

Re: AFRICAN CONCERNS WITH THE DRAFT ECONOMIC PARTNERSHIP AGREEMENT(S) BETWEEN THE EUROPEAN UNION AND THE ORGANIZATION OF AFRICA CARIBBEAN AND PACIFIC STATES (EU-OACPS Partnership Agreement – African Region)

A- Introduction

1. This memorandum is drafted by the Kenya Christian Professionals Forum (KCPF) and the African Christian Professionals Forum (ACPF) both duly registered membership entities as companies limited by guarantee in the republic of Kenya with an domestic and regional mandate respectively. The Memo is addressed to the African Union Commission, the East African Legislative Assembly, the Ministry of Foreign Affairs in Kenya, the State Department of Trade in the Ministry of Industrialization, Trade and Enterprise development in Kenya, the Kenya Conference of Catholic Bishops, the National Council of Churches of Kenya, the Evangelical Alliance of Kenya and all Kenyans of good will.
2. This memo serves to alert all concerned that the draft Economic Partnership Agreement (EPA) between the European Union (EU) and the members of the Organisation of African, Caribbean and Pacific States (OACPS) contains provisions that undermine the sovereignty of Kenya, are averse to faith and morals and are therefore not in the interest of the people of Kenya and Africa at large. The memo provides a contextualization and narrative about the EU-OACP-EPA, points out the vulnerabilities of Kenya, highlights the contentious provisions from the perspective of faith leaning entities in Kenya and makes recommendations for possible action.

B- About the Agreement

3. The Economic Partnership Agreement (EPA) between the European Union (EU) and the members of the Organisation of African, Caribbean and Pacific States (OACPS), formerly known as the ACP Group of States, is a draft treaty covering a broad range of thematic areas including peace and security, sustainable development, migration and, notably, human rights (hereinafter, the “Agreement”). Negotiations on the Agreement began in September 2018 and formally concluded on 15 April 2021.¹
4. While the Agreement builds on, and is intended to replace, the Cotonou Agreement of 2000, its scope has been expanded to cover new areas, such as “Human Rights, Democracy and Governance in People-Centred and Rights-based Societies” and “Human and Social Development”. Under the guise of advancing *inter alia* gender equality and the empowerment of women, the document introduces several controversial elements, including language on “sexual and reproductive health and

¹European Commission ‘Post-Cotonou negotiations on new EU/Africa-Caribbean-Pacific Partnership Agreement concluded’ (15 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1552>.

rights”, the implicit promotion of “comprehensive sexuality education” programs, and references to controversial, non-consensual political documents. The inclusion of these elements far exceeds the original scope of the negotiating mandate of the OACPS.²

5. The treaty moves far beyond relevant consensus-based, intergovernmentally negotiated agreements at the international level, including at the United Nations, thereby threatening to undermine national sovereignty on these critical issues. In particular, the Agreement purports to place its States Parties under an obligation to, inter alia, fully liberalize access to abortion, embrace so-called “sexual rights”, and adopt sex education programs that take into consideration the radical UNESCO guidance on comprehensive sexuality education, without due regard for parental rights. This approach lacks any basis in international law. In addition, it would commit States to coordinate negotiating positions in international fora on the basis of membership to the EPA.
6. The Agreement consists of a General Part applicable to all parties to the Agreement, and three Regional Protocols for Africa, the Caribbean, and the Pacific respectively, outlining priorities for each region. This memo provides a critical analysis of the relevant provisions of both the Agreement’s General Part and the Africa Regional Protocol.

C-The Vulnerability of Kenya

7. Article 2(6) of the Constitution of Kenya provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." While Kenya is yet to sign, on ratification, this article would immediately domesticate the contentious provisions.
8. Section 6 of the Treaty Making and Ratification Act (No 45 of 2012) provides for the values and principles in negotiating treaties. Specifically that:

6(1) In negotiating treaties, the national executive or the relevant State department shall be bound by the values and principles of the Constitution; and shall take into account the regulatory impact of any proposed treaty.

(2) When appointing persons to negotiate a treaty, the national executive or the relevant State department shall appoint persons who are competent to undertake such negotiations in the interest of the people of Kenya.

²African, Caribbean and Pacific Group of States ‘ACP Negotiating Mandate for a post-Cotonou Partnership Agreement with the European Union’ (May 2018).

With the almost remote involvement of Kenya in the negotiation process of this EPA, that the said values of Kenya have been taken into consideration or whether the negotiations were undertaken in the interest of the people of Kenya.

