

# **HARMONISATION OF LAWS IN THE EAST AFRICAN COMMUNITY**

The State of Affairs with Comparative Insights from the European Union and  
other Regional Economic Communities

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# HARMONISATION OF LAWS IN THE EAST AFRICAN COMMUNITY

The State of Affairs with Comparative Insights from the  
European Union and other Regional Economic Communities

**Edited by**

Johannes Döveling, Hamudi I. Majamba,  
Richard Frimpong Oppong, Ulrike Wanitzek

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# INTRODUCTION

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Richard Frimpong Oppong,\*\*\* Ulrike Wanitzek\*\*\*\*

This book contains the revised and edited versions of papers presented at the Research Workshop on “Eastern African Common Legal Space in Economic Law: State of the Art and Future Perspectives, with Consideration of the European Experience”. The Workshop was held at the Giraffe Ocean View Hotel in Dar es Salaam on 10–11 August 2015. It brought together policy makers, academics and post-graduate students from Burundi, Canada, France, Germany, Kenya, Rwanda, Tanzania and Uganda. The Workshop provided an opportunity for exchange and mutual learning. Through this book, we hope to make the results of the Workshop accessible to interested researchers in Africa, Europe and beyond.

In addition to the papers contained in this book, participants at the Workshop identified the need for further research on a number of issues relevant to harmonisation of laws in East Africa. In doing so the participants agreed that the comparative approach would be a highly appropriate method in studying the issues identified below. In this regard, comparativism refers not only to the different national laws involved, but also to the legal regimes in different regional economic communities, such as the European Union (EU) and other regional economic communities in Africa.

The first issue in need of further research is the principle of variable geometry. This principle is anchored in Article 7(1)(e) of the Treaty on the Establishment of the East African Community (EAC Treaty), read together with the definition contained in Article 1 EAC Treaty. Despite an Advisory Opinion from the East African Court of Justice (EACJ) on the principle, there are still significant uncertainties as to its legal relevance and interpretation. The principle of variable geometry is of special importance for the process of harmonisation of laws because it allows a group of Partner States to take the

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lead in implementing EAC initiatives. Other Partner States might opt to join the leading group later on, or to a limited extent only. The extent to which the principle of variable geometry may be used in the harmonisation of laws and the effects of such an approach is an appropriate subject for further study.

Second, there is a need for further research on the instruments for harmonisation of laws that might be suitable for the EAC. To date, a mixture of Protocols, Acts, Directives and Regulations have been deployed with varying degrees of success. The legal basis for relying on these instruments and an assessment of their respective effectiveness should constitute an important research agenda for the future.

Third, there is a need for further research on how non-state actors can contribute to harmonisation of laws as a part of the East African integration process. To date the process of harmonisation of laws in the EAC has been dominated by state and EAC institutions. Comparative experiences from other regional economic communities suggest that non-state actors could play a crucial role. Within the EAC, providing and enhancing the role of non-state actors in the harmonisation process could be seen as an aspect of the EAC Treaty's call for a "people-centred integration process" (see Articles 5(3)(d), 7(1)(a)).

Fourth, a recent development that calls for further research is the Tripartite Free Trade Area (TFTA) between three African regional trade blocs, namely the EAC, the Common Market for Eastern and Southern Africa (COMESA), and the Southern African Development Community (SADC), which was launched in June 2015. One of the main challenges of the TFTA is alignment of the relevant customs management laws to ensure that the envisaged free flow of goods will be backed by relevant legal instruments in the three trade blocs. The process of achieving this as well as the effect of the TFTA on harmonisation of laws initiatives already underway is a fertile subject for further research.

Finally, participants at the Workshop observed that there is a need for further research on the role of the EACJ regarding the harmonisation of laws in the EAC. The comparative experiences of the EU suggest that the Court of Justice of the European Union has played a very instrumental role in fostering legal harmonisation within the EU. To date the contribution of the EACJ to the harmonisation of laws within the EAC has been modest. Whether the EACJ can perform a more instrumental role and the conditions that will make for that are worthy issues for further research.

One of the central goals of the Workshop was to examine the extent to which lessons may be learned from the EU's experiences with harmonisation of laws. It was observed that even though it was commonly agreed that the European integration process may provide valuable insights for processes of regional integration in other parts of the world, the Partner States of the EAC need to resist the temptation to simply copy legal concepts from Europe and elsewhere for their own economic community. It was emphasised that it is important to take into account the legal, political, and socio-economic contexts of the particular economic bloc concerned in order to identify and implement suitable instruments for harmonisation of laws. Indeed, in comparing the institutions of the EAC and the EU, the papers presented at the Workshop revealed a relative weakness in the institutional setup of the EAC regarding the effective powers of the organs on the supranational level. It was therefore recommended to consider how and why the European integration process benefitted from strong institutions on the community level. Related to this, it was also suggested that further research on legal transplants among regional economic communities should be undertaken. A consideration of the European experience demonstrated that regional integration is a process which takes time. This suggests that the steps or initiatives in economic integration should not be rushed through, but developed gradually.

The Workshop made a number of recommendations to the EAC and its Partner States. First, there is a need to use all instruments and forms of harmonisation of laws in order to develop suitable solutions in each area of harmonisation. Second, the importance of strong national and regional judiciaries was noted. They should play a proactive rather than a reactive role with regard to harmonisation of laws. To further this aim, it was suggested that a Commercial Law Chamber should be established within the EACJ. Third, there must be prioritisation of the areas of harmonisation of laws which should be addressed at the outset, especially since the EAC Treaty envisages harmonisation of laws in so many and varied areas. Indeed, it was recommended to focus first on areas with a significant impact on the mobility of factors of production in order to further the implementation of the East African Common Market. Fourth, there was clear agreement that there should be a strong focus on adjustment of the national laws of the Partner States, especially constitutional laws, to prepare them for deeper East African integration. The existence of the rule of law was noted as a cornerstone for a law-based integration process. Finally, the need for a strong political will concerning the integration process, which by its nature is accompanied by a limitation of certain sovereign powers, was seen as crucial for

further integrative steps in the EAC. Increased and visible political will would garner more interest on the part of donors willing to support the EAC.

The Workshop was organised by the Tanzanian-German Centre for Eastern African Legal Studies (TGCL) on behalf of the University of Dar es Salaam School of Law (Tanzania) and the University of Bayreuth (Germany). Thus, participants would have been remiss if they did not make some recommendations to that institution. The TGCL was identified as an institution that can play an important role in supporting the East African integration processes through its research activities. In particular, it was recommended that the TGCL should consider establishing deeper links with other East African universities, as well as with the EAC and its organs. The TGCL was identified as one of the non-state institutions that could provide a forum for scholarly initiatives on harmonisation of laws in the EAC. It was also recommended that the TGCL should recruit doctoral students to undertake research in the areas that have been identified as topics for further research.

We would like to acknowledge the funding received from the Volkswagen Foundation, which made the Workshop possible. We are grateful to Professor Gordon R. Woodman and our anonymous reviewers for peer reviewing the papers in this book. We are also indebted to Dr Ruth Schubert for meticulously reading the manuscript and drawing our attention to issues which may have escaped us in our editorial work. Dr Omondi R. Owino strongly supported us in the course of the publication process. We are very grateful for his assistance.

# **OPENING REMARKS FROM THE EAC SECRETARIAT**



# SOME OBSERVATIONS ON PRACTICAL ASPECTS OF THE HARMONISATION OF ECONOMIC LAWS IN THE EAST AFRICAN COMMUNITY CONTEXT<sup>+</sup>

MICHEL NDAYIKENGURUKIYE\*

## 1. INTRODUCTION

Harmonisation of the laws in the East African Community (EAC) states is a requirement of the Treaty for the Establishment of the EAC (the Treaty or the EAC Treaty). In order to achieve one of the objectives of the Community, which is co-operation in legal and judicial affairs, the Partner States, under Article 126(2)(b) of the Treaty, undertook to harmonise all their national laws pertaining to the Community.

Article 47 of the Protocol on the Establishment of the East African Community Common Market (EAC Common Market Protocol) and Article 22 of the Protocol on the Establishment of the East African Community Monetary Union (EAC Monetary Union Protocol) more specifically oblige the Partner States to align their national laws, rules and procedures in order to facilitate the effective functioning of the Common Market and Monetary Union. It goes without saying that economic laws are of utmost importance in the implementation of the Common Market and the Monetary Union.

This paper provides observations on the harmonisation of laws in the EAC in general and the harmonisation of economic laws in particular, and is structured in seven sections. Section 1 is this introduction. Section 2 describes the genesis of the Sub-Committee on Harmonisation of National Laws in the EAC context, which primarily spearheads the exercise of harmonisation. Section 3 highlights the harmonisation approaches used by the Sub-Committee. Section 4 lists the areas of economic law considered for harmonisation in the

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+ This paper was elaborated from the Opening Remarks made by the author at the Research Workshop on the Eastern African Common Legal Space in Economic Law: State of the Art and Future Perspectives, with Consideration of the European Experience, 10-11 August 2015, at the Giraffe Ocean View Hotel, Dar es Salaam. The author is currently Principal Legal Officer, East African Community (EAC) Secretariat. However, the ideas expressed in this paper are exclusively his and do not necessarily reflect those of the EAC as an organisation.

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work of the Sub-Committee. Section 5 discusses some harmonisation efforts undertaken outside the Sub-Committee. Section 6 highlights the challenges encountered in the harmonisation process and Section 7 concludes the paper.

## 2. ESTABLISHMENT OF THE SUB-COMMITTEE ON HARMONISATION OF NATIONAL LAWS

The EAC Partner States established a Sub-Committee on Harmonisation of National Laws in the EAC Context (the Sub-Committee) whose role is to harmonise national laws, and this is spearheaded by the chairpersons of the Law Reform Commissions of the Partner States. The genesis of the Sub-Committee can be traced back to 1997, that is before the Treaty was concluded. It was during the East African Co-operation Meeting of Attorneys General<sup>1</sup> held at Nyali Beach Hotel, Mombasa, Kenya on 3-5 September 1997 that a precursor to the Sub-Committee was formed. At that time, the meeting deliberated at length on the “Identification and Harmonisation of Member States’<sup>2</sup> Legislation in the East African Co-operation Context” and decided to form a Tripartite Committee of National Experts on Harmonisation of Laws (Tripartite Committee) consisting of: the heads of Legislative Drafting Departments in the three Attorneys-General Chambers; the chairpersons of the Law Reform Commissions of Member States; the Permanent/Principal Secretaries of the three Member States’ line Ministries whose sectors require harmonisation of laws; and any additional members that the Tripartite Committee may decide to co-opt.

The Secretariat of the Tripartite Commission for East African Co-operation (the Legal Department) was given responsibility for coordinating the work of the Tripartite Committee.<sup>3</sup>

The Tripartite Committee held its first meeting on 10-11 November 1997, two months after it was established. The United Republic of Tanzania was not represented at that meeting and as a consequence, the meeting was a

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1 It should be noted that under the Treaty for the Establishment of the East African Community, 1999 which replaced the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation 1993, the Attorneys General/ Ministers of Justice of the Partner States met under the auspices of an organ called the “Sectoral Council on Legal and Judicial Affairs”.

2 Under the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation, 1993 the States Parties were referred to as “Member States”. The Treaty for the Establishment of the East African Community refers to them as “Partner States”.

3 *Report of the East African Co-operation Meeting of Attorneys General* (3-5 September 1997, Ref. No. EAC/SR/22/97, Nyali Beach Hotel, Mombasa, Kenya) at 14-15.



consultative one for an exchange of views.<sup>4</sup> The Committee held its second and third meetings on 27–29 January 1998 and 7–8 September 1998 respectively. The next meeting on harmonisation of laws was held on 22–23 March 1999, and for the first time the title of the report of the meeting read: “Meeting of the Sub-Committee on Harmonisation/Approximation of Municipal Laws in the East African Co-operation Context”.<sup>5</sup> It is interesting to note that the meeting of the Attorneys General held on 12–14 October 1998 never referred to the Tripartite Committee as a “Sub-Committee”.<sup>6</sup> Be that as it may, what was the Tripartite Committee of National Experts on Harmonisation of National Laws is now known as “the Sub-Committee on Harmonisation of National Laws in the East African Community Context”, which is composed of the chairpersons of the Law Reform Commissions of the Partner States. Before the chairpersons meet, there is a Task Force made up of delegates from the Attorneys General Chambers, Law Reform Commissions and Ministries in Charge of EAC Affairs. The reports of the Sub-Committee which usually contain recommendations for harmonisation of national laws are submitted to the Sectoral Council on Legal and Judicial Affairs composed of Attorneys General/Ministers of Justice.

### 3. HARMONISATION APPROACHES USED BY THE SUB-COMMITTEE

In its harmonisation efforts, the Sub-Committee has used various approaches. At the time when the Treaty had not yet been adopted, the Tripartite Committee recommended to the Attorneys General to sign the Treaty as the way forward as far as harmonisation of national laws was concerned and also insisted that the conclusion of Protocols soon after the signing of the Treaty could serve to approximate municipal laws in the context of East African co-operation. The Tripartite Committee also recommended that pending the signing and ratification of the Treaty, it was essential to amend such of their municipal laws as were relevant and critical to East African co-operation, in such a way as to facilitate the implementation of the decision of the Tripartite Commission for East African Co-operation.<sup>7</sup>

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4 *Report of the Informal Meeting of the Experts on Harmonisation of Laws from Kenya and Uganda* (11 November 1997, AICC, Arusha, Tanzania) at 1.

5 *Report of the Meeting of the Sub-Committee on Harmonisation/Approximation of National Laws in the East African Co-operation Context* (22–23 March 1999, AICC, Arusha, Tanzania).

6 *Report of the East African Co-operation Meeting of the Attorneys General* (12–14 October 1998, AICC, Arusha, Tanzania).

7 *Report of the Meeting of National Experts on the Harmonisation of Laws in the East African Co-operation Context* (27–28 January 1998, Ref. No. EAC/SR/98/3, Arusha, Tanzania) at 3.

Later on, the Sub-Committee identified “approximation” as the appropriate approach and recommended it to the Attorneys General who adopted it.<sup>8</sup> Approximation is a process of aligning national laws with commonly agreed principles of law without necessarily making them uniform. In the European Union context, this is referred to as partial harmonisation. The methodology used in the EAC context consists of studying and analysing various laws of the Partner States to establish the gaps, differences, weaknesses and similarities therein. The Sub-Committee also compares the existing laws of the Partner States and identifies principles in line with international best practices to guide the approximation process. Thereafter, recommendations are made to the Partner States to incorporate the missing principles and provisions in their respective laws. Thus far, the following pieces of legislation have been approximated: company laws, insolvency laws, partnership laws, business names registration laws, immigration laws, labour laws, employment laws and sale of goods laws.<sup>9</sup>

That approach has continued to be used until recently when the Sub-Committee adopted “model laws” as another suitable approach to harmonisation. A model law is a legislative text on a specific area of law that is recommended to the Partner States for adoption and enactment as part of their national law. So far one model law has been finalised and adopted by the Sectoral Council on Legal and Judicial Affairs. It is the Model Contract Law.<sup>10</sup> Nine intellectual property model laws are currently under consideration by the Sub-Committee. These are model laws on: Genetic Resources, Geographical Indications, New Plant Varieties, Traditional Cultural Expressions and Folklore, Traditional Knowledge, Industrial Designs, Trade Secrets, Utility Models and Layout Designs of Integrated Circuits.<sup>11</sup>

The major objective of the approaches referred to above is to align the different national laws without necessarily coming up with a uniform piece of legislation. The model law approach has been used to harmonise the contract laws of the Partner States and is currently being used to harmonise intellectual property laws.

The problem with these different approaches is that they lack a mechanism to monitor implementation and compliance with the agreed principles to

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8 Report of the Meeting of the Attorneys General, *supra* note 6 at 10.

9 *Report of the Meeting of the Sub-Committee on Harmonisation of National Laws* (6–7 March 2015, Kampala, Uganda) at 6–8.

10 *Ibid* at 8.

11 *Ibid* at 9.

guide harmonisation. In the circumstances, the intended free movement of labour, free movement of services, free movement of goods, and free movement of capital, to name a few examples, is likely to be undermined by a lack of uniform application and interpretation of various laws, and particularly laws of an economic nature, that the Community has been attempting to harmonise.

#### **4. HARMONISATION OF ECONOMIC LAWS**

As mentioned above, the work of the Sub-Committee is to review all the laws of the Partner States that have a bearing on the Community.

However, the EAC region is increasingly experiencing the emergence of a business environment supportive of cross-border investments, mergers and acquisitions. Capital markets are becoming vibrant in the region, and initial public offers are being opened to all East Africans. The movement of capital is also burdened by limited restrictions within the region. The EAC Secretariat has consequently observed a need to prioritise the harmonisation of commercial and economic laws and submitted them to the Sub-Committee for adoption. The prioritised laws fall within the following nine broad clusters: banking laws; business transaction laws; finance and fiscal legislation; insurance and re-insurance legislation; investments; procurement and disposal of assets legislation; monetary legislation; standardisation, quality assurance and metrology legislation; and trading laws.

#### **5. HARMONISATION OF ECONOMIC LAWS OUTSIDE THE SUB-COMMITTEE FRAMEWORK**

It should be noted that the work of harmonisation does not fall exclusively under the competence of the Sub-Committee. Some areas of harmonisation of national laws are initiated by other EAC Secretariat departments and institutions in collaboration with the relevant Sectoral Councils. For example, the harmonisation of health and pharmaceutical regulatory policies and laws is initiated by the Department of Health; the harmonisation of statistics policies and laws is initiated by the Department of Statistics. Some other areas of harmonisation are prioritised by the East African Legislative Assembly (EALA) and Bills are developed which are finally passed into EAC law. Examples of some outstanding economic laws that have been enacted by the EALA include the East African Community Customs Management Act, 2004; the East African Community Competition Act, 2006; and the East African Community Joint Trade Negotiations Act, 2008.

The Treaty is silent as to which instrument shall be used to harmonise laws in the EAC context. On a case-by-case basis, the Council has been adopting proposals by Sectoral Councils to use EALA Acts or Protocols. However, it should be noted that Protocols are generally developed to implement areas of co-operation agreed upon in the Treaty. Article 151(1) of the Treaty provides that the Partner States shall conclude such Protocols as may be necessary in each area of co-operation which shall spell out the objectives and scope of, and institutional mechanisms for co-operation and integration. The Protocols sometimes contain a provision on harmonisation of national policies, laws and systems. This is the case for the EAC Common Market Protocol and the EAC Monetary Union Protocol under Articles 47 and 22 respectively. As I point out below, the proposed harmonisation instruments, namely ‘directives’, have proved to be problematic and are very unlikely to be efficient.

Recently the Council of Ministers (the Council) adopted a set of directives with a view to harmonising laws in the area of the securities market.<sup>12</sup> These were initiated by the Directorate of Planning, Department of Fiscal and Monetary Policy, of the EAC Secretariat, and had been considered by the Sectoral Council on Finance and Economic Affairs before being tabled before the Council for adoption. It should be noted that the idea to develop these directives was proposed by the same Sectoral Council on Finance and Economic Affairs and was approved by the Council at its 25th meeting held on 27-31 August 2012 in Bujumbura, Burundi.<sup>13</sup> These directives are:

- Directive on Public Offers (Equity) in the Securities Market;
- Directive on Public Offers (Debt) in the Securities Market;
- Directive on Asset Backed Securities;
- Directive on Collective Investment Schemes;
- Directive on Corporate Governance for Securities Market Intermediaries;
- Directive on Regional Listing in the Securities Market; and
- Directive on Admission to Trading on a Secondary Exchange.<sup>14</sup>

All seven directives are legal instruments made up of articles just like directives as we know them in the European Union system, albeit with some differences in the drafting style. In contrast to other legal instruments that have been passed

12 *Report of the 29th Extraordinary Meeting of the Council of Ministers* (23-28 April 2014, Arusha, Tanzania EAC/EX/CM 29/ Decision 17) at 30.

13 *Report of the 25th Meeting of the Council of Ministers* (27-31 August 2012, Bujumbura, Burundi, EAC/CM 25/ Decision 14) at 55.

14 *Report of the 29th Extraordinary Meeting of the Council of Ministers*, *supra* note 12.

in the EAC context, these directives were not subjected to legal input from the Sectoral Council on Legal and Judicial Affairs.<sup>15</sup> They were adopted straight away by the Council in the following terms: The Council: (a) adopted the seven Securities Directives (*EAC/EX/CM 29/ Decision 17*); and (b) directed the Partner States to adopt the seven Directives and implement them accordingly (*EAC/EX/CM 29/ Directive 17*).

Another set of six Securities Market Directives and a Directive on Licensing of Market Intermediaries which were tabled before the Council were subjected to legal input by the Sectoral Council on Legal and Judicial Affairs. These additional Securities Market Directives were on:

- Investor Compensation Scheme;
- Takeovers and Mergers;
- Investor Education and Protection;
- Anti-money Laundering;
- Self-Regulatory Organisations; and
- Conduct of Business for Market Intermediaries.

This time the Council did not directly approve the Directives but instead *took note* [emphasis added] of them and directed the Secretariat to refer them to the 18th Meeting of the Sectoral Council on Legal and Judicial Affairs scheduled for early February 2015 for legal input and report to the Council at its Extraordinary meeting in February 2015.<sup>16</sup>

Just like meetings of the Council the ministerial session is preceded by meetings of Permanent/Principal Secretaries<sup>17</sup> and of Senior Officials, sessions of Attorneys General/Ministers of Justice<sup>18</sup> for the Sectoral Council on Legal and Judicial Affairs are preceded by sessions of Deputy Attorneys General/

15 This does not mean that the Directives were not reviewed by legal minds. Legal experts from the Ministries of Finance, Central Banks and Capital Markets reviewed them. But they are advisors to the Sectoral Council on Finance and Economic Affairs and not advisors to the Council. For legal input to EAC legal instruments, the Council is usually advised by the Sectoral Council on Legal and Judicial Affairs which is composed of the Attorneys-General/Ministers of Justice of the five Partner States.

16 See *Report of the 30th Meeting of the Council of Ministers* (20–28 November 2014, Nairobi, Kenya, (EAC/CM 30/ Decision 23) and (EAC/CM 30/ Directive 17)) at 26.

17 Burundi, Rwanda, Tanzania and Uganda use the term “Permanent Secretaries” while Kenya uses that of “Principal Secretaries”.

18 Kenya, Tanzania and Uganda have an Attorney General. The Republic of Burundi is represented by the Minister of Justice. The Attorney General of the Republic of Rwanda is also Minister of Justice.

Solicitors General and Permanent Secretaries, Ministries of Justice<sup>19</sup> and of Senior Officials. In January 2016, at the time of the writing of this paper the Sectoral Council on Legal and Judicial Affairs has not been concluded and the Session of Attorneys General/ Ministers of Justice is yet to convene.<sup>20</sup>

Based on the experience of the first set of directives, the Sub-Committee suggested the use of directives as another approach to harmonisation. The idea was for the Sub-Committee to identify areas of law that needed harmonisation and to prepare draft directives for adoption by the Council. The Sub-Committee was inspired by the principle of the primacy of Community laws embedded in Article 8(4) of the Treaty which provides that “Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty”. In proposing the directive approach, the Sub-Committee was also moved by the binding nature of Council Directives provided for under Article 16 of the Treaty and the provision of Article 47(2) of the Protocol for the Establishment of the East African Community Common Market which states that the Council shall issue directives for the purposes of harmonisation and approximation of national policies, laws and systems.

However, that idea is likely not to sail through. This is because, although the Attorneys General/Ministers of Justice have not yet met to consider the second set of directives, the Session of Deputy Attorneys General/Solicitors General and Permanent Secretaries has recommended to the Attorneys General/Ministers of Justice to recommend to the Council to adopt the content of the directives as principles to guide harmonisation in the Securities Market sector.<sup>21</sup> It should be noted that those principles, unlike the directives, cannot be binding on Partner States. A Partner State can choose to ignore them and no legal action can be taken against it. It appears that Partner States have a different

19 In the Republics of Kenya and Uganda, the most senior official in the Attorney General's Chambers is the Solicitor General, whereas in the United Republic of Tanzania, this is the Deputy Attorney General and in the Republics of Burundi and Rwanda, it is the Permanent Secretaries in the Ministries of Justice.

20 The session of Senior Officials was convened on 23-27 March 2015 and the Session of Solicitors General/Deputy Attorneys General/Permanent Secretaries was convened on 5-6 August 2015.

21 This is how the recommendation was crafted: The Deputy Attorneys General/ Solicitors General and Permanent Secretaries recommended to the Sectoral Council to: (a) advise the Council that the Directives as presented are not implementable and therefore can only be used by Partner States to enact, amend or harmonise their national laws; (b) direct the Partner States to enact, amend or harmonise their national laws in accordance with the principles/content in the Council Directives that were adopted by the Sectoral Council on Finance and Economic Affairs and noted by the Council; and (c) advise the Council to review the format of the Directives and issue directives which provide for principles to guide Partner States in the process of enacting, amending and harmonising their national laws. See Report of the session of Deputy Attorneys General/Solicitors General and Permanent Secretaries of 5-6 August 2015, Kampala, Uganda.

understanding of what a “directive” is. Most of them consider a “directive” to be of an administrative nature and not of a legislative nature.<sup>22</sup>

In the end, the first set of directives adopted by the Council referred to above are said to have been adopted without following the prescribed procedures. It is uncertain what their fate will be. What is clear is that the Sub-Committee’s recommendation for harmonising national laws by using directives as legal instruments will not be accepted in the near future. Soon the Sub-Committee will probably be advised to use the development of guiding principles in some areas where harmonisation of laws is required.

The only remaining approach would be to use Acts of the EALA, the regional legislative body, as its legislation has the force of law in all Partner States and supersedes national laws. From those Acts, the Council can develop EAC Regulations which are of direct application in Partner States, are binding and also enjoy primacy over similar national ones.

## 6. CURRENT CHALLENGES TO HARMONISATION

Since the first consultative meeting on the harmonisation of national laws, the Tripartite Committee has observed that the harmonisation of laws is a complicated and cumbersome exercise. It has noted that the exercise necessitates taking into account such factors as the identification of common approaches and of delimitations and specific aspects in the harmonisation of laws in different fields.<sup>23</sup> The Sub-Committee recently submitted a comprehensive report on its achievements and challenges in the harmonisation of national laws to the Sectoral Council on Legal and Judicial Affairs.<sup>24</sup> A number of challenges were highlighted in the report. First, there is the issue of scope of the work and financial constraints. There are very many areas of laws to harmonise and the exercise of harmonisation of national laws requires comprehensive research and a review of the Partner States’ laws, which necessitates expenses. While the Partner States are committed to the integration process, the Law Reform Commissions do not have a budget to support such research at the national level. Yet this research is necessary to enable the Sub-Committee to carry out its mandate successfully.

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22 It appears from the Report of the Session of Deputy Attorneys General, Solicitors General and Permanent Secretaries that for them, the Directives cannot be used as stand-alone documents within Partner States as is the intention. See Report of the Session of Deputy Attorneys General/Solicitors General and Permanent Secretaries, *supra* note 20.

23 See Report of the Informal Meeting of the Experts, *supra* note 4 at 3.

24 See Report of the Meeting of the Sub-Committee, *supra* note 9 at 6–10.

Second is frequent changes in the membership of the Task Force. The Partner States frequently change the members of the Task Force, thereby denying it the benefit of consistency and follow up. This has become a challenge because new members have to first learn the process and, in so doing, their output cannot be the same as that of experienced members who have an institutional memory of the work of the Sub-Committee. Change of jobs by the members and the little importance attached by Partner States to permanence in respect of the members of the Task Force are at the origin of the problem.

Third, there is the issue of conflicting commitments. Members of the Sub-Committee work on an ad hoc basis while they serve as civil servants in their respective Partner States. Most of them regard harmonisation as an additional duty and only work on it during meetings of the Sub-Committee.

Fourth is differences in Partner States' legal systems and languages. The EAC is comprised of Partner States with both Civil Law and Common Law legal systems. Differences in legal principles both in substantive and procedural matters make discussions during harmonisation meetings very lengthy. Pursuant to Article 131(1) of the Treaty, English is the official language of the Community. However, the laws of the EAC Partner States are enacted in different languages, making it difficult for the Sub-Committee to study and analyse them. The difficulty is compounded by the fact that the EAC does not have an interpretation and translation service.

Fifth is the slow pace in the implementation of the harmonisation agenda at national level. Partner States remain sovereign as to how they prioritise their harmonisation agenda. The EAC sometimes provides deadlines, but since these are mostly embedded in non-binding instruments, they are not necessarily complied with.

Finally, there is the issue of the appropriate approach to harmonisation. As indicated above, the various approaches to harmonisation that have been used by the Sub-Committee have yielded very meagre results, as they do not provide an avenue for monitoring implementation in the Partner States.

## **7. CONCLUSION**

The objective of this paper has been to give insights into the harmonisation of economic laws in the EAC context. The paper has highlighted a number of initiatives in the harmonisation process having special regard to the importance of economic laws in the implementation of the Common Market and the Monetary Union. The paper also pinpoints a number of challenges that hinder



the harmonisation process. In order to address those challenges, apart from financial resources which are a prerequisite to all EAC harmonisation meetings, there is need for an approach to harmonisation that will achieve better the objective of the EAC to become a true Common Market and Monetary Union. The impact of approximation of economic laws or of their harmonisation through model laws is likely to be negligible as those two approaches do not provide avenues for monitoring implementation and compliance. The proposed transformation of directives into guiding principles does not offer any better solution as guiding principles are not enforceable. In the circumstances, despite their lengthy adoption process, Acts of the EALA seem to be the way forward as they have the force of law in all Partner States and supersede national laws.



**PART I:**  
**REGIONAL INTEGRATION AND**  
**FUNDAMENTALS OF LEGAL**  
**HARMONISATION**



# LAW OF REGIONAL INTEGRATION – A CASE STUDY OF THE EAST AFRICAN COMMUNITY

JAMES OTIENO-ODEK\*

## 1. AN OVERVIEW OF THE EAST AFRICAN COMMUNITY

### 1.1 Introduction

The East African Community (EAC) is a group of six countries, namely Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. The geographical spread of the Community is over 1,820,664 square kilometres (702,962 sq mi), with a combined population of about 150 million (2013 estimates). At 1,820,664 km<sup>2</sup>, if the countries were to form a political federation and become one state, the Community would be the fourth largest nation in Africa and would be the second most populous nation in Africa after Nigeria. The EAC countries seek deeper economic integration and socio-political cooperation. Cooperation and integration require passing of regional laws, establishment of regional institutions and advancement of the spirit of regionalism.

The effectiveness of regional law and institutions, including their impact on national law, is a subject of study in regional integration law. In the EAC, the growth and expansion of regional law is evident. Partner States are implementing the legal regime establishing the EAC customs union and are inching towards financial integration and modernisation of their monetary policy. The Partner States are focusing on cooperation in services, investment, intellectual property protection, competition policy, technical standards and government procurement. It is anticipated that in the long term, the trade-creating effects of the EAC will far outweigh the trade diversion effects and enhance regional welfare.<sup>1</sup>

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1 Trade creation occurs when production shifts from less efficient domestic producers to more efficient regional producers for reasons of absolute or comparative advantage, thus giving customers a wider choice of lower-cost, higher quality products. Trade diversion occurs when because of common external barriers, trade shifts from more efficient external sources to less efficient suppliers within the bloc.

Integration of the EAC has generated static and dynamic effects on the Partner States' socio-cultural, political and economic spheres. The static effects are the shifting of resources from inefficient to efficient firms as trade barriers fall. The dynamic effects are the impact of overall growth in the market, the expansion of production, the realisation of greater economies of scale and the fostering of an increasingly competitive market in the region. A study by the Economic Policy Research Centre points out that there is evidence that the EAC has been a more trade creating than trade diverting regional arrangement.<sup>2</sup>

## 1.2 Typology of Integration Mechanisms<sup>3</sup>

Regionalism in the EAC adopts the negative and positive concepts of integration. Negative integration is the elimination of barriers that restrict movement of goods, services and factors of production. The EAC Treaty eliminates internal tariffs and other charges of equivalent effect as well as non-tariff barriers among the Partner States.<sup>4</sup> Positive integration is the creation of a common sovereignty through modification of existing institutions and creation of new ones. The EAC Treaty establishes various regional organs and institutions.<sup>5</sup> In theory, regional economic cooperation is premised on different typologies of integration which I itemise as follows:<sup>6</sup>

First is Preferential Trade Agreement (PTA). This is the simplest form of economic integration. It offers member countries tariff reduction in certain product categories. It represents a unilateral relationship as tariffs are reduced in only one direction.

Second, there is the Free Trade Area (FTA). This is an agreement between two or more countries to remove all trade barriers between themselves. Each country determines its own barriers and maintains its own external tariffs on import against non-members. A problem with preferential and free trade areas is the danger of trade deflection. This arises where goods are imported through the country with the lowest external tariff for free circulation throughout the region. Trade

2 Isaac Shinyekwa & Lawrence Othieno, 'Trade Creation & Trade Diversion Effects of the East African Community Regional Trade Agreement: A Gravity Model Analysis' (Research Series No. 112 – Economic Policy Research Centre (EPR) Kampala, Uganda, 2013).

3 <http://www.fao.org/docrep/004/y4793e/y4793e04.htm>.

4 EAC Treaty, art 75(1)(b) and (c).

5 *Ibid* art 9. The organs of the EAC are the Summit, Council, Coordination Committee, Sectoral Committees, Court of Justice, Legislative Assembly, and the Secretariat.

6 See also Steven Radelet, 'Regional Integration and Cooperation in Sub-Saharan Africa: Are Formal Trade Agreements the Right Strategy?' (African Economic Policy Discussion Paper No. 20 July 1999, Harvard Institute for International Development) at 2.

deflection is controlled by the use of rules of origin (rules which determine if a product is deemed to have originated in a particular country and is thus eligible for preferential tariff treatment) or through forming a customs union.

Third, there is a Customs Union, which is an agreement between two or more countries to remove tariffs between themselves and set a common external tariff (CET) on imports from non-member countries. A customs union has common policies on product regulations.

Fourth, there is a Common Market, which is an agreement between two or more countries to remove all barriers to trade and allow free mobility of capital, services, investment and labour across member countries. A single market is established for the integrating countries.

Fifth, there is an Economic Union. This is an agreement between two or more countries to remove barriers to trade, allow free movement of labour, capital, services, and investment and to coordinate economic policies. In an economic union, the level of integration is deeper and more intense than in a common market.

Sixth, there is a Monetary Union in which member states have a single currency and a common monetary policy. This level of integration is attained after establishment of a single market. Finally, there is a Political Union, which is an agreement between two or more countries to coordinate their economic, monetary and political systems. Member countries are required to accept a common stance on economic and political policies against non-members. The political union can be a federation or confederation.

### **1.3 Evolution of Integration in the EAC<sup>7</sup>**

Formal economic and social integration in the East African region commenced with, among other things, the construction of the Kenya-Uganda Railway between 1897 and 1901 and the establishment in 1900 of Mombasa as a Customs Collection Centre for Kenya and Uganda.<sup>8</sup> The two countries established the East African Currency Board (EACB) and a Postal Union in 1905; the Court of Appeal for Eastern Africa in 1909 and the East African Governors Conference in 1926. The amalgamation of the customs authorities of the two countries created a Customs Union (CU) in 1919 with a common external tariff and later with free inter-territorial exchange of goods.

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7 <http://eacgermany.org/eac-history/>.

8 EAC Treaty, preamble.

At the end of the First World War, Tanganyika was placed under the League of Nations as a mandate territory within the British Empire. Consequently, Tanganyika adopted the external tariff of Kenya and Uganda in 1922 and acceded to the free exchange of locally produced goods in 1923. Tanganyika joined the Postal Union in 1933, and a joint East African Income Tax Board (EAITB) was set up in 1940. In the same year, the Joint Economic Council (JEC) was established to enable the three countries to start operating as one economic and trade unit. In 1945, East African Airways was incorporated to serve the East African region and operate across Africa, connecting it to Europe and India. In 1948, the East African High Commission consisting of the Governors of the three territories and the East African Legislative Council (LEGCO) were established to give the territories the necessary legal status and international outlook.

In December 1958, an East and Central African leaders' conference was convened by Julius Nyerere, later president of Tanganyika.<sup>9</sup> The conference founded the Pan-African Freedom Movement of East and Central Africa (PAFMECA). In 1959, the second PAFMECA conference was held in Zanzibar, and in October 1960 the third conference was held in Uganda comprising Kenya, Tanganyika, Uganda and Zanzibar. At this third conference, it was agreed that an East African Federation,<sup>10</sup> proposed by Julius Nyerere, should be established when Tanganyika, Kenya, Uganda and Zanzibar became independent.<sup>11</sup> An administering body, the Coordinating Freedom Council, was established with two members from each member country.<sup>12</sup> In 1964, President Nyerere of Tanganyika reached an agreement with President Abeid Karume of Zanzibar and signed an Act of Union, bringing their nations together as the United Republic of Tanzania.<sup>13</sup> The United Republic of Tanzania is a Partner State in the East African Community.

Following the independence of Tanzania in 1961, the East African High Commission was replaced by the East African Common Services Organisation (EACSO). In 1967, Kenya, Tanzania and Uganda signed the Treaty establishing

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9 Adekunle Ajala, *Pan-Africanism: Evolution, Progress and Prospects* (London: Andre Deutsch, 1973) at 41-43.

10 Philip Kasaija, 'Regional Integration: A Political Federation of the East African Countries?' (2006) 7 *African Journal of International Affairs* 25.

11 *Supra* note 7

12 *Supra* note 7.

13 Articles of Union of Tanganyika and Zanzibar of 1964 signed on 22 April 1964.



the East African Community (EAC). The Community lasted until 1977 when it collapsed.<sup>14</sup>

The 1967-77 EAC had a common customs tariff and a range of public services for balanced economic growth within the region. It was a monetary union with a Currency Board and parity of currency (1 Uganda Sh = 1 Kenya Sh = 1 Tanzania Sh). It had institutions as well as regional public enterprises such as East African Railways and Harbours, East African Airways, East African Posts and Telecommunications, and East African Development Bank. Other areas of cooperation included education with a single syllabus and a single examination body, the East African Examinations Council; the University of East Africa with specialised colleges in each country. These colleges were the Faculty of Law at University College in Dar es Salaam, Tanzania; the Royal Technical College for engineering at Nairobi, Kenya; and the Makerere University College School of Medicine at Kampala, Uganda. The East African Literature Bureau was established to engage in publishing, while the Inter-University Council of East Africa coordinated university education and exchange programmes.

Instability in the 1967-77 EAC became evident in 1968 when the East African Currency Board collapsed with the setting up of three separate Central Banks with no parity of currency. In 1977, the EAC collapsed. The preamble to the 1999 Treaty for the Establishment of the EAC identifies some of the causes of collapse, including lack of strong political will, lack of strong participation from the private sector and civil society in cooperation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to differences in their levels of development, and lack of adequate policies to address this situation.<sup>15</sup> Mwalimu Julius Nyerere of Tanzania observed that “we made a mistake, we did not involve the public at all and the civil society, and the business people should push the bureaucrats”.<sup>16</sup> Different economic ideologies also contributed to the collapse of the EAC. Kenya pursued a liberalised market-oriented economic policy, while Tanzania pursued a socialist policy known as Ujamaa, as defined in the Arusha Declaration of 1967. The 1971 military coup in Uganda, in which Idi Amin Dada replaced Milton Obote as President, exacerbated ideological and political differences between the Partner States.

14 Agrippah Mugomba, ‘Regional Organisations and African Underdevelopment: The Collapse of the East African Community’ (1978) 16 *Journal of Modern African Studies* 263.

15 *Ibid.*

16 See CUTS International, *Taking East African Regional Integration Forward: A Civil Society Perspective* (CUTS Geneva Resource Centre, Jaipur Printers P. Ltd, 2010).

On the dissolution of the EAC, Kenya, Tanzania and Uganda signed the EAC Mediation Agreement on 14 May 1984 for the division of assets and liabilities of the Community. In 1986 a tri-partite working group was formed to develop modalities of renewed cooperation. Consequently, from 1991 to 1992, the Ministers of Foreign Affairs devised a programme to reactivate cooperation and a tri-partite committee of experts was set up to identify spheres of common economic interest. In 1993, the first meeting of Heads of State of Tanzania, Kenya and Uganda to discuss renewed East Africa cooperation was held. In 1994, the Permanent Tripartite Commission for East African Cooperation was set up, culminating in the signing of the 1999 Treaty establishing the revived East African Community. In 2001, the East African Legislative Assembly and the Court of Justice were inaugurated. In 2005 the EAC Customs Union was established. In 2007, Rwanda and Burundi joined the EAC and in 2010, the EAC Common Market became effective. In 2012, an agreement on Mutual Recognition of Qualifications across the EAC was agreed upon; in 2013, the Protocol on Monetary Union was signed; and in 2014, the cross-border movement of persons using identification cards of the Partner States was approved.

#### **1.4 Stages in the EAC Integration Process**

Integration in the EAC is envisaged as having four stages.<sup>17</sup> It involves formation of a Customs Union, a Common Market, a Monetary Union and, ultimately, a Political Federation.

The Customs Union came into effect in 2005.<sup>18</sup> Its central elements are<sup>19</sup> establishment of a CET, establishment of rules of origin, the internal elimination of tariffs for goods, and the elimination of non-tariff barriers (NTBs).

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<sup>17</sup> EAC Treaty, art 5(2).

<sup>18</sup> Protocol for the Establishment of the East African Community Customs Union.

<sup>19</sup> *Supra* note 3.

The Common Market became effective on 1 July 2010.<sup>20</sup> Its essential features include the freedom of movement of goods,<sup>21</sup> capital,<sup>22</sup> persons and labour,<sup>23</sup> and services,<sup>24</sup> and the right of residence and the right of establishment.<sup>25</sup>

The Protocol on the Monetary Union was signed in November 2013.<sup>26</sup> The fundamentals of the Protocol include the following. First, the process as well as the legal and institutional framework for the establishment of a single currency, including macroeconomic convergence criteria. The single currency is expected to be introduced by 2024 by member states that comply with the convergence criteria. Second, the establishment of an independent EAC Central Bank. The bank's primary objective will be price stability. Its secondary objectives are financial stability and economic growth and development. Finally, a floating single exchange rate is to be inaugurated.

The final stage in the EAC integration effort will be the formation of a Political Federation in East Africa.<sup>27</sup>

## 1.5 Objectives of the EAC

Article 5(3) of the EAC Treaty spells out the objectives of the Community as, *inter alia*, ensuring sustainable growth and development; strengthening and consolidation of cooperation in agreed fields; equitable economic development and raising the standards of living and quality of life of the populations affected;<sup>28</sup> promotion of sustainable utilisation of the natural resources; protection of the environment; strengthening and consolidation of the longstanding political, economic, social, cultural and traditional ties and associations between the peoples of East Africa; promotion of a people-centred development; mainstreaming of gender; promotion of peace, security, stability and good neighbourliness; and

20 Protocol for the Establishment of the East African Community Common Market [Protocol on Common Market].

21 *Ibid* art 6.

