Free Movement of Workers in the EAC

Caroline Kago and Wanyama Masinde

11.1 Introduction

The common market is the third level of economic integration where all barriers to the mobility of people, capital and other resources within the member states are removed, hence creating a single market where all factors of production move freely within the region in question.

The Protocol on the Establishment of the East African Community Common Market (the Common Market Protocol) was signed in Arusha, Tanzania by the Republic of Kenya, Uganda, Rwanda, Burundi and the United Republic of Tanzania, on the 20 November 2009 pursuant to Articles 2(2), 5(2), 151 (1), 76 and 104 of the Treaty for the Establishment of the East African Community (the EAC Treaty) and entered into force in 2010.

The objective of establishing the EAC Common Market through the Common Market Protocols to realise accelerated economic growth and development through the attainment of free movement of goods; free movement of persons; free movement of labour; the right of establishment; the right of residence; the free movement of services; and the free movement of capital.¹ The common market is guided by the principles of National Treatment, Most Favoured Nations Treatment and predictability through transparency and information sharing.²

The Common Market Protocol differentiates a “worker” from a person supplying a service. It first commences by defining “labour” to include a worker and a self-employed person. It thereafter defines a “self-employed person” as a person engaged in an economic activity not under any contract of employment or supervision and who earns a living through this activity and a “worker” as a person who performs services for and under the direction of another person in return for remuneration.³ Hence, a worker is an employee.

In light of the above, when discussing free movement of workers in the context of the East African Community (EAC) one must restrict the discussion to

¹ Article 2(4) of Common Market Protocol.

² Article 3 of the Common Market Protocol.

³ Article 1 of Common Market Protocol.

free movement of an employee. In the context of the EAC, this chapter will therefore commence by discussing free movement of workers and thereafter examine the link between the free movement of service providers and the free movement of workers.

11.2 Free Movement of Workers

The Partner States under the Common Market Protocol guarantee the free movement of workers, who are citizens of the Partner States, within their territories. In addition, they warrant that the said workers shall not be discriminated in their territories based on their nationalities in relation to employment, remuneration and other conditions of work and employment.⁴ In this regard, the workers shall be entitled to:

- i. *Apply for employment;*
- ii. *Accept offers of employment;*
- iii. *Conclude contracts and take up employment in accordance with the said contracts, national laws and administrative actions without any discrimination;*
- iv. *Move freely within the territories of the Partners States for the purpose of employment;*
- v. *Stay in the territory of the Partner State for the purpose of employment (right of residence);*
- vi. *Enjoy freedom of association and collective bargaining for better working conditions in accordance with national laws of the Partner State;*
- vii. *Enjoy the rights and benefits of social security accorded to workers in that territory;*
- viii. *Be accompanied by the spouse and child who are entitled to be employed or engage in any economic activity.*⁵

It should be noted that workers may only take up employment in the private sector, hence they cannot be employed in the public sector.⁶ This, therefore

⁴ Article 10 of the Common Market Protocol.

⁵ Article 10(3) of the Common Market Protocol.

⁶ Article 10(10) of the Common Market Protocol.

denies the public sector the benefits that accrue from free movement of workers such as the transfer of skills and experiences from other Partner States.⁷

In addition, Partner States are permitted to limit the free movement of workers on grounds of public policy, public security or public health.⁸ However, the state imposing the limitation is required to notify the other Partner States. Although this provision is necessary to provide Partner States with policy space it may be used as a form of disguised discrimination to hinder the free movement of workers from other Partner States.

The provisions of Article 10 of the Common Market Protocol (Free Movement of Workers) are implemented by the EAC Common Market (Free Movement of Workers) Regulations in Annex II. The Regulations cover issues such as work permits; employment of spouses and children of workers; expulsion and deportation of the worker; equal treatment in employment; and categories of workers.

The category of workers covered by the Regulations are administrators and managers; professionals such as engineers, lawyers, statisticians, teachers, accountants and architects; technicians and associate professionals; and crafts and related trades workers. For professions that require accreditation, the workers are subject to clearance by the respective regulatory bodies of the Partner States.