9. If the Economic Partnership Agreement between the European Union and the East African Community (EU-EAC-EPA) is anything to go by Kenya has already demonstrated the practice of moving on with EPAs when it deems that for economic ends, waiting for other states would be considered as holding it back. The EU finalised the negotiations on the regional Economic Partnership Agreement with five countries (Burundi, Kenya, Rwanda, Tanzania and Uganda) of the East African Community in October 2014. However, its implementation is pending because it has not been signed and ratified by all EAC States. Kenya is the only EAC country, which signed and subsequently ratified the EPA in September 2016. Yet, the Agreement foresees that the signature and ratification of all EAC countries is required for its entry into force. The conclusion and ratification of the EPA on the EU side has been paused, pending EPA's signature and ratification by all EAC Members. To unblock the situation, at the Summit of 27 February 2021, the EAC states reached a political agreement to allow for the implementation of the EPA between the EU and individual countries of the EAC³.

D- Contentious and Controversial Provisions

(a) Sexual and Reproductive Health and “Rights”

Relevant Provisions: General Part, Article 36.2

10. Article 36, paragraph 2 of the Agreement requires States to “commit to the full and effective implementation of the Beijing Declaration and Platform for Action and the Programme of Action of the International Conference on Population and Development and the outcomes of their review conferences *and commit to sexual and reproductive health and rights, in this context*”.⁴ It is important to stress that neither the Beijing Declaration and Platform for Action and the Programme of Action of the International Conference on Population and Development (ICPD), nor any of the intergovernmentally

³ The European Union and the Republic of Kenya launch strategic dialogue and engage towards implementing the East African Community Economic Partnership Agreement <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2279>

⁴ Negotiated Agreement text initialed by the EU and OACPS chief negotiators' (15 April 2021), art.36.2.

negotiated outcome documents of their review conferences, include references to “sexual and reproductive health and rights”.

11. The expression encompasses three elements: “sexual and reproductive health”, “reproductive rights”, and “sexual rights”. The former two are highly controversial and ambiguous, and their acceptance remains contested, as they are widely regarded as a euphemism to promote a “human right” to abortion. In this regard, it must be clarified that there is no ‘right to abortion’ under international law. Rather, States are under an obligation to protect the right to life of all persons, including the unborn.⁵ This is further confirmed by the Preamble of the Programme of Action of the 1994 International Conference on Population and Development (in whose context the abovementioned terms were adopted for the first time). Indeed, according to its paragraph 1.15, “[T]he International Conference on Population and Development does not create any new international human rights”.⁶
12. Similarly, so-called “sexual rights”, have never been agreed upon in any international human rights instrument or other consensus document. Though lacking a codified or otherwise agreed definition, the concept of “sexual rights” is an extremely controversial one, commonly interpreted by various actors as encompassing *inter alia* matters of sexual orientation and “gender identity”, including marriage and family, as well as abortion.⁷
13. Clearly, the Agreement’s promotion of “sexual and reproductive rights” in Article 36, paragraph 2 of its general part falls short of States’ human rights obligations relating to the protection of the right to life, but also threatens State sovereignty on an issue that falls squarely under national jurisdiction. Furthermore, it constitutes a flagrant overreach of the negotiating mandate adopted by the Member States of the OACPS in 2018, which did not include the abovementioned matters among its objectives and cross-cutting themes.⁸

⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 6.

See also Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC). Art. 6 recognizes the inherent right to life of every child and establishes the obligation of States to “ensure to the maximum extent possible the survival and development of the child.” Art. 1 does not provide a lower limit on when the status of ‘child’ attaches. The Preamble further recognizes that, “the child ... needs special safeguards and care, including appropriate legal protection *before as well as after birth*”.

⁶ International Conference on Population and Development, ‘Programme of Action’ (Cairo, 1994), art. 1.15.

⁷ See e.g. World Health Organization ‘Defining Sexual Health’ <<https://www.who.int/teams/sexual-and-reproductive-health-and-research/key-areas-of-work/sexual-health/defining-sexual-health>>.

International Planned Parenthood Foundation ‘Sexual rights: an IPPF declaration’ (October 2008) <https://www.ippf.org/sites/default/files/sexualrightsippfdeclaration_1.pdf>.

⁸ African, Caribbean and Pacific Group of States ‘ACP Negotiating Mandate for a post-Cotonou Partnership Agreement with the European Union’ (May 2018).