22 *Ibid* arts 24–28.

23 *Ibid* arts 7–12.

24 *Ibid* arts 16–23.

25 *Ibid* arts 13–15.

26 Protocol for the Establishment of the East African Community Monetary Union

27 KP Apuuli, 'Fast Tracking East African Federation: Asking the Difficult Questions' (Paper presented at Development Network of Indigenous Voluntary Associations (DENIVA) Public Dialogue on Fast Tracking East African Federation Dialogue, Kampala, 24 November 2006) Online: [www.denica.org.ug/files/articles\\_askingthedifficultquestions.do](http://www.denica.org.ug/files/articles_askingthedifficultquestions.do).

28 EAC Treaty, art 5(3)(b).

strengthening partnerships with the private sector and civil society.<sup>29</sup>

## 1.6 Areas of Cooperation in the EAC

The thematic areas of cooperation in the EAC are:<sup>30</sup> trade liberalisation and development; investment and industrial development; standardisation, quality assurance, metrology and testing; monetary and financial cooperation; infrastructure and services; development of human resources, science and technology; free movement of persons, labour, services; right of establishment and residence; agriculture and food security; environment and natural resources management; tourism and wildlife management; health, social and cultural activities; enhancing the role of women in socio-economic development; political affairs; legal and judicial affairs; private sector and civil society; and cooperation with other regional and international organizations and development partners.

## 1.7 Fundamental and Operational Principles in EAC Integration

The Partner States of the EAC adopted fundamental and operational principles to guide the realisation of the objectives of the Community. The fundamental principles listed in Article 6 of the Treaty are: mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; adherence to the principles of good governance, democracy and the rule of law, transparency and accountability, social justice, gender equity as well as recognition, promotion and protection of human and peoples' rights; equitable distribution of benefits, and cooperation for mutual benefit.

The operational principles include: people-centred and market-driven cooperation;<sup>31</sup> provision of an enabling environment and basic infrastructure;<sup>32</sup> establishment of an export oriented economy;<sup>33</sup> principle of subsidiarity;<sup>34</sup>

29 EAC Treaty, arts 7(1)(a) and 5(3)(d)(e)(f) and (g).

30 EAC Treaty, arts 74-131.

31 *Ibid* art 7(1)(a).

32 *Ibid* art 7(1)(b).

33 *Ibid* art 7(1)(c).

34 *Ibid* art 7(1)(d).

principle of variable geometry;<sup>35</sup> equitable distribution of benefits;<sup>36</sup> principle of complementarity;<sup>37</sup> and principle of asymmetry.<sup>38</sup>

Pursuant to Article 7(2) of the Treaty, the Partner States undertake to abide by the principles of good governance, adherence to democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights. The significance of the undertaking is to promote common values in implementing the integration process.

## 1.8 The EAC Institutional Architecture

The EAC's structural configuration encompasses organs and institutions. The Treaty establishes the following organs:<sup>39</sup> the Summit; the Council; Sectoral Councils; Coordinating Committee; Sectoral Committees; Legislative Assembly; Court of Justice; Secretariat, and any other organ as may be established by the Summit.

The Summit is the apex organ of the Community; its membership is the Heads of State and Government. It gives general direction and impetus to the Community.<sup>40</sup> Decisions are by consensus<sup>41</sup> thereby conferring a veto power on each Partner State.<sup>42</sup> The Summit reviews the state of peace, security and good governance within the Community and progress towards the establishment of a political federation.<sup>43</sup> It is the exclusive organ that appoints Judges to the Court of Justice. It has exclusive competence to admit new members to the Community and to grant observer status to foreign countries.<sup>44</sup> The EAC Summit corresponds to the Council of the European Union (EU).

The EAC Council consists of the ministers whose portfolio is regional integration.<sup>45</sup> It is responsible for promoting, monitoring and reviewing

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35 *Ibid* art 7(1)(e).

36 *Ibid* art 7(1)(f).

37 *Ibid* art 7(1)(g).

38 *Ibid* art 7(1)(h).

39 *Ibid* art 9(1).

40 *Ibid* art 11(1).

41 *Ibid* art 12(3).

42 *Ibid* art 148. It provides that the views of the Partner State being considered for suspension or expulsion shall not count.

43 *Ibid* art 11(3).

44 *Ibid* art 11(9).

45 *Ibid* art 13.

implementation of programmes and ensuring proper functioning and development of the Community.<sup>46</sup> It is the policy organ of the Community, as such it submits Bills to the Assembly and prepares the agenda for the Summit.<sup>47</sup> Sectoral Councils are established for specific sectors of cooperation in the Community. The Council and Sectoral Councils are assisted by the Coordination and Sectoral Committees respectively.<sup>48</sup> The Coordination Committee consists of the Permanent Secretaries responsible for East African Community affairs in each Partner State and such other Permanent Secretaries of the Partner States as each Partner State may determine.<sup>49</sup> The Sectoral Committee is responsible *inter alia* for preparation of the implementation and monitoring of programmes and setting of priorities with respect to its sector.<sup>50</sup>

The EAC Treaty establishes a Legislative Assembly and Court of Justice. The Assembly is the legislative organ of the Community<sup>51</sup> and one of its functions is to liaise with national assemblies of the Partner States on matters relating to the Community.<sup>52</sup> The Court of Justice (EACJ) is the judicial organ of the Community.<sup>53</sup> Its primary role is interpretation of the Treaty.<sup>54</sup> The role is significant as it ensures uniformity and standardization in construal and application of the Treaty among the Partner States. This significant role is underscored in Article 33(2), which provides that decisions of the EACJ on the interpretation and application of the Treaty have precedence over decisions of national courts on a similar matter. However, the independence of the EACJ is open to doubt. The judges – unlike in the EU – are appointed directly (and without consultation) by members of the Summit. This contrasts with the procedure at the Court of Justice of the European Union whose judges are

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46 *Ibid* art 14(1).

47 *Ibid* at 14(3).

48 *Ibid* arts 17–23.

49 *Ibid* art 17. Under Article 18 of the EAC Treaty, the functions of the Coordination Committee are, *inter alia*, to submit reports and recommendations on the implementation of the Treaty to the Council from time to time, either on its own initiative or at the request of the Council; to implement the decisions of the Council as the Council may direct; to receive and consider reports by the Sectoral Committees and coordinate their activities; and it may request a Sectoral Committee to investigate any particular matter;

50 EAC Treaty, art 21.

51 *Ibid* art 49(1).

52 *Ibid* art 49(2)(a).

53 *Ibid* art 23.

54 *Ibid* art 27(1). See also Anne Pieter van der Mei, 'Regional Integration: The Contribution of the Court of Justice of the East African Community' (2009) 69 *ZaoRV* 403.

appointed after consultation with a panel of experts.<sup>55</sup> In the EAC, there is no rule preventing a judge of the court from retaining his or her position as a national judge.<sup>56</sup> There is potential here for a conflict of interests.

The Secretariat is the executive and administrative organ of the Community.<sup>57</sup> It is led by the Secretary General who is appointed by the Summit. The staffs of the Secretariat are required to act independently and not to seek or receive any instructions from any Partner State. The Secretariat is responsible for initiating, receiving and submitting recommendations to the Council and forwarding Bills to the Assembly. It can conduct research and studies and is responsible for strategic planning, management and monitoring of programmes for the development of the community. It is responsible for the coordination and harmonisation of policies and strategies of the Community.<sup>58</sup> It oversees the implementation of decisions by the Summit and the Council.<sup>59</sup> It is also responsible for the mobilisation of funds for the Community. In the EU context, the EAC Secretariat is the counterpart of the European Commission. The institutions of the Community are such bodies, departments and services as are established by the Summit.<sup>60</sup> Article 9(3) establishes the East African Development Bank, the Lake Victoria Fisheries Organisation, and the surviving institutions of the former East African Community as institutions of the Community. The specialised institutions of the EAC include:

- East African Development Bank – Kampala, Uganda.
- Inter-University Council of East Africa – Kampala, Uganda.
- Lake Victoria Basin Commission – Kisumu, Kenya.
- Lake Victoria Fisheries Organization – Jinja, Uganda.
- Civil Aviation Safety and Security Oversight Agency (CASSOA) – Entebbe.
- East African Kiswahili Commission – pending establishment.
- East African Health Research Commission – pending establishment, and the
- East African Science and Technology Commission – pending establishment.

55 See Treaty on the Functioning of the European Union, 2007, art 255.

56 [http://www.kas.de/wf/doc/kas\\_28725-544-2-30.pdf?110908155533](http://www.kas.de/wf/doc/kas_28725-544-2-30.pdf?110908155533).

57 EAC Treaty, arts 66–73.

58 *Ibid* art 71(1)(e).

59 *Ibid* art 71(1)(l).

60 *Ibid* art 9(2).

## 1.9 Protocols of the EAC

The Treaty empowers the Partner States to conclude such protocols as may be necessary in each area of cooperation.<sup>61</sup> Each Protocol spells out the objectives, scope and institutional mechanisms for cooperation and integration. The following are the more important Protocols which have been concluded:

- Protocol on the East African Customs Union.
- Protocol on the Common Market.
- Protocol on Decision Making by the Council.
- Protocol on Combating Drug Trafficking in the East African Region.
- Protocol on Standardization, Quality Assurance, Metrology & Testing.
- Protocol for the Sustainable Development of the Lake Victoria Basin.
- Protocol on Establishment of Civil Aviation Safety & Security Oversight Agency (CASSOA).
- Protocol on Foreign Policy Coordination.
- Protocol on the Establishment of the East African Science and Technology Commission. The Commission is based in Kigali, Rwanda.

Some of the Protocols pending ratification and entry into force include, the Protocol on Environment & Natural Resources, the Protocol on Establishment of Kiswahili Commission, and the Protocol on Establishment of the East African Health Research Commission.

## 2. FACTORS FOR SUCCESSFUL INTEGRATION IN THE EAC

Success in integration is dependent on various factors.<sup>62</sup> It requires a regional identity in a socio-cultural, political and economic sense in place of regional identity in a geographical sense.<sup>63</sup> It envisages nurturing of regional citizens rather than national citizens and promotion of regional sovereignty over national sovereignty.

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<sup>61</sup> *Ibid* art 151.

<sup>62</sup> Simms Rachel & Simms Errol, 'The Building Blocks of Successful Regional Integration: Lessons for the CSME from other Regional Integration Schemes'. Online: <http://sta.uwi.edu/conferences/salises/documents/Simms%20R%20-%20Simms%20E.pdf>.

<sup>63</sup> Jie Chen, *Factors Shaping Regional Integration in Europe, Asia, And Africa: The Validity of Competing Theories* (MA Thesis, University of Lethbridge, Canada, 2009).



In the EAC context, when the old Community collapsed in 1977 no one saw this as abandonment of the quest for East African unity.<sup>64</sup> The Partner States drew lessons from the collapse.<sup>65</sup> The preamble to the 1999 EAC Treaty identifies the factors that led to the collapse of the Community as lack of strong political will, lack of strong participation of the private sector and civil society, and disproportionate sharing of benefits. Presently, weak political governance is a challenge to EAC integration. The weakness of the government in Burundi and the threat of external terrorism makes the EAC fragile as a unit for regional integration.<sup>66</sup> The application by South Sudan and Somalia to join the EAC has half-hearted support due to the lack of an effective government and state machinery in these countries.<sup>67</sup> Further, poor governance is an impediment to economic development and integration. Some of the important factors for the success of regional integration are discussed below.

## 2.1 Political Will

The concept of political will is complex for several reasons. First, it involves intent and motivation, which are inherently intangible phenomena. Second, it may exist at both individual and collective levels. For individuals, the notion of political will is understandable as a personal characteristic, reflecting a person's values, priorities, and desires. Aggregating beyond the individual introduces more complexity. Third, though political will may be expressed in spoken or written words (speeches, manifestos, legal documents, and so on), it is only manifested through action.<sup>68</sup>

64 A Hazlewood, 'The End of the East African Community: What are the Lessons for Regional Integration Schemes?' (1979) 18 *Journal of Common Market Studies* 40. See further FM Musonda, *Regional integration in Africa – A Closer Look at the East African Community* (Bale, Switzerland: Helbing & Lichtenhahn, 2004) at 71–74.

65 Andrea Goldstein & S Njuguna Ndung'u, 'Regional Integration Experience in the Eastern African Region' (OECD Development Center Working Paper No. 171, 2001) at 9.

66 'Burundi: How well integrated is it in the EAC?' (The Greater Horn Outlook 26, 2012).

67 An effective state controls its national territory and borders and has sufficient domestic penetration to ensure that national laws and policies are in effect throughout the country and there is sufficient state capacity to raise tax revenues and to provide education for the vast majority of children. A weak state lacks one or more of these points and will generally be incapable of promoting economic and social development.

68 DW Brinkerhoff, 'Where there's a Will, there's a Way? Untangling Ownership and Political Will in Post-Conflict Stability and Reconstruction Operations' (2007) 8 *Whitehead Journal of Diplomacy and International Relations* 111; DW Brinkerhoff, 'Assessing Political Will for Anti-Corruption Efforts: An Analytic Framework' (2000) 20 *Public Administration and Development* 239.

There is no universally accepted definition of political will. A shorthand definition of political will is: the commitment of actors to undertake actions to achieve a set of objectives. Political will is an attribute possessed by individual or collective political actors. It is the determination of individual or collective political actors to do and say things that will produce a desired outcome. It is the motive force that generates political action; it is action-oriented, observable and measurable in terms of the commitment and intensity of support for a given policy by the leadership. Its observable results include identification of common values, principles and interests; a common strategic vision and direction, progress in identification of obstacles to trade expansion, structured discussions, pragmatism and avoidance of theoretical concepts.

Lack of political will is fatal to integration efforts and gives rise to lopsided commitment when member states do not prioritise regionalism over national interests. The EAC Partner States should deliberately and continuously cultivate and harness political will to advance regional over national goals and aspirations. Political will is harnessed by developing a common vision, purpose and joint plan of action through political dialogue, personal and institutional networks and citizenry and civil society participation. The institutional framework for harnessing political will includes joint meetings, working groups, annual or semi-annual meetings, ministerial and Heads of State meetings and joint sessions at other levels, such as those of the legislature, judiciary and civil society.

## 2.2 Intra-Regional Trade and Institution Building

Increasing intra-regional trade among member countries is an indicator of the success of regional integration efforts. Low levels of intra-regional trade limit interdependence within and among the integrating economies. Following the implementation of the EAC Customs Union in 2005, the value of intra-EAC trade has more than doubled from US\$1.8 billion in 2005 to US\$4.9 billion in 2011.<sup>69</sup> However, there are significant differences with respect to specific member states.<sup>70</sup> Kenya is the largest contributor to intra-EAC exports (57.2 percent of the total in 2010) and Uganda is the largest regional importer (37 percent of intra-EAC imports in 2010).<sup>71</sup> Overall, Kenya contributes an average share of 40 percent of total intra-EAC trade and enjoys a trade surplus with

69 East African Community Facts and Figures – 2012 (EAC Secretariat, 2012).

70 Isaac Shinyekwa & Lawrence Othieno, 'Trade Creation & Trade Diversion Effects of the East African Community Regional Trade Agreement: A Gravity Model Analysis' (Research Series No. 112 – Economic Policy Research Centre (EPR) Kampala, Uganda, 2013).

71 World Trade Organization, *Trade Policy Review Report: The Secretariat East African Community* (2012).

its EAC partners.<sup>72</sup> Rwanda has attracted investments from the EAC Partner States worth over US\$100 million since it joined the Community; most of the investments are from Kenya and Uganda.<sup>73</sup>

A high level of intra-regional trade leads to the formation of an integrated region with mechanisms and institutions that facilitate trade. It intensifies ties and linkages among the trading partners and fosters vertical and horizontal linkage of the member states' manufacturing sectors. Intra-regional trade gives rise to socio-economic interdependence and this linkage provides a strong bottom-up force that is instrumental and effective in spurring and cushioning the integration process. It would be advantageous for the EAC countries to deepen intra-regional trade interdependence and bridge divergences within the regional framework.

To avoid past pitfalls, the EAC Partner States should focus on regional institution building and systems development. The goal is to have credible regional institutions that are founded on regional, supranational ideals and philosophy. Regional institutions should not be captured by individual, national or political groupings or interest groups. Past EAC experience shows that vested personal and national interests led to the collapse of the 1967-77 Community. Political groups are bent on pursuing national rather than regional interests. Individual administrative corruption and lack of democracy and rule of law renders integration and regional development difficult. Pursuit of national interests hinders regional cooperation as this favours a top-down approach to integration and does not take into account the possibility that in some cases the state may become a vehicle for personal wealth accumulation. Interest groups in pursuit of individual wealth accumulation are not likely to support

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72 In spite of the growth in intra-EAC trade performance, there are impediments like poor infrastructural services, mainly roads and railways, and high costs of energy resulting in high costs of doing business that make it difficult to boost trade. The EAC region has undertaken a number of trade policy measures to increase and boost intra-EAC trade and trade with the rest of the world: Internal Tariffs (IT) along the borders of partner states have been fully removed and the EAC CET is fully operationalised. There are, however, challenges of overlapping membership of the EAC countries in various regional arrangements, due to different rules of origin requirements, in particular Tanzania in SADC and the rest of the EAC partner states in COMESA. Non-tariff barriers (NTBs) remain a major impediment to regional trade and these include: non-harmonised technical standards, sanitary and phytosanitary requirements, customs procedures and documentation, different rules of origin regimes and road blocks. The establishment of National Monitoring Committees (NMCs) in all the EAC member states to address these NTBs has not yielded the anticipated results.

73 Speech by Rwanda Permanent Secretary in the Ministry of East Africa Community Affairs, Innocent Safari, at a press conference for raising awareness of the East African Community. He stated that more than 2500 Rwandese have been employed because of regional investments in the local market. Over 400 companies from the regional member states have entered Rwanda and created tax revenue for the government and jobs for the citizens.

integration and good governance in the regional institutions.<sup>74</sup> However, it must be noted that some supportive interest groups do positively contribute towards integration. It is critical that the EAC Partner States focus on regional institution building premised on a sustainable framework for intra-regional trade development.

### 2.3 Peace, Security and Stability in the EAC Region

The aphorism ‘no peace without development and no development without peace’ captures the central role of peace in human development. Peace, security, stability and mutual trust are a *sine qua non* for successful regional integration. The EAC Partner States face myriad problems that are not confined to their respective national boundaries. The problems do not lend themselves exclusively to national solutions – they require a regional approach and solution. Large portions of the borders of the EAC Partner States are porous and scantily monitored. Kenya is becoming a transit route for illicit drug trafficking and her borders with Somalia, Sudan and Ethiopia have areas of insecurity. Somalia is a dysfunctional state. Burundi is faced with internal political dissention that threatens to evolve into civil war. Uganda has troops in South Sudan. And there is simmering tension between Rwanda and Tanzania over Rwandans living in northern Tanzania. Past mistrust between Kenya and Tanzania is an unstated underlying factor in any negotiation process. This can be compared to the situation when a couple divorces, and later remarries: suspicion and mistrust will continue to play a role in the renewed marriage – there is no unflinching trust.

In all the EAC Partner States, internal and external refugees are an additional burden. Ethnic conflicts, fanned by exclusion from economic development and political participation, are a common feature in all the EAC Partner States. Proliferation of illegal small arms and disputes between farmers and nomads, such as the Maasai, Karamoja and Turkana, do not stop at national borders. Skewed distribution of national economic wealth is a catalyst in most of these conflicts. Unbalanced economic development automatically promotes insecurity and instability. It is refreshing to note that one of the areas of cooperation identified in the EAC Treaty is peace and security, and enhanced participation of civil society. The EAC Partner States should re-double their efforts for the promotion of peace and security within the region.

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74 Walter Mattli, *The Logic of Regional Integration: Europe and Beyond* (Cambridge: Cambridge University Press, 1999) at 52.

## 2.4 Enhanced Participation of Civil Society and Non-State Actors

One of the factors responsible for the collapse of the old EAC in 1977 was the absence of strong participation by the private sector and civil society. Civil society participation raises awareness and accountability,<sup>75</sup> and helps in monitoring, campaigning for regional integration, regional identity, regional free movement of people and regional trade integration. Proactive civil societies are involved in analytical research and lobbying in the public interest. They assist in information dissemination and monitor implementation processes. They also help on governance issues, negotiations and consensus building. Civil society has advocacy space, helps to keep governments accountable, and provides invaluable networks for outreach to citizens.<sup>76</sup> All these can be effectively harnessed to advance regional integration.

Without civil society involvement, regional integration efforts will be focused on a small elite, leading to a shaky foundation, because the majority of the populace is ignored. The absence of civil society engagement leads to a top-down model of regionalism driven by public sector officials and Heads of State. Inadequate participation of civil society affects the legitimacy of regional cooperation in the eyes of the population. Lack of opportunities for civil society participation undermines the civilian base for support for political federation.<sup>77</sup>

The role of the private sector in integration efforts cannot be underestimated.<sup>78</sup> An understanding of private-sector needs in relation to the regional trade agenda is central to the success of integration efforts.<sup>79</sup> This sector

75 Okey C Iheduru, 'Civil Society and Regional Integration in West Africa' in Lorenzo Fioramonti ed., *Civil Society and World Regions: How Citizens Are Reshaping Regional Governance in Times of Crisis* (Lanham, MD: Lexington Books, 2013) at 137-160.

76 HE Erastus Mwencha, 'Regional Integration: Role of the Civil Society' (2012). Online: [http://leadership-for-change.southernafricatrust.org/downloads/module\\_2\\_presentations/Mwencha%20Regional%20Integration.Role%20of%20the%20Civil%20Society.pdf](http://leadership-for-change.southernafricatrust.org/downloads/module_2_presentations/Mwencha%20Regional%20Integration.Role%20of%20the%20Civil%20Society.pdf).

77 [http://www.kas.de/wf/doc/kas\\_28725-544-2-30.pdf?110908155533](http://www.kas.de/wf/doc/kas_28725-544-2-30.pdf?110908155533).

78 Sophia Bekele, 'Contribution of Private Sector to Regional Integration and Success Stories' (Paper presented to Communications Africa, 2009). The paper highlights success stories of private sector companies that have aided regional integration, such as MTN, ECONET and Dimension Data. Others include TV Africa, a private sector initiative fostering regional integration through partnering with National TV companies of African countries to deliver alternative content on a separate channel via satellite. Another private company is Africa On-line which provides Internet points-of-presence (POPs) as Internet Service Providers (ISPs) in various African countries.

79 Talitha Bertelsmann-Scott, 'Political Economy of Regional Integration in Southern Africa Series: The Private Sector as a Driver of Regional Integration' (European Centre for Development Policy Management, 2013).

is one of the primary beneficiaries of regional integration and a pivotal driver of the integration process. Input from the private sector determines the approach by which the issue of Non-tariff barriers (NTBs) is addressed in the integration process. This sector can play a significant role in designing the type of institutions required to ensure that regional agreements are effectively implemented. The private sector has a role in identifying bottlenecks in areas of intra-regional trade cooperation. It can identify priority areas for trade facilitation. As a primary user of the regional institutions, a participating private sector gives feedback on the efficacy of regional institutions and the mechanisms for dispute resolution. Also, involvement of the private sector, civil society and other non-state actors creates an impetus for policy change, triggering surrender of sovereignty in sectors of the economy that are essential to improving intra-regional trade and social welfare.

## **2.5 A Regional Leader and Collective Action**

Collective action and responsibility is vital to the success of regional integration. This is facilitated by the existence of a regional leader championing consensus building in decision making. The regional leader should be a country (or countries) that takes a lead in identifying regional challenges and proposing regional solutions. Such a leading country takes the lead in underwriting the budget for regional integration, aiding weaker members and meeting adjustment costs. The regional leader need not be one country; it can be two or more countries that have a shared regional political vision, value and programme of action. For all Partner States to mutually benefit from the integration process, collective measures that yield benefit to all partners should be undertaken.

In the EAC context, all the five Partner States are individually and collectively discharging the role of regional leaders on specific agenda items in the EAC integration process. For instance, on political integration, Uganda plays a leadership role; on trade liberalisation, leadership tilts towards Kenya; on land and freedom of movement of labour and services, Tanzania leads; and all countries play a collective leadership role in respect of peace and security.

The regional collective vision and programme of action must be based on a policy agenda formulated with an awareness of regional realities in the short, medium and long term. This requires strengthening the regional research infrastructure and building a regional human resource capital base. In this regard, the East African Science and Technology Commission and the proposed East African Health Research Commission are steps in the right direction. A

regional research institution on the promotion of renewable and cost-effective energy utilisation and industrial development should be considered.

## 2.6 Duality and Multiplicity of Membership

Multiplicity of membership in various regional configurations is a stumbling block for deeper integration among the EAC Partner States. Kenya and Uganda are members of the EAC and the Common Market for East and Central Africa (COMESA) while Tanzania is a member of the EAC and the Southern Africa Development Cooperation (SADC). The EAC has its own Common External Tariff (CET). Both COMESA and SADC are in the process of establishing a customs union. The practical implication is that there may be two different external tariff regimes applicable in these regional blocs. Intra-regional trade involving the EAC countries stands to be affected as businessmen may have two different CETs to comply with. Duality or multiple memberships thus becomes a non-tariff barrier to trade. The EAC states should resist being caught in a spaghetti bowl of parallel regional integration initiatives. If multiple memberships are useful for geopolitical reasons, the establishment of a proactive coordination mechanism should precede each such membership with the aim of streamlining and harmonising policies within each regional bloc.<sup>80</sup> The proposed Tripartite Free Trade Area involving COMESA, EAC and SADC is laudable as it will harmonise and minimise challenges posed by multiplicity in various regional organisations among the EAC countries.

## 2.7 Trade Facilitation Prioritisation

A factor slowing down the EAC integration effort is the fact that there are structural constraints to the free flow of goods and services, or to the movement of business people, as well as fragmented trade regulation among the Partner States. Complicated and slow customs procedures, dissimilar health, safety and technical standards exist among the Partner States. These structural differences, being non-tariff barriers, are cost increasing and restrict trade flows within the Community. Trade facilitation should be prioritised and enhanced to minimise or eliminate such differences.

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80 CUTS International, *Taking East African Regional Integration Forward: A Civil Society Perspective* (CUTS Geneva Resource Centre, 2010) at 9.

### 3. INSTRUMENTS FOR REGIONAL INTEGRATION IN THE EAC

Instruments of regional integration can be categorised as regional policy and legislation, regional programmes and projects, schemes for redistribution of income and gains of trade, and diplomacy. The EAC Treaty imposes an obligation on the Partner States to develop a trade regime and cooperate in trade liberalisation through elimination of internal tariffs and non-tariff barriers to trade.<sup>81</sup> A viable trade regime requires commitment to market access for regional products, persons and enterprises. It demands non-discrimination through elimination of internal tariffs and charges of equivalent effect, and removal of internal non-tariff barriers while leaving domestic legislation intact. A regional trade regime should create uniform legislation either directly or through harmonisation or approximation. The EAC Treaty anticipates that the Partner States will harmonise their national laws appertaining to the Community<sup>82</sup> as the States abstain from measures likely to jeopardise the implementation of the Treaty.<sup>83</sup>

An effective instrument for regional integration is the development and implementation of regional policy, programmes and activities. The EAC Treaty acknowledges this through provisions on cooperation in financing joint projects,<sup>84</sup> development of an East African Industrial Development Strategy,<sup>85</sup> a common policy for standardisation and quality assurance,<sup>86</sup> harmonisation and eventual integration of their financial systems,<sup>87</sup> and development of a coordinated, harmonised and complementary transport and communication system.<sup>88</sup>

At a political level, regional integration relies on age-old diplomatic instruments of dialogue and cooperation which promote the emergence of a regional policy. The efficacy of diplomacy in regional integration is enhanced when other social and economic actors in addition to professional diplomats are involved. The various provisions of the EAC Treaty that impose minimum

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81 EAC Treaty, art 74 and 75(1)(b)(c).

82 *Ibid* art 126(2)(b).

83 *Ibid* art 8(1)(c).

84 *Ibid* art 87(1).

85 *Ibid* art 80(1)(a).

86 *Ibid* art 81(3).

87 *Ibid* art 82(2)(c). See also Protocol on the Establishment of the EAC Common Market, art 30.

88 EAC Treaty, art 89.



mandatory periodic meetings on the organs of the Community<sup>89</sup> go a long way to ensuring that dialogue, diplomacy and development of political goodwill is achieved and sustained.

Another critical factor for the success of integration is the issue of the distribution of the benefits of integration. The realisation that integration brings with it the risk of unequal distribution of the gains from trade informed the provision in the EAC Treaty that one of the fundamental and operational principles is equitable distribution of the benefits of trade and the provision of measures to address economic imbalance among the states.<sup>90</sup> In practice, gains from trade are neither automatic nor do they accrue equally to all member states. For successful integration, the EAC Partner States must be proactive and ensure that all members benefit equally in sectors where they have competitive advantages. There is a need for regional policies for investment coordination and income redistribution that target specific categories of beneficiaries.

#### **4. MECHANISM TO ADDRESS TRADE IMBALANCES AMONG EAC PARTNER STATES**

The EAC Treaty has principles and measures to address imbalances that may arise from cooperation efforts.<sup>91</sup> The primary measure is the safeguard clause<sup>92</sup> which is to be invoked in the event of serious injury occurring to the economy of a Partner State.<sup>93</sup> Safeguard measures include anti-dumping and countervailing measures. The Treaty provisions on subsidies, infant industry protection and approval of a sensitive list of products are all aimed at addressing the negative consequences of trade liberalisation in the integration process.

Another possible means of addressing the imbalances in the EAC would be a compensatory fund. This type of mechanism has been successfully utilised in other regional trade arrangements. It involves money transfers through a budget. In this case, monies collected from the CET can be shared according to a formula that takes into account differential impacts of the CET. In the alternative, monies collected from the CET can be placed in a central budget

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89 *Ibid* arts 12(1), 15(1) and 22.

90 *Ibid* arts 6(e)(f) and 7(f).

91 *Ibid* arts 77 and 78 as read with 7(1)(d)(e)(g) and (h).

92 *Ibid* art 77.

93 Society for International Development, *East African Integration: Dynamics of Equity in Trade, Education, Media and Labour* (2011) at 36–37.

and used for programmes agreed upon by the member states.<sup>94</sup> In the EAC, the Council of Ministers has ruled out the possibility of establishing a compensatory mechanism in a decision taken in August 2005. Instead, the EAC is considering a development fund. The proposed EAC development fund would, if established, seek to address infrastructural development issues, development imbalances, investment promotion and other development challenges of the partner states. The EAC has made it clear that it may not be used for compensation. Rather, it is meant to be a vehicle for mobilising resources for development programmes in the region. In addressing imbalances within the region, the fund will provide balance of payments/budget support to countries within the framework of policy-based operations to support member states in undertaking macroeconomic and trade liberalisation reforms related to economic integration. The fund may also support the financing of infrastructure to support a deeper and more balanced regional integration. The fund would thus operate through two main windows, an infrastructure fund and an adjustment facility.<sup>95</sup>

The EAC Treaty itemises operational principles to guide implementation of the objectives of the community.<sup>96</sup> A people-centred, market-driven and export-oriented economic cooperation is envisaged. There are a number of core operational principles designed to deal with negative trade imbalances.<sup>97</sup> First, there is the “principle of asymmetry”, which addresses variance in the implementation of measures.<sup>98</sup> Second is the “principle of complementarity” which defines the extent to which economic variables support each other in economic activity.<sup>99</sup> Third is the “principle of subsidiarity” which emphasises multi-level participation of a wide range of participants in the process of economic integration.<sup>100</sup> Finally, there are the “principles of variable speed and variable geometry” which emphasise flexibility in the progress of integration in different programmes and activities at different speeds.<sup>101</sup>

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94 *Ibid.*

95 *Ibid* at 37.

96 EAC Treaty, art 7.

97 *Ibid* art 7(1)(d)(e)(g) and (h).

98 *Ibid* art 7(1)(h).

99 *Ibid* art 7(1)(g).

100 *Ibid* art 7(1)(d).

101 *Ibid* art 7(1)(e).

#### 4.1 VARIABLE SPEED AND VARIABLE GEOMETRY

A limitation on regional integration is that progress is determined by the pace of the slowest member. As the number of integrating countries increases, it is a challenge to secure consensus that enables all countries to simultaneously implement programmes and activities at the same pace. The concepts of variable speed and variable geometry seek to deal with this challenge.

Variable speed refers to situations where all members agree to be bound by common aims or objectives.<sup>102</sup> It allows some members longer time lines to implement programmes and activities. Rather than slow or hold back the pace of integration to be in line with the slowest and most reluctant member state, variable speed permits some member states to move ahead with a common policy and others to catch up when they are ready. Variable speed is applied when different implementation periods are given to some member countries in the integration bloc.

In contrast, variable geometry refers to situations where a sub-group of members (and possibly different sub-groups on different issues, hence the term variable) wish to pursue deeper and more intensive forms of integration and cooperation on specific issues, while other members wish to remain permanently outside these initiatives. These concepts are clearly relevant to the EAC countries where there are multiple economic groupings with overlapping memberships and different integration objectives.

On the application of the principle of variable geometry, in *the Matter of Advisory Opinion by the Council of Ministers*,<sup>103</sup> the East African Court of Justice observed that when decisions are made:

It is expected that there shall be simultaneous implementation by the EAC Partner States. Simultaneous implementation presupposes that all Partner States operate within a strait jacket or one size fits all situations. However, this may not be so and variable geometry is intended, and actually allows those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.

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102 Alan Matthews, *Regional Integration and Food Security in Developing Countries* (Food and Agriculture Organisation, 2003) at 36.

103 East African Court of Justice, Application No. 1 of 2008.

The court held that variable geometry is a tool used in the implementation of programmes.

## 4.2 Subsidiarity

An important issue in integration efforts is which powers and responsibilities should be allocated upwards to be undertaken at the regional level and which powers should be retained at the national (or sub-national) levels. This involves the application of the principle of subsidiarity. Subsidiarity requires that in areas which do not fall within their exclusive competence, regional organs shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the regional organ.<sup>104</sup>

Subsidiarity deals with division of roles, functions and decision making between regional organs and national organs.<sup>105</sup> The appropriate division of powers between different levels of government is addressed from an efficiency standpoint based on the economics of multi-tier government. Using the distinctions between the allocation, stabilisation and redistribution functions of government, stabilisation and redistribution functions are best performed at the regional level, while the allocation function is usually best exercised at national or sub-national levels where it can respond to differences in preferences for public goods. The principle of subsidiarity is a bottom-up and grassroots approach to programme implementation and decision making as it guarantees that action will be taken at the local level whenever that proves to be necessary. However, the principle of subsidiarity does not mean that action must always be taken at the level that is closest to the citizen.

For comparative purposes, in the EU, a Protocol on the application of the principles of subsidiarity and proportionality has been concluded and it lays down three criteria aimed at establishing the desirability of intervention at the European level. These are: Does the action have transnational aspects that cannot be resolved by Member States? Would national action or an absence of action be contrary to the requirements of the Treaty? Does action at the European

104 The Treaty on European Union, 2007, art 5(3); Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative Law & International Law* 95.

105 For a general discussion of fiscal subsidiarity, see Iain Begg, *Fiscal Federalism, Subsidiarity and the EU Budget Review* (Swedish Institute for European Policy Studies, Report No. 1, 2009).

level have clear advantages? The EAC countries should consider learning from the EU experience and conclude a Protocol on the principle of subsidiarity.

## 5. SOVEREIGNTY, SUPREMACY AND ENFORCEABILITY OF REGIONAL LAW

The Treaty establishing the EAC, its Protocols, legislative instruments and judicial decisions constitutes a new law in the Community for whose benefit the Partner States have partially ceded their sovereign rights in matters affecting the Community. The Treaty creates its own legal system which is an integral part of the national legal systems of the Partner States. Each of the Partner States has enacted legislation<sup>106</sup> to give effect to the Treaty in its territory, thereby incorporating the regional law as a new legal order into the respective national domestic law.<sup>107</sup> The Treaty itself in Article 8(2) incorporates the regional legal order into the national legal orders and the Treaty, EAC legislation, regulations and directives are given the force of law within the national territories of the Partner States. In complementing Article 8(2)(b) of the Treaty, Article 8(4) deals with the hierarchy of legal norms where Community laws take precedence over “similar national laws.”

The EAC regional legal order having been domesticated and incorporated in the national legal orders of the Partner States, a conceptual issue arises as to which legal order is supreme – mere incorporation begs the question of supremacy of the regional versus the national legal order. Reception of regional law into national legal systems leaves unanswered the question of its status in the legal system.<sup>108</sup> What is the place of EAC law in the Partner State’s national legal system’s hierarchy of laws? In the case of variance, will EAC law override national law?

There are two approaches to analyzing these questions and each approach leads to a different conclusion. The first approach is to ask whether the EAC is a sovereign or a supranational legal entity over and above the national partner states; and the second is to ask whether the supremacy of regional EAC Treaty

106 All Partner States have enacted national legislation giving force of law to the EAC Treaty. See Kenya: *Treaty for the Establishment of East African Community Act*, 2000; Uganda: *East African Community Act*, 2002; Tanzania: *Treaty for the Establishment of East African Community Act*, 2001.

107 EAC Treaty, art 8(2).

108 Richard Frimpong Oppong, ‘Making Regional Economic Community Laws Enforceable in National Legal Systems – Constitutional and Judicial Challenges’ (2008) 8 *Monitoring Regional Integration in Southern Africa Yearbook* 149.

law should be appraised from the perspective of the hierarchy of norms in a legal order.

The corollary of sovereignty is supremacy. The EAC Treaty and regional law are supreme if the EAC is a sovereign legal entity. Is the EAC a sovereign supranational legal entity? The Partner States established the Community as a body corporate among themselves.<sup>109</sup> The Community undertakes such programmes and activities as the Partner States may from time to time decide to undertake in common.<sup>110</sup> The Summit, as the apex organ of the Community, gives general direction and impetus to the Community.<sup>111</sup> The jurisdiction of national courts is not ousted on the ground that the EAC is a party to a dispute.<sup>112</sup> The Treaty may be amended from time to time by agreement of all the Partner States.<sup>113</sup> The deduction from the foregoing Treaty provisions is that the Community has limited juridical competence that is subject to what the Partner States from time to time shall confer upon it. The Community as a legal entity is subject to and not sovereign over the Partner States. Juridical sovereignty and hence supremacy, as a legal concept, is vested in and rests with the EAC Partner States and not with the Community. The Partner States have not ceded sovereignty to the Community; what they have ceded to the Community is functional, operational and juridical competence on matters relating to the Community. Sovereignty, absolute or partial, has not been ceded to the Community as a body corporate. Drawing an analogy from the principal-agent relationship, we can say that the Community is the agent of the Partner States who are the principals. An agent cannot be greater than the principal. The EAC Secretariat has observed that national constitutions do not fall into the category of similar national organs, institutions and laws as envisaged under Article 8(4) of the Treaty and as such, they are superior to the EAC Treaty.<sup>114</sup>

In *Samuel Mukiramohochi v Attorney General of the Republic of Uganda*,<sup>115</sup> the East African Court of Justice (EACJ) had occasion to deal with the issue of sovereignty of the Partner States in the context of Uganda as a Partner State. Before the Court it was submitted that sovereignty is the supreme political

109 EAC Treaty, arts 2(1) and 4(2).

110 *Ibid* art 5(3)(h).

111 *Ibid* art 11(1).

112 *Ibid* art 33(1).

113 *Ibid* art 150(1) and (6).

114 EAC Secretariat Press Release dated 18 February 2010 on Meeting on Approximation of National Laws in the EAC Context held at Nairobi.

115 East African Court of Justice, Reference No. 5 of 2011.

authority of an independent state and, as such, Uganda is an independent state whose sovereignty was not submerged in the creation of the EAC. In concurring with the submission, the Court stated: “we entirely agree ...that Uganda is an independent sovereign state whose power...was not submerged with the coming into force of the Treaty and the Protocol...” In *Katabazi v Secretary General of EAC*,<sup>116</sup> the EACJ held that, provided that there was compliance with the legal regime of a Partner State, the Court had no mandate to superintend such a State on how it exercised its executive functions and that the notion of ‘rule of law’ entailed compliance with the governing legal framework of a given Partner State. This was re-stated in *Henry Kyarimpa v Attorney General of Uganda*,<sup>117</sup> as “where a Partner State acted in accordance with its national legal framework, the Court would not make a finding of Treaty violation”.

Discourse on the supremacy of the EAC legal order undertaken from the perspective of sovereignty leads one to conclude that the EAC regional legal order is neither sovereign nor supreme to the national legal order of the Partner States. Since the national legal order adopts and incorporates the regional legal order, it is deduced that the two legal orders co-exist, are complementary and interdependent. The above deduction may change if the EAC’s objective of establishing a political federation is realised. If a federation is established, then, depending on the nature of the instrument of federation, the Community may have legal sovereignty and supremacy that supersedes the national legal order of the Partner States.

The relationship between the two legal orders can also be appraised using the concept of the hierarchical structure of norms in a legal order. Recognising that the EAC legal order and the Partner States’ national legal orders co-exist, which legal order is higher in the normative legal hierarchy? The answer to this is given in Article 8(4) of the Treaty which stipulates that Community organs, institutions and laws take precedence over similar national ones on matters pertaining to the implementation of the Treaty. This position was affirmed by the EAC Court of Justice in the case of *Prof. Peter Anyang’ Nyong’o v Attorney General of Kenya*.<sup>118</sup> It was observed that Article 8(4) of the Treaty should be viewed as a provision dealing with the hierarchy of legal norms and not as addressing the issue of sovereign competence of the EAC versus the Partner

116 East African Court of Justice, Reference No. 1 of 2007.

117 East African Court of Justice, Reference No. 4 of 2013.

118 East African Court of Justice, Reference No. 1 of 2006.

States, and that Article 8(4) is a provision aimed at assuring the effectiveness and uniformity of EAC law.

