Freedom of Establishment and the Freedom to Provide Services in the EAC

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12.1 Introduction

Trade in services is important for the economic growth of the East African Region. This is recognized in the Protocol on the Establishment of the East African Community Common Market (“the Common Market Protocol”), which provides that accelerated economic growth and development of the Partner States can be achieved through the free movement of people and labour; right of establishment and residence; and the free movement of services and capital.¹

12.2 Right of Establishment

The Common Market Protocol guarantees the right of establishment of nationals of one Partner State in another Partner State and the non-discriminatory treatment of such nationals based on their nationalities.² In this regard, this right entitles the nationals of a Partner State to take up and pursue economic activities as self-employed persons, as well as to set up and manage economic undertakings, in the territory of another Partner State. Hence, the right of establishment is divided into two segments. Firstly, the right of natural persons to engage in economic activities not under any contract of employment or supervision and earn a living from such activities. Secondly, the right to set up a legal entity and manage economic activities under it. This Chapter shall therefore discuss the right of establishment under these two headings, namely natural persons and legal persons.

Before discussing the right of establishment as proposed above, it is important to note that the provisions of Article 13 of the Common Market Protocol on the right of establishment are implemented by the East African Community

1 Article 4 (2) of the Common Market Protocol.

2 Article 13 (1 and 2) of the Common Market Protocol.

Common Market (Right of Establishment) Regulations (Annex III). Annex III ensures that there is uniformity among the Partner States in the implementation of Article 13 of the Common Market Protocol.

In addition to Annex III, the Common Market Protocol Schedule of Commitment on the Progressive Liberalisation of Services (Annex v) provides that services can be traded in the region in four different ways—known as four modes.³ The right of establishment falls under both Mode III (the supply of services by a service supplier of a Partner State, through the commercial presence of the service supplier in the territory of another Partner State) and Mode IV (the supply of the 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). Annex v allows Partner States to make progressive market access and national treatment commitments by selecting the sectors to open up, and sometimes with conditions, hence tailoring the commitments to the particular needs and policy objectives of each Partner State. Therefore, the Partner States are able to control the overall market presence of the other Partner States for different sectors and different modes of supply.⁴ The Partner States are however required to make additional commitments on the elimination of restrictions in the service sectors and sub sectors that are not specified in Annex v after the Common Market Protocol enters into force.⁵

Annex v provides that market access and national treatment commitments in Mode IV are in accordance with the East African Community Common Market (Free Movement of Workers) Regulations (Annex II). For purposes of the right to establishment, Annex II covers issues such as entry, stay and exit of workers; acquiring, denial and cancellation of work permits; employment of spouses and children; and equal treatment in employment. There are no specific commitments and therefore there is need to delink Annex v and Annex II in respect to Mode IV to allow for further market access commitments.

12.3 Freedom to Provide Services

The freedom to provide services is provided for under Part F of the Common Market Protocol and further detailed in the Schedule of Commitment on the Progressive Liberalisation of Services (Annex v). Article 16 (7) of the Common Market Protocol defines “services” as encompassing those “in any sector except

³ See page 80 of the Schedule on Trade in Services.

⁴ Article 23 of the Common Market Protocol.

⁵ Article 23 (2) of the Common Market Protocol.

services supplied in the exercise of governmental authority which are not provided on a commercial basis or in competition with one or more service suppliers” and those which are “normally provided for remuneration, in so far as they are not governed by the provisions relating to free movement of goods, capital and persons.”⁶ Under Article 16 (1) of the Common Market Protocol, the Partner States guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner States within the Community. Nationals are defined by Article 1 of the Common Market Protocol as natural or legal persons who are nationals in accordance with the laws of the Partner State.

Nationals of a Partner State provide services to other Partner States in two ways:

- (a) By the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State hence a natural person providing the service; or
- (b) Commercial presence of the service supplier in the territory of another Partner State hence a legal person providing the service.⁷

This Chapter, will discuss the freedom to provide services along with the right of establishment under these two headings: natural and legal persons.

12.4 Natural Persons

Natural persons for purposes of the right of establishment are referred to as “self-employed persons” under the Common Market Protocol which 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.⁸

Based on the provisions of the Common Market Protocol, Annex II and Annex V, seven important issues must be considered in order to realise the right of establishment and the freedom to provide services for natural persons in the EAC:

⁶ Article 16 (7) of the Common Market Protocol. See in this regard also the very similar definition under EU law, and the way it has been developed by the Court of Justice of the EU in EU Chapter 12.

⁷ Article 16 (3 c and d) of the Common Market Protocol.