(b) Sexual and Reproductive Health Services

Relevant Provisions: Africa Regional Protocol, Article 32.2

14. Article 32, paragraph 2 of the Africa Regional Protocol mandates States to “deliver universal access to sexual and reproductive health services.”⁹
15. At the intergovernmental level, the term “reproductive health services” is defined by the Programme of Action of the International Conference on Population and Development as including *inter alia* abortion, although with specific caveats designed to limit and constrain its scope as well as to safeguard State sovereignty on this matter.¹⁰ These caveats are set out in paragraph 8.25 of the Programme of Action, according to which “In no case should abortion be promoted as a method of family planning” and that “every attempt must be made to eliminate the need for abortion.” The same article also asserts that “any measures or changes related to abortion within the health system can only be made at the *national or local level* according to the national legislative process.”¹¹ In this regard, it must also be recalled that, upon adoption of the Programme of Action of the ICPD, various Member States entered reservations on the inclusion of abortion in the concept of “reproductive health” as a service, or as a dimension of the terms “sexual and reproductive health” and “reproductive rights,” among others.¹²
16. Because the references to “sexual and reproductive health services” contained in the Partnership Agreement fail to take into account the carefully negotiated protections for the right to life and State sovereignty in matters relating to abortion, these provisions can be regarded as effectively requiring that States Parties legalize abortion under any circumstances, including as a method of family planning, and as such must be rejected in the strongest possible terms.
17. It is worth noting that the Agreement contains various references to “sexual and reproductive health commodities” and “health-care services”.¹³ While none of these terms is explicitly defined in any consensus-based international document, or understood as including abortion, great caution must be exercised when accepting the relevant provisions. Should they decide to become bound by this treaty, States must avoid any ambiguity and clearly declare upon ratification that their interpretation of

⁹Negotiated Agreement text initialed by the EU and OACPS chief negotiators’ (15 April 2021) Africa Regional Protocol, art.32.2.

¹⁰ International Conference on Population and Development, ‘Programme of Action’ (Cairo, 1994), art. 13.14b).

¹¹Id., art. 8.25.

¹² Id., 187.

¹³Negotiated Agreement text initialed by the EU and OACPS chief negotiators’ (15 April 2021), art. 29.5&Africa Regional Protocol, art. 40.6.

these terms does not include abortion or other procedures, goods or services that are contrary to national law.

(c) Comprehensive Sexuality Education

Relevant Provisions: Africa Regional Protocol, Article 40.6

18. Article 40, paragraph 6 of the Africa Regional Protocol commits States to “stress the need for universal access to quality and affordable comprehensive sexual and reproductive health information and education, taking into consideration the UNESCO International technical guidance on sexuality education”.¹⁴
19. The abovementioned technical guidance promotes so-called “comprehensive sexuality education” (CSE), a curriculum adopting a supposedly “rights-based” approach to sex education to promote ‘sexual exploration’, abortion and radical understandings of gender and sexual identity.¹⁵It instructs children to explore their sexuality and advocate for their “sexual and reproductive health and rights” from a young age, all under the guise of ensuring children’s health and empowerment. Instead of focusing on risk prevention and responsible and healthy relations, CSE explicitly rejects traditional family values and gender roles and severely interferes with the liberty of parents to educate their children in conformity with their moral and religious convictions, as enshrined in international law.¹⁶The promotion of CSE is vocally and consistently rejected at the UN and related international fora.
20. In addition to neglecting the role and rights of parents in such sensitive a matter as the education of their children, the inclusion of references to the UNESCO International Technical Guidance on Sexuality Education in these provisions would effectively commit States to promoting CSE, and thereby threatens to undermine parental rights in the education of their children, as well as eroding traditional family values by directly targeting children with a harmful, ideological agenda.
21. The faith leaders in Kenya have made their position known on the question of comprehensive sexuality education (CSE)¹⁷. The faith leaders in Ghana have rejected this

¹⁴Id., Africa Regional Protocol, art.40.6.

¹⁵ UNESCO ‘International technical guidance on sexuality education’ (2018).

¹⁶Jokin de Irala, Alfonso Osorio, Carlos Beltramo, Silvia Carlos, Cristina López del Burgo ‘The Politics of “Comprehensive Sexuality Education”’ (11 April 2014) Center for Family and Human Rights <https://cfam.org/briefing_paper/the-politics-of-comprehensive-sexuality-education/>.