At the national level, the EAC Partner States adopt dissimilar interpretations of Article 8(4) of the Treaty. The governments of Rwanda, Kenya and Burundi suggest that partner states ought to implement legislation expressly stating the precedence of EAC laws over domestic ones. Tanzania and Uganda have argued that this precedence is inherent and additional legislation on the subject is unnecessary.<sup>119</sup>

A contrasting view to the position expressed in this article is the Court of Justice of the European Union decision that, in the EU context, there had been a transferral of power by Member States to the Community which required them to abstain from any measure that could jeopardise the attainment of the objectives of the treaty. The judges observed that where a conflict arises between national law and EU law, the latter takes precedence.<sup>120</sup>

## 6. JUDICIAL DECISIONS ON THE PRECEDENCE AND PRIMACY OF EAC COMMUNITY LAW

The EAC Treaty stipulates that Community organs, institutions and law shall take precedence over similar national ones on matters pertaining to implementation of the Treaty.<sup>121</sup> The inclusion of this provision in the Treaty was a reaction to the Kenyan judicial decisions that rejected subordination of national law to community law. In the 1970 case of *Okunda v Republic*,<sup>122</sup> the Kenya High Court considered the question of the supremacy of East African Community law over Kenyan law. In this case, two persons were prosecuted under the Official Secrets Act 1968 of the East African Community without the consent of the counsel for the Community. Under section 8(1) of the Act, such consent was necessary before prosecution. The court, recognising that the

119 East African Community: Meeting on Approximation of National Laws in the EAC Context Held in Nairobi on 18 February 2010. See also Edward Kitonsa, 'The Status of the EAC Legal Harmonisation Process in Uganda' (Uganda Law Reform Commission, 2012).

120 In *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, the EU Court of Justice declared strongly that all national courts must directly and immediately enforce a clear and unconditional provision of Community law, even where there is a directly conflicting national law, and no matter how the national system worked, the effect should be immediate. It was further held that not even a fundamental rule of national constitutional law can be invoked to challenge a directly applicable community law.

121 EAC Treaty, art 8(4).

122 [1970] EA 453.



case raised an issue of fundamental importance, held *in obiter* that:

The Kenyan Constitution is paramount and any law, whether it be of Kenya, of the Community or any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of the conflict.

In the 1969 case of *in the Matter of an Application by Evan Maina*,<sup>123</sup> which involved conflict between community and Kenyan law, the Kenyan High Court affirmed the supremacy of Kenyan law.<sup>124</sup> Recent judicial decisions after the 2010 Kenya Constitution have not dealt with the supremacy of EAC regional law versus national law. The 2010 Kenya Constitution stipulates that any treaty or convention ratified by Kenya shall form part of the law of Kenya.<sup>125</sup> The EAC Treaty thus has a constitutional foundation for direct effect in Kenya. In *Rono v Rono*<sup>126</sup> as adopted and confirmed in *Dennis Mogambi Mong'are v Attorney General*<sup>127</sup> it was stated as part of Kenya's legal culture that:

It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national Constitutions, legislations or the common law.

In Uganda, in the case of *Twinobusingye Severino v Attorney General*,<sup>128</sup> the supremacy of the Uganda Constitution which is entrenched in Article 2(2) thereof was emphasised. This was reiterated by the Uganda Court of Appeal in the case of *Uganda Law Society v Attorney General*.<sup>129</sup> In Tanzania, the legislation implementing the EAC Treaty<sup>130</sup> gives the treaty “the force of law” within Tanzania and annexes the Treaty to the Act without amending the supremacy clause.

There is limited national jurisprudence on the primacy of EAC regional law over national laws. How national courts will interpret Article 8(4) of the

123 Misc. Case no. 7 of 1969.

124 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2041&context=ilj>.

125 Constitution of the Republic of Kenya, 2010, art 2(6).

126 Civil Appeal No. 66 of 2002.

127 Civil Appeal No. 123 of 2012.

128 Uganda Constitutional Petition No. 47 of 2011.

129 Constitutional Petitions No. 2 and 8 of 2002.

130 *Treaty for the Establishment of the East African Community Act*, 2001.

Treaty as to whether it is a supremacy clause that ranks EAC law above national constitutional norms remains to be seen. What is certain is that the judiciaries of the respective Partner States are aware of the existence and implications of this supremacy provision.<sup>131</sup> In the *East African Civil Societies Organisation Forum (EACSO) v Attorney General of Burundi*,<sup>132</sup> the EACJ stated that the interpretation of Partner States' national constitutions does not fall within the jurisdiction of the Court and neither does the Court have the jurisdiction to inquire into the legal soundness of the decisions of Partner States' Constitutional Courts.

In the *Peter Anyang Nyong'o* case,<sup>133</sup> the EACJ, referring to Article 33(2) of the Treaty, emphasised that decisions of the court have precedence over decisions of national courts. In *obiter*, it was stated that Article 33(2) is a hierarchical provision on the relationship between EACJ judgments and those of national courts, and that the Treaty does not contain a comparable clear-cut solution for the more general situation where a Treaty provision or Community rule conflicts with a national rule. The court opined that where there is a conflict between Community law and national law, the former should be given primacy for it to be applied uniformly and effectively.

## 7. DIRECT EFFECT, DIRECT APPLICABILITY AND ENFORCEMENT OF EAC REGIONAL LAW

The EAC Treaty, its Protocols and legislation and the decisions of the Court of Justice represent regional law of the Community that requires application and enforcement. Enforcement denotes assessing state compliance with the Treaty and regional law and naming infringement and violation, thereby increasing the costs of non-compliance. Enforcement and application is an obligation of the Partner States in the first instance and of national institutions within whose territory the regional law is to be enforced.<sup>134</sup> Two doctrines underlie applicability and enforceability of regional laws: these are the principles of direct applicability and direct effect.

131 *Shah v Manurama Ltd* [2003] 1 EA 294 where the court cited the provision as one of the reasons why a resident of the community need no longer pay security for costs when litigating before national courts.

132 East African Court of Justice, Application No. 5 of 2015.

133 East African Court of Justice, Reference No. 1 of 2006.

134 EAC Treaty, arts 8(2)(b), 44 and 29(1).

Direct effect was analysed by the European Court of Justice in the cases of *Van Gend en Loos*<sup>135</sup> and *Costa*<sup>136</sup> wherein it was held that European Community (EC) law prevails over national law. The Court observed:

The supremacy of EC law, however, does not imply that the Court has the power to conclude that a national rule is non-existent or void. Supremacy merely means that in case of a conflict a national court or any other government organ must apply the EC rule and set aside, in the case before it, the national rule. In other words, supremacy merely applies a duty to disapply a national rule infringing EC law and ultimately, it is for the EC Member States and their legislative branch of government to alter or to withdraw the rule in question.

In the EU context, direct effect allows direct application of EU law provided that the law is clear, precise and unconditional.<sup>137</sup> The functional impact of the direct effect principle is to facilitate homogeneity and uniformity in the laws of member states on matters relating to integration. Direct effect enables individuals to invoke regional law before national courts. It allows national courts to use regional law as an independent, direct and autonomous basis for decisions. It turns national courts and persons who litigate before them into enforcers of the regional law.<sup>138</sup> Article 39 of the EAC Customs Union Protocol stipulates that the customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided for in the Protocol. This article makes the EAC Customs Management Act have direct effect as regional law in the EAC customs union. Section 1(2) of the Act expressly stipulates that it applies to all the Partner States.

Direct effect determines whether community law creates enforceable rights within the national legal systems. A provision of regional law has direct effect if it grants individuals rights which they can rely on and must be upheld in the national courts. The East African Court of Justice in *Prof. Peter Anyang' Nyong'o v Attorney General of Kenya*<sup>139</sup> observed that the claimant's cause of action was brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty.<sup>140</sup> The court further stated that a claimant is not required to show a right or interest that has been infringed and/or damage that

135 Case 21/63 [1963] ECR 1.

136 Case 6/64 [1964] ECR 585.

137 *R v Secretary of State for Transport, ex parte: Factortame Ltd* [1990] ECR I-2433.

138 [http://www.kas.de/wf/doc/kas\\_16110-1522-1-30.pdf?110125181323](http://www.kas.de/wf/doc/kas_16110-1522-1-30.pdf?110125181323).

139 East African Court of Justice, Reference No. 1 of 2006.

140 *Ibid.*

has been suffered as a consequence of the matter complained of. It is enough if it is alleged that the matter complained of infringes a provision of the EAC Treaty in a relevant manner. Reasonable apprehension that a Treaty provision has been infringed in a relevant manner is enough to enable an individual citizen or resident of any Partner State to have juridical competence and *locus standi* to institute proceedings before the court. Judicial dicta from the EACJ affirm the application of the principle of direct effect in the EAC. In the case of *Samuel Mukira Mohochi v Attorney General of the Republic of Uganda*<sup>141</sup> the EACJ stated that once the Treaty was given force of law within a Partner State, it became directly enforceable within the country and took precedence over national law that was in conflict with it and the existing national legal provisions became qualified and applicable only to the extent that they were consistent with the Treaty. In *East African Law Society v Attorney General of Burundi*,<sup>142</sup> the EACJ observed in relation to Burundi that “the Treaty provisions, through Burundi’s voluntary entry into the Treaty, have crystallized into actionable obligations breach of which would give rise to infringement of the Treaty”.

Direct effect should be distinguished from direct applicability. Direct applicability deals with whether action by national bodies (in effect by parliament, regional bodies, or the administration under delegated powers) is necessary to give effect to a provision of Community law. It deals with the processes or means by which regional law becomes part of national legal systems. It is an issue of sources of law, that is whether regional law is a source of law that can be applied within the national jurisdiction. Direct applicability allows community law to become part of the national legal systems without intervening national measures. In this regard, the entry into force of community law is independent of any measure of reception into national law. Direct applicability does not necessarily mean ratification by the national parliament; for example, section 2(a) of Uganda’s Ratification of Treaties Act, 1998 allows the cabinet to ratify defined treaties without resorting to parliament. In Kenya, Article 2(6) of the 2010 Constitution makes Treaties that the country has ratified and general principles of international law part of the sources of law in Kenya. These are provisions on direct applicability.

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141 East African Court of Justice Case, Reference No. 5 of 2011.

142 Reference No. 1 of 2014.

## 8. INTERFACE BETWEEN NATIONAL CONSTITUTIONS AND THE EAC TREATY

The EAC Treaty interfaces with national constitutions of the Partner States on a range of issues. The Treaty adopts decisions of national institutions or utilizes national procedures for its implementation. A Partner State may withdraw from the Community provided: (a) the National Assembly of the Partner State so resolves by resolution supported by not less than a two thirds majority of all the members entitled to vote.<sup>143</sup> The membership of the Summit, the Council, the Coordination Committee, the Assembly, the Court and all other organs of the Community is drawn from persons appointed, nominated or elected by national institutions pursuant to national laws.<sup>144</sup>

Another area of interaction is treaty interpretation. The EAC Treaty law is a new legal order which is a supplementary source of law through which litigants can influence national constitutional values on the rule of law, democracy and human rights. The Treaty provisions are useful in adjudicating the legality of governmental conduct at national level thereby giving constitutional guidance at the national level. A Partner State may refer to the EACJ for determination the legality of any action or decision that is claimed to be *ultra vires*, unlawful or an infringement of the Treaty.<sup>145</sup> Legal or natural persons resident in a Partner State may refer for determination by the Court the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community if it is claimed that the decision, act or Act is unlawful or an infringement of the provisions of the Treaty.<sup>146</sup> These are direct effect provisions of the Treaty. In the Ugandan case of *Katabazi v Attorney General of Uganda*,<sup>147</sup> the applicants were granted bail by the High Court of Uganda. However, security agents prevented execution of the bail; they were not released even after the Uganda Constitutional Court so ordered. The EACJ held that this governmental conduct was a violation of the rule of law enshrined in Article 6(d) of the EAC Treaty.

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143 EAC Treaty, art 145.

144 *Ibid* arts 10, 13, 17, 24 and 50.

145 *Ibid* art 28(2).

146 *Ibid* art 30.

147 East African Court of Justice Case, Reference No. 1 of 2007.

## 9. EXTENDED JURISDICTION OF THE EAST AFRICAN COURT OF JUSTICE

The jurisdictional competence of the EACJ is regulated by the Treaty. When the Treaty became effective in 1999, the Court had jurisdiction in respect of the following. First, to deal with the interpretation and application of the Treaty.<sup>148</sup> Second, a reference jurisdiction on matters referred to it by the Partner States or the Secretary General over the failure by a Partner State or an institution or organ of the Community to implement its obligations or infringe provisions of the Treaty.<sup>149</sup> Third, in respect of reference by legal or natural persons (resident in a Partner State) over the legality of any Act, regulation, directive, decision or action of a Partner State or Community Institution – except for acts and regulations that are “reserved” to an institution of a Partner State.<sup>150</sup> Fourth, is the jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment of the employees of the Community or the application and interpretation of the staff rules and regulations and terms and conditions of service of the Community.<sup>151</sup> And, finally, jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract or agreement which conferred such jurisdiction to which the Community or any of its institutions was a party; or arising from an arbitration clause contained in a commercial contract or agreement in which the parties had conferred jurisdiction on the Court.<sup>152</sup>

In line with the EAC fundamental principles of sovereign equality, the EACJ is composed of two judges from each of the Partner States appointed by the Summit.<sup>153</sup> Initially, the Court had one chamber whose decisions were final. By an August 2007 Treaty Amendment, the First Instance and Appellate Divisions of the Court were established.<sup>154</sup> The court ensures adherence to the rule of law in interpretation, application and compliance with the Treaty.<sup>155</sup>

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148 *Ibid* art 27(1).

149 *Ibid* art 28 and 29.

150 *Ibid* art 30.

151 *Ibid* art 31.

152 *Ibid* art 32.

153 *Ibid* art 24.

154 *Ibid* art 23(2).

155 *Ibid* art 23.

Its decisions have precedence over decisions of national courts on a similar matter.<sup>156</sup>

The EAC Treaty stipulate that the EACJ is subject to such other jurisdiction as would be determined by the Council at a suitable subsequent date.<sup>157</sup> In the cases of *James Katabazi v Attorney General of Uganda*<sup>158</sup> and *Attorney General of Kenya v Independent Medical Legal Unit*,<sup>159</sup> the Appellate Division of the EACJ stated that for the court to claim and exercise jurisdiction in any matter it had to find through interpretation of the Treaty the source and basis for such jurisdiction.

The EAC Treaty does not expressly confer a human rights jurisdiction on the EACJ. However, through the craft of judicial interpretation, the court has entertained disputes on governance, human rights and the rule of law.<sup>160</sup> In *James Katabazi v Attorney General of Uganda*,<sup>161</sup> the EACJ stated that it would not abdicate from exercising its jurisdiction of interpretation of the Treaty merely because the reference included an allegation of human rights violation.<sup>162</sup> In *Sitenda Sebalu v Secretary General of the East African Community*,<sup>163</sup> the court held that the failure by the Council to extend the jurisdiction of the Court violated the applicant's legitimate expectations that the principles of good governance stipulated in Article 6 of the Treaty had to be observed. It is noteworthy that in this case, the EACJ held that the Treaty does not confer appellate jurisdiction on the court over the decisions of national courts.

In practice, whereas the EACJ has jurisdiction to hear a Reference by a Partner State alleging infringement or violation of the Treaty,<sup>164</sup> the court has never been seized of a matter for determination on reference by a Partner State. It seems that Partner States have preferred to use non-judicial, diplomatic and political mechanisms to resolve inter-state disputes. Other parallel dispute resolution mechanisms (national courts and quasi-judicial bodies) have been provided for in the instruments governing the EAC trade regime. Article 41(2)

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156 *Ibid* art 33.

157 *Ibid* art 27(2).

158 East African Court of Justice, Reference No. 1 of 2007.

159 East African Court of Justice, Appeal No. 1 of 2011.

160 James Gathii, 'Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249.

161 East African Court of Justice, Reference No. 1 of 2007.

162 See also *Attorney General of Uganda v Omar Awadh*, Appeal No. 2 of 2012.

163 East African Court of Justice, Reference No. 1 of 2010.

164 EAC Treaty, art 28.

of the Customs Union Protocol establishes Committees to handle disputes arising out of the Protocol. Under Article 54(2) of the Common Market Protocol, jurisdiction to entertain Common Market related disputes is assigned to national courts.

In line with Article 27(2) of the Treaty, in February 2015, the Partner States signed a Protocol to extend the jurisdiction of the Court to trade and investment matters arising out of implementation of the three Protocols on Customs Union, Common Market and Monetary Union. The extension of jurisdiction demonstrates the significance of trade and investment in EAC regional integration efforts. The extension does not preclude the exercise of jurisdiction conferred upon other bodies by the Treaty or relevant laws of the Partner States. Although the Court has now extended jurisdiction, such jurisdiction is limited to disputes by investors or investments from Partner States and specifically to services or service providers where some rights such as the Most Favoured Nation (MFN) and national treatment are concerned. Presently, the EAC does not have a regional investment law which the court could interpret. The EACJ in exercising its extended jurisdiction must look to the Treaty and any relevant Protocol for guidance. For instance, Chapter 12 of the Treaty lays down the framework for cooperation in investment and industrial development; Article 80(1)(e) and (f) of the Treaty requires the Partner States to rationalise investments and ensure full use of established industries so as to promote efficiency and production; and to harmonise and rationalise investment incentives including those relating to taxation of industries, particularly those that use local materials and labour, with a view to promoting the Community as a single investment area.

A relevant instrument establishing rights in the field of investment is the Common Market Protocol. The Protocol provides for the protection of cross-border investments and deals with security of investments, non-discrimination and compensation in the event of expropriation. The Protocol regulates restrictions on the free movement of capital and applies the MFN and national treatment principles which are guaranteed to services and service suppliers of other Partner States. The Customs Union and Common Market Protocols are the pillars to guide the EACJ in developing jurisprudence on regional trade and investment law.



## **10. CONCLUSIONS AND RECOMMENDATIONS**

The legal framework for the East African Community is the Treaty, Protocols, legislation and decisions of the East Africa Court of Justice. The framework embodies the legal order of the Community which co-exists with and has interdependence with the national legal orders of the Partner States. The regional legal order takes precedence over similar national laws. Though the regional legal order has been adopted and incorporated into the national legal orders of the Partner States, it is neither autonomous nor supreme in respect of the national legal orders. Analysis of judicial decisions by the EACJ and national courts shows that they do not explicitly state that the EAC legal order is autonomous and independent of the national legal orders. EAC regional law ought not to vary from state to state in deference to national legal orders and Partner States are required to desist from taking national measures that supersede the Treaty or are inconsistent with the regional legal order. A conceptual challenge arises because the national constitutions of Partner States declare their respective constitutions to be the supreme law and this lends credence to the view that the EAC regional legal order is subject to the national constitutions of the Partner States. To this extent, it can be inferred that Article 8(1) of Treaty, which requires Partner States to refrain from any measure inconsistent with the Treaty, is a good faith best endeavour clause whose effectiveness is dependent on political good will and mutual trust. It is evident that the Partner States have not ceded any sovereignty to the Community as a supranational authority but have only conferred functional, operational and implementation competences on the Community.

The unanswered question as to whether EAC law supersedes national constitutions is an issue that calls for legal reform at both regional and national levels. The reform should include clarification of Treaty provisions on the hierarchy of regional laws in Member States versus national constitutions. There is a need to strengthen regional enforcement mechanisms and domestic legal and judicial systems to enable them to enforce the Treaty effectively. There is a need for the Partner States to expressly make the EAC a supreme supranational authority and for recognition of the supremacy of Community law by all the organs of the Partner States. In this context, the issue of supremacy and sovereignty and not legal hierarchy should be addressed. The failure to cede supremacy and sovereignty to the EAC as a supranational authority reflects the predominance of the spirit of nationalism over regionalism. This is a challenge

to the realisation of the objectives of the Community. One way to promote regionalism is to introduce an EAC curriculum in the lower, tertiary and higher educational institutions of the Partner States.

Regionalism as a value and philosophy of the general citizenry is not at its highest level in the EAC. Integration is hampered by conflicts in the region, lack of funds and the desire to protect national sovereignty. These remain challenges to the East African integration process. Major socio-economic challenges are the AIDS pandemic, poor education and infrastructure conditions, low income and prevalent unemployment. These myriad challenges have rendered the Partner States unable to give sufficient financial support to the EAC.

A further challenge to the EAC integration process is weak regional enforcement mechanisms. The existence of several forums for resolving disputes affecting the Community, such as the Trade Remedies Committee, and prevalent political and diplomatic processes prevent the emergence of a regional institutional framework for dispute resolution. It is recommended that the EAC should work towards establishing a unitary regional dispute resolution system. This requires coordination and harmonisation of the national legal orders of all the Partner States. Legal coordination is complicated by the differences in legal systems. While Kenya, Tanzania, and Uganda all inherited the British common law system, Rwanda and Burundi come from the civil law tradition of Germany and Belgium. There is a need for Rwanda and Burundi to transition their legal systems into the common law system.<sup>165</sup>

Multiple membership in dissimilar integration efforts has the potential to generate conflicting policies. If for geopolitical reasons multiple membership is useful, proactive coordination mechanisms should precede such membership with the aim of streamlining and harmonising policies within each integration block.

In relation to intra-regional trade, there are policy issues that need to be addressed to support the EAC integration process. The prevalence of non-tariff barriers, the absence of a common policy on partner states' trade with non-partner states, the lack of standardised customs formalities, the lack of harmonised procedures, and different approaches to investment and export promotion are challenges to be surmounted. It is recommended that the EAC should adopt a legally binding approach to NTBs, harmonise trade policies and

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165 See 'EAC Wants Rwanda, Burundi to Adopt Common Law System' (The New Times, Kigali, 2 June 2009).

standardise documentation and procedures. In all these endeavours, political will must be harnessed and sustained.



# AN ENQUIRY INTO THE ACHIEVEMENTS AND CHALLENGES OF EAST AFRICAN REGIONAL INTEGRATION

KHOTI CHILOMBA KAMANGA\*

## 1. INTRODUCTION

The preoccupation of this paper is the East African Community (EAC), as created on 30 November 1999, by the Treaty for the Establishment of the East African Community, in short, the EAC Treaty. However, the grand goal lies in the identification of ‘success stories’ as well as the hurdles standing in the way of the integration process, that is, in creating a Customs Union, a Common Market, a Monetary Union, and ultimately, a Political Federation.

In the view of the crafters of the EAC Treaty, the erstwhile EAC failed (in 1977) on account of the following “main reasons”, namely, lack of political will, skewed benefit sharing, and “lack of adequate policies to address this situation”. If that is so, how far has the present EAC distanced itself from this governance deficit? This is the second time that the East African states have embarked on a shared economic integration initiative in the post-independence era. Otherwise, economic integration has its roots in British colonial times, most notably with the construction of the “Uganda Railway” in 1896–1901. Over time this integration process led to a Customs Union, a common currency and a raft of service organisations such as the postal services, railways, harbours, civil aviation, income tax and a Court of Appeal.<sup>1</sup>

Put briefly, and running ahead of the narration, the key achievements and challenges of East African economic integration can be clustered in the following manner. Among the EAC’s most fundamental and visible ‘success stories’, are the sheer fact of survival, and the consolidation and growth of its organs and institutions. Parallel with this is the enlargement in membership.<sup>2</sup>

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1 Victor Umbricht, *Multilateral Mediation: Practical Experiences and Lessons* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1988) at 7–12 [Umbricht, *Multilateral Mediation*].

2 The three original ‘Founding Partner States’ – Kenya, Tanzania, and Uganda – have been joined by two more – Burundi and Rwanda -- in July 2007, and South Sudan in April 2016.

Furthermore, Partner States have, by and large, gone a long way in creating the appropriate legal environment for the national implementation of their respective treaty obligations.

A *caveat* is in order. Seeking to ascertain the achievements and gaps of a cross-cutting phenomenon such as a Regional Economic Community (REC) could easily fill the pages of a book. Given this limitation, the present paper addresses only a modest number of issues – the adequacy of the EAC Treaty, and of the organs it creates, and relevant jurisprudence.<sup>3</sup>

## 2. WESTERN EUROPE'S EXPERIENCE AND ITS RELEVANCE FOR THE EAC

It must be acknowledged that, to get where it is today, the European Union has successfully negotiated several successive and related treaties on a Customs Union, a Common Market, and a Monetary Union. Further relevance of the EU experience is the fact that the EAC Treaty is modelled on the EU Treaty framework,<sup>4</sup> a fact acknowledged by several EAC observers.<sup>5</sup> In summary, the following six aspects may be taken as being of most relevance.

First, Europe took a *gradual* approach in terms of membership expansion and in terms of the integration process, even if this was not explicitly set out in the Treaty of Rome, 1957.<sup>6</sup> Second, there is the unique role of the Court of Justice of the European Union (CJEU), in particular through what have come to be known as 'integrationist judgments'. Cases such as *Van Gend en Loos*, *Costa*, *Handelsgesellschaft*, *Dassonville*, and *Cassis de Dijon*, stand out for their contribution to articulating the scope of the free, non-discriminatory movement of goods, a cornerstone of any REC.<sup>7</sup> Third, the EU experience

3 For a more expansive and current analysis of the EAC see Emmanuel Ugirashebuja (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, (Leiden/Boston: Brill Nijhoff Publishers, 2017).

4 Economic Research Bureau, *Tanzania's Capacity to Participate in EAC Arrangements and Effects of EAC Treaty Provisions. Study Report for Government of the United Republic of Tanzania and UNDP* (Dar es Salaam, 1999) at 80–81, 139–140.

5 M Baregu, 'The African Economic Community and the EAC: Any Lesson from the EU?' in Rok Ajulu ed., *The Making of a Region: The Revival of the East African Community* (Midrand, South Africa: Institute for Global Dialogue, 2005).

6 Khoti Chilomba Kamanga, 'Fast-Tracking East African Integration & Treaty Law: Pacta sunt servanda Betrayed?' (2010) 3 *Journal of Africa & International Law* 697 at 698–701 [Kamanga, Fast-Tracking East African Integration].

7 Paul Craig, et al., *EU Law: Texts, Cases and Materials* (Oxford: Oxford University Press, 4th ed., 2008)

shows how the existence of an identifiable, shared fear is capable of facilitating bonding in charting out a new common destiny. In this particular case, it was apprehensions over Germany's unfettered access to the vast resources in coal and steel found in the Ruhr area.<sup>8</sup>

Fourth, the presence of 'Eurocrats' was important, a dedicated ruling elite, especially in the early years of the EEC, passionate about 'federalism'. In East Africa, an analogy would be (to paraphrase Thomas Kwasi Tieku) what could be termed '*East Africrats*', the 'drivers', 'champions' of EAC integration. Finally, the role of individuals, civil society and even political groupings is relevant. The Union of European Federalists (UEF) is nearly 50 years old, and the European Federalists Party, a Pan-European political organisation is distinguished by its agitation for a Federal Europe.

How does the EAC fare in respect to the above issues? Like the EU, the EAC has adopted a *gradualist* approach not only in terms of membership expansion, but also by adopting a fresh treaty at each major step in the integration process. Burundi and Rwanda, the first new entrants, joined the EAC eight years after the organisation's inception, thus bringing the membership to 5 from its original 3 (Kenya, Tanzania, and Uganda). A second 'enlargement' occurred in 2016, almost a decade later, with the admission of South Sudan. But Protocols, that is, fresh treaties, have been adopted at each major turn. First came the Protocol on the Customs Union in 2005, followed by one on the Common Market in 2010, and finally, on the Monetary Union in 2013. It is pertinent to mention the key challenges experts have found in respect of the Monetary Union. As one observer points out, there are three preconditions for a successful Monetary Union. These are Free movement of labour and capital, optimum currency area, and disciplined fiscal and monetary policies.<sup>9</sup> Experts have described how dissonant the general economic and fiscal situation is, and suggested that the required macro-economic convergence initiatives are still lacking.<sup>10</sup>

As for 'integrationist judgments', it may be too early for these, given the nascent stage of the East African Court of Justice. The court has been in existence for barely a decade and fully operational for a period shorter than

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at 153; D Chalmers, et al., *European Union Law* (Cambridge: Cambridge University Press, 2006) at 14.

8 Chalmers, *ibid* at 9.

9 MD Sajjabi, 'Monetary Integration in the EAC: Challenges and Prospects' (Paper presented to the Committee on Fast Tracking East African Federation, Arusha, Tanzania, 2004) at 2.

10 *Ibid*. See also BK Mkenda, 'Is East Africa An Optimum Currency Area?' (Working Papers in Economics, No. 41, School of Economics and Commercial Law, Goteborg University, 2001).

that, whereas the CJEU has celebrated its 60th anniversary already. But there are other more fundamental aspects, discussed in greater detail later in this paper.

As intimated already, the EU is notable for one major driving factor – the desire to place controls over German’s unbridled access to two key resources – coal and steel. However, the regional integration process in the EAC betrays no such shared fear of any particular State. The British colonial government prescribed regional economic integration in the last century as part of its strategy to check imperial German expansionism in the region but also to access the riches of the Kenyan and Ugandan hinterland.<sup>11</sup> Indeed, rather than coalesce in confronting a common aggressor, the EAC Partner States have at different times been at war with one another, Tanzania and Uganda in 1978/1979,<sup>12</sup> followed by Rwanda and Uganda on the territory of the DR Congo.

The conflict in the DRC, which is not an EAC Partner State, sadly, has sucked in three contiguous EAC Partner States with costly economic, social and political consequences.<sup>13</sup> Another factor that has been behind the success of the EU, but not highly visible in the EAC, appears to be a dedicated corps of technocrats. While each EAC Partner State has designated a centralised government agency (at the level of a Cabinet Ministry), matters of regional economic integration and the EAC barely surface or make it to the top of the political agenda during general elections or in Parliamentary debates.<sup>14</sup> Parallel to this is the fact that usually persons designated to lead the respective Ministry responsible for regional integration are often not career officers; they are appointed at the pleasure of the State President from among sitting Members of Parliament.

The fluidity of this situation can be seen in the number of persons who have at various periods served as Minister for EAC. In Tanzania, within the last decade or so alone, the position has been occupied by a succession of four

11 Umbricht, Multilateral Mediation, *supra* note 1 at 7–11.

12 T Avirgan, et al., *War in Uganda: The Legacy of Idi Amin* (Dar es Salaam: Tanzania Publishing House, 1983).

13 More details of the dimensions of the conflict can be found in *DRC v Uganda*, ICJ Reports, and *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07.

14 For example, in the newly launched Election Manifesto of the largest opposition party in Tanzania, *Chama cha Demokrasia na Maendeleo* (CHADEMA), the EAC is mentioned in general terms, along with SADC and the AU as institutions which a CHADEMA led Government will strive to work closely with in the context of promoting “African unity and cooperation”.



persons – Hon. Dr. Diordus Kamala. Hon. Dr. Harrison Mwakyembe. Minister, Hon. Samuel Sitta, and, as of December 2015, Hon. Dr. Augustine Mahiga.<sup>15</sup>

The EU experience also reveal a sustained and ever-growing engagement of civil society with regional integration. Just as there seems to be a deficit of ‘*East Africrats*’, one rarely encounters civil society bodies on the scale found in Western Europe, dedicated to promoting regional integration in East Africa. This is particularly worrying given the modest achievements in securing a ‘people-centred’ EAC and the peripheral role of civil society and the youth. As we point out in a subsequent section of this paper, while a number of initiatives such as the launch of an EAC Civil Society Organisation have been rolled out, it is too early to ascertain the impact of such initiatives.

### 3. THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

#### 3.1 Membership and Objectives

The provision on membership reiterates widely accepted modern day political and legal values, namely, “good governance, democracy, rule of law, ... human rights and social justice”.<sup>16</sup> The key provision in the EAC Treaty governing the nature and scope of the legal obligations of Partner States makes repeated reference to the sanctity of the objectives of the Community, and sets out the main goals (and means for their achievement). These are, a “Customs Union, a Common Market, subsequently a Monetary Union, and ultimately, a Political Federation”.<sup>17</sup> Implicit in this formulation is the concept of gradualism, which has been a cornerstone of the EU experience.

This *gradualism* is, by the way, given further emphasis by several other provisions of the Treaty, and practice. It is also worth stressing that the significance of ‘objectives’ can be gleaned from two distinct situations. Often, courts of law seek guidance by recalling the ‘objectives’ for which an organisation was created, as was the case in *Van Gend en Loos*. But also, the Vienna Convention on the

15 As a consequence of General Elections of 25 October 2015, which returned to power *Chama cha Mapinduzi* (CCM), while John Pombe Joseph Magufuli replaced Jakaya Mrisho Khalfan Kikwete, the latter having exhausted the constitutionally permissible maximum terms 2005–2010; 2010–2015).

16 EAC Treaty, art 3(3)(b).

17 *Ibid* art 5(2).

Law of Treaties, 1969, is unequivocal that “a Treaty shall be interpreted in good faith... and in light of its object and purpose”.

### 3.2 Principles of the EAC

Another matter given ample, if not exaggerated attention is the governing ‘principles of the [EAC]’ and understandably so. Two distinct provisions are dedicated to this question. In elucidating its governing principles in such elaborate fashion, the EAC Treaty stands out when compared with the constitutive instrument of the EU, which allowed the principles of EU Law to be developed subsequently and gradually by the CJEU.

The impression one gets from reading Articles 6 and 7 of the EAC Treaty is that, whereas the first cluster of principles, identified as “fundamental principles”, are of general application, and therefore hierarchically superior, in the second cluster are “principles that shall govern the *practical achievement* of the objectives of the Community” (emphasis added). Having so distinguished the two categories of principles, the crafters then proceeded to reproduce *verbatim* some of the principles found in the first group (that is, ‘fundamental principles’) in the second group (which comprises ‘operational principles’), thus creating avoidable duplicity and attendant difficulties. This is particularly the case in respect of the principles of good governance, democracy, rule of law, social justice, and human rights.

The EAC Treaty is also striking in that despite making explicit reference to, and enumerating principles of the EAC, when one combs the Treaty closely the number of principles exceeds those expressly listed in Articles 6 and 7. This includes references to “principles of international law governing relationships between sovereign States”, and to the duty “to abstain from any measures likely to jeopardise the achievement of the objectives or the implementation of the provisions of the Community”. The overarching duty to create the environment necessary to “give effect to [the] Treaty, probably forms part of this ‘addendum’ of principles, as does the implicit recognition of the customary international law principle of *pacta sunt servanda*.

In language reminiscent of the EU principles of ‘direct effect’ and ‘supremacy’ (and characteristic of a supra-national REC like the EU), the EAC Treaty is unequivocal in defining the inter-sectionality between EAC Law, on the one hand, and national legal systems of Partner States, on the other. The pertinent part reads as follows: “[EAC] organs, institutions and laws shall take precedence

over similar national ones on matters pertaining to the implementation of [the EAC Treaty]”.<sup>18</sup> Secondly, there is a provision which sets out the international legal status of Regulations, Directives, Decisions and Recommendations of the EAC Council, the “policy organ”. Its edicts, the Treaty stresses, are “binding on the Partner States... and on those to whom they may ...be addressed”.<sup>19</sup>

This discussion on the inter-sect between EAC Law, and legal systems of Partner States would be incomplete if it ignored the following provisions in the EAC Treaty. Not only is the EAC Treaty (and all subsequent Protocols) the subject of mandatory ratification, but so, too, is Presidential assent an absolute legal requirement for EAC legislation to acquire the force of law, a situation suggesting a nuanced but significant departure from the ‘direct effect’ principle. The significance of this observation lies in the fact that this type of legislative process throws EAC law into the phenomenal red tape and ornate procedures prevalent in Partner State legislative assemblies (and therefore far removed from the ‘direct effect’ some of the provisions of the EAC Treaty seem to embrace). Indeed, one of the chronic challenges confronting the EAC, is the debilitating delays in undertaking the national measures, including legislative, necessary to give effect to EAC law.

To conclude, there is no escaping that principles of the EAC (and, the maxim *pacta sunt servanda*, in particular), have been destined to assume a significant legal role, as is evident from case law of the EACJ. In a growing number of cases, litigants have founded their claims on the basis of infringement of their respective rights as protected by the “fundamental, and operational principles of the Community”. Illustrations can be found in the *Hon. Sitenda Sebalu v Secretary General of the*,<sup>20</sup> *Mary Ariviza & Okotch Mondoh v Attorney General of the Republic of Kenya*,<sup>21</sup> *Plaxeda Rugumba v Secretary General of the EAC*,<sup>22</sup> *Mbugua Mureithi wa Nyambura v Attorney General of the Republic of Uganda and Attorney General of the Republic of Kenya*,<sup>23</sup> and, *Mbidde Foundation Ltd and Rt Hon Margaret Zziwa v Secretary General of the EAC et al.*<sup>24</sup>

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18 *Ibid* art 8 (4).

19 *Ibid* art 16.

20 East African Court of Justice, Ref. No. 1, of 2010.

21 East African Court of Justice, Ref. No. 3 of 2010.

22 East African Court of Justice, Taxation Cause No. 8 of 2013.

23 East African Court of Justice, Ref. No. 11 of 2011.

24 East African Court of Justice, Application No. 5 of 2014.

## 4. CHALLENGES CONFRONTING ECONOMIC INTEGRATION IN EAST AFRICA<sup>25</sup>

### 4.1 The EAC Development Strategy

The EAC Development Strategy, the pre-eminent policy text of the EAC, offers unique insights into the general issue of ‘challenges’. Most notable of these are: fragility of democracy in the sub-region; absence of a crystal clear, shared ‘vision’; weak alignment of policies, plans, laws and regulations of the EAC, on the one hand, and those of the Partner States, on the other; popular participation deficit; limited institutional capacity; low industrialisation; “low implementation rate of [EAC] decisions”; and “inadequate capacity for coordination, implementation and monitoring and evaluation mechanisms”.

### 4.2 Zanzibar and the EAC

Another key challenge which may be termed as being of a ‘constitutional nature’ relates to the position and role of Zanzibar within the EAC legal architecture.<sup>26</sup> There is hardly any dispute that what is now the United Republic of Tanzania (URT) is the result of a ‘union’ between two sovereign entities: Tanganyika (present day Mainland Tanzania), on the one hand, and the Isles of Zanzibar and Pemba, as personified by the Government of the Revolutionary Council, on the other. Despite the ruling of the Court of Appeal of the URT in *Machano Khamis Ali et al.*,<sup>27</sup> debate persists as to whether Zanzibar is a ‘State’ in the eyes of international law, and by extension, entitled to individual membership (or some other kind of representation, along with the URT) in Intergovernmental Organisations (IGOs) such as the EAC. This debate is an enduring one, going back several decades. Curiously, Zanzibar does not feature in any substantive way in any of the early scholarly works which made a comprehensive review of regional economic integration in the EAC.<sup>28</sup> Even more intriguing is the ERB

25 For a more detailed discussion see Juma V Mwapachu, *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (E & D Vision Publishing, 2014), especially ‘Part One’.

26 JE Ruhangisa, ‘Regional Integration in Africa with Specific Focus on the East African Community’ (2011) 1 *Zanzibar Yearbook of Law* 129–153 [Ruhangisa, ‘Regional Integration in Africa’]; Mahadhi Juma Maalim, ‘The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar’ in TGCL Research Series 2, University of Dar es Salaam School of Law, 2014.

27 In the Court of Appeal of Tanzania at Zanzibar, Criminal Appeal No. 8 of 2000.

28 SM Wangwe, ‘Economic Integration in Southern Africa: Towards Cost and Benefit Analysis for

study<sup>29</sup> which, while acknowledging the peculiar situation of Zanzibar within the EAC, eschews the fundamental issue of Zanzibar's constitutional status.

This is even more intriguing bearing in mind that at the time of the ERB study's publication (in March 1999) several major public reports were in circulation, each dealing in sufficient detail with the 'Zanzibar question'. These were the 'Nyalali Commission' and the 'Kisanga Committee', or, the Report of the Commission for the Single and Multi-Party System in Tanzania, 1991, and the Report of the Committee for the Collection of Views on the Constitution, 1999, respectively.<sup>30</sup>

Rather than accepting to be swept away from the national constitutional discourse, the 'Zanzibar question' has held its ground.<sup>31</sup> It has not only resurfaced in the nation's high politics, but also triggered unprecedented public debate and scholarly works.<sup>32</sup> The highlights of the contemporary constitution making process probably began with the enactment of the Constitutional Review Act, in 2011, the inauguration of the Constituent Assembly on 18 February 2013, and the presentation of the Draft Constitution (more widely known as the 'Warioba Draft') before the Constituent Assembly, by the Chairperson of the Constitutional Review Commission, Judge Joseph Sinde Warioba on that fateful day of 18 March 2014. Such was the dispute and acrimony in the august house that a group of members of the Constituent Assembly walked out on 16 April 2014, in protest against the rejection of the 'Warioba Draft', under a loose coalition better known by its Kiswahili acronym (*Umoja wa Katiba ya Wananchi – UKAWA*).

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Tanzania' (Seminar Paper, African Development Bank, Dar es Salaam, 1995); WM Lyakurwa, et al., *A Regional Integration Study of East Africa: Tanzania Country Report* (Dar es Salaam, 2002).

29 Economic Research Bureau, *Tanzania's Capacity to Participate in EAC Arrangements and Effects of EAC Treaty Provisions. Study Report for Government of the United Republic of Tanzania and UNDP* (Dar es Salaam, 1999) at 138-140.

30 M Baregu, 'The African Economic Community and the EAC: Any Lesson from the EU?' in Rok Ajulu ed., *The Making of a Region: The Revival of the East African Community* (Midrand, South Africa: Institute for Global Dialogue, 2005).

31 F Jjujjo, et al, eds., *Federation Within Federation: The Tanzania Union Experience and the East African Integration Process, A Report of Kituo cha Katiba Fact-Finding Mission to Tanzania* (Kampala: Fountain Publishers, 2010); Yahya K Hamad, 'The State of Constitutionalism in Zanzibar: 2008' in K Kamanga ed. *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2008* (Kampala: Fountain Publishers, 2010).

32 GM Fimbo, Tuijadili Katiba Inayopendekezwa, University of Dar es Salaam School of Law, 2014; T Maliyamkono, et al., eds., *One Hundred Academics' Search for Katiba Bora Tanzania* (Dar es Salaam: ESAURP, 2014).

This unique situation, bordering on a political crisis, despite giving rise to two court cases, did not prevent the remaining Members of the Constituent Assembly from proceeding to adopt a fresh draft (*'Katiba Inayopendekezwa'*) in October 2014.<sup>33</sup> However, the envisaged constitution review process was never able to run the full circle of definitively giving the nation a new Constitution, perhaps on account of the constitution review process colliding with the October 2015 general elections itinerary. As a last and final step, the Constitution Review Act prescribes putting the Draft Constitution through a referendum and subsequent promulgation of the new Constitution.

What is pertinent for this study is that the 'Warioba Draft' recommended, among others, a three-tier government (i.e. including autonomous governments for Tanzania Mainland, and Zanzibar). To the contrary, the contemporary draft adopted by the Constituent Assembly (*'Katiba Inayopendekezwa'*) retains the existing two-tier government – one for Zanzibar, plus the Union Government. In so doing, the existing ambiguity and complications with regard to Zanzibar's constitutional status and its relationship with the EAC, rather than having been put to rest, will in all likelihood continue to remain a festering wound.