Based on the provisions of the Common Market Protocol and the Regulations, five important issues must be considered in relation to free movement of workers in the EAC:

1. Free movement of persons
2. Mutual recognition of academic and professional qualifications
3. Right of residence
4. Portability of social benefits
5. Labour market information systems

11.2.1 *Free Movement of Persons*

Free movement of persons is one of the fundamental rights guaranteed in the Common Market Protocol. It is the most important right for a worker as it enables him/her to take up a job in another Partner State as the worker is able to move freely within the region with his/her dependents, stay in the territory

⁷ Compare in this regard the much more limited exception to the EU right of free movement of workers for employment in public service under Article 45(4) TFEU as discussed in EU Chapter 11 par. 2.

⁸ Article 10 (11) of Common Market Protocol.

of the Partner State together with his/her dependents, be protected while in the territory of the Partner State based on national laws and exit the territory of the Partner State without restrictions.⁹

According to the Common Market Protocol, the Partner States agreed to eliminate all obstacles to the freedom movement of persons by establishing a standard identification system of issuing national identification documents to nationals, which shall be the basis of identifying the citizens of the Partner States in the Community.¹⁰ The citizens of the Partner States will therefore be able to use machine-readable national identity cards as a travel document. Rwanda and Uganda are currently issuing standardized machine readable national identification. However, Kenya, Burundi and Tanzania are yet to commence the issuance of the standardised machine-readable identifications. Nevertheless, there is currently an understanding between Kenya, Uganda and Rwanda that their nationals can use the national identity cards as travel documents across their borders.

The Partner States further agreed to have a common standard travel document for the nationals of Partner States. The common standard travel document, which is the EAC Passport, is currently being used by many nationals of the Partner States. In addition, the Sectoral Council of Ministers responsible for EAC Affairs and Planning, during the 22nd Meeting held on 14th August 2015, developed and adopted a schedule of activities that will ensure that the EAC e-Passport is launched by the 17th Ordinary Summit of the EAC Heads of State.¹¹

The provision on free movement of persons contained in Article 7 of the Common Market Protocol is implemented through the EAC Common Market (Free Movement of Persons) Regulations (Annex 1). The Regulations require Partner States to effectively manage their borders through ensuring ease of border crossing for citizens of Partner States; reciprocal opening of border posts; operational hours for the border posts; manning of border posts on 24 hour basis; harmonisation of certain measures, including immigration procedures.¹²

Implementation in some Partner States of border management requirements is ongoing. For example, in Kenya, a recent study reported that seven border posts are operational on a 24 hour basis: Jomo Kenyatta Airport, Mombasa International Airport, Namanga, Lunga Linga, Taveta, Malaba and

⁹ Article 7, 8 and 9 of the Common Market Protocol.

¹⁰ Article 8.

¹¹ Council Report of the 32nd Meeting of the Council of Ministers held on the 10th–14th August 2015 in Arusha, Tanzania at ages 9–11. EAC/CM/32/2015.

¹² Regulation 8 of the Regulations on Free Movement of Persons.

Busia. All these borders are electronically interconnected and have integrated border management systems.¹³

11.2.2 *Mutual Recognition of Academic and Professional Qualifications*

The Common Market Protocol requires Partner States to harmonise and mutually recognise academic and professional qualifications, experience obtained, requirements met, and licences or certificates granted in other Partner States.¹⁴ Recognition requires a high level of trust in the education system and professional standards of the home country.¹⁵ Therefore, this means that the Partner States must eventually harmonise their curricula, examinations, standards, certification and accreditation of educational and training institutions. This process is currently ongoing through a four phase project of the EAC which entails harmonising the goals and philosophies of education, curriculum content, education structures, policies and legal frameworks; examining the curricula and approaches of content delivery in order to identify gaps, overlaps and areas to be harmonised; developing of a relevant harmonised curriculum; and making necessary reforms to implement the harmonised curricula.¹⁶

Recognition of academic and professional qualifications is currently being processed through the conclusion of Mutual Recognition Agreements (MRAs) wherein Partner States agree to accept and recognise each other's requirements, certificates and licences because they are harmonised, considered equivalent or are according to international standards.¹⁷

In 2013, the Sectoral Council of Education directed the EAC Secretariat to develop legally binding framework for MRAs and mechanisms on how signed MRAs can be formally adopted as instruments of the EAC.¹⁸ A draft Annex VI to the Common Market Protocol, the EAC Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011, places an

13 Victor Ogalo "Achievements and Challenges of Implementation of the EAC Common Market Protocol in Kenya: Case of Free Movement of Labour" (2014) Friedrich Ebert Foundation Research Report.

