The EU – EAC Economic Partnership Agreement Standoff: The Variable Geometry Question

By:

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My previous discussion of the EU – EAC EPA (the EPA/the Agreement) deadlock concluded that the cause of the stalemate lay deeper than the merits of the Agreement concerned. The ineffectiveness of the decision-making process, as well as the lack of proper constitution of a representative body in the negotiations, has facilitated the advancement of national interests over the collective interests of the East African Community (the Community/EAC). Instead of the stranded parties seeking to address these systemic problems, some 'band-aid' solutions to the deadlock have been put forward. One of them is variable geometry. But, to what extent might variable geometry offer a solution to the EPA deadlock, and what implications might this have for the future ACP-EU relationship?

Variable geometry is an operational principle under the Treaty for the Establishment of the East African Community (the EAC Treaty). Much like the

European Union's 'enhanced cooperation' provisions, the objective of variable geometry is to reinforce the integration process by allowing progression of cooperation among a group of partner states within the Community in chosen areas and at different speeds. The underlying principle of flexibility is seen in both the Union and Community contexts albeit with necessary procedural differences. Other similarities lie in the requirement that cooperation must be left open to any member state wishing to join later, and that such cooperation can only be invoked as a last resort.

In theory, the subject matter of the EPA falls within the widely-worded EAC Treaty provision of trade liberalisation and development, making variable geometry permissible. However, the EAC members hold diverging views on the Agreement. Can variable geometry therefore be applied to the EPA, so that those states – such as Kenya and Rwanda – that have expressed a willingness to engage with the EU can proceed with liberalisation under the EPA, while the other states (Tanzania, Burundi, Uganda and South Sudan) join when they deem fit? In answering this question, it must be determined whether variable geometry can be used if there is total disagreement on the merits of the EPA, and whether it can be used in respect of external agreements.

In addressing the first issue, the conditions under which variable geometry may be used must be identified. The EAC Treaty does not set out an exhaustive framework for the use of the principle, but due to established similarities with the Union's counterpart, there exists a moderate basis for comparison. An important distinction, however, relates to competence. In the Union context, EU Member States cannot rely on the use of enhanced cooperation in areas within the exclusive competence of the Union. On the other hand, issues of competence have not elicited detailed discussion in the Community as there appears to be no real threat of the supranational organs, such as the Secretariat and the Legislative Assembly, 'creeping' into national affairs due to their limited powers. The first requirement is thus met, given that there are no hard and fast rules around the different types of competence.

The next thing to turn to are the formal requirements. By examining the procedures provided for the use of variable geometry, it may be possible to determine the implications of disagreement among the partner states. The East

African Court of Justice, in its advisory opinion, sets apart the issue of decision-making from that of variable geometry. It states that consensus is purely a decision-making mechanism while variable geometry is a strategy for implementation. It must first be established that the subject matter is in line with the objectives of the Treaty. If a positive consensus is reached, a second decision on implementation is taken, also on the basis of consensus, which may well be variable geometry. In this case, partner states can choose to implement the decision at different speeds, or even opt out of implementation all together due to national realities. A distinction between the two stages of decision-making is important to narrow down the area of disagreement, especially if it is clear that a backing of the second stage by the reluctant partner states does not strictly require them to implement the Agreement.

The question of whether variable geometry can be used in dealings with third countries is rather more complex. Most projects in which variable geometry has been applied have been inward-facing: they have demonstrated a direct impact on Community objectives without reliance on third country obligations. Some examples are the creation of a single tourist visa and the use of identification cards as travel documents within the participating partner states. The Union has also used enhance cooperation with an internal focus, for instance, the Agreement on a Unified Patent Court.

A more reliable ground to consider is whether the cooperation will further the objectives of the Community as enunciated by the East African Court. Similarly, Union law precludes enhanced cooperation if it '[undermines] the internal market, or economic, social and territorial cohesion'. Participation in the EPA by the Community as anything other than a unit would significantly undermine the common external tariff created under the Customs Union Protocol, given that tariffs on imports from the Union are to be gradually reduced under the EPA. Such a move would directly and negatively impact the objectives of the Community, whose attainment is founded on the creation of a customs union. This can equally be seen as undermining the economic and territorial cohesion of the Community. For this reason, variable geometry may not be a viable option for the implementation of the EPA.

The demonstrated recourse to short-term solutions draws attention to an

unwillingness by the EAC group to address the underlying structural issues, presumably because its implication would be to limit individual or state power. This speaks to bigger problems in the ACP dynamic seeing as the Community is praised as being the most advanced and integrated arrangement in Africa. These structural aspects could pose recurring issues across African blocs, which may have a combined effect of halting post 2020 EU-ACP negotiations.

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