It is equally worth noting the stand-off between the ruling party, CCM, on the one hand, and its single largest challenger, UKAWA, on the issue of the constitution review process. While CCM appears content with the existing Draft Constitution (*'Katiba Inayopendekezwa'*), UKAWA has made it quite clear that it intends to pursue the issue of giving the nation a new constitution as one of its major planks in the post general election period.<sup>34</sup>

### 4.3 Resource Mobilisation and Broader Implications

Resource mobilisation and 'ownership' by Partner States represents another patent challenge. In an interview, the then EAC Secretary General repeatedly stressed how acute the issue of resource mobilisation is (and continues to be).<sup>35</sup> One encounters similar concerns in several key EAC documents, including the EAC Annual Report, the EAC Development Strategy, EAC Partnership Fund Annual Reports, and more notably, in EAC Budget Speeches by the Chairperson of the Council of Ministers. This is also evident from the budget

33 Fimbo, *ibid.*

34 'UKAWA, Warioba and CA Victors: Is the Battle Over?' (The Citizen, 3 October 2014).

35 Interview with Ambassador Juma V Mwapachu, the then Secretary General of the EAC, Arusha, 22 November 2010.

estimates of the organisation (summarised in Table I) over the last 5 to 6 years, with the year-on-year increases at times spiking as high as 41%.

**Table I: EAC Budget Estimates for the Financial Years 2009/2010 – 2014/2015**

FINANCIAL YEAR	TOTAL AMOUNT (USD)	PERCENTAGE CHANGE
2009/2010	54,257,291	–
2010/2011	77,664,443	+11%
2011/2012	109,680,319	+41%
2012/2013	138,316,455	+26%
2013/2014	130,429,394	–6%
2014/2015	USD 124,069,625	–5%

Source: Researcher

#### 4.4 Subscription Formula and Implications

In the considered opinion of the Secretary General, the prevailing arrangement by which Partner States contribute in ‘equal’ amounts is simply untenable, and a major determinant of one of the ten major weaknesses identified in the EAC Development Strategy.<sup>36</sup> It was revealed to me that, in the 2010/2011 financial year, 48% of the EAC budget was derived from donations made by foreign governments and institutions, in particular, the EU. And, that membership subscriptions barely suffice to cover staff remuneration and related administrative costs, leaving no funds for running development-orientated programmes and projects. As captured in Table II below, all the five Partner States were at the time in significant arrears with their respective subscriptions.

<sup>36</sup> Indeed, there is evidence that the issue of the EAC subscription formula continues to be a festering wound. See for example ‘Rwanda, Burundi reject equal funding’, *The East African* (Dar es Salaam), May 20 – 26, 2017, p 6.

**Table II: Status of Partner States Annual Subscriptions**

	<b>PARTNER</b>	<b>ARREARS (USD Millions)</b>
	<b>STATE</b>	
1	Burundi	11,461,131.00
2	Tanzania	8,629,775.00
3	Kenya	6,160,510.00
4	Rwanda	6,150,674.00
5	Uganda	3,106,458.00
	<b>TOTAL</b>	35,508,548.00

**Source: Researcher**

#### **4.5 Opinion of the Council of Ministers**

As intimated, EAC Budget Speeches present yet another opportunity to ascertain the status of resource mobilisation in the organisation. Highly pertinent observations were made by Hon. Monique Mukaruliza, Rwanda's Minister for the EAC, and Chair of the Council of Ministers, in her remarks in respect of the financial year 2009/2010. In her assessment, the "percentage ratio of remittances to total budget by the Partner States stands at 73%" which is not surprising, given the prevailing "low performance in timely remittances of budget contributions by most Partner States".<sup>37</sup>

#### **4.6 'Donor Dependence Syndrome'**

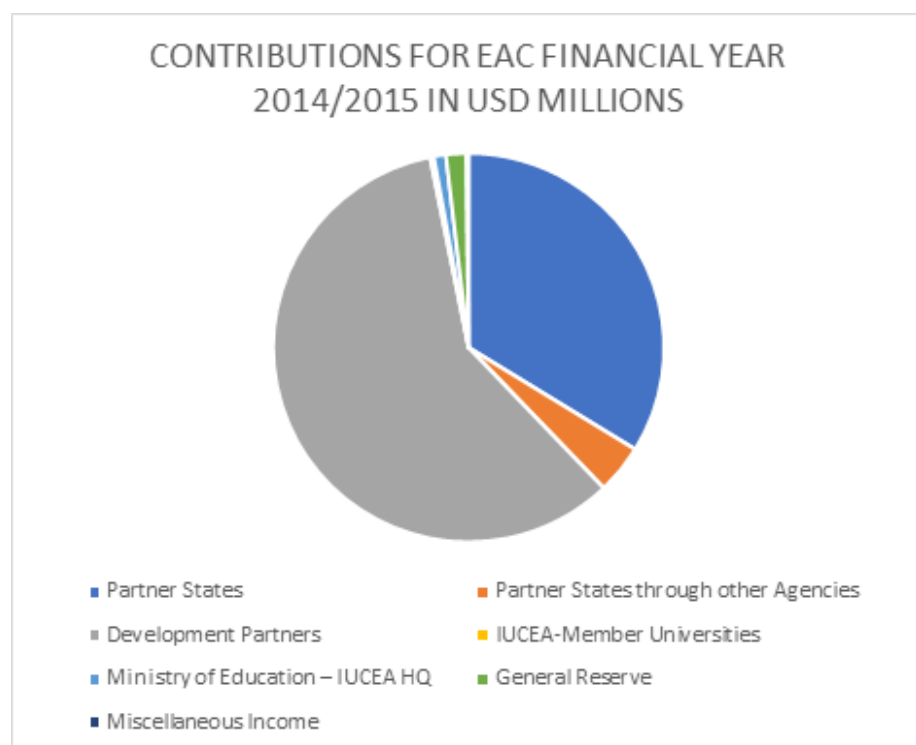
A sluggish pace in remittances is not the end of the financial woes of the organisation. The situation is complicated even further by a visible over-dependence on financial support from the so-called donor community. Such was the pre-eminent role of external funding, that Mukaruliza conceded "[h]ad it not been for funding from Development Partners, many EAC projects and programmes would not have been implemented". This parasitic relationship was seen as compromising "sustainability of the regional integration process" and more pertinently, "ownership" of the process.

<sup>37</sup> EAC, Budget Speeches of the Council of Ministers for the financial years: 2009/2010; 2011/2012; 2012/2013; 2013/2014; 2014/2015.



Two clear trends stand out when one examines the EAC Budget Speeches for the period 2009/2010–2014/2015. In the majority of instances, the quantum of external financial aid from ‘Development Partners’ either nearly matches that which is contributed by the EAC Partner States (2009/2010, and 2010/2011), or the contribution of the former outstrips that of the EAC Partner States (2012/2013, 2013/2014, 2014/2015).

The following pie chart attempts to summarise the details found in those Budget Speeches.



**Source: Researcher**

It needs to be stressed that donor funding is also associated with two major threats: on the one hand, rarely is the pledged amount released in full, in fact only 70%. On the other hand, funds are always released with a 5–6 month delay, thus complicating “fund absorptive capacity” which stood at 74%.

#### 4.7 A ‘People-Centred Community’?

There is no escaping from the fact that the absence of ‘popular participation’ lies at the heart of the collapse in 1977 of regional economic integration, and cogent proof can be found in the preamble of the EAC Treaty, 1999. Incidentally, it goes to explain the motivation for elevating the aspiration for a “people-centred EAC” to an “operational” principle of the EAC. The EAC Treaty is quite candid in its acknowledgement of how the ‘downstream’, ‘top-down’ architecture of the 1967 Community proved to be an Achilles heel for integration, and ultimately contributed to the Community’s collapse in 1977. But at the same time, while the principles of ‘asymmetry’, ‘complementarity’, ‘subsidiarity’, and variable geometry’ (which form part of the list of ‘Operational Principles’), are elaborated in the ‘Interpretation Clause’, we are left guessing at what precisely is the meaning to be attached to a “people-centred” EAC. In turn, this has prompted us to propose that perhaps a sound and fair approach to interrogate whether the EAC is now more “people-centred” is by investigating to what extent, if any, there is popular participation in the most politically, and socially, decisive processes within the EAC,<sup>38</sup> which takes us to the status of one key cluster of constituencies.

#### 4.8 Civil Society and Youth

As we have pointed out already, not only was deficit of popular participation a major determinant of the collapse of East African Cooperation in 1977, but a ‘people-centred Community’ was embraced by the EAC Treaty, 1999, as a major tenet of the new integration roadmap. There is the further argument that ‘people’ means the respective citizens of the five Partner States, with civil society and youth standing out as among the most strategic components. Youth, in particular, are not only the sub-region’s single largest social group, but the most energetic section of the work force. According to one estimate, by mid-2012, East Africa’s population stood at 144 million. Of this, those who belong to the ‘youth’ age group (i.e. 15 – 35 years) account for 35 – 45%.<sup>39</sup>

Given the wide acknowledgement of civil society as a key stakeholder in matters of governance, on the one hand, and the numerical as well as socio-economic significance of youth, on the other, one would expect to find that

38 AfriMap, et al., *Towards a People-Driven African Union: Current Obstacles & New Opportunities* (2007).

39 Society for International Development, *The State of East Africa 2013* (2013).

ample attention is given in the EAC Treaty to both civil society and youth. In reality, it requires some effort to locate elaborate, focussed provisions dedicated to these two constituencies. While a number of provisions are cited as being relevant, on close inspection it is only one provision which stands the test of being expressly dedicated. This is what distinguishes Articles 120, 128 and 129 on the one hand, from Article 127, on the other. Article 127 stands out as being part of Chapter 25 of the EAC Treaty, and is entitled ‘The Private Sector and the Civil Society’ (*sic*). The subtitle to Article 127 is explicit. It reads: ‘Creation of an Enabling Environment for the Private Sector and the Civil Society’. In contrast, Articles 120, 128 and 129 do not have the issue of either civil society or youth as their explicit concern. The first of the three is dedicated to the broad issue of ‘Social Welfare’, while the second and third have as their respective focus the ‘Private Sector’ and ‘Cooperation among Business Organisations and Professional Bodies’.

At the other extreme, one cannot help noticing that Article 127 is found at the tail end of the EAC Treaty (suggesting a diminished significance), being in Chapter 25 of the Treaty’s 29 Chapters. Even more importantly, close scrutiny of the above four provisions reveals that the context and focus of the provisions in question is far removed from facilitating or enhancing popular participation (which is the focus of the present discussion), and therefore far from being a strategy for creating a ‘people-centred Community’.<sup>40</sup> The gaps in the content of Article 127 do not end there. Although it is the only provision expressly dedicated to civil society, it suffers from two significant handicaps. It opens with the formulation that “Partner States agree to provide an enabling environment for the private sector and the civil society” a language quite distinct from that found within the same provision, where the Treaty is explicit in stating the nature, and binding nature of a duty: “The Secretary General *shall* provide the forum for consultations between the private sector, civil society organisations ...” (emphasis added).

To be fair, in recent years a fair amount of effort has gone into public awareness, but also towards facilitating greater inclusion of the East African citizenry in the EAC policy and decision-making processes. For example, there are publications aimed primarily at a general readership, and a Consultative Dialogue Framework (CDF) has been launched, which has the real and genuine potential for facilitating, and even institutionalising, popular participation, and therefore giving meaning to the principle of a ‘people-centred Community’.

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40 AfriMap, *supra* note 38.

According to the EAC, this framework is meant to facilitate “participation in the activities of the Community at all levels”, including engagement with “the various organs of EAC such as EALA, EACJ, EAC, Secretariat...” The adoption of an EAC Youth Policy is another major landmark, as is the launch of the EAC University Students Debate series, along with the EAC Youth Ambassadors’ Platform.

#### 4.9 ‘Coalition of the Willing’: The Paradox of ‘Variable Geometry’

‘Variable geometry’ constitutes one of the operational principles of the EAC, and is defined by the EAC Treaty as “flexibility which allows for progression in co-operation among sub-groups of members in a larger integration scheme in a variety of areas and at different speeds”. Ostensibly, on the basis of this tenet, the presidents of Kenya, Rwanda and Uganda (to the exclusion of Burundi and Tanzania) held three successive summit meetings, beginning in 2013, to create the ‘Tripartite Initiative for Fast Tracking the East African Integration’, more commonly referred to as ‘Coalition of the Willing’ (CoW).<sup>41</sup>

It needs noting that this principle has been the subject of an Advisory Opinion of the EACJ.<sup>42</sup> Before the EACJ were the following questions. First, whether variable geometry is in harmony with the requirement for consensus in decision-making. Second, whether variable geometry can apply to guide the integration process, the requirement on consensus in decision-making notwithstanding. And, finally, whether the requirement on consensus in decision-making implies unanimity of Partner States.

Essentially the court’s interpretation was that if applied appropriately, the principle of variable geometry and the requirement of consensus are not necessarily in contradiction to one another. Whereas consensus is an absolute requirement and a “decision-making mechanism in Summit, Council, and other executive organs of the Community”, variable geometry serves as “a strategy for implementation”.<sup>43</sup> This pronouncement, while allowing greater understanding of the notion of variable geometry, does not provide sufficient

41 K Gastorn, ‘Variable Geometry, Coalition of the Willing and the Destiny of EAC’ (Paper presented at the 2nd Forum of the African Union Commission on International Law on ‘Law of Regional Integration in Africa, Addis Ababa, 11-12 November 2013).

42 East African Court of Justice, *In the Matter of a request by the Council of Ministers of the EAC for an Advisory Opinion*, Application No. 1 of 2008.

43 *Ibid* at 29.

guidance on another key issue, which is whether a handful of States can adopt this ‘implementation strategy’ in respect of issues which are the subject of an earlier ‘consensual decision’, and on matters falling squarely within EAC Protocol obligations to the isolation of some Partner States (in essence the observation of President Jakaya Kikwete when addressing the Tanzania National Assembly on November 7, 2013).

Ally Hatibu and two other applicants had approached the EACJ<sup>44</sup> seeking clarification of this and related issues, but the application was inexplicably withdrawn and the opportunity to hear the Court’s position was allowed to pass.<sup>45</sup>

All said, there are two other matters that warrant attention. The first is the principle of asymmetry, which, like that of variable geometry, is listed in Article 7 of the EAC Treaty as one of the ‘operational principles of the Community’. Asymmetry has the additional significance of being a tool for dealing with one major determinant of the collapse of the erstwhile 1967 Treaty initiative – “disproportionate sharing of benefits of the Community among the Partner States due to the differences in their levels of development...”<sup>46</sup> It would appear that unbridled variable geometry in a situation of historic, real and significant variations among Partner States could prove detrimental to economic integration.<sup>47</sup> This perhaps is the context in which some observers have taken a rather pessimistic stand on the merits of variable geometry.

Related to this is the issue of another obligation found in the EAC Treaty, which has not been adequately discussed. The provision in question is Article 8(1)(c). It obliges EAC Partner States to “abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of [the EAC Treaty]”. In other words, rushing to claim that CoW is consistent with variable geometry would appear to be legally insufficient, since an implementation strategy cannot be allowed to run in the face of a residual treaty obligation, in particular the one enunciated in Article 8(1)(c).

44 East African Court of Justice, Ref. No. 9 of 2013.

45 Gastorn, *supra* note 41 at 52–53.

46 EAC Treaty, Preamble.

47 Walter Odhiambo, *Equity Issues in Regional Trade Arrangements: The Case of the East African Community* (Institute for Development Studies, Nairobi, 2004).

## 5. ORGANS OF THE COMMUNITY

The main organs of the EAC are the Summit, the Council of Ministers, the Secretariat, the Legislative Assembly (EALA), and the Court of Justice (EACJ). The Council of Ministers is not only the “policy organ of the Community”. Its edicts (Regulations, Directives, Decisions, and Recommendations) “shall be binding on the Partner States, on all organs and institutions of the Community”. The Secretariat, according to the EAC Treaty of 1999, is “the executive organ” and the Secretary General is the “principal executive officer of the Community”. While it may be premature and even unwarranted to draw parallels between the EAC Secretariat and the European Union Commission, it is inconceivable how EAC integration will ever fully flourish as a Monetary and Economic Union, leave alone a Political Federation, without a shared political and administrative nerve centre appropriately resourced, and sufficiently empowered, as is the case with the EU Commission. As one observer aptly notes, the EU Commission is not only the ‘driving force’ of EU policies, but is the starting point of every major EU initiative.<sup>48</sup>

For its part, the Legislative Assembly assumes unique importance in examining the issue of a “people-centred” Community on account of two factors: its traditional and conventional role of law making, and the broad ‘social representativeness’ of its composition. Another key organ is the EACJ. Like the EALA, and as in any political entity, the judiciary is a major constitutional pillar. In the context of the EAC, the “interpretation and application of [the EAC] Treaty” is within the exclusive jurisdiction of the EACJ. Let us now direct our attention to the issue of unravelling how much room exists, if any, for ‘popular participation’ in respect of each of these four organs of the EAC, even if briefly. We begin with the EAC Secretariat.

### 5.1 Secretariat of the Community

An analysis of the EAC Treaty, clearly marks out the Summit and the Council of Ministers as exceptionally important organs. However, while in theory matters get onto the agenda of either of the above two organs on the initiative of the EAC Coordination Committee, in practice all major strategic programmes and projects are initiated by the Secretariat. The centrality of the Secretariat to the proper and effective functioning of the EAC is widely acknowledged to

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<sup>48</sup> Klaus-Dieter Borchardt, *The ABC of European Union Law* (Brussels: EU, 2010) at 64.

the point of advocating for an expanded mandate.<sup>49</sup> Now, curiously, nowhere in the EAC Treaty do we find structural or procedural mechanisms providing for popular participation in its decision-making processes. In all fairness, the Consultative Dialogue Framework (CDF) has the potential to create a ‘bridge’ between the institution, and the East African citizenry. However, there exist no thorough, sustained empirical studies of the matter as yet.

## 5.2 East African Legislative Assembly (EALA)

The EALA is an equally vital organ with regard to policy and decision making within the EAC, but its work is compromised by the weak state of harmonisation between EAC law, on the one hand, and the laws of the Partner States on the other.<sup>50</sup> As the “legislative organ” of the Community, its potential for giving effect to the principle of a “people-centred” EAC is real and considerable.

However, if the EALA is to accomplish this, a number of hurdles have to be recognised and addressed. First is the circumscribed manner in which the Parliament’s functions are set out in the EAC Treaty, especially in respect of safeguarding the Parliament’s autonomy and effectiveness in the context of the separation of powers.<sup>51</sup> Second, there is the manner in which the EALA members are elected, which is not by direct, popular ballot (that is, by universal suffrage: EAC Treaty, 1999). A third, and related constraint, is the ‘representativeness’ of the EALA. The EAC Treaty is quite clear here, to the extent that it does not confine representation in the EALA to “various political parties represented in the [respective National Assemblies of Partner States]”.<sup>52</sup> Rather, the EAC Treaty takes a far more inclusive approach, by including “shades of opinion, gender, and other special interest groups” found in Partner States. Not surprisingly, the ‘unrepresentativeness’ (and therefore legitimacy) of the EALA has already been the subject of several petitions filed at the EACJ.

In *Anyang’ Nyong’o*,<sup>53</sup> the applicants, drawing authority from Article 50 of the EAC Treaty, contended that “the process by which the representatives of the Republic of Kenya to EALA were nominated was incurably and fatally flawed

49 Ruhangisa, ‘Regional Integration in Africa, *supra* note 26.

50 *Ibid.*

51 Adams Oloo, ‘East African Legislative Assembly and the National Assemblies of Partner States: Conflict or Harmony?’ (Paper presented to the International Conference on the EAC, Naivasha, Kenya, 2004).

52 EAC Treaty, art 50.

53 East African Court of Justice, Reference No. 1 of 2006.

in substance, law and procedure”. In a development that is likely to foster respect for the principle of rule of law and accountability by high ranking EAC officials, the EALA was able to obtain the removal of the EALA Speaker, the Right Honourable Margret Nantongo Zziwa. The enquiry team found Hon. Zziwa guilty of misconduct, contrary to the EAC Treaty, on the basis of which a recommendation was made calling for the Speaker’s immediate removal from office.

### 5.3 East African Court of Justice (EACJ)

Besides its binding judgments, and the fact that its decisions “on the interpretation and application of the [EAC] Treaty shall have precedence over decisions of national courts on a similar matter”, the EACJ is empowered to issue Advisory Opinions and Interim Orders. At the outset, it is critical to recall the *obiter* of the EACJ in *Mwatela v EAC*, where it was stated, *inter alia*, that “the Assembly is a representative organ in the Community set up to *enhance a people-centred cooperation*, its independence under Article 16 of the Treaty should be preserved because the Treaty has not endowed the *Council with any power to interfere* in the operation of the Assembly” (emphasis added).<sup>54</sup>

We need to recall that within the EU, the European Court of Justice has distinguished itself for its sterling work in determining the direction and even pace of the integration process, largely through what have come to be known as ‘*integrationist judgments*’.<sup>55</sup> In my interview with the EAC Registrar in 2010, the Court’s numerous achievements were pointed out. They included a robust staff recruitment initiative, specialised training for judges (on arbitration and ICT) and staff, acquisitions for the library, and an ever-increasing case load.

In a legally and politically controversial amendment to the EAC Treaty, the EACJ has not only assumed a bifurcated structure, with the original unicameral structure giving way to a bicameral structure, with a Court of First Instance and an Appellate Division, but it has also expanded the grounds for removal, which is notable given the far-reaching consequences of this for the existing arrangement. Not only is the appointment of a judge exposed to the whims of the Executive arm in the respective Partner States, but so too is the judge’s tenure. A judge may be suspended for infringement of his own country’s laws, infringements which are defined in the broadest fashion imaginable.

<sup>54</sup> Quoted in *East Africa Law Society Practice Manual Series*, No. 5, 2007, at 15.

<sup>55</sup> Kamanga, *Fast-Tracking East African Integration*, *supra* note 5 at 702-703.



This situation holds the possibility of the Community finding itself with a bench whose occupants would lack the professional boldness to deliver judgments which are unpalatable to some national executives (as was the case in *Anyang' Nyong'o* in a bench comprised of JJ Warioba, Ramadhani, Mulenga, ole Keiwua, and Mulwa), but which are otherwise openly '*integrationist judgments*'.

In a remarkable revelation, the Registrar raised the issue of the "sovereignty syndrome", which is reflected in the seemingly consistent pattern of reluctance to acknowledge the EACJ as the principal adjudicatory forum for matters pertaining to the EAC Customs Union, and the Common Market. The Registrar maintained that several Partner States have proceeded to vest jurisdiction over the EAC Customs Union, and the EAC Common Market, in quasi-judicial national bodies. His conclusion from this was that Partner States' confidence in the EACJ remains questionable. This is hardly a far-fetched claim. The EAC Protocol on the Customs Union, for example, creates a 'Committee on Trade Remedies' as a dispute resolution mechanism over a wide range of trade-related matters, and in that way, reduces the chances of trade disputes coming before the EACJ. The end result is likely to be retarded growth of jurisprudence of the court. Again, there is a sharp contrast with the situation within the EU where disputes (related to infringements of EU Law) allow for no 'forum shopping'.

Not unrelated to the previous challenge is that of 'parallel jurisdictions'. This, the Registrar explained, is largely on account of the multiple membership of RECs (for instance, COMESA and SADC) which one finds among EAC Partner States. In the event of a dispute this, again, gives rise to 'forum shopping'. However, the challenge the Registrar was at pains to share, was the following. It is associated with the EACJ's "*ad hoc*" status. According to the EAC Treaty, judges appointed to the EACJ "shall serve on an *ad hoc* basis" and this situation shall continue "until such time as the Council determines" otherwise. But of all the challenges facing the EACJ two stand out: insufficient jurisdiction in disputes relating to EAC law; and erosion of existing jurisdiction through the establishment of parallel dispute resolution mechanisms within the EAC itself.<sup>56</sup>

## 5.4 Council of Ministers

This organ, like the Summit, sits at the very apex of the EAC architecture, but neither of them are accessible to the citizenry in any direct, meaningful

56 Ruhangisa, 'Regional Integration in Africa, *supra* note 25.

or institutionalised manner. The Council is listed among the principal organs of the EAC, trailing only behind the Summit.<sup>57</sup> Its members are the respective Cabinet Ministers of Partner States with responsibility for matters of the EAC, and its functions are not only elaborate, but openly describe the Council as the “policy organ” and thus very high up in the decision-making processes of the EAC.<sup>58</sup> All (subordinate) executive organs, that is, the Coordination Committee, Sectoral Committees, and the Secretariat have no access to the Summit save through the Council.<sup>59</sup> In further appreciating the centrality of the Council, one has to take into account the binding nature of its edicts on Partner States, all principal organs of the Community (save the Summit, the EACJ and the EALA, within their respective areas of competence).<sup>60</sup>

However, and pertinently, the Council’s decision-making processes make no room for involvement, leave alone meaningful and institutionalised participation, of the citizens of East Africa. While receiving instructions from the Summit, the Council, at the other extreme, can only be addressed by the Coordination Committee, Sectoral Committees, and the Secretariat. A reading of the EAC Treaty would suggest that neither the EACJ nor the EALA have direct access to the Council save through the Secretariat.

A discussion of the Council would be incomplete without considering case law of the EACJ, especially *Mwatela v EAC*,<sup>61</sup> in which, most pertinently, the court was seized with the matter of the relationship of the Council and the Assembly with regard to the sensitive question of enactment of legislation, and in that way defining the scope of the ‘policy-making’ function of the Council.

## 6. CONCLUSION

This paper set out to map the major achievements and challenges of the EAC. As for achievements, high on the list is the EAC’s sheer survival, having outlived the erstwhile East African Cooperation of 1967–1977, by a handsome five years. There has also been an evident consolidation and growth of the legal framework, as well as organs and institutions, especially the EALA and the EACJ. The EAC has succeeded in attracting considerable and sustained financial support from its

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57 EAC Treaty, art 9.

58 *Ibid* art 14(1).

59 See e.g. *Ibid* arts 18(a), 21, and 67(3)(d).

60 *Ibid* art 16.

61 East African Court of Justice, Case No. 1 of 2005.

‘Development Partners’. Ironically, ‘over-dependency’ on external benefactors may in a way also serve as a measurement of ‘donor confidence’ in the potential and prospects of the EAC.

The EAC Treaty, the bulwark of the EAC’s legal framework, although not spared from gaps, is overall a fairly comprehensive, forward-looking legal text. It is explicit with respect to ‘objectives’ and is equally unambiguous about the ‘means’, which is *gradualism*. ‘Principles of the Community’ have been given attention, while powers of the ‘main organs’ have been demarcated.

Not surprisingly, there are challenges,<sup>62</sup> most of which the EAC itself is bold enough to acknowledge. The most fundamental of these, in our view, is the governance deficit, on account of the fact that it is not a “people-centred Community” (the absence of which was the bane of the 1967 EAC), despite the inauguration of the Consultative Dialogue Framework (CDF). Resource mobilisation continues to be a chronic problem, largely on account of over-dependency on ‘donor funding’, coupled with an unrealistic subscription formula.

Casting his gaze widely, Ambassador Mwapachu (the former Secretary General of the EAC) concludes that “the story of African regional integration, to date, is predominantly a sad one”, largely on account of the absence of “supranational decision-making authority”, with Partner States typically wanting to eat their cake and keep it, all at the same time.<sup>63</sup> So, ironically, one is filled with optimism when considering achievements, but caution if challenges are taken on board. Hopefully, forthcoming anniversaries of the EAC will allow a more unequivocal verdict on the achievements and challenges confronting it.

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62 Henry Kyambalesa & Mathurin C Hounnikpo, *Economic Integration and Development in Africa* (Aldershot: Ashgate Publishing Company, 2006); Mwapachu, *supra* note 24.

63 Mwapachu, *Ibid* at 16-27.



# COMPARATIVE LAW AS A BASE FOR REGIONAL HARMONISATION

ULRICH SPELLENBERG\*

## 1. DIVERSITY AND COMPARISON OF LAWS

We know that the many laws throughout the world are different, but the causes of these differences have ever been a matter for debate. The famous 18th century lawyer and sociologist Montesquieu believed that climate played an important role. This theory, which by the way had already been advanced in ancient Greece, does not explain why laws can be changed while the general climate remains constant. I believe that the actual state of any given system of law is the result of much historical and political accident. We may to a certain extent be able to explain why things came to be as they are now, but we can rarely prove that they could not have been different, or how they will develop in the future.

The comparison of laws as a science has no other purpose than to enlarge our knowledge of how and why laws are different, and to satisfy our curiosity, says Sacco.<sup>1</sup> That does not exclude the possibility of using the information we gather in comparative law for practical purposes, *inter alia* for the integration or harmonisation of laws. And we may even start a comparison for this purpose. But the comparison never tells us what we should do; it only gives us the information necessary to decide reasonably. Optimists say that, at least in financial matters, legal systems usually arrive at the same results although by different routes, but that is much too global a view.

It is believed that differences in local laws can hamper importation and exportation or, to put it more generally, the free movement of persons, goods and money, and that a wider market would be advantageous for all. Two ways to remove the legal barriers are possible: unification of the national laws or the creation of a special law for international exchanges, leaving the national laws

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1 Rodolfo Sacco, *Einführung in die Rechtsvergleichung* (Baden-Baden: Nomos Repr. 2011) at 16; Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung* (Tübingen: J.C.B. Mohr, 3rd ed., 1996) at 14; Kischel, *Rechtsvergleichung* (München: C.H. Beck, 2015) at 3.

to govern internal exchanges. For both we have examples that merit attention before we engage in theorising.

## 2. SOME HISTORICAL REMARKS

Comparative law may be useful not only to harmonise laws in regional economic communities but also to modernise and integrate a purely national law. When in 451BC the Roman senate charged ten wise men to establish a written law for Rome, these men, it is said, first travelled to Greece where Athens and Sparta had already had legal codes for about 150 years. Whether they adopted much from these codes is not known, because there is little reliable information about the text of this early Roman law, but the idea of first looking abroad is interesting.

When the Roman Emperor Justinian had the Roman law restated in the famous *Corpus Juris Justinian* in the sixth century, he aimed to produce a consolidation of what was at that time the Roman law by verifying the sources and seeking to eliminate contradictions and outmoded rules. There was no external comparison simply because for Justinian there was no other law than the Roman.

Internal consolidation and harmonisation were accomplished when Frederick II, German Emperor and King of Sicily, caused to be reduced to writing the law of his kingdom of Sicily, which until then had consisted of numerous local laws. However, this text also contains some quite new and “modern” legislation.<sup>2</sup>

In the territories that later became known as France and Germany, the Germanic tribes brought all their own customary laws and continued to live by them when they settled there from the fifth century AD onwards after their great migrations. But when these laws were later put into writing some elements of the Roman legal tradition were included, partly because these were laws followed by the autochthonous people of Gaul, and partly because the new regional kings tried to use the old Roman administrative structures. These Germanic kingdoms disappeared later, especially under Charles the Great. Along with the German customs Roman law continued to apply in the south-eastern part of France.

In the middle of the 15th century, the French king commanded that the customary laws be collected and put into writing. This had an interesting

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2      *Constitutiones of Melfi*, 1231.

consequence. The lawyers of the 16th and 17th centuries found principles that were said to be common to all the customary laws. They were found by interpretation and comparison. The finding had a political motive because these lawyers proposed not to resort to Roman law, as had been the rule in cases of lacunae in the customs, but to apply these common Frankish customary principles. The majority of these lawyers supported the central power of the kings that had been established in the 15th and 16th centuries, and they fought against the Roman law preferred in the southern regions because these regions were constantly striving for independence.

A similar development did not take place in Germany because of the fact that there were no contemporary restatements of the local laws, and the old laws from the 12th century and earlier were no longer suitable. Roman law was more attractive because it was taught in the universities, especially in Bologna, Italy. Moreover, the German universities in the 15th century and later, found it difficult to teach the local laws because the teachers did not know them all, and the students at each university came from all over Germany, so that there were too few from each region to justify teaching all the regional laws. At the same time the new regional powers tried to secure more sovereignty for themselves at the expense of the emperor, and so needed educated lawyers for their courts and administration. Thus, the influence of Roman law was stronger in Germany than in France.

During the French revolution from 1789 the French parliament demanded a uniform and written code for all Frenchmen, but could not agree on its content, being split between support for three different proposals. Success came only in 1804 through the Emperor Napoleon as dictator. Under his direction the Code Civil was established by four well-known lawyers in only four months. That shows that it contained essentially what was already the law at the time. As the author of the Swiss codes a hundred years later stated, codification is no more than a statement of the existing laws.

The French civil code was well noted in Germany and there was a strong movement to have a German civil code for all Germans, but this did not succeed for various reasons. It was only after the German-French war of 1870/71 and the unification of Germany that the German parliament voted for a civil code which was established by several commissions. The influence of the French code was strong, with the commissions sometimes adopting the French rules, but also sometimes rejecting them.

Three lessons may be drawn from these examples. First, a general unified civil code presupposes a more or less central state power.<sup>3</sup> That existed in France already in the 17th and 18th centuries, but in Germany it was created only in the 19<sup>th</sup> century. Second, new codes have to be prepared by teaching and systemising what is common in the existing laws. In France that was the above-mentioned movement, while in Germany it was the teaching and science of “today’s Roman law”, as it was called by the leading scholar Savigny.<sup>4</sup> Third, a kind of legal nationalism, sometimes expressed by the phrase “one nation, one law”, was needed.

Thus, in a certain way an integration of local laws also needs comparison of the laws to see what is common, and where there is no common law to choose one of the different solutions or to create a new one. But in any event, political decisions are involved.

### 3. WORLD-WIDE LAW FOR CROSS-BORDER SALES

#### 3.1 UN Convention on Contracts for the International Sale of Goods (CISG)

Around 1900, the optimistic idea prevailed that, at least in the long run, one could build a common private law for all nations with similar civilisations and economic systems by eliminating all historically fortuitous features of existing laws. The experience of the last century has proved that this was too optimistic. Social and economic conditions in England, France and Germany are similar, yet their national laws are quite different. They are the result of the countries’ different histories. Nevertheless, some harmonisation, and even integration, of law is possible.

An instance is the CISG ratified in a total of 85 states, including many non-European states.<sup>5</sup> It was based to a large extent on the comparative work by Ernst Rabel, *Recht des Warenkaufs* (Law of the Sale of Goods), published in two volumes in 1936 and 1957. In 1928, Rabel proposed to the Roman Institute for the Unification of Private Law (UNIDROIT) that it should work on an international unified sales law. In 1929, in the Kaiser-Wilhelm-Institut,

3 In the 1820s, before political unification, there was a proposal for a common German civil code: A Code for the German nation.

4 Friedrich Carl von Savigny, *System des Heutigen Römischen Rechts* (Berlin: Veit & Co, Vol 8, 1840–1849).

5 In Africa: Lesotho, Zambia, Benin, Burundi, Gabon, Guinea, Liberia and Uganda.



whose director he then was, he himself elaborated a report on the general principles of the sale of goods on a comparative basis. UNIDROIT appointed an international committee which presented a first draft of a sales law in 1935 and a second text in 1939. The work was resumed in 1950, within the frame of the Hague Conference on Private International Law, which presented drafts in 1956 and 1958 on the formation of contracts for the sale of goods and their effects. After consultation with interested governments two amended drafts were published in 1963. Thus, one can say that this international sales law was broadly and intensely prepared by a comparative process. It was accepted in 1964 by The Hague Conference, but thereafter only nine states ratified it. The project was a failure. Most developing and socialist countries refused for political reasons, feeling that they had had an insufficient role in the elaboration of the convention and that it was too closely related to the law of the industrialised countries and former colonial powers. In fact, it became a unified law for Western Europe, and so might be ranked as a regional unification.

However, there was an international interest in developing a unified international sales law. In 1968 the United Nations Commission on International Trade Law (UNCITRAL) established a working group with 15 members from all parts of the world for this purpose. It used The Hague Drafts as the starting point and finished with the so-called New York Draft that was sent to the member states of UNCITRAL for comments. Finally, the Vienna or UN Sales Law was adopted at the Vienna Diplomatic Conference of March–April 1980. Thus, we may say that it took more than 50 years to arrive at this result.

We may summarise by saying that unification of law with a global scope not only takes a long time, but also needs a solid and profound comparison of laws to convince state governments that the proposed law takes their interests into account, in the sense that it suits international trade better than their national rules, and, especially, that it is compatible with them. But there will inevitably be political obstacles of all kinds, from legal nationalism or rejection of the foreign<sup>6</sup> to general political antagonisms, as the first rejection of the draft shows. The pronouncement of the great lawyer and comparatist, von Jhering, that nobody will look abroad when he has better law at home, and only a fool will refuse a better rule just because it is foreign,<sup>7</sup> is pure theory or unfounded optimism, which does not take account of national fears of what is foreign, or

6 See Diana Wallis, 'Common European Sales Law and the Media: Reduction of Complexity or Scaremongering?' in Matthias Lehmann ed., *Common European Sales Law Meets Reality* (München: Sellier, 2015) at 55–62 on the subject of CESL.

7 Von Ihering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Leipzig: Breitkopf und Härtel, Vol 2, 4th ed., 1878) at 8f.

even egotism. And, more important, with only 85 participating states, CISG is not yet a truly universal convention.

UNCITRAL continues to care about CISG by providing reports of court decisions on the convention in the form of English abstracts<sup>8</sup> and by an official digest of the jurisprudence in the six official languages of the UN. The last edition is from 2012.

To keep this instrument uniform, it is of course of the highest importance to have access to the court practice in the member states, because there is no supra-national court and the application of CISG depends solely on the national judiciaries. That is, by the way, equally true on the national level where unified national law cannot be maintained only through the text of an Act without publication of the courts' practice.

But the CISG is not complete in the sense that it does not regulate some significant questions concerning both the formation of the contract and its effects where there is unsatisfactory execution or no execution at all of contractual obligations. To fill the gaps, Art 7 § 2 refers to the general underlying principles of the convention and if these do not provide a result, then to the national law applicable by the rules of private international law. A few examples out of many are the determination of rates of interest and the period for prescription. Further, agency is not mentioned in the convention, and when an issue of agency is to be decided, the courts choose the national law made applicable by their private international law rules (Art 7 CISG).

Looking at the content of CISG, it is based on extensive comparative law and it is clearly exaggerated, even wrong, that a court in the US once considered the CISG to be an "international version of the US Uniform Commercial Code".<sup>9</sup> It is true that many of its rules are received from one or the other national law; it is difficult to create totally new solutions. But by combining national elements something new is created. I will not deny that there are a few truly original rules, but they are, I think, not very fundamental.

The question of interpretation is difficult but central for international unified law. The problem starts with the fact that national laws have developed fundamentally different methods of interpretation of legal texts.<sup>10</sup> Thus one would be tempted to stick to the literal meaning of words were it not that even

8 Accessible free of charge under <http://www.uncitral.org>.

9 Senior Court of Massachusetts CISG-Online No 1005.

10 Urs Peter Gruber, *Methoden des internationalen Einheitsrechts* (Tübingen: Mohr Siebeck, 2004) at 79.

terms that appear to clear trend, on closer inspection, to become ambiguous if one considers their different meanings in different national contexts.<sup>11</sup> If all member states understand a provision in the same way, there is no real problem.<sup>12</sup> If they differ, the dominant opinion is that comparative interpretation is not helpful, the CISG itself already being comparative law.<sup>13</sup> Nevertheless it is arguable that in the interpretation of rules that are clearly taken from a specific national law their meaning there may be considered.<sup>14</sup> I doubt this.

It is worthy of note that the CISG applies independently of whether the parties to the contract are merchants (Art 1 § 3) and is only excluded if the buyer buys for his personal use or that of his family or household. Behind this lies a difference between, for instance, German and French law on the definition of merchant and consumer. German law defines the nature of the contract in the same way as the CISG, while French law defines these persons by their properties. The CISG had to choose between the two because they cannot both be followed at the same time.

The CISG is excluded if the parties opt out. It seems that that is still the case in many, if not the majority, of contracts, even if the CISG is today being increasingly accepted.<sup>15</sup> When the CISG is not excluded by the parties, it prevails over national law.

### 3.2 Insolvency Law

The World Bank and UNCITRAL are today proposing other conventions in the field of international commerce that will aim at universal application. These are the “Principles and Guidelines for Effective Insolvency and Creditor Rights Systems” by the World Bank, the “Orderly and Effective Insolvency Procedures” by the International Monetary Fund, and the UNCITRAL Model Law on Cross-Border Insolvency. The latter has now been enacted in about 41 countries. In contrast to international conventions such as the CISG, model laws must be enacted by the interested state as part of its national law.

11 *Ibid* at 188–189.

12 Even then, correctly speaking, an autonomous interpretation is obligatory.

13 Staudinger Ulrich Magnus, *BGB, Wiener UN-Kaufrecht* (München: Sellier) Art 7 CISG No 37. But see Gruber, *supra* note 10 at 199 ff.

14 Staudinger Magnus, *ibid*; Gruber, *supra* note 10 at 189–228.

15 Exact statistics cannot be given. Ulrich Magnus, ‘Introduction’ in Ulrich Magnus ed., *CISG vs. Regional Sales Law Unification* (München: Sellier, 2012) at 2–3, sees nevertheless a progressive acceptance.

Here, too, the authors had to choose fundamental orientations and principles. Some national insolvency laws aim at a just and equal distribution of the debtor's property (as does German law, for example), while others see the main purpose as the readjustment and preservation of the enterprise in the interest of the employees (like the law of France). To some extent both purposes may be compatible, but ultimately a choice has to be made.

## **4. REGIONAL HARMONISATION**

### **4.1 European Union**

Unification or harmonisation limited to a region is the case of the European Union, which is not a federal state but a union of sovereign states which have ceded significant legislative competence to the Union. Today, often by majority in the Council and the parliament, it can make uniform law that is directly applicable in the member states through their courts. The instruments available to the Union are regulations, which apply directly in the member states, and directives, that must be implemented by the member states. In the case of directives, it is left to the states to decide individually how they will achieve the results required by the Union.

The central aim of the EU has always been freedom of movement of persons, capital and goods. That has necessarily excluded restrictions on exports and imports, such as import duties. The EU is also committed to ensuring equal and fair trade competition in the markets. The principle of free access by each state to the markets in other member states may also lead to the prohibition of requirements that marketed goods have qualities other than those required in their country of origin. While earlier discussion referred to the common market, today references are to the internal or inland market as if the EU were a national state. These are not questions for which comparative law in the strict sense may assist in providing answers.

### 4.1.1 Common European Sales Law (CESL)

It is believed that differences in the national laws relevant to trans-border contracts for the sale of goods may also hamper free trade. When such differences exist the seller may refrain from offering goods for sale because he would have to adjust the general conditions on his website to the foreign legal systems. It is also possible that sellers will reject orders from abroad because they fear the unfamiliar foreign rules on matters such as remedies for defective goods.<sup>16</sup>

An impact assessment by the European Commission has found that, in business-to-business transactions, 35% of companies already involved or interested in cross-border trade and 51% of businesses without experience of trading abroad feel affected by differences in contract laws. In business to consumer transactions, it was found that at least 40% of traders were affected. According to this impact assessment, between €6 billion and €84 billion of trade potential is lost, it is said, through traders not wanting to trade abroad because of contract law barriers. At the same time 23% of traders who are engaged in cross-border activities refuse foreign orders by consumers because of differences in contract law, according to the Commission's impact assessment. I doubt these numbers.