14 Article 5 (3a) and 11 (1a) of the Common Market Protocol.

15 Cronje, J.B., "Mutual Recognition of Professional Qualifications: The East African Community" (2015) Tralac Brief No. SI5TB04/2015. 2015.

16 This actually forms an area where EAC objectives and ambitions go beyond those in the Europe, as the EU lacks the competence to harmonise curricula, and mutual recognition is based more on trust in the existing systems, as well as secondary legislation. See EU Chapter 11 par. 3.

17 Cronje, J.B. (n 13 above).

18 Report of the 28th Meeting of the Council of Ministers held in Kampala, Uganda on 22nd-29th November 2013 at page 40–41.

obligation on the Partner States to designate competent bodies and to authorise them to enter into MRAs to facilitate the movement of professionals in accordance with the market access commitments made under the Common Market Protocol.¹⁹ It provides guidance on the development of MRAs and the key elements it should contain. The key elements are academic and professional qualification requirements; registration procedures; permitted professional competencies; common code of conduct; disciplinary processes; and administration of the MRA.

This therefore requires that all competent bodies responsible for regulating professional services liberalised by Partner States be identified and required to negotiate MRAs. They include bodies responsible for regulating legal services, accounting services, architectural services, engineering services, integrated engineering services, medical and dental services, nurses and midwives, veterinary services, paramedics and physiotherapists.

So far, accountants, engineers and architects (excluding the Architects' Association of Tanzania) have concluded MRAs.²⁰ Lawyers are still negotiating their MRA.

11.2.3 *Right of Residence for Workers, Relatives and Non-Economically Active Persons*

A worker and their spouse, children and dependents are entitled to the right of residence.²¹ In this regard, a worker with a contract of employment of a period of more than 90 days, his/her spouse, children and dependents are issued with a pass upon the submission of valid travel documents or national identity cards and contract of employment to the immigration officer. Upon entry to the territory of the Partner State, the worker is required to apply for a work permit and dependent pass for his/her spouse, children and dependents. If the contract of employment is for less than 90 days, the worker is issued with a special pass.

Partner States are therefore required to make major reforms in their laws and policies regarding movement of persons to ensure that their laws do not inhibit the free movement of workers and their right of residence. Kenya is a good example of a Partner State that has made efforts towards this end. Following the promulgation of the current Constitution of Kenya in 2010, laws that inhibited the free movement of people such as the Kenya Citizenship Act

¹⁹ Cronje, J.B. (n13 above).

²⁰ Report of the 28th Meeting of the Council of Ministers held in Kampala, Uganda on 22nd–29th November 2013 at page 40–41.

²¹ Article 14 of Common Market Protocol.

(Cap 170); the Immigration Act (Cap 172); Alien Restriction Act (Cap 173) and Visa Regulations were repealed and subsequently replaced with the Kenya Citizenship and Immigration Act No. 12 of 2011 and the Kenya Citizens and Foreign Nationals Management Act No. 31 of 2011.

Currently, the competent authorities in Partner States issue work permits to East Africans wishing to work within the Partner States within 30 days from the date of application.²² The work permits may be issued for an initial period of up to two years and may be renewed upon application.²³ In addition, Partner States are given the first opportunity, based on merit, in the event they are competing for the same job opportunity with nationals from outside the EAC region.²⁴ With regard to work permit fees, Rwanda, Kenya and Uganda have waived payment of the fees for East Africans who are workers.²⁵

Pursuant to the 20th Meeting of the Sectoral Council of Ministers responsible for EAC and Planning held on 13th July 2014, the EAC Secretariat is coordinating the process of the harmonisation of classification and procedures for issuance of entry/work/residence permits as this is currently still being done in accordance with national laws.²⁶

11.2.4 *Labour Laws and Portability of Social Benefits*

The objectives of the Common Market Protocol can only be realised if the Partner States (among other things) harmonise their policies in areas provided for by the Common Market Protocol or determined by the Council.²⁷ Hence, the Partners States need to harmonise labour policies, programs, legislation, social services, provide for social security benefits, establish common standards and measures for association of workers and employers, establish employment promotion centers and eventually adopt a common employment policy.²⁸

The Partners States are therefore required to make major reforms in their labour policies and legislations to address discrimination of citizens and

22 <http://www.eac.int/sectors/immigration-and-labour/migration-and-development>. Accessed on 1.3.16.