⁸ Article 1 of the the Common Market Protocol.

- i. Free movement of persons
- ii. Right of residence
- iii. Non-discrimination,
- iv. Removal of restrictions
- v. Obtaining licenses and certificates
- vi. Portability of social benefits
- vii. Right to join professional bodies and trade organisations

12.4.1 *Free Movement of Persons*

A self-employed person, his/her spouse and children can enter and exit the territory of another Partner State in accordance with the national laws and established immigration procedures of the Partner State.⁹ The Partner State is required to ensure non-discrimination of the citizens of the Partner States based on their nationalities by ensuring that the citizens of the other Partner States enter its territory without a visa; move freely within its territory; are allowed to stay in the territory; and are allowed to exit the territory without restrictions.¹⁰ In addition, the Partner State must guarantee the protection of the citizens of the other Partner States while in their territories, in accordance with the law. However, if the national of a Partner State commits a crime in their territory, the national is not exempt from prosecution or extradition.

While at the designated entry and exit point of the Partner State, the self-employed person and his/her dependents are required to present to the immigration officer valid travel documents or national identity cards, where a Partner State has agreed to use the national identity card as a travel document, and declare all information required for entry or departure.¹¹ If the self-employed person and his/her dependents have fulfilled all the legal and procedural requirements, they are each issued with a pass which shall entitle them to enter the territory of the host Partner State for a period of up to six months.¹²

A Partner State can however limit the free movement of persons on grounds of public policy, public security or public health. The Partner State imposing any of the aforesaid permissible limitations must notify the other Partner States immediately.¹³

9 Annex II of the Common Market Protocol Regulation 4 and 5(1).

10 Article 7 of the Common Market Protocol.

11 Annex II of the Common Market Protocol. Regulation 5(2) and Article 9 of the Common Market Protocol. . . .

12 Annex II of the Common Market Protocol. Regulation 5(3 and 4).

13 Article 7 (5 and 6) of the Common Market Protocol . . .).

12.4.2 *Right of Residence*

The right of residence is provided for in Article 14 of the Common Market Protocol and implemented in accordance with the East African Common Market (Right of Residence) Regulations—Annex IV of the Common Market Protocol. Annex IV ensures that there is uniformity in the implementation of Article 14 and that the process is transparent, accountable, fair, predictable and consistent with the Common Market Protocol.¹⁴

Upon entry into the territory of the Partner State, a self-employed person and his/her dependents who intend to reside in the territory of the Partner State are required to apply for a residence permit, within thirty days from the date of entry.¹⁵ The residence permit is however issued by the host Partner State on the basis of the work permit hence a valid work permit must accompany an application for the residence permit.

The procedure and requirements for the application of a work permit by a self-employed person are contained in Annex II of the Common Market Protocol. Annex II provides that a self-employed person who intends to pursue economic activities in the territory of the Partner State is required to apply to the competent authority for a work permit within 30 days from the date of entry.¹⁶ Upon such application, the self-employed person is first issued with a special pass which allows him/her to engage in an economic activity in the territory of the Partner State for the period of the pass as the formalities of establishment are completed.¹⁷ The application for the work permit must be supported by evidence that the self-employed person has sufficient capital and other resources to carry out the economic activity and that the self-employed person is duly licensed or authorized by the host Partner State to engage in the economic activity.¹⁸

If the application for a work permit is successful, the self-employed person is issued with a work permit within 30 days of application, for an initial period of two years.¹⁹ The competent authority may deny the applicant a work permit however an appeal of the decision is allowed provided it is done in accordance with the national laws of the host Partner State. If the appeal is rejected or the self-employed person is not interested in appealing the decision, the

14 Regulation 2 of Annex IV of the Common Market Protocol.

15 Regulation 6(1) of Annex IV of the Common Market Protocol.

16 Regulation 6(1) of Annex IV of the Common Market Protocol.

17 Annex II Regulation 6 (1, 2 and 3) of the Common Market Protocol.

18 Annex II Regulation 6 (4) of the Common Market Protocol.

19 Annex II Regulation 6 (5) of the Common Market Protocol.

self-employed person and his/her dependents are required to leave the territory of the host Partner State within a given reasonable time.²⁰

Once the self-employed person is in possession of a valid work permit, he/she is required to apply for a residence permit which is issued within 30 days of the application. The duration of the residence permit for the self-employed person cannot exceed the duration of the work permit. If the self-employed person wishes to reside with his/her spouse and children, he/she is required to apply for a dependents pass for each one of them within 30 days from the date of entry of the spouse and/or children. The dependents pass is issued on the basis of the work permit or residence permit of the self-employed person.²¹