Therefore, the EU is now proposing a Common European Sales Law (CESL), to be enacted as a regulation. I am not sure that the absence of a uniform Sale of Goods Law is a cause of the imperfect market in Europe, nor that the proposed Common European Sales Law will create a great new market. In particular there is already an international sales law in the form of the CISG which has been ratified by the majority of EU Members. The CESL seems to avoid conflict with the CISG by limiting its sphere of application to consumer contracts. The CESL would take precedence over national law and would regulate mainly consumer contracts which are not the object of the CISG.

But problems are not so easily avoided because Article 7 of the proposed regulation extends its application to contracts between traders of which at least one is a small or medium enterprise, provided that, as in the CISG, the buyer does not buy for his personal or household purpose. In this field of business to business contracts, CESL will apply only in the European Community, whereas CISG has world-wide applicability.

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16 Wilhelm Van den Aardweg, 'CESL in Politics -- Making European Sales Law: Insight from Brussels' in Matthias Lehmann ed., *Common European Sales Law Meets Reality* (München: Sellier, 2015) at 7-22.

However, because of numerous European directives on consumer protection there are no longer any real differences in this particular field, so that a complete unification of this law would not change much. In contrast to this, on the general rules of contract CESL is much more explicit and detailed, so that some important differences, not only between common law and civil law, but also between German and French law, may be suppressed. There is an idea that CESL may one day serve as the starting point of a common European contract law. This is based indirectly on a good deal of comparative law. I am sceptical that the project will pass on the political level<sup>17</sup> and there are reports that the Commission has withdrawn its proposal. In any case, CESL will apply only if both parties opt in (Article 3 of the Regulation). Nevertheless, some national courts may use it to interpret their national laws of contract in a European sense,<sup>18</sup> just as they already refer to the Principles of European Contract Law or the Draft Common Frame of Reference, both of which are not directly applicable instruments.

The CESL was drafted by a commission whose members were carefully chosen from member states and who have different legal backgrounds. The starting point was the consumer protection directive, after which the commission took into consideration the Common Frame of Reference which states the common principles of contract law in Europe, and, since small and medium enterprises were included in the commission's field of reference, the CISG.<sup>19</sup> The main object is to remove barriers to free access to the markets that stem from differences between national laws of contract.

Up to now, the activity of the EU in the field of private law has been mainly directed towards the conflict of laws, with the aim of providing rules to determine which national laws should apply in any particular circumstances. So far, the differences between the national laws have been maintained. But in the meantime, the Commission has withdrawn the proposition.

#### **4.1.2 Commercial Companies**

A special problem is the recognition of commercial companies that move their seat from one country to another, or that are constituted by a law other than that of their principal place of activity. In the regulation of commercial companies

17 Perhaps slightly more optimistic under certain conditions; see Wallis, *supra* note 6 at 56 ff.

18 Martinez Velencoso & Luz Maria, 'National Courts: How Can They Keep Track?' in Matthias Lehmann ed., *Common European Sales Law Meets Reality* (München: Sellier, 2015) at 110-111.

19 Van den Aardweg, *supra* note 16 at 12-13.

there are important differences between national laws, for example in provisions as to how much the partners of a limited liability company have to contribute to the minimum capital. In a famous case before the European Court of Justice, a Danish couple had founded a company in England using English law because the minimum capital prescribed there is very small, whereas in Denmark it would have been 50,000 Kroner.<sup>20</sup> They never intended to do and never did do business in England, but only in Denmark. It seems evident that doing business in a common market via a limited company is much easier under English law than under Danish or German law. The question is therefore whether such under-capitalised companies may be allowed to do business in Denmark or Germany, where they may be at an advantage in comparison to local companies.

This problem would be avoided by unifying the law, and the EU provides by regulation for an optional *societas europea* (SE) and special forms of private limited companies. These may be used only if chosen by the partners, which is not yet very common. However, the French model could be attractive for those German small and medium enterprises that want to escape from the German law requiring workers' co-determination.

#### **4.1.3 European Insolvency Regulation**

The European Regulation on Insolvency has been in force since 2002. It determines in which country an insolvency procedure may be opened and whether it will have effects outside this country. It is therefore a regulation that belongs mainly in the sphere of conflict of laws and jurisdictions.

#### **4.2. OHADA**

There are not many multilateral conventions concerning the international sale of goods, and therefore we are not often concerned with the relationship between the CISG and other conventions. Passing over uniform commercial codes and the like in the USA and Australia, we may mention OHADA (*Organisation pour l'Harmonisation en Afrique du droit des affaires*), and the above-mentioned Common European Sales Law, which, however, is not yet in force.

Both are regional instruments of harmonization, not only because their geographical reach is limited in practice but also because they are only meant to apply within a limited geographical region. The CISG, by contrast, is in force

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20 EuGH 9.3.1999, C-212/97 – Centros –.

only in certain parts of the world, including nearly all European countries, but it aims at application throughout the world.

OHADA consists of Uniform Acts which apply directly in the member states, replacing national law. An important difference between OHADA and CISG is that the Uniform Acts of OHADA, for instance that concerning general commercial law, apply even in purely internal affairs. Thus, the OHADA policy is to unify the national laws so that there will no longer be any differences that may hamper transnational exchanges. The scope of the Uniform Acts is not limited to international exchanges.

These Acts are prepared by the Permanent Secretariat and communicated to the governments of the member states, who can make observations within 90 days, and to the Court of Justice which has another 30 days. They are then adopted by the Council of Ministers by a majority decision. It is said that the secretary often engages external experts (professors or advocates). The participation of the national governments seems to be too short for there to be enough time for comparison of laws and discussion. The Council may or may not follow the observations of the national governments.

Of the highest importance is the independent Common Court of the OHADA (*Cour commune de justice et d'arbitrage*) whose decisions are *res judicata* and must be executed directly in all member states. It is nowadays very active.

For the drafting of OHADA it was demanded that its provisions should not be too closely modelled on one national law, especially French law.<sup>21</sup> In spite of the fact that France is not a member, there was evidently that fear. But in fact the Uniform Acts do not follow French law very often. That is surprising since after their independence the francophone participant countries all maintained in force the French Civil Code and other French laws. The unification of economic laws in West Africa created a distance from the former colonial power, without regard for the fact that for all participating countries France is by far the most important economic partner. The alternative model in general contract law was mainly the CISG, and in company law, it seems, German law. It is ultimately a mix of European civil law; English common law plays no evident part.

Since parts of OHADA follow the CISG, one may argue that in this respect OHADA is indirectly based on comparative law. What role comparative law

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21 Nicolas Hagege, *Das einheitliche Kaufrecht der OHADA* (Frankfurt, Berlin, Bern: Peter Lang, 2004) at 28-29.



played in the drafting of the Uniform Acts, and especially to what extent specific African ideas were introduced by the African states, is difficult to see. It is noteworthy that articles 202 to 288 of the General Commercial Law adopt the CISG to a large extent, but here, too, African notions are not evident.

An example may be Articles 210 and 235, General Commercial Law OHADA, which require that the price of goods for sale is fixed in the contract of sale. That corresponds to French law, while the CISG and German law do not have such a provision. The same is true for the case where the seller does not fulfil his obligations. Article 254 OHADA provides that the buyer may have the contract terminated by a court decision, while Article 49 CISG provides that the buyer can terminate the contract by private declaration. Here the CISG does not follow the solution given by French law, whereas OHADA does.

On the other hand, the provision that title to the goods is transferred by delivery (Article 283) is contrary to French and English law where this transfer takes place *solo consensu* by the formation of the contract of sale.<sup>22</sup> Here OHADA comes close to German law.

Article 90 of the CISG provides that bilateral and multilateral conventions which contain regulations on questions that are also objects of CISG provisions, prevail if both parties to the contract concerned have their places of business in member states of such a convention. These conventions may be older or younger than the CISG. Nothing forbids members of the CISG to adhere to other conventions of international commercial law. Incidentally, OHADA will allow other African countries to join if they are unanimously invited to do so. But only four members of OHADA are also members of the CISG.<sup>23</sup> If both parties have their places of business in these three countries, their contracts of sale will be governed by OHADA, which will prevail over the CISG (Article 90 CISG). This is even more the case if the states concerned have made a declaration in accordance with Article 94 CISG that they will not apply the CISG.

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22 Cf. Ulrich Spellenberg, 'Transfer of Property and Risk of Loss in French, English and German Law' in Gordon Woodman & Diethelm Klippel eds, *Risk and the Law* (London: Routledge-Cavendish, 2009) at 114–130.

23 Benin, Congo, Gabon, Guinea.

The CISG presupposes that both parties are in member states. If one party is based in an OHADA member state and the other in a CISG state outside OHADA, the question is open to discussion.<sup>24</sup>

OHADA regulates a much broader field of activity than the CISG, including procedure, arbitration, commercial corporations, execution of judgments, labour law, and (recently renewed) insolvency, and the Council may enlarge the field. The limitation on the “Droit des affaires” is rather large. It would be interesting to look more closely into the Uniform Act on Commercial Companies, to know the source of its inspirations. That would go too far here, but it may be noted that Article 414 OHADA on commercial companies allows public corporations, meaning companies which sell shares to the public, to choose between administration by a board of directors who are shareholders and whose president is the acting organ, and administration by a general president who may be, and often is, an employee of the company controlled by the council. The first is the traditional French model and the latter the German model. The choice is to be made unequivocally in the company statutes drawn up at the time of the creation of the company.

The European Regulation on Public Corporations (*Societas Europaea*) gives the same choice, as French law also does today. The interesting point is that the Uniform Act of OHADA dates from 1998, while the European Corporation law dates from 2001. It has been in force since 2004 and the new French Law was made even later. I have no information on the elaboration of the OHADA Act, but it seems that harmonisation was created by joining together two different models, and that this was done independently of a European model, or at least long before the European model was developed.

## 5. CONCLUSION

These examples of international and regional harmonisation have used comparative law to different degrees, but obviously in the first place by combining elements of different legal systems. The “mother” of all the instruments which have been mentioned is the CISG. Even the OHADA Uniform Act on General Commercial Law follows it to a large extent. For the OHADA law on public corporations it appears that the drafters initially used the French model and added the German model. Whether it is wise or practical to let the companies

<sup>24</sup> For these questions see Franco Ferrari, *CISG and OHADA Sales Law, or the Relationship between Global and Regional Sales Law* in Ulrich Magnus ed., *CISG vs. Regional Sales Law Unification* (München: Sellier, 2012) at 79, 88.

themselves choose which model to apply, remains to be seen.<sup>25</sup>

With regard to comparative law as a base of harmonisation we may safely say that it helps to get better results if one takes into consideration the different regulations practised in the world. To understand them one has to explore in each case which conflicts of interest the national rule is meant to solve and what are the reasons for the conflict and for the adopted solution. The same has to be done for corresponding regulations in other legal systems. In the case of regional harmonisation, one may limit the field to correspond to the geographical area. After establishing the social situation and identifying the interests in conflict, a new regulation can be drafted. It is my opinion that we can only harmonise or unify laws where the social systems are comparable.

That is obviously the case with Europe. For the CISG it is probably expected that only countries with comparable economies and social orders will wish to join. The rest is legal politics in choosing one of the models available or combining several or even creating new solutions.

When a question arises concerning reform of one given national law, the decision depends on circumstances which are not always legal, but may be related to the economy, general education or religion. A law on public corporations, for instance, is of no use without a market to act upon; I sometimes even think that it might be detrimental.

In the field of economic law I would stress the importance of the existence of a corps of lawyers.<sup>26</sup> (New) law is much more in people's heads than in legal codes. And as Rheinstein says, we need to verify the consequences of changing the actual rules.<sup>27</sup> Thus, harmonisation does not proceed without costs (not only in a financial sense), but law which has been harmonised through international contracts is very difficult to change, because every reform of that law needs an international contract and the assent of all partners.<sup>28</sup> And these Acts must be fitted into each national system. The smaller the subject of the harmonised law

25 I do not mention ECOWAS because it focuses on elimination of custom duties, harmonisation of development and economic policies, and human rights questions, and engages very little in harmonisation of private law.

26 A good example is the introduction of Swiss law in Turkey: Ernst Emmanuel Hirsch, *Rezeption als sozialer Prozess* (Berlin: Duncker & Humblot, 1981).

27 Max Rheinstein, *Einführung in die Rechtsvergleichung* (München, C.H. Beck, 1974) at 26.

28 Hein Kötz, 'Rechtsvereinheitlichung, Kosten, Nutzen, Methode, Ziele' (1986) 50 *RebelsZ* 3-6; Verica Trstenjak, 'The Challenge Faced by the European Court of Justice of the European Union and Possible Responses' in Matthias Lehmann ed., *Common European Sales Law Meets Reality* (München: Sellier, 2015) at 90-91.

is, the greater this problem becomes. Herein lies an important advantage of the Uniform Acts of OHADA that cover whole branches of the law.

Regional or world-wide harmonisation poses the special difficulty that it is necessary to verify whether a proposed new rule will be compatible with the different social and economic circumstances of all the states involved. With regard to the CISG it may help that states have to opt to accept it and many have not done so. It helps, too, that the international sale of goods is a “neutral” matter, much more so than family or succession. Furthermore, the international nature of the situation probably makes deviation from any particular national law easier to support and to handle.

The CISG shows that civil lawyers can cope with elements of English common law and vice versa.<sup>29</sup> This may be a consequence of the fact that the CISG is an independent international instrument drawn up on a comparative basis and to be interpreted by its own purposes and principles and not by those of English or German law. Every modern law needs a corps of trained lawyers for its interpretation and application. Harmonised law for an international jurisdiction, be it only a regional community, needs lawyers with a special understanding of comparative law, and of the national laws of the various members of the community.

OHADA is an interesting case because its Uniform Acts are meant to be the only national laws on their subjects. However, it is obvious, for instance, that the general commercial law or the law governing commercial companies will be of no use to peasants in central or northern Benin. Of course they will not engage in international trade, but how will they cope with the Uniform Acts as the only national law? This question raises the old problem of the role of customary law and French modern law. Some of the Uniform Acts allow for the observance of customary law, but only in a few cases.

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<sup>29</sup> On common lawyers and civil contract law generally, see David Mackie, ‘Is the UK Afraid of European Private Law and Should It Be? A Practical View from an English Trial Judge’ in Matthias Lehmann ed., *Common European Sales Law Meets Reality* (München: Sellier, 2015) at 41–49; Colm Peter McGrath & Helmut Koziol, ‘Is Style of Reasoning a Fundamental Difference?’ (2014) 78 *RabelsZ* 713–717.

# THE DIFFERENT INCARNATIONS OF THE MEMBER STATE IN LEGAL HARMONISATION PROCESSES: A COMPARATIVE STUDY OF THE EAC, EU AND OHADA

OLIVIER DUBOS\*

## 1. INTRODUCTION

International integration organisations have been built on the myth of a world without sovereignty. The legal harmonisation processes to which they give rise are one of the most significant factors in this attempt to bypass the State: it is a matter of producing, outside the competence of the State, norms that are common to several States, intended for persons within the jurisdiction of those States.

An examination of legal harmonisation within three integration organisations – the East African Community, the European Union and the Organisation of the Harmonisation of Business Law in Africa (OHADA) – indicates not only the persistence of the State, but above all its resistance. Obviously, the State's presence manifests itself in various ways and the Member State takes on different guises. It can be the State as a subject of international law, particularly where it is represented within the intergovernmental bodies of a given organisation. It may be the State as a subject of domestic law as adapted and deployed through its various bodies, be it the executive, legislative or judicial branch.

The harmonisation process can be divided into three phases. In an initial phase, an act is elaborated, the purpose of which is to harmonise the law. The second phase involves the determination of the norm, i.e. the interpretation of the act by a court. Finally, in the third phase, the norm is applied. From the point of a view of a realistic theory of interpretation, it is essential to distinguish between phases two and three and to bear in mind that the latter are concomitant, as an act cannot be interpreted where it faces a series of practical situations because the facts construct the norms just as the norm applies to the facts.<sup>1</sup>

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1 According to G Marty & P Raynaud, *Droit civil. Introduction générale à l'étude du droit*, t. I, Paris, Sirey, 2<sup>e</sup> édition 1972, spec. n° 347, "asserting that a concept which is the rule can be found in such and such circumstances which are the facts of this or that case, ultimately results in establishing a definition of

It is therefore possible to see the dominance of States as much in the elaboration of acts (section 2 below) as in the application of norms (section 4). However, their role is more restricted in the elaboration of norms, but it is nevertheless not inconsiderable (section 3).

## **2. THE DOMINANCE OF STATES IN ELABORATING ACTS**

In line with the analysis that constitutional law experts engage in when discussing the processes for elaborating acts, it is possible to identify three phases in the elaboration of unilateral acts of international integration organisations: impetus (2.1.); creation (2.2.); and the decision (2.3.). This section addresses these phases.

### **2.1 Impetus**

In the European Union, the European Commission has played an essential role as the driving force behind the development of secondary legislation, as much in the 1960s for the creation of the Customs Union as in the 1990s with the relaunch of the Single Market. The Commission has since been in decline although it has made gains in terms of democratic legitimacy since the Maastricht Treaty, which can be compared to an investiture by the European Parliament, together with the fact that it can be compared to a “Government” for the EU. In the 1960s and 1990s, its legitimacy was essentially technocratic. Since the late 1990s, however, there has been a rise in the power of the European Council, which brings together the Heads of State or Government and the President of the European Commission.

The European Council is almost as old as the European Economic Community itself. It was born out of the European summits of the 1960s, instigated by General de Gaulle to counterbalance the supranational nature of the Community. In 1974, these summits became periodic and were held twice a year. The Single European Act, 1986 formalised the existence of the European Council under Article 30. Its role was later strengthened with the Maastricht Treaty and the introduction of the European Union. The Treaty of Lisbon made it a full institution of the Union. According to Article 15(1) EU, “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions

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the concept under consideration, doubtless a specific definition but likely to apply only to similar cases should these arise in future. This is how a form of casuistry is created within notions which develops and refines them”.

and priorities thereof. It shall not exercise legislative functions". The refusal to confer such a legislative function simply means that it has no decision-making powers. Member States naturally retain a decision-making role via the Council of Ministers. This rise in the European Council's power to the detriment of the Commission in recent years is not solely the consequence of the development of EU legislation: it may also be found in practice. The Commission embodies the criticisms made by Eurosceptics and is the leading victim of the crisis of legitimacy currently affecting the European Union. In addition, the presidency of José Manuel Barroso, whose main policy was to manage all Member States, accelerated the European Commission's decline and the rise in the European Council's power.

Impetus may now also come from citizens of the Union. Under Article 11(4), "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties". For the time being, no citizen initiative has resulted in the adoption of a legislative act. Furthermore, under Article 255 TFEU, "the European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons". Yet again, this option is rarely implemented in practice. The European Council therefore remains very much the master of political impetus within the European Union.

This prominence of Member States in initiating the decision-making process can also be found in the East African Community, and not only because the harmonisation process does not rest solely on secondary acts, but also on additional protocols. The equivalent of the European Council is the Summit, also composed of Heads of State or Government. Under Article 11(1) of the EAC Treaty, "[t]he Summit shall give general directions and impetus as to the development and achievement of the objectives of the Community". However, the Summit does not have to compete with any other institution of the East African Community. The Secretariat cannot be compared to the European Commission: its structure and role correspond to that of an executive body as is found within a co-operation organisation. Nevertheless, another manifestation of the Member States is the Coordination Committee, which can play a part in providing the impetus for the decision-making process. Under Article 18 of the

EAC Treaty, it “shall submit from time to time, reports and recommendations to the Council either on its own initiative or upon the request of the Council, on the implementation of this Treaty”. That impetus is relayed by the sectoral committees.

The OHADA presents the same characteristics. There is a Conference of the Heads of State and Government, which is an institution. The Treaty remains particularly laconic and vague as to its mission as, under Article 27(1), “it rules on any question concerning the Treaty”. Even though the Permanent Secretariat is involved in the creation of legislative acts, it cannot seriously compete with the Conference of the Heads of State and Government.

Furthermore, the indirect influence exercised by the political systems of Member States cannot be ignored. The regimes of the Member States of the EAC and the OHADA are presidential political systems in which there is a strong tendency towards the executive domination of power. In the EU, all Member States are parliamentary systems – although some are semi-presidential (particularly France, but also Cyprus, Finland, Lithuania, Poland, Romania and the Czech Republic), which would explain why a President and/or the Head of Government can sit on the European Council.

It seems logical that this importance of the Head of State in African political systems should extend to the institutional structure of the integration organisation. The political significance of the institution that brings Heads of State and Government together would therefore appear to be the *sine qua non* in the dynamics of the organisation’s legislative process.

## 2.2 Creation

Once the political will has been expressed, the legislative act must be created, i.e. the process of determining the measures contained in the proposal that will form the basis of discussions for those institutions in charge of the decision. The European Commission has the monopoly on initiating legislative acts; under Article 17(2) TFEU, “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”. The Commission’s role is essential because it will draft the text of the proposal, on the basis of which the Parliament and the Council, or the Council alone will decide. The Commission’s monopoly has an impact on the decision-making process as its role ultimately does not end on the creation of a legislative act.



The process of creating a legislative act begins with the publication of a Green Paper, which launches a vast operation of discussions involving private players – such as businesses or non-governmental organisations – and public actors, such as local authorities but also the various administrations. The Green Paper is followed by a White Paper, which will contain a number of proposals. If it is favourably received by the Council – i.e. by the Member States – this opens the way for the conception of those measures that will form the draft bill on the basis of which a decision will be made. Again, public and private players are involved. Once the draft has been formalised, the final stage in the conception of a legislative act begins. This involves national parliaments which, since the Treaty of Lisbon came into force, are involved in the subsidiarity control mechanism.

According to Article 5(3) EU, “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. According to Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, the Commission’s draft is forwarded to each of the national parliaments, which have eight weeks in which to give a reasoned opinion on the act’s compliance with the principle of subsidiarity. As the great majority of Member State parliaments are bicameral, each has two votes. Where unfavourable reasoned opinions represent one third of the votes, the European Commission must re-examine its draft legislative act, then amend, maintain or withdraw it. Where the legislation in question relates to the area of freedom, security and justice, the threshold is reduced to a quarter. If the reasoned opinions represent half of the votes and if the European Parliament or the Council also considers that the draft act does not comply with the principle of subsidiarity, the Commission is under a duty to withdraw its draft act. We can see, therefore, that the Member States are very much involved in the process of creating a legislative act, but not as subjects of public international law but rather through the intermediary of those various bodies. Therein lies a specific feature of the EU as an international integration organisation.

In the East African Community, the importance attached to States in the decision-making process means that non-state players are less involved in the process of creating legislative acts. When harmonisation is to be achieved by protocol, Partner States organise their own consultation mechanisms that will

involve businesses and non-governmental organisations.<sup>2</sup> As regards unilateral acts, the Secretariat elaborates a draft act that will then be examined by committees of experts representing various Partner State ministries. The Secretariat then re-examines and amends the draft act, which is then presented to the relevant Sectoral Committee; the latter highlights the main points to be debated by the Co-ordination Committee<sup>3</sup>. This will form the basis of the debates held before the Council. As the East African Community Legislative Assembly has grown more powerful, so another avenue has opened for proposing Community acts. The Assembly comprises 45 members elected in each of the Partner States by the national parliaments and seven ministers in charge of EAC affairs. Pursuant to Article 59 of the EAC Treaty, members of the Assembly have the right to propose bills; 47 such bills were thus adopted on the initiative of a parliamentary representative in 2015.<sup>4</sup>

No such assembly exists within the OHADA, which greatly favours Members States. Under Article 6 of the OHADA Treaty, “uniform acts are prepared by the Permanent Secretariat in consultation with the governments of the States Party”. The Permanent Secretariat has the option beforehand to involve private players. Once the draft bill has been elaborated, the Permanent Secretariat forwards it to the governments of the Members States which, under Article 7 of the OHADA Treaty, have ninety days in which to submit their comments. A new draft is then elaborated and forwarded to the Common Court of Justice and Arbitration for its opinion. Therein lies a highly unusual aspect of the OHADA, which is quite likely explained by the considerable role played at the earliest stages by the supranational court. The Permanent Secretariat then puts the finishing touches to the final draft.

### 2.3 The Decision

The Treaty of Lisbon strove to rationalise the procedures for adopting so-called “legislative” acts. In principle, they are adopted through an ordinary legislative procedure involving the European Parliament and the Council, a procedure similar to that of an egalitarian bicameral system.<sup>5</sup> In this scenario, the Council acts by qualified majority, calculated in line with two cumulative criteria: 55%

2 Solomon Ebobrah et al., *The Civil Society Guide to Regional Economic Communities in Africa* (South Africa: Africa Mind Publishers, 2016) at 27.

3 *Ibid.*

4 K Gastorn, ‘The Struggle for Legislative Powers’. Online: <http://voelkerrechtsblog.org/>.

5 See Treaty on the Functioning of the European Union, 2007 art 294 [TFEU].

of the Member States (this being, under the existing Treaties, 16 out of 28) must be in favour of the proposals, and those States must represent at least 65% of the Union's population. In practice, however, consensus is sought within the Council. Nonetheless, the existence of this qualified majority serves to deter States from simply vetoing proposals. The role of co-legislator assigned to the European Parliament, which is elected by universal suffrage in the Member States and thus represents the citizens of the European Union, serves to prevent the adoption of legislative acts becoming a purely diplomatic procedure and to confer a degree of democratic legitimacy; this in turn serves in superseding Member States, who are thus no longer the sole masters of the decision-making game. Secondary legislative acts may also be adopted through various special legislative procedures. The most frequently encountered version involves the European Parliament in a purely consultative capacity while the Council decides alone and by unanimous vote. In other procedures, the Parliament has a power of approval and may thus simply oppose the adoption of a given act without amending it.

The Commission is not entirely removed from the decision-making process and plays a direct role. Article 293 (1) TFEU provides that, when acting by qualified majority, the Council may only exclude a proposal from the Commission by unanimous vote. In addition, under paragraph 2 of the same Article, "as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Union act". The Court of Justice has considered that this provision even allows the Commission to withdraw its proposal.<sup>6</sup> This power may not be exercised in a wholly discretionary manner. There is an initial formal restriction, which is the duty to give reasons. Next, the right of withdrawal may only be exercised preventively, i.e. before the Council has acted. This time limit is essential as it prevents the Commission's right of withdrawal from becoming a right of veto. Lastly, the right of withdrawal may only be exercised with full respect for the principle of loyal co-operation between institutions, which implies that it must be preceded by discussions between the Commission and the Council. We can see, therefore, that formally Member States are not the only players in the EU's decision-making processes: they are part of a network of constraints that must not disguise the fact that they remain the leading masters of the game.

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6 ECJ, Case C-409/13, *Council of the European Union v European Commission*, 14<sup>th</sup> April 2015 (unreported).

In the East African Community, we see the same dual model. Where harmonisation is achieved by protocol, the Partner States are the sole decision-makers as a protocol is similar to an international treaty. However, where harmonisation is achieved by a secondary legislative act, matters become more complicated. The proposal made by the Secretariat must be adopted unanimously by the Council. It is also possible for the East African Legislative Assembly to adopt a bill that will only enter into force after being approved by the Partner States. Under Article 62 (1) and (2) of the EAC Treaty, “1. The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community. 2. When a Bill has been duly passed by the Assembly the Speaker of the Assembly shall submit the Bill to the Heads of State for assent”. In any event, the Partner States are the primary decision-makers in the EAC.<sup>7</sup>

With the OHADA Treaty, the procedures are more straightforward, but also greatly favour Member States. Decisions are made by the Council acting unanimously.<sup>8</sup> Article 8(3) of the OHADA Treaty states that “abstention shall not constitute an obstacle to the adoption of uniform acts”. Unanimity is evidently restrictive as it allows each State to have a power of veto. In an organisation that has 17 Member States, such a rule becomes all the more restrictive. However, it guarantees the proper application of uniform acts, which subsequently requires no further State involvement.<sup>9</sup>

### 3. THE LIMITED ROLE OF STATES IN DETERMINING NORMS

The courts established by the constitutive treaties of the organisations discussed in this paper are the sole interpreters of the treaties and the acts adopted on the basis thereof. This interpretative monopoly serves to ensure the effectiveness of the harmonisation process (3.1.). However, as the courts are an inert power, in order to gauge that role we must examine the remedies provided by those courts and the extent to which they may be accessed by the Member States, State Members and Partner States (3.2.).

<sup>7</sup> Ebobrah et al., *supra* note 2 at 30.

<sup>8</sup> OHADA Treaty, art 8.

<sup>9</sup> See PG Pougoue & YR Kalieu Elongo, *Introduction Critique à l'OHADA* (Presses universitaires d'Afrique, 2008) at 59.

### 3.1 The Interpretative Monopoly of International Courts at the Service of Harmonisation

One of the primary characteristics of the organisations discussed in this paper is the existence of a court entrusted with the task of interpreting the law of the organisation in question, be it the constitutive treaties or the secondary acts based thereon. The provisions of the EU, EAC and OHADA treaties converge in this respect. Under Article 19 EU, the Court of Justice “shall ensure that in the interpretation and application of the Treaties the law is observed”. Article 13(1) of the EAC Treaty provides that “The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty”. Similarly, Article 14 of the OHADA Treaty provides that “the Common Court of Justice and Arbitration ensures the common interpretation and application of the Treaty together with the regulations for its application, uniform acts and decisions”. This marks a break with traditional international law in which the principle whereby *eius est interpretare legem cuius est condere* (whoever is authorised to establish the law is authorised to interpret it) allows States to remain the masters of treaties. Consequently, treaties take on both a constitutional and a federal flavour.<sup>10</sup>

The phenomenon is particularly significant with regard to the interpretation of the scope of an organisation’s powers, and as a counterpoint to the States’ powers. The Court, as in a federal system, is master of the separation of powers between the federation and the federated States. It is the Court that therefore identifies those areas that are likely to be subject to harmonisation measures. Thus, prior to the entry into force of the Treaty of Lisbon, the Court of Justice was able to rule that, although the Treaty establishing the European Community did not contain express provisions concerning any kind of criminal competence, it was possible for the Community legislature to define the relevant offences and penalties in order to ensure the full effectiveness of harmonisation measures adopted with regards to the environment.<sup>11</sup> An EU criminal competence thus emerged. However, the effect of this monopoly is not limited to ensuring the institutional dynamic of the integration organisation; it is first and foremost the guarantor of the unity of the law and therefore those harmonisation measures developed in that context.

10 See Elisabeth Zoller, ‘Aspects Internationaux du Droit Constitutionnel: Contribution à la Théorie de la Fédération d’Etats’ (2002) 294 *Recueil des Cours* 39 at 41 “Either the federal agreement is a treaty and each State, alone or together with other parties, has an authentic law of interpretation on each of its clauses, or it is a constitution and that law escapes it”.

11 ECJ, Case C-176/03, *European Commission v Council of the European Union* [2005] ECR I-07879.

If these organisations, the primary objective of which is to harmonise the law, did not make provision for the introduction of a court tasked with the interpretation not only of the constitutive treaty but also the law adopted on the basis thereof, the objective pursued could never be achieved. Each State would produce its own interpretation, either by diplomatic means or through national courts; there would be one act but numerous norms, and the harmonisation objective would not be achieved. However, the effectiveness of the unificatory role of those courts depends on the remedies which make them accessible.

### **3.2 Remedies that Sometimes Depend on Member States**

The remedies provided by the European Union and the East African Community are quite similar. There are actions for annulment of acts of the organisation, which are open to Member States.<sup>12</sup> Both treaties also provide for actions for failure to fulfil obligations, which are open not only to Member States<sup>13</sup> but also, in the EU, to the European Commission and, in the EAC, to the Secretary General.<sup>14</sup> There is, however, a difference between the European Union and the East African Community. While the Commission may apply directly to the Court of Justice, the EAC Secretary General must, under Article 29(2) of the EAC Treaty, “refer the matter to the Council which shall decide whether the matter should be referred by the Secretary General to the Court immediately or be resolved by the Council”. Article 29(3) provides that “Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary General to refer the matter to the Court”. This means that the Secretary General does not have access to the Court without approval from the Council, i.e. from the Partner States. The effectiveness of actions for failure to fulfil obligations is thus minimised.

Furthermore, the EAC Treaty, like the Treaty on European Union, institutes a mechanism for referrals for preliminary rulings which may relate to the interpretation of EU law or the validity of an act of secondary legislation.<sup>15</sup> Yet again, through their national courts, the States play an essential part in triggering the mechanism as it is a procedure between courts. However, it is quite clear that the question may only be brought before the European Court insofar as

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12 TFEU, art 263(3) and EAC Treaty, art 28(2).

13 TFEU, art 259 and EAC Treaty, art 28(1).

14 TFEU, art 258 and EAC Treaty, art 29.

15 TFEU, art 267 and EAC Treaty, art 34.

a plea based on EU law has been made to the national court. Article 34 of the EAC Treaty imposes a duty on all Partner State courts to make referrals for preliminary rulings only where such a referral proves “necessary to enable it to give judgment”. Conversely, under Article 267 TFEU, this obligation is incumbent only on courts of last instance. The Court of Justice has also imposed such an obligation on other national courts where the validity of an act of secondary legislation is at issue.<sup>16</sup> In the European Union, referrals for preliminary rulings are the primary route for the Court of Justice to ensure the interpretation of acts of harmonisation, the purpose of which is clearly to be applied by national courts. In the East African Community, in 2011, ten years after the establishment of the Court, the picture was a mixed one.<sup>17</sup>

The jurisdiction enjoyed by the Common Court of Justice and Arbitration, for which provision is made in the context of the OHADA, is of a different nature. Admittedly, national courts may make referrals to it on a consultative basis where they are called upon to apply a Uniform Act. Above all, paragraphs 3, 4 and 5 of Article 14 of the OHADA Treaty provide that “When hearing appeals brought before it, the Court shall rule on the decisions handed down by the appeal courts of the State Members in all cases raising questions as to the application of uniform acts and regulations provided by the present Treaty, with the exception of decisions applying criminal penalties. It shall rule in the same circumstances on decisions that cannot be appealed before any national court of the State Members in the same cases. When sitting as a court of final appeal, the Court shall hear and rule on the merits of the case”. Under Article 15 of the OHADA Treaty, such referrals to the Common Court of Justice and Arbitration may be made by the parties themselves or by the national appeals court where the latter is hearing the matter. There is therefore a duty for the national court to decline jurisdiction. Article 18(1) provides that “any party which, having pleaded that a national court of final appeal did not have jurisdiction, considers that said court has, in litigation involving it, failed to respect the jurisdiction of the Common Court of Justice and Arbitration may refer to the latter within a period of two months from the notification of the contested decision”. Paragraph 3 provides that “if the Court decides that the court in question wrongly claimed jurisdiction, the decision handed down by said court shall be considered null and void”.

16 ECJ, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199.

17 JE Ruhangisa, ‘The East African Court of Justice: Ten Years of Operation’. Online: <http://eacj.org/2014/docs/EACJ-Ten-Years-of-Operation.pdf>.

Moreover, Article 21 institute an arbitration procedure in which the Common Court of Justice and Arbitration has jurisdiction for cases concerning contracts between persons residing in the territory of one of the Member States and contracts enforced at least partially in the territory of a State Member. The Common Court of Justice and Arbitration does not rule on the cases but, under Article 25(3), it alone has jurisdiction to rule on the *exequatur* of arbitration awards.

States are thus removed from proceedings before the Common Court of Justice and Arbitration, the powers of which are similar to those of a Supreme Court in a federal State. It has hierarchical power over national courts while the European Court of Justice and the East African Court of Justice do not have such power. Their decisions are binding on national courts, but they cannot censure decisions handed down by those courts.

#### **4. STATE DOMINANCE IN THE APPLICATION OF NORMS**

The application of a given organisation's norms allows the involvement of the national executive and legislative branches (4.1.) and the judicial branch (4.2.). This section addresses both subjects.

##### **4.1 The Varying Involvement of Member State Executive and Legislative Branches**

In the context of the OHADA, the executive and legislative branches do not need to be involved in the implementation of uniform acts. Under Article 10 of the OHADA Treaty, "uniform acts are directly applicable and mandatory in the State Members, notwithstanding any prior or subsequent provision of domestic law to the contrary". It could not be clearer. Admittedly, the purpose of OHADA acts is not so much legal harmonisation as it is unification. The terminology of "uniform" acts speaks volumes. The unification objection therefore precludes any recourse to supplementary implementation norms on a national level. In the East African Community and the European Union, the configuration is sometimes similar, particularly when harmonisation is achieved by means of regulations. In the main, this is not the preferred option. However, in certain areas such as conflicts of laws or of jurisdiction, regulations and unification would appear to be the only sensible choice.

The majority of the East African Community's acts, and those of the European Union, call for national implementation and enforcement measures.



These organisations, like the German federal system, follow the indirect administration model. In this respect, directives – which are used by both organisations – are particularly topical. In order to be applied, they must be transposed by national authorities; and the decision as to precisely how such directives are transposed falls within the scope of the Member States' constitutional autonomy. Depending on the constitutional provisions of the Member State concerned, a directive may be transposed by law or regulations. In those Member States that have a federal structure, transposition may also fall within the remit both of federal and federated bodies. More generally, even in the event of a harmonisation measure based on a regulation, the involvement of national administrations may prove necessary where authorisations must be granted.

Furthermore, in the European Union, even when legislative acts on harmonisation are implemented and enforced on a Union level on the basis of the direct administration model, Member States are not utterly excluded from the process. Where the Commission is granted implementation and enforcement powers by a legislative act, it remains under the supervision of the Member States, via a number of comitology procedures.<sup>18</sup> Committees comprising representatives of Member States who specialise in various fields control the exercise of the Commission's enforcement powers. For individual acts, these committees have only a consultative role with regard to individual acts, but Article 4(2) of Regulation 182/2011 nevertheless provides that the Commission must take "the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered". With regard to regulatory acts and the most important individual acts relative to environmental matters, the procedure allows the committee to veto the proposal presented by the Commission.<sup>19</sup> Moreover, within both the European Union and the East African Community, independent agencies have developed which are responsible for the implementation of Community legislation. They may adopt individual acts and even regulatory acts. In the EU, they may only be granted decision-making powers in those areas where the exercise of discretionary powers is not at issue.<sup>20</sup> In such a scenario, the decision is made by the Commission but

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18 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 Laying down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission's Exercise of Implementing Powers.

19 See Paul Craig, *European Administrative Law* (Oxford: Oxford University Press, 2012) at 238.

20 ECJ, Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1958] ECR English special edition 1957–1958 00133; ECJ, Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament, Council of the European Union*,

prepared by the relevant agency. While such agencies are bodies that formally fall within the remit of the East African Community or the European Union, States play a significant part therein as each is represented on the Board. Thus, while there is a form of direct administration on a legal level, in political terms there is a form of co-administration that is both vertical (organisation and Member States) and horizontal (between Member States).

The role of Member States in the implementation of harmonised law is extended by the involvement of national courts, which are responsible for the proper application of that law.

## 4.2 National Courts – The Ordinary Courts of Harmonised Law

As the international courts established by the EAC, EU/TFEU and OHADA Treaties are special administrative courts, the national courts in Member States may be regarded as ordinary courts from the moment when harmonised norms may be invoked before them, i.e. have direct effect. There is genuine convergence in this area, at least in terms of the principles shared by the three organisations discussed here. Under OHADA law, direct effect is the result of the text of the treaty itself, as Article 10 of the OHADA Treaty stipulates that uniform acts are “directly applicable”. In the European Union, beyond the provisions of Article 288 TFEU under which regulations are “directly applicable”, direct effect is a construct of ECJ case law<sup>21</sup> which has been taken a step further in that it is accepted that even the provisions of a Directive may have direct effect, at least against a Member State’s authorities in the event of a failure in the process of transposing a given Directive.<sup>22</sup> In the East African Community, the Court has admittedly not recognised the direct effect of EAC law, but there are a number of clues along those lines. The existence of the mechanism for referrals made by national courts for preliminary rulings from the Court of Justice is the main sign: why would the authors of the Treaty have provided for such referrals if EAC law could not be invoked before national courts? Recognition of the principle of primacy by the EAC Treaty is also an indication of the direct effect of EAC law before the national courts of EAC Partner States.

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[2014] ECR 00000.

21 ECJ, Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR English special edition 1.

22 ECJ, Case 41/74 *Yvonne Van Duyn v Home Office*, [1974] ECR 01337.

The principle of primacy is another factor that indirectly reveals the importance of national courts in the process of applying harmonised norms. Under Article 8(4) and (5) of the EAC Treaty, “4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty. 5. In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones”. The principle of primacy is also expressly recognised by the OHADA Treaty under Article 10, which provides that uniform acts are applicable “notwithstanding any prior or subsequent provision of domestic law to the contrary”. In the European Union, the principle of primacy is not the result of explicit Treaty provisions, but a construct of ECJ case law.<sup>23</sup>

Lastly, we can see the importance of national courts in the application of harmonised norms in the resistance that they are likely to develop. In the East African Community, this resistance takes the form of their particularly limited use of referrals for preliminary rulings. In the OHADA, national supreme courts do not always decline jurisdiction in favour of the Common Court of Justice and Arbitration and do not always recognise the principle of the primacy of OHADA law.<sup>24</sup> In the European Union, many constitutional courts have demonstrated a desire to resist the “empire” of the Union, which shows no sign of abating.<sup>25</sup>

## 5. CONCLUSIONS

This resistance on the part of States is above all a manifestation of their ability to adapt. Integration organisations show that the Westphalian State has not disappeared, but is instead combined with other incarnations of the State. The Member State is in fact still sovereign as it can always withdraw from the organisation in question. However, at the same time, the State also becomes a key player in an integration process to which it has consented and which looms over it. The issue is therefore not the nature of the State or the nature of the Union, as is usually considered by lawyers. There is a new public power that is the result of the system formed by the Union and its Member States;

23 ECJ, Case 6/64 *Flaminio Costa v E.N.E.L.*, [1964] ECR English special edition 00585.

24 Abdoullah Cisse, ‘L’harmonisation du droit des affaires en Afrique: l’expérience de l’ohada à l’épreuve de sa première décennie’ (2004) 18 *Revue Internationale de droit Economique* 130.

25 Krzysztof Wojtowicz, *Constitutional Courts and European Union Law* (Uniwersytet Wrocławski, 2014).

together, these constitute a new incarnation of governmentality and, therefore, of statehood.

An examination of the harmonisation processes within integration organisations backs up the analysis of the state put forward by Michel Foucault some forty years ago:

The state does not have an essence. The state is not a universal nor in itself an autonomous source of power. The state is nothing else but the effect, the profile, the mobile shape of a perpetual statification (*étatatisation*) or statifications, in the sense of incessant transactions which modify, or move, or drastically change, or insidiously shift sources of finance, modes of investment, decision-making centres, forms and types of control, relationships between local powers, the central authority, and so on. In short, the state has no heart, as we well know, but not just in the sense that it has no feelings, either good or bad, but it has no heart in the sense that it has no interior. The state is nothing else but the mobile effect of a regime of multiple governmentalities.<sup>26</sup>

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26 Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)* (Paris: Gallimard Seuil, 2004) at 78-79.