23 <http://www.eac.int/sectors/immigration-and-labour/migration-and-development>. Accessed on 1.3.16.

24 <http://www.eac.int/sectors/immigration-and-labour/migration-and-development>. Accessed on 1.3.16.

25 <http://www.eac.int/sectors/immigration-and-labour/migration-and-development>. Accessed on 1.3.16.

26 <http://www.eac.int/sectors/immigration-and-labour/migration-and-development>. Accessed on 1.3.16.

27 Article 4(3) of the Common Market Protocol.

28 Article 5 (2 c) and 12(1) of the Common Market Protocol.

workers from Partner States. Uganda has so far made major labour law reforms for purposes of compliance with the Common Market Protocol. It enacted several statutes and adopted a set of regulations in the area of labour and employment in 2011.²⁹ Kenya similarly made major labour law reform to facilitate free entry into Kenya of citizens of Partner States to take up jobs, in accordance with the Common Market Protocol.

In addition to the harmonisation of labour laws and policies, the Common Market Protocol envisages a single market in the retirement benefit sector in order to encourage greater movement of workers. The EAC Partner States have different social security schemes operating simultaneously in each Partner State and this therefore creates a major challenge with regard to harmonisation. For example, Burundi has a mandatory public pension scheme, civil service pension scheme, supplementary pension schemes and individual private pensions.³⁰ Kenya has a mandatory public pension scheme, LAPFUND and LAPTRUST for employees of county governments, public service pension scheme for the civil service, private pension schemes and individual private pensions.³¹

In light of the above, transferability of the benefits of a worker to another Partner State is not possible at the moment until the retirement benefit sector is harmonised and therefore this is a major impediment to the realisation of free movement of workers.

11.2.5 *Labour Market Information Systems*

In order to facilitate access to employment opportunities, the Partner States are required to collect and disseminate information on job vacancies and put in place labour market information systems to facilitate access to employment opportunities by the citizens of the Community.³²

29 ILO Labour Administration and Inspection Programme, *International Labour Organisation (ILO) Technical Memorandum of the Uganda labour and administration and inspection needs assessment*.

30 Callund Consulting Limited (UK), *Review of the Structure of the Pension Sector in the East African Community* (2013).

31 Callund Consulting Limited (UK), *Review of the Structure of the Pension Sector in the East African Community* (2013).

32 Regulation 12(1) of Annex II of the CMP.

11.3 Service Providers and the Free Movement of Workers

Under the Common Market Protocol Schedule of Commitment on the Progressive Liberalisation of Services (Annex v), services can be traded in the region in four different ways—known as four modes.³³ Service providers or self-employed, as defined in this Chapter, fall under Mode iv—supply of services by a supplier of a Partner State through the presence of a natural person of a Partner State in the territory of another Partner State.

Service providers should be able to move freely within the territory of Partner States; stay in the territory together with his/her dependents; take up and pursue economic activities as self-employed persons; and set up and manage economic undertakings in the territory of another state without being discriminated upon on the basis of nationality.³⁴

Common Market Protocol through Annex II and Annex v link the free movement of workers (Annex II) and the service suppliers (Annex v) despite the distinction made under Article 1 of the Common Market Protocol that service providers are not workers. Annex v provides that market access and national treatment commitments in Mode iv are in accordance with Annex II therefore greatly limiting Mode iv to those requirements set in Annex II with regards to entry, stay and exit of workers; acquiring, denial and cancellation of work permits; employment of spouse and children; and equal treatment in employment. Annex II and Annex v need to be delinked in order to enable further separate liberalization negotiations for service suppliers so as to have specific market access and national treatment commitments.

In September 2014, the Council of Ministers directed that specific amendments must be made to the Common Market Protocol hence giving the Partner States an opportunity to review their commitments across all modes of supply but with specific focus on the temporary movement of persons supplying a service (Mode iv) under Annex v of the Common Market Protocol.

33 See page 80 of the Schedule on Trade in Services.

34 Article 13 (2) and (3).