and requires a meaningful alternative to be offered. There is, in my view, sufficient evidence of potential areas of difficulty to make the application of Article 37.6 an issue of pressing practical concern as well as legal importance.

33. Further confirmation that the Commission's stance is contrary to the terms of Article 37.6 stems from the emphasis placed on the principle of political ownership and political choice of the development process by the ACP countries. In the context of Article 37.6, it is the non-LDC countries themselves which will decide that they are not in a position to enter into EPAs. More generally, EPA negotiations will be undertaken with ACP countries "which consider themselves in a position to do so, at the level they consider appropriate and in accordance with the procedures agreed by the ACP group..." (Article 37.5).
34. It is a fundamental principle of the agreement that there be equality of the partners and ownership of the development strategies and that, for the purposes of implementing the objectives of the partnership, the ACP States shall determine the development strategies for their economies and societies in all sovereignty (Article 2). This fundamental principle finds further expression in Article 4, where it is stated that ACP States shall determine, inter alia, the models of their economies, and in Article 34 which states that economic and trade cooperation shall aim at fostering the smooth and gradual integration of the ACP States into the world economy, "with due regard for their political choices and development policies". (General approach).
35. In my view, the Commission's stance on Article 37.6 breaches this fundamental principle of the Agreement, as well as the specific terms of paragraphs 5 and 6 of

Article 37. This is because, in failing wholeheartedly to examine alternatives to the EPA's, the Commission is removing meaningful choice from those non-LDC's who have expressed their wish to pursue alternatives. This may have the consequence of forcing those countries to accept EPAs which in their political and sovereign judgment are unsuitable for their development and their economies.

36. *Procedural Issues Relating to Article 37.6*: A further issue considered by the Select Committee was that of Sustainability Impact Assessment (SIA). The Select Committee took evidence from Mr Michel, the Commissioner for Development and Humanitarian Aid who indicated that ACP countries were being actively encouraged to carry out SIAs at the national level but that the Commission has very little information about these studies<sup>13</sup>

37. The Select Committee noted that there did not seem to be a formal process of incorporating the findings of SIAs into the EPAs and making adjustments where necessary and expressed its desire to see evidence that the EPAs would produce the desired poverty outcomes.<sup>14</sup>

38. In my view, the Community needs to take appropriate steps to audit the potential effect of both the EPAs and any possible alternatives to be considered under Article 37.6. A failure to audit the likely impact of the proposed measures will make it very difficult to ensure that the objectives of the Agreement are met. In particular, in this context, Article 9.1 of the Agreement states that:

“Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.”

39. In my view a failure to audit the impact of the proposed EPAs *and* any alternatives that are being considered pursuant to Article 37.6 would be likely to constitute a breach of Article 3 of the Agreement which requires Parties to take all

---

<sup>13</sup> Select Committee Report note 3 *infra*, page Ev 30.

<sup>14</sup> Select Committee Report, note 3 *infra*, paragraph 56.

appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from the Agreement and to facilitate the attainment of its objectives.

40. I am very happy to advise further on these issues or discuss any points arising from this advice as necessary.

**KATE COOK**  
**Matrix Chambers**

**23 June 2005**