# LEGAL HARMONISATION IN AFRICAN REGIONAL ECONOMIC COMMUNITIES: PROGRESS, INERTIA OR REGRESS

RICHARD FRIMPONG OPPONG\*

## 1. INTRODUCTION

Harmonisation of laws has a long history. However, early attempts at harmonisation through institutions such as The Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT) were for a long time confined to Europe, and this constrained their international impact.<sup>1</sup> Today it is a phenomenon that is occurring at the international, regional and national levels. There are multiple international, regional and national institutions engaged in the process to which different areas of law have been subject.

The concept of harmonisation is one that does not easily lend itself to definition. This difficulty is exacerbated because, often, similar concepts are used to mean the same thing when they are in fact different. Examples are approximation, legal integration, unification and convergence.<sup>2</sup> Zeller has defined harmonisation as “the process of making rules similar”.<sup>3</sup> Penda Matipé distinguishes between harmonisation and unification in this way: “harmonisation consists of modifying existing laws to attain substantial congruence among them ... unification of laws is more comprehensive than harmonisation; it entails the elimination of any differences within national laws by the substitution of a uniform act for the member states’ national laws. Harmonisation is subtler than

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1 Jürgen Basedow, ‘Worldwide Harmonisation of Private Law and Regional Economic Integration – General Report’ (2003) *Uniform Law Review* 31 at 32.

2 See generally Mads Andenas, Camilla Baasch Andersen & Ross Ashcroft, ‘Towards a Theory of Harmonisation’ in Mads Andenas & Camilla Baasch Andersen eds., *Theory and Practice of Harmonisation* (Cheltenham, Northampton MA: Edward Elgar Publishing, 2012) at 572–594.

3 Bruno Zeller, *CISG and the Unification of International Trade Law* (Abingdon: Routledge-Cavendish, 2007) at 12.

unification and respects the particularities of the various legal systems involved, enhancing legal cooperation among them”.<sup>4</sup>

This paper addresses harmonisation of laws<sup>5</sup> within Africa’s regional economic communities (hereinafter RECs). Although there are over 14 RECs on the continent, this paper focuses mainly on four of the RECs recognised by the African Union, namely, the East African Community (EAC),<sup>6</sup> the Common Market for Eastern and Southern Africa (COMESA),<sup>7</sup> the Economic Community of West African States (ECOWAS),<sup>8</sup> and the Southern African Development Community (SADC).<sup>9</sup> All these communities have the African Economic Community (AEC)<sup>10</sup> as their umbrella organisation.

## 2. SOURCES OF DIVERSITY AND THE CASE FOR HARMONISATION OF LAWS IN AFRICA

Because law-making is an essential attribute of states, law will necessarily differ from one country to another.<sup>11</sup> A principal source of differences in national laws in Africa is the fact that there is a diversity of legal traditions. African

4 Jean Alain Penda Matipé, ‘Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa’ in Claire Moore Dickerson ed., *Unified Business Laws for Africa – Common Law Perspectives on OHADA* (London: IEDP, 2012) at 7.

5 Harmonisation need not be restricted to laws. For example, member states of a REC may harmonise governmental policy objectives relating to issues such as inflation, working week, unemployment, etc. Harmonisation may also relate to institutional structures and procedures. See David W Leeborn, ‘Claims for Harmonisation: A Theoretical Framework’ (1996) 27 *Canadian Business Law Journal* 63 at 68–71.

6 Treaty for the Establishment of the East African Community, 30 November 1999, 2144 *UNTS* I-37437 [EAC Treaty]. The EAC is a ‘resurrection’ of the defunct East African Community established under the 1967 Treaty for East African Cooperation, 6 June 1963, 6 *ILM* 932.

7 Treaty Establishing the Common Market for Eastern and Southern Africa, 5 November 1993, 33 *ILM* 1067 [COMESA Treaty]. COMESA began its life under the 1982 Treaty for the Establishment of the Preferential Trade Area for the Eastern and Southern African States, 21 December 1981, 21 *ILM* 479.

8 Revised Treaty Establishing the Economic Community of West African States, 24 July 1993, 35 *ILM* 660, (1996) 8 *African Journal of International and Comparative Law* 187 [ECOWAS Treaty]. ECOWAS was first established under the 1975 Treaty establishing the Economic Community of West African States, 28 May 1975, 1010 *UNTS* I-14843; 14 *ILM* 1200.

9 Treaty of the Southern African Development Community, 17 August 1992, 32 *ILM* 120 [SADC Treaty]. The Southern African Development Coordinating Conference (SADCC), which was established on 1 April 1980, was the precursor of SADC.

10 Treaty establishing the African Economic Community, 3 June 1991, 30 *ILM* 1241.

11 John Goldring, ‘Globalisation, National Sovereignty and the Harmonisation of Laws’ (1998) *Uniform Law Review* 435 at 445.

countries may be broadly categorised as having common law,<sup>12</sup> civil law,<sup>13</sup> or mixed legal systems.<sup>14</sup> Colonisation is the principal reason for this diversity of legal traditions and, concomitantly, national laws. Ironically, colonisation is also the principal reason why there is a significant and broad swathe of harmonised (or sometimes uniform) laws across many African countries. This history of 'imposed harmonisation' would no doubt be important to any future initiatives to harmonise laws in Africa. For example, the rapid success of the Organisation for the Harmonisation of Business Law in Africa (OHADA) in unifying the business laws of its 17 member states can, in no small measure, be attributed to the fact that all the member states were formerly colonised by continental European countries that broadly adhere to a common civil law tradition.

Adherence to different legal traditions provides a starting point for diversity of national laws. However, even where countries adhere to the same legal traditions, there may be diversity in defined areas of law due to factors such as different levels of economic development, political orientation, the impact of local indigenous or customary laws, the level or speed of law reform, and judicial interpretations. These factors cannot be ignored in any harmonisation initiative.

In addition to the above, the lack of engagement with international developments on harmonisation of laws, including the non-ratification of relevant international conventions, the slow pace of domestic law reforms, the lack of concrete harmonisation initiatives at the community level, and the minimal use of litigation to contest national laws vis-à-vis community laws, have all contributed to the diversity of laws in Africa.

The need for harmonisation of law is often felt within regions where trans-boundary social and commercial exchange is particularly intense.<sup>15</sup> Economic integration and the regional economic communities they create provide such a setting. An important issue in regional economic integration is how to overcome the challenges posed by differences in national laws and legal traditions. These differences may exist both in respect of substantive and procedural laws. It may also extend to legal culture and mode of legal thought.

12 Examples: Gambia, Ghana, Kenya, Sierra Leone and Uganda.

13 Examples: Benin, Burkina Faso, Central African Republic, Democratic Republic of Congo, Guinea, Guinea-Bissau, Ivory Coast.

14 Examples: Botswana, Cameroon, Lesotho, Mauritius, Namibia, South Africa, Swaziland, Seychelles and Zimbabwe.

15 Basedow, *supra* note 1 at 36. See generally John Ademola Yakubu, *Harmonisation of Laws in Africa* (Ikeja: Malthouse Press Ltd, 1999).

It is important to emphasise that, in this respect, both public and private law are affected. For example, differences in constitutional principles relating to the implementation of community law – a public law issue – are as important as differences in national laws relating to the setting up of businesses – a private law issue. Similarly, differences in administrative procedures for reviewing decisions on licensing applications – a public law issue – are as important as differences in national law dealing with remedies for breach of contract – a private law issue. This is an important point because it tends to be the case in discussions on legal harmonisation and regional economic integration that attention is paid only to private law.

Economic integration creates and enhances the environment for cross-border transactions. However, differences in national laws can complicate business decision-making and hinder cross-border transactions.<sup>16</sup> As far back as 1994, when the founding treaties of the new generation of African RECs were being negotiated or emerging, Thomson and Mukisa observed that “legal diversity is ... a major barrier to African economic integration”.<sup>17</sup> Where the laws of the member states of a community vary, businesses and persons engaged in cross-border transactions or relationships may have to seek legal advice on different national legal regimes. This imposes additional costs and delay in doing business. As Mancuso perceptively puts it, “following a single set of rules, instead of having to consider various state laws, is more efficient, reduces transaction costs, and thus facilitates the development of economic activities”.<sup>18</sup> Indeed, in a regional economic integration context, one may consider diversity of laws as a non-tariff barrier to trade.

Another potential risk posed by differences in national laws for a community is that it can lead to the concentration of investments and legal services in those member states with well-developed legal systems or favourable rules to

16 Polina Dlagnekova, ‘Need to Harmonise Trade-Related Laws within Countries of the African Union: An Introduction to the Problems Posed by Legal Divergence’ (2009) 15 *Fundamina* 1 at 23–24.

17 Bankole Thomson & Richard S Mukisa, ‘Legal Integration as a Key Component of African Economic Integration: A Study of Potential Legal Obstacles to the Implementation of the Abuja Treaty’ (1994) 20 *Commonwealth L Bulletin* 1446 at 1452. See generally O Anukpe Ovwah, ‘Harmonisation of Laws within the Economic Community of West African States (ECOWAS)’ (1994) 6 *African Journal of International and Comparative Law* 76 who notes at 92 that “different laws only cause trouble and confusion”. See also Gbenga Bamodu, ‘Transnational Law, Unification and Harmonisation of International Commercial Law in Africa’ (1994) 38 *Journal of African Law* 125.

18 Salvatore Mancuso, ‘Trends on the Harmonisation of Contract Law in Africa’ (2007) 13 *Annual Survey of International & Comparative Law* 157 at 158. See also Muna Ndulo, ‘Harmonisation of Trade Laws in the African Economic Community’ (1993) 42 *International and Comparative Law Quarterly* 101 at 107–108.



the detriment of other members of an economic community. For example, in addition to providing a favourable climate for investment, contracting parties may choose the law and courts of such countries as forums for the settlement of their disputes, thus creating a significant market for legal services in that jurisdiction. The concentration of investments in specific countries in an economic community could breed jealousy and domestic resentment.<sup>19</sup> This can lead to the disintegration of the community. The collapse of the old East African Community is often cited as lending credence to this view.<sup>20</sup> Differences in national laws also do not afford equal legal protection to citizens of a community since legal rights may vary between member states. The absence of equal protection may hinder the free movement of persons and capital within a REC.

One can also not discount the use of harmonisation of law as an instrument for political unification of some sort. From the unification of commercial laws in Western Europe and the Nordic countries during the 19th century to the imposition of common law and civil law on colonies in various parts of the world in the 19th and 20th centuries, there has always been some political dimension or motivation to the harmonisation of laws. The process of harmonising laws engages inter-governmental co-operation at all levels and, thus, it assists in bringing countries together.

An important aspect or by-product of harmonisation of laws is the opportunity for law reform. Many African countries suffer from out-dated and under-developed legal regimes and laws. Harmonisation of law provides an opportunity for countries to reflect on their existing laws with a view to bringing them up to date and in line with current demands. From the above, it is evident that any REC that aims to achieve its fullest potential must pay attention to the national laws of its member states.

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19 Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011) at 107.

20 Susan Fitzke, 'The Treaty for East African Co-Operation: Can East Africa Successfully Revive One of Africa's most Infamous Economic Groupings?' (1999) 8 *Minnesota Journal of Global Trade* 127; Neil Orloff, 'Economic Integration in East Africa: The Treaty for East-African Co-Operation' (1968) 7 *Columbia Journal of Transnational Law* 302.

### 3. LEGAL AND INSTITUTIONAL FOUNDATIONS FOR HARMONISATION

Harmonisation of law within a REC cannot occur in a vacuum.<sup>21</sup> There should be a legal foundation for any such initiative, especially if it is to come from the community. Accordingly, the fundamental question is whether there is a legal obligation imposed on member states of RECs in Africa to harmonise their laws. For a start, one can argue that regional economic integration both presupposes and necessitates the harmonisation of certain substantive laws of the member states.<sup>22</sup> In other words, harmonisation of laws is inherent in the concept of regional economic integration. Without prejudice to the preceding, in a regional economic integration context, where harmonisation is envisaged, it is often provided for in the founding or constitutive treaty of the organisation.

The four treaties (including protocols and regulations concluded thereunder) that are examined below, namely the EAC, ECOWAS, COMESA and SADC treaties, share a common objective of promoting socio-economic interdependence that will strengthen both their respective regions and the African continent as a whole. However, the extent to which each document imposes legal obligations on its signatories to harmonise their laws varies significantly.

#### 3.1 EAC Treaty

The EAC Treaty<sup>23</sup> contains a number of provisions that expressly impose a legal obligation on its Partner States to harmonise their laws.<sup>24</sup> Article 126 is the centrepiece of this and requires member states to “harmonise all national laws that appertain to the Community”.<sup>25</sup> The full scope of this apparently tersely worded obligation becomes evident when one reads the EAC Treaty in full: it contains a gargantuan list of subjects on which Partner States are obliged to harmonise their laws. The Treaty provides that the Partner States shall harmonise their macro-economic policies especially in respect of exchange

21 For a summary of the legal basis for harmonisation in respect of some of the economic communities in Africa, see Riekie Wandrag, ‘Unification of Southern African Contract Law’ (2011) 13 *European Journal of Law Reform* 451 at 453–455.

22 Dlagnekova, *supra* note 16 at 19.

23 Treaty for the Establishment of the East African Community, 30 November 1999, 2144 UNTS I-37437 [EAC Treaty]. For a fuller discussion of the state of affairs with respect to the harmonisation of laws within the EAC, see Michel Ndayikengurukiye’s paper in this book.

24 For an overview of harmonisation initiatives in the EAC see Stephen Agaba, ‘The Future of International Commercial Law in East Africa’ (2011) 13 *European Journal of Law Reform* 505–513.

25 EAC Treaty, art 126.

rate policy, interest rate policy, monetary and fiscal policies;<sup>26</sup> harmonise and eventually integrate their financial systems;<sup>27</sup> harmonise their tax policies with a view to removing tax distortions in order to bring about a more efficient allocation of resources within the Community;<sup>28</sup> harmonise their banking Acts and the regulatory and legislative frameworks relating to the capital market;<sup>29</sup> harmonise standards and regulatory laws, rules, procedures and practices relating to transport and communication;<sup>30</sup> harmonise their traffic laws, regulations and highway codes and adopt a common definition of classes of roads and route numbering systems;<sup>31</sup> harmonise the provisions of their laws concerning licensing, equipment, markings and registration numbers of vehicles for travel and transport within the Community;<sup>32</sup> harmonise rules and regulations concerning special transport requiring security;<sup>33</sup> harmonise procedures with respect to the packaging, marking and loading of goods and wagons for railway transport within the Community;<sup>34</sup> harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation, with particular reference to Annex 9 thereof;<sup>35</sup> harmonise and simplify rules, regulations and administrative procedures governing waterways transport on their common navigable inland waterways;<sup>36</sup> harmonise and simplify regulations, goods classification, procedures and documents required for multimodal transport within the Community;<sup>37</sup> harmonise the requirements for registration and licensing of freight forwarders, customs clearing agents and shipping agents;<sup>38</sup> harmonise their policies on postal services;<sup>39</sup> harmonise their labour policies, programmes and legislation including those on occupational health and safety;<sup>40</sup> harmonise quarantine policies, legislation and regulations to

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26 *Ibid* art 82(1)(b).

27 *Ibid* arts 82(2)(c) and 86.

28 *Ibid* art 83(2)(e).

29 *Ibid* art 85.

30 *Ibid* art 89.

31 *Ibid* art 90(b).

32 *Ibid* art 90(c).

33 *Ibid* art 90(k).

34 *Ibid* art 91(i).

35 *Ibid* art 92(3)(d).

36 *Ibid* art 94(a).

37 *Ibid* art 95(a).

38 *Ibid* art 97(1).

39 *Ibid* art 98.

40 *Ibid* art 104(3)(e).

ease trade in seeds;<sup>41</sup> harmonise quarantine regulations in artificial insemination and livestock breeding centres;<sup>42</sup> harmonise policies, legislation and regulations for enforcement of pests and disease control;<sup>43</sup> harmonise their policies and regulations for the sustainable and integrated management of shared natural resources and ecosystems;<sup>44</sup> harmonise their legal and regulatory frameworks for the management, movement, utilisation and disposal of toxic substances;<sup>45</sup> harmonise mining regulations to ensure environmentally friendly and sound mining practices;<sup>46</sup> harmonise the professional standards of agents in the tourism and travel industry within the Community;<sup>47</sup> harmonise their policies for the conservation of wildlife, within and outside protected areas;<sup>48</sup> harmonise drug registration procedures and national health policies and regulations;<sup>49</sup> harmonise their legal training and certification and encourage the standardisation of the judgments of courts within the Community.<sup>50</sup> As a related measure, the Partner States shall take all necessary steps to “revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning.”<sup>51</sup>

In addition to the Treaty, supplementary community laws such as the EAC Customs Union Protocol, the EAC Common Market Protocol and the Protocol on the Establishment of the East African Community Monetary Union contain harmonisation obligations. For example, under the Customs Union Protocol the Partner States agree to harmonise their exemption regimes in respect of goods that are excluded from payment of import duties.<sup>52</sup> Under article 47 of the Common Market Protocol, the Partner States have undertaken to approximate their national laws and to harmonise their policies and systems for purposes of implementing the Protocol.<sup>53</sup> In furtherance of this,

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41 *Ibid* art 106(e).

42 *Ibid* art 107(e).

43 *Ibid* art 108(a).

44 *Ibid* art 112(2)(j).

45 *Ibid* art 113(2).

46 *Ibid* art 114(2)(c)(iv).

47 *Ibid* art 115(2).

48 *Ibid* art 115(a).

49 *Ibid* art 118(d)(e).

50 *Ibid* art 126(1).

51 *Ibid* art 126.

52 EAC Customs Union Protocol, art 33.

53 EAC Common Market Protocol, art 47.

the Partner States have undertaken to harmonise labour policies, programmes and legislation;<sup>54</sup> harmonise their national social security policies, laws and systems;<sup>55</sup> harmonise their financial sector policies and regulatory frameworks;<sup>56</sup> and harmonise their tax policies and laws.<sup>57</sup> Similarly, under article 22 of the Monetary Union Protocol, the Partner States have undertaken to “harmonise their policies, laws and systems for the purpose of implementing this Protocol”.

### 3.2 ECOWAS Treaty

The ECOWAS Treaty contains express provisions in which member states are required to harmonise their ‘labour laws and social security legislations’<sup>58</sup> and their customs regulations and procedures.<sup>59</sup> Outside these provisions, the treaty contains a number of provisions that may be broadly interpreted as providing a foundation for the harmonisation of laws. Indeed, the concept of harmonisation is used very frequently in the treaty. For example, member states are obliged to take all necessary measures to harmonise their strategies and policies, and to refrain from any action that may hinder the attainment of the said objectives;<sup>60</sup> harmonise and co-ordinate their economic, scientific, technical, cultural and social policies;<sup>61</sup> harmonise their industrialisation policies;<sup>62</sup> harmonise national policies on scientific and technological research, and educational systems;<sup>63</sup> harmonise their policies in the field of energy<sup>64</sup> and natural resources;<sup>65</sup> harmonise their monetary, financial and payments policies;<sup>66</sup> and harmonise their policies in education, training and employment.<sup>67</sup> In addition, member

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54 *Ibid* arts 5(2)(c) and 12.

55 *Ibid* art 12(2).

56 *Ibid* art 31(1).

57 *Ibid* art 32.

58 ECOWAS Treaty, art 61(2)(b).

59 *Ibid* art 46.

60 *Ibid* art 5(1).

61 *Ibid* art 7(3)(a).

62 *Ibid* art 26(1).

63 *Ibid* art 27(2).

64 *Ibid* art 28(1).

65 *Ibid* art 31(1).

66 *Ibid* art 51(1)(b).

67 *Ibid* art 60(2)(a).

states undertake to co-operate in judicial and legal matters with a view to harmonising their judicial and legal systems.<sup>68</sup>

### 3.3 SADC Treaty

The SADC Treaty does not expressly provide for harmonisation of the laws of member states.<sup>69</sup> However, there are several provisions that can be interpreted as providing for it.<sup>70</sup> For example, under article 5(2)(d), the SADC shall develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and the peoples of the region. As has been argued above, differences in national laws can constitute a significant non-tariff barrier to the free movement of persons, goods, services and capital. In addition, the treaty enjoins member states to “cooperate” in the areas of food security, land and agriculture; infrastructure and services; trade, industry, finance, investment and mining; social and human development and special programmes; science and technology, natural resources and environment; social welfare, information and culture; and politics, diplomacy, international relations, peace and security.<sup>71</sup> Article 21(2) also requires its signatories to “coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of cooperation.”<sup>72</sup> Harmonisation of laws on issues relevant to the above areas is, arguably, one of the forms of cooperation (a concept not defined in the treaty) envisaged. Indeed, it is trite that the process of harmonising laws entails inter-governmental cooperation.

Protocols concluded under the treaty also provide for harmonisation of laws. For example, article 18(1)(b) of the SADC Protocol on Trade in Services obliges member states to develop model laws, regulations and uniform and simplified administrative procedures with a view to promoting trade and investment in services.<sup>73</sup> Similarly, article 5(d) of the SADC Protocol on the

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68 *Ibid* art 57(1).

69 An alternative to harmonisation of laws is mutual recognition. This is provided for in Article 7 of the SADC Protocol on Trade in Services, 2012.

70 See generally Tapiwa Shumba, *Harmonising the Law of Sale in the Southern African Development Community (SADC): An Analysis of Selected Models* (PhD Thesis, Stellenbosch University Faculty of Law, 2014) [Shumba, *Harmonising the Law of Sale*].

71 SADC Treaty, art 21(1).

72 *Ibid* art 21(2).

73 [http://sadc.int/files/7313/6439/6118/Protocol\\_on\\_Trade\\_in\\_Services\\_-\\_2012\\_-\\_English.pdf](http://sadc.int/files/7313/6439/6118/Protocol_on_Trade_in_Services_-_2012_-_English.pdf).

Development of Tourism imposes an obligation on state parties to “harmonise legislation” relating to the development of tourism and travel.<sup>74</sup>

### 3.4 COMESA Treaty

In the COMESA Treaty, one of the specific undertakings of member states of COMESA in the field of economic and social development is to “harmonise or approximate their laws to the extent required for the proper functioning of the Common Market”.<sup>75</sup> There are also undertakings to harmonise tax policies with a view to removing tax distortions affecting commodity and factor movements in order to bring about a more efficient allocation of resources within the Common Market;<sup>76</sup> harmonise civil aviation rules and regulations by implementing the provisions of the Chicago Convention on International Civil Aviation;<sup>77</sup> harmonise their legal and administrative requirements for inter-state railway transport within the Common Market with a view to eliminating related barriers and inconsistencies that exist among themselves;<sup>78</sup> adopt a harmonised system for legal, scientific and industrial metrology activities in the member states and formulate modalities for the mutual recognition of calibration certificates issued by the national metrology laboratories of the member states. Indeed, the “harmonisation of policies” is one of the fundamental principles of COMESA.<sup>79</sup>

In addition to the above, the COMESA Treaty enjoins member states to “co-operate” in a dizzying array of areas, including trade liberalisation and customs; transport and communication; industry and energy; monetary affairs and finance; agriculture; and economic and social development. “Co-operation” is defined to include “the undertaking by the Member States in common, jointly or in concert of activities undertaken in furtherance of the objectives of the Common Market as provided for under this Treaty or under any contract or agreement made thereunder or in relation to the objectives of the Common

74 [http://sadc.int/files/2413/5292/8368/Protocol\\_on\\_the\\_Development\\_of\\_Tourism1998.pdf](http://sadc.int/files/2413/5292/8368/Protocol_on_the_Development_of_Tourism1998.pdf). This extends to the harmonisation of tourist registration documents, such as visa application forms, and entry and exit forms.

75 COMESA Treaty, art 4(6)(b).

76 *Ibid* art 76(2)(e).

77 In this regard, the COMESA Treaty is unique in recognising the potential role international conventions can play in harmonisation of law within the community.

78 COMESA Treaty, art 86(2)(d).

79 *Ibid* art 6(c).

Market”.<sup>80</sup> The kind of activities that could be undertaken is neither defined nor restricted. Harmonisation of laws is, thus, one of the potential acts of co-operation that could be undertaken by member states.

### 3.5 Comparative Examination

A comparative examination of the above treaties from the perspective of the extent to which they provide a legal foundation for harmonisation of laws within the RECs reveals a number of important things. First, while some provisions expressly impose an obligation on member states to harmonise their laws, other provisions are more ambiguous in terms of the obligations they impose. For example, there are various provisions that call on member states to “co-operate” or standardise their policies in respect of various matters. The concept of policy can broadly be interpreted to include laws. Indeed, purposive interpretation of such vaguely or ambiguously phrased provisions may be used to extend the powers of the communities to harmonise the laws of member states.

Secondly, one can argue that the concepts of harmonisation and co-operation are used too indiscriminately in Africa’s economic integration treaties: the areas where harmonisation, co-operation and standardisation is envisaged are too many and too far-reaching for communities at the initial stages of the economic integration ladder. There is no clear indication in the treaties whether all the areas where harmonisation is envisaged have a direct relevance for the development of the respective economic communities. There is no clear guidance in the treaties as to how harmonisation should be implemented, which institutions are responsible, and which instruments – treaties, protocols, regulations, directives, etc. – are to be used.<sup>81</sup> Indeed, one cannot help but notice that some of the provisions are very similar, raising the question of whether this is a case of blind or purposeful comparative borrowing.

Finally, as discussed below, despite decades of economic integration initiatives in Africa, and the presence of multiple legal foundations for pursuing harmonisation, none of the RECs have achieved significant progress: there are very few REC-initiated harmonised laws that have been implemented in African countries. This raises questions about the degree to which there is

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<sup>80</sup> *Ibid* art 2.

<sup>81</sup> For a discussion of how this is becoming a problem for the EAC, see Michel Ndayikengurukiye’s paper in this book.



commitment on the part of the member states to harmonise their laws, or the institutional capacity to undertake such projects in respect of so many areas of law.

Harmonisation of laws requires strong institutions to foster and sustain it. Such institutions must be empowered to enact, implement, enforce and interpret harmonised laws. The SADC Treaty provides for the following institutions of the organisation, namely the Summit of Heads of State and Government, the Council of Ministers, the Secretariat, the Tribunal, and the Committees.<sup>82</sup> Harmonisation of laws is not expressly delegated to any of these institutions. It can, however, be argued that the Secretariat is the lead institution in the harmonisation of the laws within the SADC.<sup>83</sup> The Summit is responsible for adopting legal instruments for the implementation of the treaty's provisions,<sup>84</sup> while the Council's duties include implementing the treaty's policies and programmes.<sup>85</sup> The role of the SADC Tribunal as the ultimate interpreter of SADC law will also be relevant to any adopted harmonised laws.<sup>86</sup>

The ECOWAS Treaty lists a number of institutions that will enforce its laws, including the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Economic and Social Council, the Community Court of Justice, the Specialised Technical Commissions, and the Executive Secretariat.<sup>87</sup> Although the treaty does not expressly appoint an institution to harmonise laws of member states, the Authority is given the general responsibility of ensuring that member states harmonise their policies.<sup>88</sup> The Council, in contrast, is obligated to delegate matters solely concerning the harmonisation of economic integration policies.<sup>89</sup>

COMESA provides for various institutions in its founding treaty. These include the Authority of the Heads of State and Government, the Council of Ministers, the Court of Justice, the Committee of Governors of Central Banks, the Intergovernmental Committee, the Technical Committees, the Secretariat,

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82 SADC Treaty, art 9.

83 *Ibid* art 14.

84 *Ibid* art 10.

85 *Ibid* art 11.

86 Article 16 of the SADC Treaty. This Tribunal has been indefinitely suspended and a new one is being created to replace it.

87 ECOWAS Treaty, art 6.

88 *Ibid* art 7.

89 *Ibid* art 10.

and the Consultative Committee.<sup>90</sup> The treaty provides that the Authority is responsible for enforcing policies that will achieve the objectives of the Common Market,<sup>91</sup> while the Secretariat is required to monitor the development of the Common Market.<sup>92</sup> The Intergovernmental Committee is obligated to focus solely on the finance and money sector<sup>93</sup> and the Technical Committees must ensure the co-operation of policies in their respective programmes.<sup>94</sup> None of these institutions is expressly tasked with the harmonisation of laws.

The EAC Treaty delegates responsibilities to institutions including the Summit, the Council, the Co-ordination Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and the Secretariat.<sup>95</sup> The Summit is responsible for achieving the objectives of the EAC Treaty,<sup>96</sup> while the Council is required to make policy decisions that will improve the harmonious functioning of the treaty.<sup>97</sup> The Assembly is the principal legislative institution,<sup>98</sup> and the Secretariat performs its duties as the community's executive body.<sup>99</sup> In addition to the role of the Assembly in enacting harmonised laws, the EAC has a specialised committee dedicated to the harmonisation and approximation of laws.<sup>100</sup> The Chairpersons of the Law Reform Commissions in the respective member states head the committee.

A comparative assessment of the institutions for harmonisation of laws under the respective treaties reveals that in all the treaties no one institution is specifically assigned that responsibility. It is, however, possible for the mandate of some of the institutions to be broadly interpreted to include harmonisation of laws. The approach of the EAC in co-opting national Law Reform Commissions to undertake harmonisation of laws is innovative and worth emulating in other RECs. However, the lack of an explicit institutional

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90 *Ibid* art 7.

91 COMESA Treaty, art 8.

92 *Ibid* art 17.

93 *Ibid* art 14.

94 *Ibid* art 16.

95 EAC Treaty, art 9.

96 *Ibid* art 11.

97 *Ibid* art 14.

98 *Ibid* art 49.

99 *Ibid* art 66.

100 For a full discussion of the origins and work of this committee, see Michel Ndayikengurukiye's paper in this book. See also Teresa Thorp, 'The Rule of Law and the Implementation of an Economic *Acquis Communautaire* in Sub Saharan Africa: Legal Challenges for the East African Community' (2012) 3 *European Yearbook of International Economic Law* 485 at 521.

mandate for the harmonisation of laws is concerning. If harmonisation of laws is to be effectively pursued in the RECs, there will be a need for institutions specifically mandated and resourced to perform the task.

#### 4. PATHS TO HARMONISATION

The task of harmonisation is one that cannot be lightly undertaken. It is also not one that can be undertaken by only lawyers, as it calls for the involvement of a myriad of institutions and the taking into account of diverse interests. The existence of political will is an important factor here. Harmonisation of laws always has implications for national sovereignty and it is important to ensure that member states first buy in to the idea.

Once countries decide to harmonise their laws they must choose a method for doing so. The starting point for any meaningful exercise of harmonisation of law is a comprehensive comparative study of the legal rules that operate in all the states involved. Comparative law is an important aid to harmonisation of law.<sup>101</sup> National Law Reform Commissions, academic institutions and scholarly writings all have a role to play in pursuing such a comparative study. The study should be designed to reveal all differences, similarities and issues that deserve specific attention.<sup>102</sup>

The decision as to which area to focus on is an important one. It is one that should be made deliberately and carefully in consultation with member states. In a regional economic integration context, the focus should be on areas that help promote the free movement of persons, capital, enterprises and services across national boundaries. The areas broadly under the umbrella of commercial law, which is of immediate importance to the promotion of regional economic activity in Africa, and for which national values may not be too diverse, may be the best starting point. As Antony N. Allott has perceptively observed, in Africa it is those areas of law with “less peculiar local content” that are more likely to be susceptible to transnational harmonisation.<sup>103</sup> The focus of harmonisation of laws in an economic integration context should be on laws that directly affect private transactions between people in different states.<sup>104</sup>

101 See further Professor Ulrich Spellenberg’s paper in this book.

102 John Goldring, ‘Globalisation, National Sovereignty and the Harmonisation of Laws’ (1998) *Uniform Law Review* 435 at 448.

103 Antony N Allott, ‘Unification of Laws in Africa’ (1968) 16 *American Journal of Comparative Law* 51 at 86.

104 John Goldring, ‘Globalisation, National Sovereignty and the Harmonisation of Laws’ (1998) *Uniform*

There are two principal means for harmonisation of laws. The first focuses on either the substantive international aspects of the relevant branch of law in question (e.g. international sale of goods), or the substantive domestic law aspects (e.g. domestic sale of goods). The second focuses on harmonisation of conflict of laws or private international law rules to assist in the selection of the appropriate national law in cases involving a foreign element. Harmonisation of substantive law involves ensuring a degree of similarity in the substantive laws of the countries concerned. Harmonising private international law rules implies that the substantive laws of the states remain intact, but harmonised choice-of-law, jurisdiction and foreign judgment enforcement rules are provided to ensure that parties transacting across national boundaries can be well-informed of the governing law and the court(s) with jurisdiction in case of disputes.<sup>105</sup>

Harmonising substantive or private international law rules has its merits and demerits. Substantive harmonisation of laws brings certainty because people transacting across national boundaries will be subject to the same substantive law. Indeed, to some, substantive harmonisation is preferred to the harmonisation or unification of private international law rules.<sup>106</sup> It is, however, worth noting that although substantive harmonisation of law reduces the scope for private international law problems, it requires great effort to achieve. Even when successful, “private international law will remain of considerable importance in the resolution of cross border disputes”.<sup>107</sup> Accordingly, it is important that both areas are addressed. Harmonising private international law rules generally entails only a minimal disturbance in national legal systems, as private international law addresses only matters involving foreign elements. Consequently, one can argue that it is more likely to appeal to politicians with an eye to preserving their country’s unique or perceived superior legal system. The process is considered simpler because a whole branch of substantive law may be covered by a few choice-of-law clauses.<sup>108</sup>

Harmonisation of law could be pursued using a mixture of hard law (e.g. treaties, Acts from regional law making bodies) and soft law instruments (e.g.

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*Law Review* 435 at 437.

105 For a discussion of harmonisation of private international law, see Volker Wiese and Richard Frimpong Oppong in this book.

106 Ronald D Rotunda et al., ‘Conflict of Laws as a Technique for Legal Integration’ in Mauro Cappelletti et al., eds., *Integration through Law – Europe and the American Federal Experience* (Berlin, New York: Walter de Gruyter, Vol. 1 Book 2, 1986) at 256.

107 Roy Goode, ‘Rule, Practice, and Pragmatism in Transnational Commercial Law’ (2005) 54 *International and Comparative Law Quarterly* 539 at 541.

108 Rotunda et al., *supra* note 106 at 170–74.

model laws, guidelines, model contracts, and principles).<sup>109</sup> In this respect a lot will depend on the legal foundation of the harmonisation initiative. Also as Shumba has observed, “the choice of a harmonisation technique depends on the specific circumstances of countries seeking to harmonise their laws. In some situations, effective harmonisation may require a hard law approach involving legislative measures with a high degree of state participation. In other cases, a soft law approach might suffice to facilitate effective harmonisation”.<sup>110</sup>

International law and international initiatives aimed at harmonisation of law could complement regional initiatives by African RECs. An easily available path to harmonisation of law, albeit in respect of a limited range of subject matters, is ratification of relevant international conventions. In some cases the adoption of an international convention by member states of a REC may be used as a means of harmonisation without the need for a separate regional instrument.<sup>111</sup> The uniform, international and neutral nature of some of these international conventions, as well as their already accumulated jurisprudence make them good candidates for adoption and use in a regional context. In addition to issues related to the cost of developing a regional instrument, the adoption of an international instrument also overcomes the challenge posed by diversity of legal traditions to the negotiation of a regional instrument.

For example, rather than develop a separate regional instrument dealing with enforcement of foreign arbitration awards, member states of African RECs may become parties to the United Nations (UN) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). Similarly, in respect of international sale, the UN Convention on Contracts for International Sale of Goods, 1980 (CISG) and the UN Convention on the Use of Electronic Communications in International Contracts, 2005 are viable instruments. For comparison, NAFTA countries – Canada, Mexico and USA – have adopted the CISG as their uniform law of cross-border transactions, and the EU has refrained from developing its own foreign arbitral awards enforcement regulation, preferring instead to rely on the New York Convention which has been ratified by all the EU member states. Some of the treaties establishing the African RECs, such as the COMESA and EAC treaties, also encourage

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109 See a fuller discussion of this by Tomasz P Milej in this volume.

110 Shumba, *Harmonising the Law of Sale*, *supra* note 70 at 60.

111 Ndulo, *supra* note 18 at 113–115.

member states to implement the Chicago Convention on International Civil Aviation of 1944, with particular reference to its Annex 9.<sup>112</sup>

To date, aside from the New York Convention, there has been a limited rate of adoption of these international conventions in Africa.<sup>113</sup> For example: ECOWAS has 16 member states. Of these only twelve (Benin, Burkina Faso, Cote d'Ivoire, Ghana, Guinea, Guyana, Liberia, Mali, Mauritania, Niger, Nigeria and Senegal) are parties to the New York Convention, and only five (Benin, Ghana, Guinea, Liberia and Mauritania) are parties to the CISG. The EAC has five member states. All five of them (Kenya, Uganda, Tanzania, Burundi and Rwanda) are parties to the New York Convention, but only two (Uganda and Burundi) are parties to the CISG. The SADC has 15 member states. Of these only six (Botswana, Lesotho, Mozambique, Tanzania, Zambia and Zimbabwe) are parties to the New York Convention, and only two (Lesotho and Zambia) are parties to the CISG. COMESA has 23 member states. Of these only 14 (Burundi, Comoros, Congo, Djibouti, Kenya, Lesotho, Madagascar, Mauritius, Mozambique, Rwanda, Tanzania, Uganda, Zambia and Zimbabwe) are parties to the New York Convention, and only six (Burundi, Congo, Lesotho, Madagascar, Uganda and Zambia) are parties to the CISG.<sup>114</sup> Even where they have been adopted, there is often limited or inaccessible African jurisprudence on the provisions of the instruments.

In addition to ratifying international conventions, there should be room for enacting harmonised national legislation on the basis of international soft law instruments or model laws. Examples of these model laws include the UN Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures, 2001 and the UNCITRAL Model Law on Electronic Commerce, 1996. Indeed, these two model laws have already informed a number of legislations on the continent.<sup>115</sup> At present, one can argue that, although they possess legal personality, the RECs do not have the competence to become

112 See COMESA Treaty, art 87(3)(d) and EAC Treaty, art 92(3)(d).

113 See generally Luca G Castellani, 'International Trade Law Reform in Africa – A Call for Action' (2011) 13 *European Journal of Law Reform* 479–487.

114 Samuel Kofi Date-Bah, 'The Case for Accession to, or Ratification of, the Vienna United Nations Convention on the International Sale of Goods 1980 by African States' (2011) 13 *European Journal of Law Reform* 360–369. See also Emmanuel Laryea, 'Why Ghana should Implement Certain International Legal Instruments Relating to International Sale of Goods Transactions' (2011) 19 *African Journal of International and Comparative Law* 1; Shumba, Harmonising the Law of Sale, *supra* note 70 at 145–150 arguing for the adoption of the CISG within SADC.

115 See e.g., Ghana: Electronic Transactions Act, 2008; South Africa: Electronic Communications and Transactions Act, 2002; Tanzania: Electronic Transactions Act, 2015; Uganda: Electronic Transactions Act, 2011.

parties to international conventions, which then become community law.<sup>116</sup> They can, however, encourage member states to become parties to international conventions as an indirect path to harmonisation of laws.

National courts and the respective regional courts of the RECs can be important mediums for the harmonisation of law. In other words, another path to harmonisation of laws in Africa is to rely on national and regional courts. This could be characterised as the judicial path to harmonisation. An important complement to any attempt at harmonisation of law in a regional economic integration context is the existence of a regional court that can provide authoritative and definitive interpretation of the agreed text. This ensures consistent interpretation of the harmonised laws. A radical step in respect of the role courts can play in the harmonisation of law within Africa's RECs is to establish regional courts with jurisdiction to hear and make binding decisions regarding appeals from decisions of national courts. The existence of a common appellate tribunal promotes uniformity on matters over which the tribunal has jurisdiction; notable in this regard is the role played by the Judicial Committee of the Privy Council for many Commonwealth countries, including those in Africa for which the Privy Council was the highest appellate court in the colonial and immediate post-independence era. The jurisdiction of the existing community courts<sup>117</sup> could be expanded to accommodate this role. This step would entail amendments of national constitutions and the founding treaties of the communities.

Expanding the jurisdiction of the existing community courts to encompass an appellate jurisdiction from decisions of national courts will not be achieved easily. However, such a court is not without precedent in Africa or elsewhere. The former Court of Appeal for Eastern Africa and the former West African Court of Appeal served as appellate courts for decisions from the British colonies in East and West Africa respectively. At present, the Court of Justice of the Caribbean Community serves as the final court of appeal for some member states of the

116 See generally MA Ajomo, 'International Legal Status of the African Economic Community' in MA Ajomo & Omobolaji Adewale eds., *African Economic Community Treaty: Issues, Problems and Prospects* (Lagos: Institute of Advanced Legal Studies, 1993) at 40; Oppong, *Legal Aspects of Economic Integration*, *supra* note 19 at 69–72. The practice in respect of this issue has been inconsistent, at best. There are a few treaties, such as the Protocol on Relations between the African Union (AU) and the Regional Economic Communities (RECs), 2007 which was signed by the RECs. Other major treaties such as the recent Agreement establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, 2015 was signed by the Heads of State and Government of the various member states.

117 Oppong, *Legal Aspects of Economic Integration*, *ibid* at 124–128.

Caribbean Community.<sup>118</sup> The EAC Treaty envisages such an extension of the jurisdiction of the East African Court of Justice and consultations are currently underway to make that effective.<sup>119</sup> Such a court provides a forum from which a ‘common jurisprudence’ – harmonised laws – on legal issues can be fashioned for decisions of national courts. In this way, a slow but appreciable level of harmonisation can be achieved within the communities.

National courts should also be more attentive to the jurisprudence of each other in deciding cases with a view to achieving uniformity of outcomes. The potential for jurisprudential communication as a path to harmonisation is currently evident within the Roman-Dutch law jurisdictions of southern Africa. South Africa serves as the ‘unofficial’ parent jurisdiction, and its jurisprudence is of considerable persuasive force within the other countries. Because of historical and continuing reliance on English authorities there is significant uniformity between approaches to English law and the law in many Commonwealth African countries; and, accordingly, among the Commonwealth African countries.