¹⁷ <https://www.aciafrica.org/news/1388/bishops-in-kenya-renew-campaign-against-comprehensive-sexuality-education-commitment>

curriculum too¹⁸. A similar position is held by the faith leaders in Uganda on the controversial Comprehensive Sexuality Education¹⁹.

(d) Problematic references to regional treaties and political commitments

Relevant Provisions: Africa Regional Protocol, Article 40.6; General Part, Article 36.2

22. Article 40, paragraph 6 of the Africa Regional Protocol affirms that States “shall promote and encourage the ratification and the effective implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (hereinafter, the “Maputo Protocol”)...”.²⁰ Article 14 of the Maputo Protocol of 2005 requires States Parties to “Protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”²¹ The Protocol is not supported by several African Union States, and various States Parties have entered reservations on this provision, based on concerns that the ground of ‘mental and physical health’ is extremely broad and vague, and effectively renders abortion permissible in almost all cases.²² In fact, Kenya entered a reservation to the effect that:

“The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) which is inconsistent with the provisions of the Laws of Kenya on health and reproductive rights.”²³

23. By requiring African States who have not ratified it to “promote and encourage the ratification and effective implementation” of the Maputo Protocol, the provision infringes unacceptably on State sovereignty and blatantly exceeds the ACP negotiating mandate.

24. The Agreement also elevates States’ political commitments under a number of controversial soft-law documents to the status of treaty obligations. Article 40, paragraph 6 of the Africa Protocol also commits States to “support the effective

¹⁸ <https://radioangelus.com/catholic-bishops-reject-comprehensive-sexuality-education/>

¹⁹ <https://international.la-croix.com/news/world/uganda-catholic-church-rejects-sex-education-program-for-schools/7836>

²⁰ ‘Negotiated Agreement text initialed by the EU and OACPS chief negotiators’ (15 April 2021), Africa Regional Protocol, art.40.6.

²¹ African Union ‘Maputo to the African Charter on Human and People’s Rights on the Rights of Women in Africa’ (adopted October 2003, entry into force November 2005), art.14(2c).

²² L. Asuagbor ‘Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa’ (2016) <<https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>>.

²³ Justice Lucy Asuagbor, Status of Implementation of the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf>

implementation of the Maputo Plan of Action 2016-2030, as appropriate”.²⁴The political document advocates for various problematic elements including “universal access to comprehensive sexual and reproductive health services” and the promotion of “comprehensive education on sexual and reproductive health”.²⁵The provision only calls for the implementation of this document “as appropriate”;however, this qualifier is too weak to offset the dangerous language contained in them. Even if not strictly binding on States, the implicit endorsement of this document may compromise national sovereignty on policies related to abortion, sex education and related areas.

25. Furthermore, according to Article 36, paragraph 2 of the general part of the Agreement, “the Parties commit to the full and effective implementation of the Beijing Declaration and Platform for Action and the Programme of Action of the International Conference on Population and Development and the outcomes of their review conferences...”²⁶By committing states to the “full and effective implementation” of these international agreements, the provision disregards national sovereignty in determining the extent and nature of implementation. The Programme of Action of the ICPD clearly states that “the implementation of the recommendations contained in the Programme of Action is the sovereign right of each country, consistent with national laws and development priorities, with full respect for the various religious and ethical values and cultural backgrounds of its people, and in conformity with universally recognized international human rights.”²⁷As mentioned above, several States submitted reservations and interpretive declarations on several controversial elements of the document.²⁸ Similarly, paragraph 9 of the Beijing Declaration and Platform for Action establishes that “the implementation of this Platform ... is the sovereign responsibility of each State”.²⁹
26. In addition to the Programme of Action of the ICPD and the Beijing Declaration and Platform for Action, references to the outcomes of their review conferences are highly problematic, as several of them were neither the subject of an intergovernmental negotiation, nor held under the auspices of the UN General Assembly. Furthermore, some of these documents have been drafted at the regional level, thereby not representing the position of all Member States on such sensitive issues as sexuality and reproductive health. By committing to the full and effective implementation of “the outcomes of their review conferences” in a binding treaty, attempts could be made to

²⁴‘Negotiated Agreement text initialed by the EU and OACPS chief negotiators’ (15 April 2021), Africa Regional Protocol, art.40.6.

²⁵ African Union Commission ‘Maputo Plan of Action 2016-2030’ (2016)

<https://addis.unfpa.org/sites/default/files/pub-pdf/MPOA%20English_A5_%20Version%205.pdf>, 10, 14.

²⁶ ‘Negotiated Agreement text initialed by the EU and OACPS chief negotiators’ (15 April 2021), art.36.2.