Cancellation of a work permit affects the residence status of a self-employed person. A work permit may be cancelled if the self-employed person is expelled or deported from the territory of the host Partner State; ceases to engage in the economic activity for which the work permit was issued; or obtained the work permit fraudulently. Upon cancellation of the work permit, the self-employed person is required to either regularize his/her status or leave the territory of the host state.²²

It is not automatic that once a person has a work permit, the residence permit will be issued. The competent authority of the host state may deny the self-employed person a residence permit. The denial must however be done in writing and reasons for such denial given. The self-employed person is permitted to appeal the decision in accordance with the national laws of the host Partner State. If the appeal is unsuccessful or if the self-employed person decides not to appeal the decision, then he/she must leave the territory of the Partner State within a reasonable time.²³

The residency status of the self-employed person may also be affected by cancellation of the residence permit. A residence permit can be cancelled where a condition of the residence permit is not fulfilled or is breached or on grounds of public policy, public security and public health. In such a case, the self-employed persons and his/her dependents are required to leave the territory of the host state within an indicated reasonable time.²⁴ If they fail to leave within the time given, then the host Partner State may deport them.²⁵

20 Annex II Regulation 7 of the Common Market Protocol.

21 Annex II Regulation 8 of the Common Market Protocol.

22 Annex II Regulation 8 of the Common Market Protocol.

23 Annex II Regulation 9 of the Common Market Protocol.

24 Annex II Regulation 11 of the Common Market Protocol.

25 Annex II Regulation 12 of the Common Market Protocol.

As stated earlier, if the work permit or residence permit of the self-employed person is cancelled, it automatically affects the residence status of the dependents. However, there are certain circumstances where the dependents pass may be cancelled independent of the residence status of the self-employed person. These situations include divorce or nullification of the marriage; or if the dependent engages in employment or business.²⁶ The dependent is however given an opportunity to regularise his/her status (usually 30 days) failure to which he/she must leave the territory of the host Partner State.²⁷

12.4.3 *Non-discrimination*

The Partner States are required to ensure that nationals of other Partner States are not discriminated upon on the basis of their nationalities.²⁸ In addition, services and service suppliers of other Partner States must get similar treatment as that accorded to similar services and service suppliers of the host Partner State unless the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Partner States.²⁹ Also, each Partner State must accord unconditionally, to services and service suppliers of other Partner States, treatment no less favourable than that it accords to like services and service suppliers of other Partner States, third parties or custom territories unless the difference in treatment is the result of an agreement on avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Partner State is bound.³⁰ Nevertheless, the Common Market Protocol allows for “policy space” in that a host Partner State is allowed to implement measures necessary to protect public morals or to maintain public order; protect human, animal and plant life or health; protect its essential security interests; and secure compliance with laws and regulations which are not inconsistent with the Common Market Protocol such as the prevention of defective and fraudulent practices, the protection of the privacy of individuals in relation to the processing and dissemination of personal data, protection of confidentiality of individual records and accounts, and safety.³¹

²⁶ Annex 11 Regulation 10 of the Common Market Protocol.

²⁷ Annex 11 Regulation 10 (2) of the Common Market Protocol.

²⁸ Article 13(2) of the Common Market Protocol.

²⁹ Article 17 and 21 (1d) of the Common Market Protocol.

³⁰ Article 18 of the Common Market Protocol.

³¹ Article 21 and 22 of the Common Market Protocol.

12.4.4 *Removal of Restrictions*

Removal of restrictions is essential for purposes of guaranteeing the free movement of services supplied by nationals of Partner States and the free movement of service suppliers of nationals from other Partner States. In this regard, the Partner States are required to identify the restrictions on the right of establishment and progressively remove the restrictions and not introduce new restrictions after entry into force of the Common Market Protocol.³² Neither the Treaty for the Establishment of the East African Community (EAC Treaty) nor the Common Market Protocol define what amounts to a progressive removal and how the same can be uniformly implemented. However, Article 76(2) of the EAC Treaty requires the establishment of the common market to be progressive and in accordance with schedules approved by the Council. The reference to the schedules and Article 76(2) of the EAC Treaty are critical and decisive in defining the progressive nature of the services. The schedules of commitment on the progressive liberalization of services provide for elimination dates for market access and national treatment provisions for each liberalised sector and per each country.³³ The Council is therefore the only organ that determines the pace of the progressive removal of restrictions as per the schedules.