As noted above, harmonisation of law is enhanced if there is a regional court that can provide authoritative and definitive interpretation of the agreed text. This ensures consistent interpretation of harmonised community laws. In respect of Africa’s RECs, this can be achieved through the use of the preliminary reference procedure enshrined in the respective founding treaties of some of the RECs.<sup>120</sup> The use of the preliminary reference procedure will ensure that one institution to which all national courts of member states are bound authoritatively decides questions about the meaning of specific provisions of a community’s harmonised laws. Until recently, the preliminary reference jurisdiction of the regional court had never been invoked. A recent decision of the East African Court of Justice given as a result of a preliminary reference

118 David S Berry, *Caribbean Integration Law* (Oxford: Oxford University Press, 2014) at 391–394.

119 Article 27(2) of the EAC Treaty; Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice, EAC Secretariat, 2005. Historically, there was the Court of Appeal for Eastern Africa. It was established in 1909 with its jurisdiction initially covering Aden, Kenya, Seychelles, Somalia, Tanganyika, Uganda and Zanzibar. The territorial jurisdiction of the court was later reduced to cover Kenya, Tanganyika, Uganda and Zanzibar. On independence, the Court of Appeal for Eastern Africa was established by the East African Common Services Organization Agreement 1961 and continued in existence under article 80 of the Treaty for East African Co-operation 1967. The court collapsed with the East African Community in 1977. In West Africa, there was the West African Court of Appeal. It was originally established in 1867, dismantled in 1874 and revived in 1928 for the colonies of Nigeria, Gold Coast, Sierra Leone and Gambia. See generally Bonny Ibhawoh, *Imperial Justice: Africans in Empire’s Court* (Oxford: Oxford University Press, 2013).

120 COMESA Treaty, art 30; ECOWAS Court Protocol, art 10(f); EAC Treaty, art 34; SADC Tribunal Protocol, art 16.



from the Ugandan High Court represents positive change in this respect.<sup>121</sup> Significantly, the court held that national courts and tribunals are entitled to entertain matters involving alleged violations of the EAC Treaty. Litigation before national courts framed to challenge national laws that are obstacles to the free movement of persons, goods, capital and enterprises may ultimately result in a measure of harmonisation in respect of the affected issues. When one national court issues a judgment that a certain national law violates community law, it may signal to other national governments that have similar laws that there is the prospect of a successful challenge to their laws. This may expedite reform of the latter's laws to avoid a prospective legal challenge.

## 5. RECORD OF HARMONISATION WITHIN THE RECS

There are what may be described as natural forces that tend towards harmonisation of laws in Africa. Adherence to common legal traditions, the colonial past and the penchant of the legislative draftsman to copy legislation from the United Kingdom and sister African countries are among such forces. These forces, however, have their limits. These limits can be exceeded only through the use of structures and institutions that directly facilitate harmonisation of laws. As discussed above, to a large extent, such structures and institutions are lacking in the African RECs. It is therefore unsurprising that the record of harmonisation within the RECs has been poor.

This is quite unfortunate for as early as 1965, just two years after the formation of the Organisation of African Unity, Professor Allott concluded that the international harmonisation of laws in Africa was a key aspect of the "pan-African spirit in action".<sup>122</sup> He anticipated that the rebuilding of regional institutions, such as the East African Community, would make "a limited contribution to harmonisation of laws" in areas affecting trade, taxation and the movement of people.<sup>123</sup> The *Charter of the Organisation of African Unity*<sup>124</sup> did not

121 See *Reference for a Preliminary Ruling under Article 34 of the Treaty Made by the High Court of the Republic of Uganda in the Proceedings between the Attorney General of the Republic of Uganda and Tom Kyahurwenda*, Case Stated No. 1 of 2014, East African Court of Justice, Appellate Division, 31 July 2015.

122 Antony N Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International and Comparative Law Quarterly* 366 at 374.

123 Antony N Allott, 'The Unification of Laws in Africa' (1968) 16 *American Journal of Comparative Law* 51 at 85.

124 Charter of the Organization of African Unity, 25 May 1963, 479 U.N.T.S. 39. The Organisation of African Unity was replaced in 2000 by the African Union. See Constitutive Act of the African Union, 11 July 2000, (2005) 13 *African Journal of International and Comparative Law* 25.

contain any express provisions on the harmonisation of laws of member states.<sup>125</sup> Indeed, nothing significant was achieved on that front by the OAU. Similarly, the defunct East African Community did not achieve anything significant in the field of harmonisation of laws. This is remarkable given that article 2(j) of the Treaty for East African Co-operation, 1967, called for the approximation of the commercial laws of the member states. In recent times, numerous calls, within and outside the context of economic integration, have been made for the harmonisation of laws in Africa.<sup>126</sup>

As noted above harmonisation (indeed some may argue unification) of laws is an important part of the legal infrastructure of integrated economies. This is reflected in the constitutive treaties and laws of some communities.<sup>127</sup> A degree of harmonisation of laws is inherent in all economic integration arrangements in the form of common internal tariffs and, depending on the stage of integration, common external tariffs.

In recent times, it appears the EAC is making progress in the field of harmonisation of laws.<sup>128</sup> In its 2014 Report, the Investment Climate Facility for Africa (ICF) noted that:

125 Article II: 2 of the Charter provided that the Member States should coordinate and harmonise their general policies, especially in the fields of political and diplomatic cooperation; economic cooperation, including transport and communications; educational and cultural cooperation; health, sanitation and nutritional cooperation; scientific and technical cooperation; and cooperation for defence and security. These areas of coordination and harmonisation continue to be reflected in the founding treaties of various African RECs.

126 Muna Ndulo, 'Harmonisation of Trade Laws in the African Economic Community' (1993) 42 *International and Comparative Law Quarterly* 101; Muna Ndulo, 'The Need for the Harmonisation of Trade Laws in the Southern African Development Community (SADC)' (1996) 4 *African Yearbook of International Law* 195; John Ademola Yakubu, *Harmonisation of Laws in Africa* (Lagos: Malthouse Press Limited, 1999); 'Gbenga Bamodu, 'Transnational Law, Unification and Harmonisation of International Commercial Law in Africa' (1994) 38 *Journal of African Law* 125; O Anukpe Ovwah, 'Harmonisation of Laws within the Economic Community of West African States (ECOWAS)' (1994) 6 *African Journal of International and Comparative Law* 76.

127 See, e.g., Article 74(2) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, 5 July 2001, 2259 U.N.T.S. I-40269; Article 114 of the Consolidated Version of the Treaty on the Functioning of the European Union, 13 December 2007, [2010] O.J. C 83/47.

128 A much more successful initiative on harmonisation of laws has been undertaken by the Organisation for the Harmonisation of Business Law in Africa (OHADA). See generally B. Fagbayibo 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42 *Comparative and International Law Journal of Southern Africa* 309; Boris Martor, *Business Law in Africa: OHADA and the Harmonization Process* (London; Philadelphia, PA: GMB Publishing; 2nd Rev. Ed., 2007); Jimmy Kodo, 'Harmonisation of Business Law: The Experience of Africa' in Mads Andenas & Camilla Baasch Andersen eds., *Theory and Practice of Harmonisation* (Edward Elgar Publishing Ltd, 2011) at 252-267; Rachael Ajomboh Ntongho, 'Political Economy of the Harmonisation of Business Law in Africa' (2012) 5 *Journal of Politics and Law* 58.

ICF's partnership with the East African Community Secretariat sought to bring the EAC closer to total economic integration by harmonising commercial laws within the EAC. Establishing a synchronised legal framework for partner states will reduce the private sector's burden of having to deal with different laws when doing cross-border transactions. The project has outlined the current EAC partner state laws governing commercial transactions and recommended harmonisation of commercial laws in the region. The project also developed a commercial code (set of laws) for the region, which is pending adoption.<sup>129</sup>

The experience of the EAC reveals that institutions, funding and political will matter in any successful harmonisation initiative. As noted above, the EAC currently has a sub-committee dedicated to the task of harmonisation, which is the Sub-Committee on Harmonisation and Approximation of Laws.

Recently, the SADC also adopted the SADC Model Law on Electronic Transactions and Electronic Commerce, 2012. This Model Law was prepared by the International Telecommunication Union as part of the project on the Harmonisation of ICT Policies in Sub-Saharan Africa, with funding from the European Union.

## **6. NON-STATE INITIATIVES AND HARMONISATION OF LAWS IN AFRICA**

To date, attempts at harmonisation of law in RECs in Africa have occurred mainly through state and community institutions. For example, as noted above, within the East African Community, the Law Reform Commissions of the respective member states have been involved in the harmonisation of member states' laws. What has been missing is the critical role private institutions can play in encouraging the harmonisation of laws. This section argues that a bottom-up approach spearheaded by non-state institutions is a yet untapped source for harmonisation of laws within the RECs.

Such private initiatives aimed at harmonisation of laws are not uncommon in other parts of the world. In Asia, there is a private initiative by scholars and academics that aims to create a model law called the Principles of Asian Contract Law.<sup>130</sup> Another non-state initiative is the Principles of European Contract

129 Investment Climate Facility Report, 2014. <http://www.icfafrica.org/library/annual-reports>. The multi-million dollar sponsored project on the harmonisation of law within the EAC was funded by the Investment Climate Facility of Africa.

130 Shiyuan Han, 'Principles of Asian Contract Law: An Endeavour of Regional Harmonisation of Contract Law in East Asia' (2013) 58 *Villanova Law Review* 589.

Law, 1998 drafted by the Commission on European Contract Law (hereinafter Lando Commission). The Lando Commission, which was established in 1982, is composed of “primarily academics, many of whom are practicing lawyers. They are independent and are not representatives of specific political or governmental interests”.<sup>131</sup> Another interesting project in this regard is the Common Core of European Private Law.<sup>132</sup> This project aims to “chart the ‘common core’ of private law in Europe by publishing a series of books covering many issues of private law”.<sup>133</sup> In the Caribbean, there is the Organisation for the Harmonisation of Business Law in the Caribbean (OHADAC).<sup>134</sup> Since its formation in 2010, OHADAC has already produced a model law of commercial companies,<sup>135</sup> and there are projects for the harmonisation of private international law and the law on international commercial contracts.<sup>136</sup>

This paper argues that there is room for such private initiatives to play a role in the harmonisation of laws within the African RECs. For example, given its interests in regional economic integration and the pace of development of the EAC, the Tanzanian–German Centre for Eastern African Legal Studies (TGCL) is uniquely positioned to establish an institute or working group within the Centre dedicated to the harmonisation of laws in East Africa. In addition to developing draft principles and model bills, a TGCL Institute for the Harmonisation of Law could be a forum for comprehensively and critically studying the operation and effectiveness of already enacted harmonised laws such as the EAC Customs Management Act, 2004. Countries within the EAC could adopt model laws developed through the work of the Institute; this would ensure a measure of harmonisation of laws across the sub-region.

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131 Ole Lando, ‘Salient Features of the Principles of European Contract Law: A Comparison with the UCC’ (2001) 13 *Pace International Law Review* 339; Gema Tomás, ‘Harmonisation of European Contract Law: Slowly but Surely?’ (2013) 20 *Lex et Scientia International Journal* 7.

132 Ugo Mattei & Mauro Bussani eds., *The Common Core of European Private Law: Essays on the Project*, (Kluwer Law International, 2002). Mauro Bussani & Ugo Mattei, ‘The Common Core Approach to the European Private Law’ (1997) 3 *Columbia Journal of European Law* 339.

133 David J Gerber, ‘The Common Core of European Private Law: The Project and its Books’ (2004) 52 *American Journal of Comparative Law* 995.

134 <http://www.ohadac.com/accueil.html>.

135 <http://www.ohadac.com/textes/1/draft-ohadac-model-law-of-commercial-companies.html>.

136 Status of the OHADAC Project’s Progress. <http://www.ohadac.com/actualite/126/status-of-the-ohadac-project-s-progress.html>.

## **7. CONCLUSION**

In a sentence, the story of harmonisation of laws by regional economic communities in Africa is a story of ‘much has been promised, but little has been delivered’. To a large extent, the slow progress in this area is a reflection of the general lack of significant progress on the economic integration front. There exist strong legal foundations and practical reasons for the harmonisation of laws in African RECs. The absence of institutions specifically mandated and resourced to harmonise laws represents a significant shortfall in the provisions of the founding treaties of African RECs in respect of harmonisation of laws. Moving forward one cannot discount the important role the private sector can and should play in the harmonisation of laws. To this end, it has been suggested, for example, in this paper that the Tanzanian–German Centre for Eastern African Legal Studies (TGCL) is uniquely positioned to establish an institute or working group within the Centre dedicated to the harmonisation of laws in East Africa. A private initiative of this kind would complement initiatives at the community level.



# LEGAL HARMONISATION IN REGIONAL ECONOMIC COMMUNITIES – THE CASE OF THE EUROPEAN UNION

TOMASZ P MILEJ\*

## 1. COMPARING THE EAC WITH THE EU

For a scholar trained in European Union law, who is used to voluminous EU legislation based on the cherished principles of supremacy, direct effect and *effet utile*, a look at the EAC and, more generally, integration processes in Africa may be somewhat bewildering. The first striking feature is the scarcity of secondary legislation; integration within the EAC is chartered by a founding treaty whose substantive provisions hardly ever go beyond general policy statements and commitments to international cooperation. And rather than enacting secondary legislation, the Partner States, in order to add flesh to the bones, go on negotiating further international treaties – protocols (on the Customs Union, on the Common Market, but also for instance on the Establishment of the East African Civil Aviation Safety and Security Oversight Agency) with detailed annexes and schedules. But even those protocols do not encompass the entire integration agenda set out in the EAC Treaty, an agenda which is not only focused on free movement rights, but also includes almost every conceivable area of state activity.

Responsibility for implementing the integration agenda is not entrusted to a community legislator; it lies with the national lawmakers. Their obligation to harmonise laws is not linked to any supranational autonomous legal order, as famously proclaimed in Europe in the *Van Gend en Loos* case;<sup>1</sup> rather, it is an obligation under public international law which is not backed by any robust enforcement mechanism; the Partner States countered the evolving resolute case law of the East African Court of Justice (EACJ) with a Treaty amendment ousting the Court's jurisdiction.<sup>2</sup> The weakness of EAC law enforcement is a consequence of the weakness of the EAC's institutions. The EAC secretariat

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1 CJEU, Case 26/62, *Van Gend en Loos*.

2 See EACJ, Case No. 3 of 2007, *The East African Law Society et al.*

cannot be compared with the European Commission, either in terms of the powers accorded it by the founding Treaty, or in terms of institutional capacity.<sup>3</sup> Its ability to define and stand up for the interest of the Community taken as a whole is thus limited.<sup>4</sup>

Despite the principle of “people-centered co-operation” announced in Article 7 para. 1 of the EAC Treaty, true representation of the East African peoples is missing. The East African Legislative Assembly (EALA) consists of members who are not directly elected, as in the case of the European Parliament,<sup>5</sup> but of members “elected by the Partner States”<sup>6</sup> and further *ex officio* members who hold offices within the executive branch of the Partner States. Whereas the number of members of the European Parliament reflects at least to some extent the size of the EU Member States’ populations,<sup>7</sup> in the EAC the basic democratic rule “one man, one vote” entirely gives way to the rule “one state, one vote”, which reflects the classical understanding of the international law principle of sovereign equality, which the EAC Treaty strictly observes. Accordingly, Burundi with its 10 million inhabitants is represented by the same number of EALA members (nine) as Tanzania with over 50 million.<sup>8</sup>

Legislative procedures are prescribed only for “Community Acts”, of which, however, only a small number has been enacted. Even if those Acts originate in the Bills passed by the EALA, their fate rests entirely in the hands of each and every Head of State who may withhold his or her assent.<sup>9</sup> Unlike in the EU, there is no indication in the founding Treaties that the EAC organs passing the Community Acts exercise powers conferred upon the Community by the Partner States.

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3 The Secretariat consists of the Secretary General, Deputy Secretaries General, Counsel to the Community and other officers to be determined by the Council. See Treaty for the Establishment of the East African Community, 1999, art 66 [EAC Treaty]. Unlike in the EU, there is no college of independent commissioners (currently assisted in the EU by 33 specialised Directorate-Generals). The important power of the European Commission to oversee the application of Union law does not have an equivalent in the EAC Treaty’s depiction of the Secretariat’s functions. Compare Treaty of the European Union, 2007, art 17 [TEU] with EAC Treaty, art 71.

4 Such a task is not even assigned to the Secretariat. According to Article 66 of the EAC Treaty, the Secretariat “shall be the executive organ of the Community”, whereas the European Commission shall “promote the general interest of the Union”. TEU, art 17.

5 TEU, art 14 para. 3.

6 See EAC Treaty, art 48. This wording hints at the nature of the EALA-membership which is not the representation of peoples, but the representation of states. Article 50 of the EAC Treaty goes on to specify that it is for the National Assemblies to conduct the elections.

7 TEU, art 14 para. 2.

8 EAC Treaty, art 48(1)(a).

9 *Ibid* arts 62 and 63.



The EAC Treaty provides for other forms of secondary legislation, such as Regulations, Directives, Decisions and Recommendations, which are adopted by the Council without any parliamentary participation and which are binding “on the Partner States”.<sup>10</sup> The Council itself is composed of the Partner States’ ministers and Attorneys General.<sup>11</sup> The Council and the powerful Summit composed of the Heads of State<sup>12</sup> decide by consensus.<sup>13</sup> The main actors of the integration process are therefore the executive organs of the Partner States; it is up to them to decide how quickly integration should proceed, it is up to them to negotiate the relevant international treaties – the aforementioned protocols – and they are in control of community legislation. The organs of the EAC that are not under the direct control of the Partner States’ executive branches (the Secretariat, the EACJ and the EALA) offer very little institutional counterweight; one can thus hardly claim that the principle of institutional balance, which is one of the EU principles,<sup>14</sup> is also reflected in EAC law.

To sum up, the reliance on intergovernmentalism within the EAC is virtually antithetic to the supranational approach taken by the EU. It has also been conceptualised in some academic writing as fitting better into African reality than an EU-modelled, law-ridden integration project would.<sup>15</sup> Without going into the details of this discussion,<sup>16</sup> for the present analysis it can be safely assumed that the fundamental differences between the East African and the European integration models obviously affect their approaches to the harmonisation of laws. Nevertheless, the recent case law of the EACJ<sup>17</sup> seems to embrace some of the EU’s supranational elements, while the post-Brexit EU may also be willing to rethink the allocation of powers between the Union and Partner States. A comparative look at the EU and the EAC may thus soon be

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10 *Ibid* art 16.

11 *Ibid* arts 14.

12 See *Ibid* arts 10 and 11.

13 See *Ibid* arts 12(3) and 15(4).

14 On the evolution of the principle of “institutional balance”, see Paul Craig, ‘Institutions, Power and Institutional Balance’ in Paul Craig & Gráinne de Búrca eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed, 2011) at 41 et seq.

15 See James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2011) at 15 et seq.; Luwam G. Dirar, ‘Rethinking and Theorizing Regional Integration in Southern Africa’ (2014) 28 *Emory International Law Review* 123 at 152.

16 See Tomasz Milej, ‘What Is Wrong about Supranational Laws? The Sources of East African Community Law in Light of the EU’s Experience’ (2015) 75 *Heidelberg Journal of International Law* 601.

17 EACJ, Case No. 1 of 2014, *The Attorney General of the Republic of Uganda v Tom Kyahurwenda*.

of very practical use. The following sections focus on the EU approach, while the paper by Richard Frimpong Oppong in this book expounds on the EAC.

## 2. FORMS OF HARMONISATION

Harmonisation is a fuzzy term. Even if used in a specific context of regional integration, it may have different meanings. Harmonisation can be looked at as an *outcome* of certain processes. In this sense, it could be equivalent to the coordination of various state policies, being a result of cooperation by states forming a Regional Economic Community (REC). Similarly, legal harmonisation may be regarded as an effect of approximation of laws, as a result of having *similar laws* or *uniform laws* in place.<sup>18</sup> One may also get down to the level of application, claiming that legal harmonisation requires that similar or uniform laws must be similarly or uniformly applied.

The terms similar or uniform raise a question as to the degree of approximation, in other words, how similar the laws should be. And in this regard a distinction based on the degree of approximation could be made; accordingly, one could speak of full harmonisation, which implies uniform laws being in place in all the states of a REC, or minimal harmonisation, which would require only some level of similarity.

Legal harmonisation can be also looked at from the perspective of *procedure*, or how harmonisation is brought about in the sense of its outcome – similar or uniform laws in different states backed by similar or uniform application.<sup>19</sup> From this angle, a *regulatory* and a *contractual* approach<sup>20</sup> can be distinguished. If a regulatory approach is adopted, there would be an international institution in place which would enact uniform regulations. Alternatively, it would enact framework regulations by outlining the required level of uniformity within its scope of application and subject to further implementation by national legislation. A contractual approach is based on agreements among the member states, which would negotiate and conclude international instruments, setting out areas on which a certain level of similarity or uniformity is to be achieved.

18 For this conceptual outline, see Mads Andenas et al., 'Towards a Theory of Harmonization' in Mads Andenas et al., eds., *Theory and Practice of Harmonisation* (Cheltenham: Edward Elgar Publishing, 2012) at 578 et seq. These authors use the term "consequential harmonisation". *Ibid* at 579.

19 *Ibid* at 583.

20 See generally Youri Devuyt, 'The Community-Method after Amsterdam' (1999) 37 *Journal of Common Market Studies* 116; Alexander Caviedes, 'The Open Method of Co-ordination in Immigration Policy: A Tool for Prying Open Fortress Europe?' (2004) 11 *Journal of European Public Policy* 298.

Both approaches – the regulatory and the contractual – have their hard and their soft version. The soft version of a contractual approach would mean that instruments on harmonisation concluded by the member states are not binding; they can take the form of various soft-law documents, such as memoranda of understanding, or political declarations. A hard version of such an approach would require a binding document which takes the form of an international treaty. As an example, one may think of the EAC Protocols. In RECs adopting a soft regulatory approach, the uniform regulations would be subject to further validation by the states. This would be the case, for instance, when model laws are enacted. This validation or implementation – if required – can be of a mandatory or a voluntary character. If it were mandatory, failure to implement would constitute a violation of international law. Therefore, one can speak of a soft version of the regulatory approach only if validation or implementation is voluntary.

### 3. APPROACH TO HARMONISATION ADOPTED BY THE EU

In pursuing legal harmonisation, the European Union adopts as a matter of principle a radical version of a hard regulatory approach,<sup>21</sup> which is characterised by the use of directly effective and directly applicable laws enacted by the institutions of the Union within their area of competence. These regulatory competences are attributed to the EU by the Member States according to the principle of conferral enunciated in Article 1(1) TFUE; by virtue of this principle, the EU is authorised to regulate, but may do so only within the limits of the powers conferred upon it by the Member States through the norms of the founding Treaties. The delimitation of regulatory competences, a distinction between the powers of the Union which have been conferred upon it by the Member States and the regulatory powers remaining with the Member States,<sup>22</sup> lies at the heart of the EU's approach to harmonisation. In addition, EU law takes precedence over national law. The judges are under obligation not to apply provisions of national law which are contrary to EU law.<sup>23</sup> The radical character

21 See James D Wilets, 'A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization' (2010) 32 *University of Pennsylvania Journal of International Law* 771.

22 See TEU, arts 3 para. 6 and 4 para. 1; Article 1 and Article 2 of the Treaty on the Functioning of the European Union, 2007, arts 1 and 2 [TFEU].

23 On the historical evolution of the direct effect and supremacy doctrines and the respective case law of the CJEU, starting with *Vand Gend en Loos* and *Costa v. ENEL*, see Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order' in Paul Craig & Gráinne de Búrca eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed, 2011) at 324 et seq.

of the regulatory approach is in contrast to the harmonisation methods used within the EAC framework.<sup>24</sup>

The laws adopted by the EU can take the form of regulations or directives.<sup>25</sup> Regulations are, as a matter of principle, laws applied uniformly throughout the Community area. They do not require any form of validation or implementation by the Member States. In order not to jeopardise their uniform application, it is even forbidden for national legislators to enact any laws implementing the EU's regulations.<sup>26</sup>

Directives require implementation. There is a distinction between directives for minimum harmonisation and directives for total harmonisation.<sup>27</sup> This distinction does not necessarily provide information as to the degree of the approximation of laws, which the directive concerned is intended to harmonise. Minimum harmonisation means that the Member States may maintain higher standards – mostly with regard to certain type of products or levels of consumer protection – than those required by the directive. As a result, even in a case of minimum harmonisation, there will be a certain level of uniformity, with only some Member States going beyond what is required by the directive. One must add that, according to the principle of mutual recognition,<sup>28</sup> even those states maintaining higher standards are not entitled to impose restrictions on products which have been duly approved in another Member State in conformity with the standards stipulated in the given directive.

The Member States' latitude in the process of implementation of directives varies, but should not be overrated.<sup>29</sup> The Member States realised that when it comes to implementation, the substantial policy decisions have already been made. As a consequence, the national parliaments were on the way to being reduced to organs enforcing EU guidelines. For this reason, from the early 1990s, substantial efforts have been made to involve national parliaments at the stage of

24 On the harmonisation approach, see the chapter by Richard Frimpong Oppong in the present volume. See also Milej, *supra* note 16 at 579 et seq.

25 See TFEU, art 288.

26 CJEU, Case 94/77, *Fratelli Zerbone*, para. 26.

27 Bruno de Witte, 'Legal Instruments, Decision-Making and EU-Finances' in PJG Kepteyn et al., eds., *The Law of the European Union and the European Communities* (Alphen aan den Rijn: Kluwer Law International, 4th rev. ed, 2008) at 317 et seq.

28 See KJM Mortelmans, 'The Functioning of the Internal Market, The Freedoms' PJG Kepteyn et al., eds., *The Law of the European Union and the European Communities* (Alphen aan den Rijn: Kluwer Law International, 4th rev. ed, 2008) at 581 et seq.

29 See Tomasz Milej, 'Zur Verfassungsmäßigkeit der Umsetzung des Gemeinschaftsrechts durch dynamische Verweisungen und Rechtsverordnungen' (2009) 44 *Europarecht* 563 et seq.

decision-making by the EU organs.<sup>30</sup> The relevant procedural arrangements are now provided for in the Protocol on the role of national parliaments annexed to the Lisbon reform treaty of 2009. The national parliaments have also a strong position as guardians of the principle of subsidiarity.<sup>31</sup>

Even if the radical version of a hard regulatory approach to harmonisation remains a typical feature of the EU, one must acknowledge that since the early 1990s, when the scope of integration was expanding, other forms of legal harmonisation also came into use.<sup>32</sup> The most obvious examples were the Common Foreign and Security Policy (CFSP), which, however, only rarely required legislative action, and the Police and Judicial Co-operation in Criminal Matters (PJCC), originally Justice and Home Affairs (JHA). Both forms of cooperation constituted the so-called pillars of the European Union and were introduced by the Treaty of Maastricht in 1992.<sup>33</sup> The harmonisation of laws within those pillars was based on a hard version of the contractual approach. Inter-governmentalism has been reinforced in connection with the Monetary Union, and most particularly in the course of dealing with the euro crisis, but more as a method of decision-making on issues of economic/budgetary policy and mutual assistance rather than as an approach to legal harmonisation.<sup>34</sup>

More clearly, the community law idea of formal supranational law as an integration instrument experienced a significant boost when the intergovernmental areas of cooperation – the CSFP and PJCC – were subjected to the rule of supranational laws by the Lisbon reform treaty of 2009.<sup>35</sup> One can thus safely assume that, in the EU, this method of legal harmonisation still remains prevalent.

30 See Declaration No. 13 on the role of national parliaments in the European Union annexed to the Treaty of Maastricht of 1992, and the (legally binding) Protocol on the role of national parliaments in the European Union annexed to the Treaty of Amsterdam of 1997.

31 See Article 12 TEU and the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Treaty of Lisbon of 2009.

32 Bettina Lange, 'How to Conceptualise Law in European Union Integration Processes? Perspectives from the Literature and Empirical Research' in Volkmar Gessner & David Nelken eds., *European Ways of Law: Towards A European Sociology of Law* (Oxford: Hart Publishing, 2007) at 256; also, Devuyt, *supra* note 20 at 114.

33 See respectively Title V and Title VI of the Treaty on European Union in the Maastricht version.

34 See the Treaty between the euro area Member States establishing the European Stability Mechanism of 2012.

35 See Part Five and Part Three Title Five of the TFUE respectively.

Regarding those other forms of legal harmonisation, the so-called Open Method of Coordination (OMC) has acquired some relevance.<sup>36</sup> The OMC may be applied as a soft-contractual method of legal harmonisation. It is used by the Member States of the EU outside of the area of competences conferred upon the Union and with some involvement of the Union's intergovernmental organ, the Council of Ministers. Within the OMC framework, common policy guidelines and strategies are established. Their implementation is monitored and peer-reviewed on the basis of agreed benchmarks and indicators. As the OMC may not frustrate the division of competences between the Member States and the Union, it is often emphasised that the common policy frameworks agreed under the OMC and the monitoring results are not binding. The OMC is thus regarded as only a supplementary, soft policy steering mechanism,<sup>37</sup> even though one should not underestimate the political pressure so generated. It is applied mostly in the area of social policy, education, research and immigration policy.

As the OMC is at variance with the traditional radical regulatory approach of the European Union, it is not a surprise that it is meanwhile facing some criticism. Critics claim that it is an ineffective policy tool, which lacks visibility on the national level; it is further claimed that it poses a threat to the traditional method of law making in the Union. The controversies around the OMC also highlight the commitment to the traditional regulatory method of legal harmonisation. Similarly, in some cases, the (hard) contractual approach to which the Member States used to resort has also been abandoned, and the convention concluded by the Member States in the area of private international law has been transformed into EU regulations; these issues are discussed in detail in another article in this book.<sup>38</sup>

#### **4. REASONS FOR THE PREVALENCE OF A HARD REGULATORY APPROACH IN THE EU**

Even if, as said above, the regulatory approach is a typical feature of the EU, it has not been eagerly emulated worldwide. Trying to answer the question

36 For a compact overview, see European Parliamentary Research Service, The Open Method of Coordination, Doc. PE 542.142.

37 Thomas Bodewig, 'Die 'offene Methode der Koordinierung' in der Europäischen Union – 'schleichende Harmonisierung' oder notwendige 'Konsentierung' zur Erreichung der Ziele der EU' (2003) 38 *Europarecht* 320 et seq.; Rudolf Streinz, Christoph Ohler & Christoph Herrmann, *Der Vertrag von Lissabon zur Reform der EU* (München: C.H.Beck Verlag, 2010) at para. 11 item 5.

38 See the paper by Volker Wiese in this book.

why this has not been the case would go beyond the scope of this paper. But understanding the reasons why the EU has followed this particular approach may contribute to a better understanding of why the majority of other RECs have not.

These reasons, which will be addressed in the following section, can be roughly divided into two groups; the first group encompasses ideological reasons, and the second group of reasons may be seen as pragmatic. However, the two groups are to some extent intertwined.

## 4.1 Ideological Reasons

### 4.1.1 *The Rule of Law*

The hard regulatory approach fits into, and promotes, the concept of the rule of law. The rule of law is a principle of state organisation which is common to all European jurisdictions and deeply enrooted in the European legal tradition. Obviously, there are divergent views as to the components of the rule of law. For instance, much has been said on the differences between the German principle of *Rechtsstaat* and the Anglo-Saxon concept of the “rule of law”.<sup>39</sup> But as this idea was regarded as a common good at the inception of the European integration, it was adopted as a guiding principle of European integration. Accordingly, the very early ideas of European regional organisation that were developed in the interwar-period by the so-called “federal union” envisaged a EU maintained by the rule of law.<sup>40</sup> The first president of the European Commission, Walter Hallstein, coined the term “*Rechtsgemeinschaft*”,<sup>41</sup> which was taken up by the European Court of Justice in 1985 to describe the legal character of what were by then the European Communities. The Court said:

It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor

39 For a historical account on the two concepts, see Bernardo Sordi, ‘Revolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe’ in Susan Rose-Ackermann & Peter L Lindseth eds., *Comparative Administrative Law* (Cheltenham: Edward Elgar Publishing, 2010) at 28 et seq.

40 Ian Ward, *A Critical Introduction to European Law* (Cambridge: Cambridge University Press, 3rd ed., 2009) at 5.

41 See Dieter H Scheuing, ‘Rechtsstaatlichkeit’ in Reiner Schulze, Manfred Zuleeg, Stefan Kadelbach eds., *Europarecht* (Baden-Baden: Nomos Verlag, 2nd ed., 2010) at para 1; Jörg Phillip Terchechte, ‘Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag’ (2008) 43 *Europa-Recht* 184.

its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.<sup>42</sup>

Constitutionalism and the legality of action of both the Community and the Member States are thus regarded by the ECJ (the European Court of Justice) – now the CJEU (Court of Justice of the European Union) – as the key components of the rule of law. There are a number of facts that make the EU a “community based on the rule of law” or a “*Rechtsgemeinschaft*”? First is the fact that it is created on the basis of law, and law determines its structure and procedures. Second, the EU is a source of law – this is also the anchor of the regulatory approach to legal harmonisation. Third, and probably most important, the European Union adheres to the very idea of law. As regards the relations between the Member States, this idea is seen as an alternative to power-based politics.<sup>43</sup> Accordingly, not political pressure or violence but the law is supposed to govern relations among the Member States.<sup>44</sup>

However, the idea of a rule-based international order is not a new one. It was embraced by the peace movements in the late 19th century, and enunciated at The Hague Peace Conferences of 1899 and 1907. What the concept of a “Community based on the rule of law” really adds, is the idea of the equality of the European citizens within the community, which presupposes that all citizens are subjected to the same rules. The concept of European citizenship was entrenched in the founding treaties by the Treaty of Maastricht in 1992.<sup>45</sup> It is evident that this theoretical foundation generates a strong pull towards the harmonisation of laws in the sense of achieving uniformity, even if limited to the areas of the EU’s competence.

42 CJEU, Case 294/83, *Les Verts*, para 23.

43 Youri Devuyst argues that the architecture of decision-making was also intended to protect smaller Member States from the hegemonic ambitions of larger Member States, and to ensure a conducive climate for Franco-German cooperation. Particularly the legislative monopoly of the European Commission must be seen in this light; see Devuyst, *supra* note 20 at 115.

44 On the concept of “*Rechtsgemeinschaft*”, see Scheuing, *supra* note 41 at para 1; Frank Schorkopf, ‘Gestaltung mit Recht. Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft’ (2011) 136 *Archiv des öffentlichen Rechts* 324.

45 See Article 8 et seq. of the EC Treaty as amended by the Treaty of Maastricht in 1992.



### 4.1.2 Legitimacy

Adherence to the rule of law provides the legitimacy<sup>46</sup> of the European Union.<sup>47</sup> As far as integration is based on law, it is believed to be legitimate, that is capable of generating a sufficient level of acceptance of and confidence in the EU. This legitimacy comes from tradition; the Union is legitimate because it reflects the legalistic way of thinking, according to which conflicts in society should be resolved on the basis of pre-established rules. Accordingly, the law is also likely to be accepted as an instrument of integration.<sup>48</sup> Furthermore, European legal thought tends to point out the qualities of the law as an integration tool: law is neutral, law is logical and law provides for protection against arbitrary decisions and the abuse of political power; it is the law which sets limits for its legitimate use.<sup>49</sup>

### 4.1.3 Separation of Powers

The separation of powers is regarded as an element of the rule of law. Yet, it acquires a special importance in the context of the harmonisation of laws within a REC. Harmonisation based on the contractual approach is left within the realm of the national executive, and, more properly speaking, of the organs in charge of concluding international treaties. Compatibility of the harmonisation instruments with human rights treaties, and with the provisions and objectives of the funding treaties, would remain at the discretion of national governments, and the involvement of parliamentarians would be dependent on national ratification procedures. If a contractual approach is adopted, an effective system of checks and balances within a REC is unlikely to be established. And latitude at the level of implementation is normally, as said above, quite limited.

<sup>46</sup> The concept of legitimacy gives an answer to the question as to which requirements must be met for decisions to be complied with or to generate the so-called “compliance pull”. According to the popular definition by Th. Franck, there are four legitimacy criteria in international law: determinacy, symbolic validation, coherence and adherence. See Thomas M Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1997) at 30; also, Thomas M Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 90. The criterion of adherence is of special relevance for harmonisation, as it requires that secondary rules be clearly linked to the primary rules. The EU’s hard regulatory approach seems more suitable to meet the criteria of determinacy and coherence than a soft contractual approach, based on general descriptions of co-operation areas.

<sup>47</sup> Terchechte, *supra* note 41 at 184.

<sup>48</sup> See Roger Cotterrell, ‘Comparative Law and Legal Culture’ in Reinhard Zimmermann & Mathias Reimann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) at 714-715, see also Terchechte, *supra* note 41 at 184.

<sup>49</sup> Most explicitly Scheuing, *supra* note 41 at para 1; Terchechte, *supra* note 41 at 184.

The regulatory approach adopted by the EU doesn't leave the law-making process at the mercy of national governments, but subjects it to the system of separation of powers within the EU.<sup>50</sup> The vertical separation of powers is ensured by the principle of conferral of powers upon the Union<sup>51</sup> and the principles of proportionality and subsidiarity<sup>52</sup> according to which those powers are to be exercised. Obviously this system is imperfect; it doesn't mirror the separation of powers within a national state; however, the idea is reflected in the principle of "institutional balance".<sup>53</sup> Accordingly, the principle of popular representation embodied in the European Parliament is followed in the process of law making,<sup>54</sup> and the CJEU checks the Union's legislation for compatibility with the founding treaty documents, which, after the entry into force of the Treaty of Lisbon, also include guarantees of fundamental rights.<sup>55</sup> The European institutions – most notably the European Commission<sup>56</sup> and the CJEU – represent a common European interest, the interest of the Union as a whole. They therefore constitute a political counterweight to the representatives of Member States in the Council of Ministers.

## 4.2 Pragmatic Reasons

### 4.2.1 Law as "European Software"

The EU was not created by a single sovereign power, "the European people". It was for the Member States to confer upon the Union the law-making powers which it exercises. Therefore, to some extent, the EU lacks the sense of being a community (or polity) upon which a legal system is formed; there is no unifying origin of public authority.<sup>57</sup> As the European institutions can hardly be regarded as organs providing for a common sense of identity, this function

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50 Terchechte, *ibid* at 185; Manfred Zuleeg, 'Die Europäische Gemeinschaft als Rechtsgemeinschaft' (1994) 47 *Neue Juristische Wochenschrift* 548.

51 TEU, arts 3 para. 6 and 4 para. 1

52 *Ibid* art 5.

53 See *supra* note 14.

54 See TFEU, art 289.

55 See in particular Articles 263 and 264 TFEU. Charter of Fundamental Rights of the European Union is incorporated into the founding treaties under Article 6 para. 1 TEU.

56 See TEU, art 17 para. 1.

57 Armin von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organisation with a Single Legal System' (1999) 36 *Common Market Law Review* 899.

is incumbent upon European law. It is the law – a flexible software<sup>58</sup> – and not the hardware, that is, the imperfect institutions, which provides the cement or glue holding the EU Member States together, as there is hardly any other conceivable uniting factor in sight.<sup>59</sup> In other words, the common identity rests upon the European legalistic tradition and rule-of-law concept, which appear to be not only the common heritage, but also the only possible connector. One can assume, that the regulatory approach to harmonisation lies at the heart of the concept of European unity, as it is the law which unites Europe.<sup>60</sup>

#### 4.2.2 Efficiency and Certainty

The EU's version of the regulatory approach is efficient. As qualified majority voting (QMV) has been gradually extended to many areas of activity, the regulatory approach makes it possible to harmonise laws on issues where consensus cannot be achieved.<sup>61</sup> European legislation is based on drafts prepared by a highly specialised and powerful community organ – the European Commission. Being an organ focused not on the interests of the Member States, but rather on those of the EU as a whole, it is in a position to look beyond the smallest common denominator of Member States' interests, identifying areas in which there is a common interest in harmonisation and coordinating legislative action with the EU's objectives. The efficiency of the EU's regulatory approach also manifests itself at the stage of implementation. Adopting the concept of direct applicability of EU laws, the stage of implementing legislative action by the Member States is to a large extent by-passed.

In terms of certainty, the uniform laws adopted within a regulatory approach are more stable than domestic legislation implementing international treaty obligations, as their endurance is not affected by changes of government in the individual Member States.<sup>62</sup> In addition, having uniform laws in place

58 See the account of discussions at the seminar on National Parliaments held in Wrocław (Poland) in November 2003, Report by MILEJ, Tomasz Milej, 'Europäisches Parlament und Nationale Parlamente' (2004) 50 *Osteuropa-Recht* 59 et seq.

59 Ward, *supra* note 40 at 212. The reliance on a flexible integration "method", rather than an "ideology", was a deliberate choice by the "founding fathers" after the horrors of World War II which totalitarian ideologies brought to Europe.

60 The uniting function of law is stressed by Terchechte, *supra* note 41 at 187 and Zuleeg, *supra* note 50 at 548.

61 See Devuyst, *supra* note 20 at 114. It was the experience of the first years of the functioning of the Council of Europe, marked by passivity, which moved the founding fathers of the EU to embrace the regulatory approach.

62 Andenas, Andersen & Ashcroft, *supra* note 18 at 590.

moderates the challenges to certainty which inevitably remain at the stage of their application. The application of law at grassroots level is context-related; it depends on the legal traditions, the education of lawyers, the prevalent schemes of argumentation and the legal system in place.<sup>63</sup> In other words, even harmonised uniform laws will be looked at by the national authorities through the lens of their own jurisdiction. And if the body of law to be applied by the national authorities consisted not of uniform rules but of the national enabling legislation of what was internationally agreed between the Member States, the level of uncertainty would be much higher. Finally, laws originating from one authority following certain policies are more likely to form a legal system, as compared to a set of agreements between states; this point is of importance at least from the point of view of continental legal thinking.<sup>64</sup>

### 4.2.3 Empowerment of Courts and Citizens

Regional integration is too important to be left to politicians only. In conferring individual rights upon citizens, it not only raises popular awareness of the harmonised law but also creates a real interest in its enforcement.<sup>65</sup> The direct effect and the direct applicability of EU law make every national judge a Union judge. Even if it is the CJEU which is famous for championing many important developments in EU law, it frequently did so in cases which were referred to it by the national courts.<sup>66</sup> The EU's approach to harmonisation thus provides for a system in which the law of the Union is applied in the everyday administration of justice; and it is applied to the real-life problems which citizens bring to their national courts. This approach has dismantled the state as the unitary actor in the process of regional integration and increased the number of stakeholders involved in this process;<sup>67</sup> it has made the courts – both the national courts and the CJEU – “key drivers of European integration”.<sup>68</sup>

63 See, most comprehensively, Werner Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006) at 184 et seq. and Andenas et al., *supra* note 18 at 589.

64 See Mary Ann Glendon et al., *Comparative Legal Traditions, Text, Materials and Cases on Western Law* (St. Paul, MN: West Academic Publishing, 3rd ed., 2008) 433 et seq.

65 The idea of positioning citizens as guardians of the implementation of European law was present already in the *Van Gend en Loos* case, CJEU, Case 26/62, *Van Gend en Loos*.