²⁷ International Conference on Population and Development, ‘Programme of Action’ (Cairo, 1994), 10.

²⁸ Id., 187.

²⁹ World Conference on Women ‘Beijing Declaration and Platform for Action’(1995), art. 9.

penalize States Parties for upholding their legitimate, sovereign positions on these matters, as opposed to the non-consensual norms advanced in these regional reviews.

27. Kenya hosted the controversial ICPD25 in November 2019. This conference was agenda driven and the organisers were intentional about excluding the voices of value and faith based global participants. In fact the Holy See declined to participate on the grounds that: "The organizers' decision,... to focus the conference on a few controversial and divisive issues that do not enjoy international consensus and that do not reflect accurately the broader population and development agenda outlined by the ICPD", was regrettable.³⁰ Pro-life and Pro-family organizations globally supported and hosted by KCPF and faith leaders in Kenya ended up organizing a parallel conference since the ICPD25 organizers could not tolerate alternative views. It is therefore surprising that the United Nations Fund for Population Activities has continued to use the impugned outcomes of ICPD25 to pressure various government departments including the Ministry of Education along with the National Council on Population and Development(NCPD)³¹.

(e) Recommendations

28. The draft Agreement represents a major threat to national sovereignty on sensitive issues such as human sexuality, the protection of life, and marriage and the family. Some aspects of the Agreement fall beyond the scope of the negotiating mandate of the OACPS and, if ratified in its current form, threaten to bind its African States and Kenya in particular to support positions that are not only in direct contradiction of its national laws and values, but also would result in a violation of its obligations under international human rights law. Beyond the harmful impact the ratification of this instrument would have at the national level, the adoption of the Agreement as a framework for EU and OACPS Member States to "establish common positions in the framework of the United Nations and other international and regional organisations and forums" has the potential to dramatically impact the development of international human rights law in the future.³²
29. In light of the aforementioned, the following priority avenues of strategic action are recommended to African states and Kenya for consideration:
 - a. Partner with likeminded States to formally denounce the overreach of the ACP negotiating mandate for a post-Cotonou Partnership Agreement with the European Union of 30 May 2018, and demand the deletion or, in the alternative, the immediate renegotiation of provisions of the draft Partnership Agreement

³⁰ Holy See announces it will not participate in the "Nairobi Summit"
https://holyseemission.org/contents/press_releases/5dc57ff651f7f.php

³¹ <https://kenya.unfpa.org/en/topics/adolescents-and-youth-1>

³² Negotiated Agreement text initialed by the EU and OACPS chief negotiators' (15 April 2021), art. 1.5.

and the Africa Regional Protocol related to “sexual and reproductive health and rights” and “reproductive health services”, namely:

- i. Article 36, paragraph 2, of the Partnership Agreement (Part II, Title III, Chapter 3);
 - ii. Article 32, paragraph 2 of the Africa Regional Protocol (Title II, Chapter 1);
- b. Oppose the signature, provisional application, and conclusion of the Partnership Agreement and the Africa Regional Protocol;
- c. Oppose the ratification of the Partnership Agreement and the Africa Regional Protocol, in accordance with relevant domestic procedures;
- d. Without prejudice to the ratification of the Partnership Agreement and the Africa Regional Protocol, States parties could enter reservations to the following provisions:
 - i. Article 36, paragraph 2, of the Partnership Agreement (Part II, Title III, Chapter 3);
 - ii. Article 32, paragraph 2 of the Africa Regional Protocol (Title II, Chapter 1);
 - iii. Article 40, paragraph 6 of the Africa Regional Protocol (Title II, Chapter 2);
- e. Formulate a conditional interpretative declaration specifying that the meaning of the terms “sexual and reproductive health”, “reproductive health”, “sexual and reproductive health and rights”, “sexual and reproductive health commodities”, “sexual and reproductive health services”, “sexual and reproductive health-care services, information and education” does not include abortion or any other procedures, goods or services that are against national law;
- f. Formulate an interpretative declaration stating that the development and provision of “comprehensive sexual and reproductive health information and education” will be undertaken with full respect for the rights of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions, and that in no way does any reference to the UNESCO International Technical Guidance on Sexuality Education contained in the Partnership Agreement and the relevant Regional Protocol impose an obligation to incorporate comprehensive sexuality education in national school curricula.

For further information on the draft EU-OACPS Partnership Agreement, Kenya Christian Professionals Forum info@kcpf.or.ke