Removal of restrictions may also gradually and pragmatically be pursued through the principle of variable geometry. This principle is defined as a principle of flexibility which allows for progression in co-operation among a subgroup of members in a larger integration scheme in a variety of areas and at different speeds.³⁴ It is therefore applicable at the implementation stage once a policy or a protocol has been concluded consensually by all Partner States.³⁵ Variable geometry as a rule of flexibility would allow Partner States which are ready to remove some restrictions among themselves and allow the remaining Partner States to join them at a later date.

It needs to be emphasised that the EAC Treaty does not prevent bilateral or trilateral arrangements between and among the Partner States. It is submitted that such arrangements may enrich the cooperation and serve as a foundational base for a strong Community. Some activities under the ongoing Northern Corridor initiatives such as the abolition of work permits between

32 Annex III Regulation 10 (1) And Annex v of the Common Market Protocol.

33 Annex v.

34 Article 1 of the Treaty. See also Chapter 6 on the General Principles of EAC Law.

35 *In the Matter of a Request by the Council of Ministers of the East African Community for an Advisory Opinion*, Application No. 1 of 2008, EACJ First Instance Division.

Rwanda, Uganda and Kenya serve as a good example of multilateralism as well as the principle of variable geometry.

12.4.5 *Obtaining Licenses and Other Documents*

For a service provider to be able to provide services in the territory of the host state, he/she needs certain licenses and certificates depending on the national laws and regulations of the host Partner State. The host Partner State is required to ensure that the processes as well as procedures involved in obtaining the relevant licenses and other relevant documents are simplified and the requisite fees to be paid are harmonised.³⁶ With regard to issues such as proof of financial standing and character of the service provider, the host Partner State is mandated to accept the certifications issued by the banks of the national's Partner State and competent authorities.³⁷

12.4.6 *Portability of Social Benefits*

Portability of social benefits is a great incentive for any self-employed person as it guarantees continuity in contribution. The EAC Partner States have different social security schemes operating simultaneously in each Partner State and therefore there is a major challenge with regard to harmonisation of national social security policies, laws and systems to provide for social security for self-employed persons who are nationals of other Partner States.³⁸ In this regard, transferability of the benefits of self-employed persons to another Partner State is not possible at the moment until the retirement benefit sector is harmonized and hence a major impediment to the realisation of freedom of establishment.

12.4.7 *Right to Join Professional Bodies and Trade Organisations*

Self-employed nationals of other Partner States should be able to join relevant trade organisations and professional bodies of the host Partner State under the same conditions and with the same rights and obligations as a national of the host Partner State.³⁹ In addition, the self-employed person from a Partner State should be able to vie for any position in the organisation or be appointed for any position available. If any high position in the organisation is connected with the exercise of public authority and hence reserved by any

³⁶ Annex III Regulation 11.

³⁷ Annex II Regulation 13.

³⁸ Article 12 (2) and 13 (3b) of the Common Market Protocol.

³⁹ Annex III Regulation 12 of the Common Market Protocol.

national law of the host Partner State for its nationals, then the position may be declared unavailable.

12.5 Legal Persons

With regard to legal persons, the following three issues must be considered in order to realise the right of establishment for legal persons in the EAC:

- i. Non-discrimination
- ii. Removal of restrictions
- iii. Licenses and Certificates

12.5.1 *Non-discrimination*

According to the Common Market Protocol, companies and firms established in accordance with the national laws of a Partner State and undertaking substantial economic activities in the Partner State must be accorded non-discriminatory treatment in other Partner States, for purposes of establishment.⁴⁰

The requirements with regard to National Treatment and Most Favoured Nation treatment which are applicable to natural persons are also applicable to legal persons.

12.5.2 *Removal of Restrictions*

Partner States are required to ensure that all restrictions on the right of establishment based on the nationality of companies and firms are removed and new restrictions are not introduced.⁴¹ In the event that there are any restrictions in administrative procedures and practices resulting from national laws that restrict the right of establishment, the same should be progressively removed. In this regard, common restrictions such as those on setting up agencies, branches or subsidiaries of companies or firms and the entry of personnel of the companies or firms registered in another Partner State into managerial or supervisory positions in agencies, branches or subsidiaries should be eliminated.

⁴⁰ Article 13(6) of the Common Market Protocol.

⁴¹ Article 13(5) of the Common Market Protocol.

12.5.3 *Licenses and Certificates*

Partner States are required to mutually recognise the relevant experience obtained, requirements met, licenses and certificates granted to a company or firm in another Partner State.⁴² Nevertheless, the company or firm of a Partner State must register to be licensed in the host Partner State and disclose the shareholders, partners, directors and financial statements.⁴³

42 Article 13(7) of the Common Market Protocol.

43 Annex II Regulation 9 (3 and 4) of the Common Market Protocol.