66 See CJEU, Case 26/62, *Van Gend en Loos*; CJEU, Case 6/64 *Costa v. ENEL*; CJEU, Case 120/78, *Cassis de Dijon* and more recently CJEU, Case 34/09, *Ruiz Zambrano* – to name just a couple of landmark cases.

67 See generally Laurence R. Helfer & Anne-Marie Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’ (1997) 107 *Yale Law Journal* 289.

68 Lange, *supra* note 32 at 257.

## 5. CONCLUSION

Even if the regulatory approach has proved to be a successful tool of harmonisation in the past, it is at its limit in terms of bringing forward European integration. Following the legal tradition is one thing, but setting objectives for the future is another. Even the paradigm of creating an “ever closer Union”, which was the cornerstone of the integration process from the very beginning, is in jeopardy. Europe lacks visions; the establishment of the “United States of Europe”, as proclaimed by Winston Churchill in 1946, or, to borrow from the EAC Treaty, a political federation, no longer seem to be an inspiration for the European peoples and their political elites. A common market is in place, despite its deficiencies, but it is not a vision which brings Europeans together; neither is the common currency, to say the least. The concept of European citizenship, despite recent tendencies in the case law of the CJEU,<sup>69</sup> is hardly filled with tangible contents. Without a political blueprint or – as Ian Ward puts it – a “deeper political morality”,<sup>70</sup> European law may become a bureaucratic tool<sup>71</sup> for managing what is already in place.

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69 On the substance of rights conferred upon citizens of the Union, see CJEU, Case 34/09, *Ruiz Zambrano*. For a detailed account, see for instance Tomasz Milej, ‘The “substance of the rights” of the Union Citizenship in the Recent Case Law of the CJEU – Potential and Limits of the Concept’ (Studies in Law (Cracow), 2014/2) at 41 et seq.

70 Ward, *supra* note 40 at 213. See also Lange, *supra* note 32 at 257 et seq.

71 See also Cotterrell, *supra* note 48 at 731–732.



**PART II:**  
**SELECTED FIELDS OF**  
**HARMONISATION IN ECONOMIC**  
**LAW**

**PRIVATE INTERNATIONAL LAW AND**  
**LEGAL HARMONISATION**





# PRIVATE INTERNATIONAL LAW AND HARMONISATION OF LAWS IN AFRICAN REGIONAL ECONOMIC COMMUNITIES

RICHARD FRIMPONG OPPONG\*

## 1. INTRODUCTION

Regional economic integration enhances cross-border business transactions and inter-personal relationships. It is a fertile site for private international law problems. The approach to such problems in a regional community setting can either promote or hinder the free movement of persons, capital and enterprises within the community. This paper examines the harmonisation of private international law within regional economic communities in Africa. It argues that while there are 'natural' forces that work towards harmonisation in these communities, such as their common legal traditions and judicial comparativism, more direct steps are needed, including the use of community legislation and greater engagement with international initiatives in the field of private international law.

## 2. IMPORTANCE OF PRIVATE INTERNATIONAL LAW TO REGIONAL INTEGRATION

Private international law is concerned with claims or matters within states that involve a foreign element. Its principal function is ensuring justice for individuals whose relations touch more than one state,<sup>1</sup> but in addition private international law performs a regulatory function between states. It can be used to regulate

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\* Associate Professor, Thompson Rivers University, Faculty of Law, Canada. This paper draws from remarks I gave during the 2013 Annual Meeting of the American Society of Comparative Law at the UALR William H Bowen School of Law on October 12, 2013. See also Richard Frimpong Oppong, 'Globalization and Private International Law in Commonwealth Africa' (2014) 36 *University of Arkansas at Little Rock Law Review* 153; Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011) at 271-309; and, generally, Richard Frimpong Oppong, *Private International Law in Commonwealth Africa* (Cambridge: Cambridge University Press, 2013). For an interesting article on the subject, see Annelies Nachtergaele, 'Harmonization of Private International Law in the Southern African Development Community' (2014-15) 16 *Yearbook of Private International Law* 365.

1 Robert Wai, 'In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law' (2001) 39 *Canadian Yearbook of International Law* 187.

the conduct of persons who transact across states with a view to achieving the objectives of a regional economic community (hereinafter ‘community’ or ‘economic community’).<sup>2</sup> For example, choice of law rules could be used to ensure adherence to standards set by a community, and protect community interests by preventing any resort to laws that may defeat community goals.<sup>3</sup> The rules on the enforcement of foreign judgments can be used to ensure greater effectiveness of judgments and, thus, aid cross-border settlement of disputes within a community.<sup>4</sup> Put differently, private international law can be used to manage interstate relations, especially the intense economic relationships fostered by economic integration.<sup>5</sup> Important community goals might be difficult to achieve without an effective private international law regime. For example, there can be no meaningful implementation of factor mobility, which is the free movement of persons, goods, capital and services, without attention to the facilitative role of private international law. It is significant that factor mobility is envisioned by Africa’s economic communities.<sup>6</sup> Private international

- 2 Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation’ (2001– 2002) 40 *Columbia Journal of Transnational Law* 209; Robert Wai, ‘Transnational Private Law and Private Ordering in a Contested Global Society’ (2005) 46 *Harvard International Law Journal* 471; Horatia Muir Watt, ‘Integration and Diversity: The Conflict of Laws as a Regulatory Tool’ in Fabrizio Cafaggi ed., *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006) at 107; Dimitris Tzouganatos, ‘Private International Law as a means to Control the Multinational Enterprise’ (1986) 19 *Vanderbilt Journal of Transnational Law* 477; Sara Seck ‘Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law’ (1999) 37 *Canadian Yearbook of International Law* 139.
- 3 A classic example is declining to give effect to parties’ choice of law agreement because enforcement of the agreement would lead to a breach or evasion of community law. See e.g., *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, Case C-381/98, 2000 ECR I-9305.
- 4 Significantly, four of the current international conventions on the enforcement of foreign judgments have been spearheaded by economic integration organisations. These are the *Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, 8 May 1979, 1439 UNTS I-24392, 18 ILM 1224; *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, 24 ILM 468; Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on *Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ, L 351/1; and the *Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, [2007] OJ L339/3. So far, attempts by The Hague Conference on Private International Law to have a global convention on the subject have failed.
- 5 Antonio Boggiano, ‘The Law of Relations between Legal Systems: A Methodological Analysis’ in Jürgen Basedow ed., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification - Liber Amicorum Kurt Siehr* (The Hague: TMC Asser Press, 2000) at 79–94; Kurt Siehr, ‘Coordination of Legal Systems in Private International Law’ in Talia Einhorn & Kurt Siehr eds., *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter Nygh* (The Hague: TMC Asser Press, 2004) at 325; Peter Hay et al., ‘Conflict of Laws as a Technique for Legal Integration’ in M Cappelletti et al. eds., *Integration through Law: Europe and the American Experience* (New York: Walter de Gruyter, Vol. 1(2), 1989) at 168.
- 6 *Treaty Establishing the African Economic Community*, 3 June 1991, 30 ILM 1241, art. 6(2)(f)(i) [AEC

law affects the functioning of any economic community that promotes factor mobility. Indeed, it was social and commercial relations between individuals in independent European states that set the stage for the emergence and development of private international law as a subject.<sup>7</sup>

In economic communities and in the world at large, private international law can be a tool for multi-level governance. Co-operation between national courts can mean that there is adherence to a state's norms even though litigation is pursued outside its borders. Indeed, private international law is a force for ensuring order and stability in legal relationships that transcend national legal systems.<sup>8</sup> This role is most visible in federal states – a more advanced form of economic integration – where, in some jurisdictions, rules are deployed to ensure legal harmony or unity within the federation.<sup>9</sup> Private international law also provides an avenue for harmony in decision-making in the face of legal pluralism, a significant feature of African legal systems. In other words, regardless of the multiplicity and diversity of legal traditions, the application of private international law rules can provide some comfort for individuals transacting across states; it gives such individuals the assurance that national courts will hear their claim even if it contains a foreign element; that national courts will not necessarily apply their domestic law to such a claim, and that a judgment resulting from such a claim would be enforced where the defendant has assets. Indeed, this is the very essence of the role of private international law in economic integration. Economic integration assumes and fosters the dismantling of state boundaries, and even though private international law is

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Treaty]; *Treaty Establishing the Common Market for Eastern and Southern Africa*, 5 November 1993, 33 ILM 1067, art. 84 [COMESA Treaty]; *Treaty for the Establishment of the East African Community*, 30 November 1999, 2144 UNTS I-37437, art. 104 [EAC Treaty]; *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, 35 ILM 660, art. 55(1)(ii) [ECOWAS Treaty].

7 John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (London: Stevens and Haynes, 1904) at 23.

8 Horatia Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws' (2005) 9 *Edinburgh Law Review* 6; Hay, *Conflict of Laws*, *supra* note 5 at 168; Ulrich Drobnig, 'Conflict of Laws and the European Economic Community' (1966–1967) 15 *American Journal of Comparative Law* 204.

9 Canada and Australia have witnessed the constitutionalisation of private international law. The Supreme Court of Canada has held that private international law has a role to play in fulfilling the intention of the framers of the Canadian constitution to create a single country. *Morguard Investments Ltd. v De Savoye* [1990] 3 SCR 1077, 76 DLR (4th) 256; *Hunt v T & N plc* [1993] 4 SCR 289, 109 DLR (4th) 16; *Tolofson v Jensen* [1994] 3 SCR 1022, 120 DLR (4th) 289; *John Pfeiffer Ltd. v Rogerson* (2000) 203 CLR 503; Elizabeth Edinger, 'The Constitutionalization of the Conflict of Laws' (1995) 25 *Canadian Business Law Journal* 38; Janet Walker, 'Must there be Uniform Standards for Jurisdiction within a Federation?' (2003) 119 *Law Quarterly Review* 567; James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 8.

founded on the existence of boundaries, it provides principles for managing cross-border co-existence.

Politically, private international law's approach to managing the co-existence of states is suitable for states which may want to maintain their distinct legal traditions and laws even while integrating.<sup>10</sup> Private international law maintains the integrity of the national legal systems; it defines the applicable law for the resolution of a particular problem, but leaves the content of that law untouched. This characteristic can be useful in the harmonisation of laws since it reassures executives and legislatures of their control over their substantive laws. African states which are in the early stages of economic integration have concerns about sovereignty, and some might be equally concerned about the erosion of the ideals of their legal traditions. A developed private international law regime can provide legal certainty for cross-border transactions in such a setting, and, at the same time, ensure that substantive national laws are not fundamentally changed.

Differences in private international law regimes may constitute a non-tariff barrier to trade in an economic integration setting. The private international law regimes of African countries manifest differences in some major areas, as the following examples illustrate. In respect of jurisdiction in international matters, the Roman Dutch law countries<sup>11</sup> have attachment as the basis of jurisdiction *in personam* in respect of claims sounding in money, while the common law states<sup>12</sup> have service as the foundation of jurisdiction. The use of choice of forum clauses as a sole basis of jurisdiction in international matters is well accepted in the common law tradition. This is not the case in the Roman Dutch law countries.<sup>13</sup> For example, under South African law, the mere presence of a South African choice of forum agreement in a contract between two foreigners is not

10 The demands of economic integration may, however, compel a different result. An example of this is the Europeanisation of English private international law. *Allianz SpA v West Tankers Inc.*, Case C-185/07; *Turner v Grovit*, Case C-159/02, [2004] ECR I-3565; *Owusu v Jackson*, Case C-281/02, [2005] ECR I-1383; TC Hartley, 'The European Union and the Systematic Dismantling of the Common Law Conflict of Laws' (2005) 54 *International and Comparative Law Quarterly* 813; Jonathan Harris, 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4 *Journal of Private International Law* 347.

11 These are Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe. These are, in fact, mixed legal systems as they also apply aspects of common law.

12 These are Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia. One should also add Liberia, which, although not a former British colony, has laws influenced by English law. This is because of its historical association with America.

13 See generally Christopher Forsyth, 'The Impact of the Domestic on the International: Some Crucial Deficiencies in the South African Law of Jurisdiction with their Regional and International Consequences' (2006) 18 *South African Mercantile Law Journal* 1.

enough to confer jurisdiction on the South African courts. It is worth pointing out that a Botswana court has held that in this age of intense international trade involving cross-border transactions, and because of the existence of efficient mechanisms for the international enforcement of judgments, there is no reason why foreign parties who have by their own agreement submitted themselves to the jurisdiction of the court should not be held to their obligations in terms of their agreement.<sup>14</sup> The existing differences in national laws will become more significant as economic integration progresses and cross-border economic activities increase.

Given the importance of private international law in economic integration, it comes as no surprise that its harmonisation is an essential component of economic integration in most parts of the world.<sup>15</sup>

### 3. HARMONISATION OF PRIVATE INTERNATIONAL LAW

Harmonisation of private international law is a key aspect of economic integration efforts in most parts of the world. For example, considerable institutional and academic attention is given to it within the European Union (EU). From its inception, a sound private international law regime was identified as having a key role to play in the creation and sustenance of the internal market.<sup>16</sup> The Organization of American States (OAS) also has economic integration among its objectives.<sup>17</sup> Through its Inter-American Conference on Private International Law, the OAS has supervised the negotiation and adoption of over 20 conventions by its members.<sup>18</sup> These conventions cover various issues

14 *MAK (Pty) Ltd. v St. Paul Insurance Co. SA Ltd.* 2007(1) BLR 210.

15 Robert C Casad, *Civil Judgment Recognition and the Integration of Multi-State Associations: Central America, the United States of America, and the European Economic Community* (Lawrence: Regent Press of Kansas, 1981); Bradford A Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgment in the LAWASIA Region: A Comparative Study of the Laws of Eleven Asian Countries Inter-se and with the E.E.C. Countries* (North Ryde, N.S.W.: CCH Australia Limited, 1985).

16 See Article 220 of the *Treaty Establishing the European Economic Community*, 25 March 1957, 298 UNTS 11. The Convention (now Regulation) on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters was the direct product of article 220.

17 Article 42 of the *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3.

18 Friedrich Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 *American Journal of Comparative Law* 381; Alejandro Garro, 'Unification and Harmonization of Private Law in Latin America' (1992) 40 *American Journal of Comparative Law* 587; Jose Daniel Amado, 'Recognition and Enforcement of Judgment in Latin American Countries: An Overview and Update' (1990-91) 31 *Virginia Journal of International Law* 99; Leonel Pereznieto Castro, 'Some Aspects concerning the Movement for Development of Private International Law in the Americas through Multilateral Conventions' (1992) 39 *Netherlands International Law Review* 243; Paul A O'Hop Jr., 'Hemispheric Integration and the Elimination of

including the recognition and enforcement of judgments and choice of law in contracts.<sup>19</sup> There has also been a focus on the free trade agenda of the region.<sup>20</sup> The Common Market of the Southern Cone (MERCOSUR) sees the “harmonisation of legislation in relevant areas” as a key to strengthening its integration process.<sup>21</sup> Private international law has attracted MERCOSUR’s attention, and progress there has been described as “impressive”.<sup>22</sup> Indeed, the history of co-operation on private international law issues in the Americas dates back to the 19th century; the Bustamante Code (Convention on Private International Law) was adopted as early as 1928.<sup>23</sup>

Against this background, it is baffling that, despite decades of economic integration in Africa, private international law has not been on the agenda of any community, notwithstanding the fact that the founding treaties contain provisions that may be interpreted as enjoining the communities to adopt private international law initiatives. Article 57(1) of the ECOWAS Treaty, commits member states “to co-operate in judicial and legal matters with a view to harmonizing their judicial and legal systems”. The modalities for the implementation of this article were to be the subject matter of a protocol. So far, none has been concluded. Article 126 of the EAC Treaty also obliges member states to “encourage the standardization of judgments of courts within the community”, and “harmonise all their national laws appertaining to the community”. At present, no initiative of significance relating to private international law has been undertaken under it.

What could explain this state of affairs? Some of the reasons that can be offered are: the low level of intra-regional trade and movement of persons; the

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Legal Obstacles under a NAFTA-Bases System’ (1995) 36 *Harvard International Law Journal* 127 at 163–166.

19 *Inter-American Convention on the Law Applicable to International Contracts*, 17 March 1994, 33 ILM 732; *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, 24 May 1984, 24 ILM 468.

20 Diego P Fernandez Arroyo & Jan Kleinheisterkamp, ‘The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step towards Inter-American Legal Integration’ (2002) 4 *Yearbook of Private International Law* 237 at 254.

21 *Treaty for the Establishment of a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, 26 March 1991, 2140 UNTS I-37341, art. 1. See also Diego P Fernandez Arroyo, ‘International Contracts Rules in Mercosur: End of an Era or Trojan Horse’ in Patrick J Borchers & Joachim Zekoll eds., *International Conflict of Laws for the Third Millennium, Essays in Honour of Friedrich K Juenger* (New York: Transnational Publishers, 2000) at 157–163.

22 Fernandez Arroyo, *ibid* at 172.

23 Bustamante Code (Convention on Private International Law), 20 February 1928, 86 League of Nations Treaty Series 246.

under-developed nature of private international law research and scholarship; the stage of development of the communities; and the lack of political will.<sup>24</sup>

Economic integration does not appear to be impacting on existing national private international law regimes.<sup>25</sup> The private international law regimes in most African countries are under-developed, and there has been no initiative to date to consciously harmonise national regimes. The issue of foreign judgments enforcement is illustrative. An effective foreign judgment enforcement regime is a key component of any successful economic integration initiative.<sup>26</sup> So far, it seems careful thought has not been given to this issue in Africa.

There have been cases in which judgments from other African countries were denied recognition or enforcement by national courts. This was due to the fact that the foreign judgments emanated from countries which had not been designated as beneficiaries under the statutory regime for registration of foreign judgments.<sup>27</sup>

24 Bankole Thomson & Richard S Mukisa, 'Legal Integration as a Key Component of African Economic Integration: A Study of Potential Legal Obstacles to the Implementation of the Abuja Treaty' (1994) 20 *Commonwealth Law Bulletin* 1446.

25 But see *Shah v Manurama Ltd* [2003] 1 EA 294 (HCU) (Uganda) in which the court reformed the Ugandan rules relating to foreign plaintiffs and security for costs on the basis that the plaintiff was resident within the East African Community. In this case, the defendant brought an application seeking an order requiring the plaintiff to pay security for costs. The plaintiff was resident in Kenya, and thus outside the jurisdiction of the Uganda High Court. The defendant, relying on well-established common law principles, argued that the plaintiff's foreign residence was a *prima facie* ground for ordering payment of costs. In reply, the plaintiff argued that given the re-establishment of the EAC, the question of residence for the purpose of ordering security for costs should be re-examined. In denying the application, the court held that in East Africa, there could no longer be an automatic and inflexible presumption that the courts would order security for costs with regard to a plaintiff resident in the EAC. The court reasoned that the EAC residence "begs for a fresh re-evaluation of our judicial thinking" regarding the implementation of the law requiring foreign plaintiffs to pay security for costs. Among the factors that the court considered in coming to its decision was the fact that the EAC treaty makes express provision for the unification and harmonisation of the laws of the partner States, including "standardization of the judgments of courts within the community" and establishment of a common bar (that is cross-border legal practice) in the Partner States.

26 Regulation (EC) No 1215/12 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ, L 351/1.

27 *Heyns v Demetriou* [2001] Malawi High Court 52 (holding that a South African judgment could not be registered under Malawi's British and Commonwealth Judgments Act, 1922 and the Judgment Extension Act 1922); *Barclays Bank of Swaziland v Koch* 1997 BLR 1294 (holding that a Swaziland judgment could not be registered under Botswana's Judgments (International Enforcement) Act; *Willow Investment v Mbomba Ntumba* [1997] TLR 47 (the Tanzanian court refused to enforce a judgment from Zaire); *SDV Transmi (Tanzania) Limited v M/S STE DATCO* (Civil Application No. 97 of 2004) (Court of Appeal, Tanzania, 2004) (in which the absence of a regime for the reciprocal enforcement of judgments between Tanzania and Democratic Republic of Congo was the determinative consideration that made the court grant a stay of execution in favour of the applicant against the Democratic Republic of Congo resident respondent judgment creditor who had no



These cases reflect a wider problem: under the statutes on the registration of foreign judgments, not many African countries have been designated as beneficiaries.<sup>28</sup> At present, it is only between the founding members of the EAC – Kenya, Tanzania and Uganda – that judgments can be registered in each other's countries.<sup>29</sup> It is a damning indictment on Africa's economic integration that a judgment from the United Kingdom – a former colonial power – is more likely to be registered in member states of the various regional economic communities than judgments from their respective member states.

There is little sign that within Africa's regional economic communities harmonisation of private international law will occur any time soon, notwithstanding the various calls that have been made for it.<sup>30</sup> An important initiative in this regard, which may ultimately serve as a model for harmonisation of private international law in Africa, is the Treaty on Harmonization of Business Law in Africa (OHADA)<sup>31</sup> to harmonise the substantive laws among its 17 member countries.<sup>32</sup> This initiative has produced some concrete outcomes

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assets in Tanzania); *Italframe Ltd. v Mediterranean Shipping Co.* [1986] eKLR 54 (in which a judgment from Tanganyika – now Tanzania – was denied registration in Kenya); *Re Lowenthal and Air France* 1966(2) ALR Comm. 301 (judgment from Zambia denied registration in Kenya).

28 South Africa's regime designates only Namibia. Namibia's regime designates only South Africa. Swaziland's regime has been extended to Lesotho, Botswana, Zimbabwe, Zambia, Zanzibar, Malawi, Kenya, and Tanzania. Ghana's designates only Senegal (see First Schedule of Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument, 1993, L.I. 1575). Tanzania's regime designates Lesotho, Botswana, Mauritius, Zambia, Seychelles, Somalia, Zimbabwe, and the Kingdom of Swaziland (see Reciprocal Enforcement of Foreign Judgments Order, GN Nos. 8 & 9 of 1936); Kenya's regime designates Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda (Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, sec. 2).

29 See e.g., *Sebagga & Sons Electric Ltd. v Kenya Nat'l Shipping Lines Ltd.* [2000] LawAfrica LR 931 (enforcement of judgment from Uganda); *Pioneer General Assurance Society Limited v Zulfikarali Nimji Javer* [2006] eKLR (Kenyan court registered judgments from Uganda, payment of interest on a Ugandan judgment registered in Kenya); *Société de Transports International Au Rwanda v H.H. Abdi*, Civil Application No. NAI 298 of 1997 (Court of Appeal, Kenya, 1997) (appeal against a decision setting aside the registration in Kenya of a Rwanda judgment).

30 See e.g., Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011) at 111–115.

31 The treaty was concluded in Port Louis (Mauritius) in 1993. The initiative is being pursued under the aegis of the Organisation pour l'harmonisation en Afrique du droit des affaires (Organisation for the Harmonization of Business Laws in Africa, OHADA), which is not an economic integration organisation. Most of the members of OHADA are francophone states in West Africa that all share a civil law tradition. The objective of the OHADA Treaty is to harmonise the business laws in the contracting states through the elaboration and adoption of simple, modern and common rules adapted to their economies.

32 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo-Brazzaville, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo. These states are mostly francophone. Guinea Bissau is Portuguese-speaking and Equatorial Guinea is Spanish-speaking. Cameroon is bilingual—English and French. Liberia and Angola are on record as having expressed interest in becoming members. See generally



including over ten Uniform Acts already in force. The existing Acts govern major sectors such as general commercial law, company law, carriage of goods by road and arbitration. Some of the Uniform Acts have provisions significant to private international law. For example, the Uniform Act on Arbitration<sup>33</sup> deals with the enforcement of arbitral awards (Article 30) and endorses the principle of separability (Article 4).

The willingness of the 17 states to abandon their disparate national laws in favour of harmonised rules represents a triumph for international legal cooperation in Africa, but so far this is an isolated example. It is significant to note that all the member states of OHADA are civil law countries. Any attempt to extend OHADA Uniform Acts into the common law countries would involve a clash of legal traditions and principles.<sup>34</sup> Date-Bah predicts that “[it] is thus likely that before the Anglophones can come into their fold, their existing Uniform Acts may need some readjustment to reflect the legal tradition of the joining group.”<sup>35</sup>

International efforts at unification of private international law, mainly under the umbrella of The Hague Conference on Private International Law, have not had a very significant impact in Africa.<sup>36</sup> There are currently 27 African

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Boris Martor, *Business Law in Africa: OHADA and the Harmonization Process* (London; Philadelphia, PA: GMB Publishing; 2nd Rev. Ed., 2007); Claire Moore Dickerson, ‘Harmonizing Business Laws in Africa: OHADA Calls the Tune’ (2005) 44 *Columbia Journal of Transnational Law* 17; Nelson Enonchong, ‘The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?’ (2007) 51 *Journal of African Law* 95; Salvatore Mancuso, ‘Trends on the Harmonization of Contract Law in Africa’ (2007) 13 *Annual Survey of International and Comparative Law*; Babatunde Fagbayibo, ‘Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?’ (2009) 42 *Comparative and International Law Journal of Southern Africa* 309; Marcel Fontaine, ‘Law Harmonization and Local Specificities – A Case Study: OHADA and the Law of Contracts’ (2013) 18 *Uniform Law Review* 50.

33 Uniform Act on Arbitration (OHADA), [http://www.ohadalegis.com/anglais/AUArbitrage\\_gb.pdf](http://www.ohadalegis.com/anglais/AUArbitrage_gb.pdf) art. 30, 4 (1999). The Act applies to any arbitration when the seat of the Arbitral Tribunal is in one of the member states.

34 See Akere T Muna, ‘Is OHADA ‘Common Law Friendly’?’ (2001) 3 *International Law FORUM du droit International* 172; SK Date-Bah, ‘The Preliminary Draft OHADA Uniform Act on Contract Law as Seen by a Common Law Lawyer’ (2008) 13 *Uniform Law Review* 217; Simon Tabe, ‘Unification of Business Law in Cameroon: Realities of the Application of the OHADA Uniform Act on Commercial Companies in Anglophone Cameroon Twelve Years after (1998–2010)’ (2013) 16 *International Trade and Business Law Review* 136.

35 Date-Bah, *ibid* at 221. In addition, there are issues of translation and of the procedures for implementing the Uniform Acts. The procedures currently avoid national legislative procedures by making the Uniform Act directly applicable in the member states.

36 See generally Richard Frimpong Oppong, ‘The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation’ (2006) 8 *Yearbook of Private International Law* 189.

countries that are parties to Hague Conventions<sup>37</sup> and six that are member states of the Conference<sup>38</sup> – the most recent member being Burkina Faso. This is an improvement: in December 2006 only 18 African countries were parties to conventions adopted by The Hague Conference and three African countries were members of the Conference.<sup>39</sup> Significantly, there appears to be an increasing awareness of Hague Conventions in legal circles and there have been instances in which some conventions have been invoked in countries that are not parties to it.<sup>40</sup>

It is worth noting that in recent times, The Hague Conference on Private International Law has been actively engaging with African countries with a view to encouraging their greater participation in its work.<sup>41</sup> A collaborative relationship between The Hague Conference and Africa will ultimately prove useful to the harmonisation of private international law in Africa.

National courts have a significant role to play in the harmonisation of private international law. The jurisprudence of many courts reveals sensitivity to the impact of globalisation and the need to adapt private international law rules to ensure that they meet the needs of globalisation. There is no gainsaying that the emergence of economic blocs – regional economic communities – has been one of the key features of globalisation. Some courts have emphasised policy considerations and values that are important in a globalised world. The jurisprudence of the courts in this area would ultimately prove useful in the economic integration context. For example, in the South African decision of *Government of the Republic of Zimbabwe v Fick*,<sup>42</sup> the Constitutional Court emphasised the need to ensure that “lawful judgments are not to be evaded with impunity by any State or person in the global village” and the need to

37 Botswana, Burkina Faso, Burundi, Cape Verde, Cote d'Ivoire, Egypt, Gabon, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa, Swaziland, Togo, Zambia, and Zimbabwe.

38 Burkina Faso, Egypt, Mauritius, Morocco, South Africa and Zambia.

39 Oppong, *supra* note 36.

40 See, e.g., *SAJ v AOG*, Petition 1 of 2013 (eKLR) (Supreme Court, Kenya, 2013) in which the court lamented that Kenya had not ratified the 1980 Hague Convention on Civil Aspects of International Child Abduction. In the following: *NS v RH* 2011 (2) NR 486; *In the Matter of Iren Najjuma*, HCT-00-FD-FC-0079-2009 (High Court, Uganda, 2009); *In the Matter of Michael, an Infant*, HCT-00-FD-FC-072-2009 (High Court, Uganda, 2009), the courts advocated for Namibia and Uganda to become a party to The Hague Adoption Convention.

41 Richard Frimpong Oppong, 'Private International Law Scholarship in Africa (1884-2009) - A Selected Bibliography' (2010) 58 *American Journal of Comparative Law* 319 at 323-324.

42 [2013] ZACC 22 at 28 (developing the common law regime for enforcing foreign judgments of international courts - in this instance, an order for costs from the Southern African Development Community Tribunal).

promote international cooperation. Other policy-oriented considerations that have influenced outcomes in conflicts cases include the following: exigencies of international trade and commerce;<sup>43</sup> the need to hold parties to “their obligations in terms of their agreement;”<sup>44</sup> the need to deal with issues in a “practical way” and to avoid an “ivory tower” and “academic approach;”<sup>45</sup> taking into account the parties different bargaining powers in deciding whether to give effect to a jurisdiction agreement;<sup>46</sup> and the need to ensure that the selection of the appropriate legal system is sensitive to considerations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule.<sup>47</sup>

Notwithstanding the above, one can argue that the impact of economic integration on the private international law jurisprudence of African courts has been minimal. Indeed, I am aware of only two cases in which economic integration has been argued in a private international law case. Both cases involved an application for security for costs. In the Kenyan case of *Healthwise Pharmaceuticals Ltd. v Smithkline Beecham Consumer Healthcare Ltd.*,<sup>48</sup> the court rejected the applicant’s argument that it was a resident of the EAC and therefore the defendant would have no difficulties in recovering any costs that may be awarded. However, as noted above, in the Ugandan case of *Shah v Manurama Ltd.*,<sup>49</sup> the court held that, given the re-establishment of the EAC, there could no longer be an automatic and inflexible presumption that the courts would order security for costs with regard to plaintiffs who are resident in the EAC when they bring claims against Ugandan residents. Among the factors that informed this decision were the facts that the EAC Treaty made express provision for the unification and harmonisation of the laws of the member states, and that there existed a regime for the reciprocal enforcement of judgments among the member states.

43 *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* 1993 (2) SA 342 at 343–44; *Richman v Ben-Tovim* 2007 (2) SA 238 at para 9.

44 *MAK (Pty) Ltd. v S.t Paul Insurance Co.* 2007 (1) BLR 210 at 218.

45 *Bourgwelss Ltd. v Shepavolov* 1999 NR 410 at 422.

46 *Valentine Investment Company (MSA) Ltd. v Federal Republic of Germany* [2006] eKLR Civil Case 237 of 2003 (High Court of Kenya).

47 *Society of Lloyds v Price and Lee* 2006 (5) SA 393 at [27]; *Tanzania National Roads Agency v Kundan Singh Construction Ltd* [2013] eKLR case no. T3735–12.

48 [2001] LawAfrica LR 1279.

49 [2003] East African LR 294.

#### 4. COMPARATIVE LAW AND HARMONISATION OF PRIVATE INTERNATIONAL LAW

Comparative internationalism in judicial decision-making would be an important means of harmonising private international law in Africa. Comparative law and the use of comparative foreign materials generally enrich judicial decisions. Private international lawyers have argued that this is a path to harmonisation in the absence of international conventions.<sup>50</sup> Southern Africa provides a good example of how comparative law aids international (in this case regional) harmonisation of law. Judgments of southern African courts, particularly those of South Africa, are frequently cited in other southern African countries. The legal principles of the common law countries<sup>51</sup> are also largely similar, but, unlike the Roman-Dutch law countries in southern Africa,<sup>52</sup> there is infrequent judicial comparativism among their courts. In general, the common law countries, at least those in West Africa, do not frequently cite each other's case law. Rather, the source of the harmony in their jurisprudence is England from where they borrow principles of law; this is mainly because of the transplant of common law from the United Kingdom to these countries as part of the process of colonisation.

There is very little reliance on decisions from outside England in the judgments of court in the common law countries. This is unfortunate in two respects. First, there have been significant reforms of private international law in some common law countries that are likely to be beneficial to Commonwealth African countries. Notable in this respect are developments in Canadian case law, including the introduction of 'real and substantial connection' as a basis of international competence and the enforcement of foreign non-money judgments.<sup>53</sup> Second, with increased Europeanisation and, one may say, near death of English common law private international law,<sup>54</sup> Commonwealth African countries may have to turn their attention elsewhere for persuasive

50 Christopher F Forsyth, 'The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 *Journal of Private International Law* 93.

51 Ghana, Gambia, Kenya, Malawi, Nigeria, Tanzania, Sierra Leone, Uganda and Zambia.

52 Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe.

53 See e.g., *Morguard Investments Ltd. v De Savoye* [1990] 3 SCR 1077; *Beals v Saldanha* [2003] 3 SCR 416; *Pro Swing Inc. v Elta Golf Inc.* [2006] 2 SCR 612.

54 Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict Laws' (2005) 54 *International and Comparative Law Quarterly* 813.

authority – the considerations that animate the European rules, including the demands of the European internal market, are not necessarily relevant in Africa. Academics and academic institutions certainly have a crucial role to play in the harmonisation of private international law in Africa. At present, private international law is taught as an optional course in many African universities and to the author's knowledge, it is only at the University of Johannesburg's Faculty of Law that the subject is compulsory. In addition, there are institutes specifically dedicated to private international law issues, such as the Institute of Private International Law at the Faculty of Law, University of Johannesburg, the Centre for Foreign and Comparative Law at the College of Law, University of South Africa, and the Institute of International and Comparative Law in Africa, which is to be established at the Faculty of Law, University of Pretoria. It is submitted that these institutions must take the lead in the harmonisation of private international law in Africa. They should consider developing conventions and model laws that would be adopted by interested governments.

## **5. CONCLUSION**

There are currently no significant attempts to harmonise private international law in African regional economic communities. In general, economic integration has made little or no impact on national private international law regimes. Indeed, there has been little or no attempt to reform national regimes to meet the demands of economic integration. In addition to 'natural' forces that tend towards harmonisation of law, such as adherence to common legal tradition and the penchant of the legislative draftsman to copy legislation from other countries, judicial comparativism remains the principal source of harmonisation of private international law in the African regional economic communities.

This paper has argued that engagement with international initiatives in the field of private international law would be an important means for harmonisation in the future. Academics and institutions have a crucial role to play in pushing politicians and policy-makers in the direction of harmonisation of private international law.



# PRIVATE INTERNATIONAL LAW AND LEGAL HARMONISATION IN AN ECONOMIC UNION – KEY ASPECTS OF THE EUROPEAN EXPERIENCE

VOLKER WIESE\*

## 1. INTRODUCTION

In his 18th-century work, *The Spirit of Laws*, French lawyer and political philosopher Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, perfectly highlighted the benefits of economic unions. He noted that “The natural effect of commerce is to bring about peace. Two nations which trade together render themselves reciprocally dependent; if the one has an interest in buying, the other has an interest in selling; and all unions are based upon mutual needs”.

It is my view that the highly desirable effect mentioned by Montesquieu provides sufficient motivation for almost any endeavour to make (regional) economic unions a success. Montesquieu’s statement also provides a guideline as to what to start with in such a union: facilitating cross – border trade. So far, the European experience has proven successful in this respect. Given that Europeans initiated their economic union in 1957, only twelve years after the devastating experience of World War II, it is amazing that since then Europeans have profited from a long – lasting period of peace and prosperity. Private international law has been one of the cornerstones that helped to pull down barriers to intra – community trade and build an economic union.

In this paper, I argue that harmonisation is key to building a strong economic union. The paper is organised as follows. First, I will briefly sketch the general objectives of private international law. These objectives are to overcome three different kinds of legal conflicts, namely, conflicts of jurisdiction, conflicts of substantive laws, and conflicts concerning the recognition and enforcement of foreign judgments. Within economic unions legal harmonisation is of paramount importance to overcome these conflicts. Europeans have given specific answers to the legal harmonisation process in each of these fields.

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Second, I will provide a summary of the history of the harmonisation of European private international laws. Legal harmonisation in Europe did not start with EU law, but with two major international conventions<sup>1</sup> that were transformed into secondary EU laws only thirty years later.<sup>2</sup>

Third, I will examine the main legal principles of European private international law and how they contributed to harmonisation. I will start with the most important aspect, which is the mutual recognition and enforcement of foreign judgments, before discussing conflicts of jurisdiction and conflicts of laws. I conclude the paper with some personal closing remarks.

## 2. OBJECTIVES OF PRIVATE INTERNATIONAL LAW

Private international law rules are meant to solve claims and cases involving a foreign element. Private international law is made up of mechanisms that facilitate the settlement of international disputes.<sup>3</sup> Private international law answers three main questions.<sup>4</sup> These are, first, which country's courts have jurisdiction in a dispute with foreign elements? This question refers to the determination of "international jurisdiction" or "conflicts of jurisdiction". Second, which country's substantive law is to be applied by the court hearing the case? The problem of applicable law goes by the name of "conflict of laws". Third, can the decision given by the court which declares that it has jurisdiction be recognised and, if necessary, enforced in another member state? This question is traditionally characterised as "effect of foreign judgments" or "mutual recognition and enforcement of foreign judgments".

Europeans have given specific answers to each of these three aspects of private international law. Confronted with conflicts of jurisdiction, for example, the Europeans opted for legal harmonisation to provide for legal certainty

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1 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ L 299, 31.12.1972, p. 32 (hereinafter referred to as Brussels Convention); and 1980 Convention on the Law Applicable to Contractual Obligations, OJ L 266, 9.10.1980, p. 1 (hereinafter referred to as Rome Convention).

2 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12, 16.1.2001, p. 1 (hereinafter referred to as Brussels I Regulation); and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, OJ L 177, 4.7.2008, p. 6 (hereinafter referred to as Rome I Regulation).

3 Eleanor Cashin Ritaine, 'Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps?' (2006) 34 *International Journal of Legal Information* 419.

4 The following explanations are cited from the Commission of the European Communities' Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, at 8.



and predictability. They realised that it is of outmost importance for legal practitioners to know where a court action can be brought in an international dispute.<sup>5</sup>

Another very important aspect was to avoid so-called negative and positive conflicts of jurisdiction.<sup>6</sup> A negative conflict occurs where no court of a member state is willing to accept that it has international jurisdiction. If this happens union-wide and in an uncoordinated manner, it risks creating an obstruction to justice and a denial of justice to European citizens.

The European member states also intended to curtail exorbitant and parallel international jurisdiction of different courts.<sup>7</sup> These sorts of positive conflicts are one of the main stimuli for so-called forum-shopping which is generally undesirable<sup>8</sup> and to the detriment of defendants who deserve fairness and protection.

Furthermore, the Europeans understood that as long as the respective substantive laws are not harmonised, conflicts of laws will be inevitable. Conflicts of laws, however, have never been seen as a bad thing in themselves: since conflicts of laws basically reflect a diversity of substantive laws, conflicts of this kind are also fair evidence of a living plurality of different national traditions.<sup>9</sup> This plurality can be maintained whilst providing market participants with a level playing field of coordinated rules of the game, if one starts with no more than harmonising the rules of conflict of laws. Harmonisation guarantees legal certainty and predictability and stimulates investments. It also helps to generate court decisions that are acceptable union-wide, as all the different national courts will apply the same national substantive laws to a given cross-border dispute.<sup>10</sup>

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5 Cp. Commission of the European Communities, Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, at 9.

6 Cp. Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters by Jenard, OJ C 59, 5.3.1979, P 1 (hereinafter referred to as Jenard's Report) at 23 and 42.

7 See in particular, Brussels Convention, art 3.

8 Explicitly ECJ, 15.11.1983, 288/82, *Duijnste/Goderbauer*, (1985) IIC 584: "undesirable practice of 'forum shopping'".

9 See, for instance, Matthias Lehmann, 'From Conflict of Laws to Global Justice' (Columbia University 2011) (accessed Nov. 2015 via <http://academiccommons.columbia.edu/item/ac:174221>), at 154: "Legal diversity is a cornerstone of the current setup of the world, and one that has its own virtues. ... A universal approach to the conflict-of-laws problem would thus not diminish legal diversity. It would just make the deleterious consequences of the split of the world into different states disappear."

10 Cp. Report on the Convention on the law applicable to contractual obligations by Giuliano and

However, the aspect that has always been identified as most important of all is the mutual recognition and enforcement of judgments made in another European member state.<sup>11</sup> Recognition and enforcement become especially important if, for instance, a losing party in court proceedings has no assets in the country where the judgment was given.<sup>12</sup> Without harmonised and efficient rules of recognition and enforcement of judgments significant barriers to cross-border trade would survive. In other words, any concept of free movement of goods remains incomplete without a concept of free movement of court decisions.<sup>13</sup>

### 3. HISTORY OF PRIVATE INTERNATIONAL LAW HARMONISATION IN EUROPE

The European history of law-making in the field of private international law starts with one of the most classic tools of international legal harmonisation: an international convention. As the original Treaty of Rome in 1957 establishing the European Economic Community<sup>14</sup> did not provide for the competence of the Community to legislate in civil and procedural matters, in 1968 the member states themselves concluded the so-called Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments.

One of the important things this convention was meant to do was to give answers to conflicts of jurisdiction. To achieve the mutual recognition and enforcement of judgments, the Europeans duplicated well-known legal mechanisms, particularly in the field of international arbitration. The Brussels Convention, like the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>15</sup> introduced recognition of decisions

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Lagarde (hereinafter referred to as Guiliiano/Lagarde-Report), OJ C 282, 31.10.80, p. 1, at 4 et seq.

11 See Jenard's Report, *supra* note 6 at 3.

12 Commission of the European Communities, Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, at 8.

13 As clearly stated by Recital 2 of the Brussels I Regulation: "Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential." Cp. Recital 4 of the Brussels I *bis* Regulation.

14 See Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft, BGBl. 1957 II, at 766 et seq.

15 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as New York Convention). Cp. in particular Article III of the New York Convention: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance

stemming from another Member State “without any special procedure being required”.<sup>16</sup> A special enforceability procedure, the so-called *exequatur*, was introduced in order to guarantee due enforcement of judgments.<sup>17</sup> *Exequatur* allows an applicant recourse to the national enforcement procedures governed by the domestic Member State in which enforcement is sought.

In 1980, the then Member States of the European Economic Community concluded a second international treaty to address some material questions in respect of conflicts of laws: the Rome Convention on the Law Applicable to Contractual Relations. The Brussels Convention covered both contractual and non-contractual obligations. In separate protocols, the Europeans also agreed that the European Court of Justice should be the court of last instance in interpreting the Brussels and the Rome Conventions.<sup>18</sup> This new competence of the European Court of Justice greatly helped to guarantee harmonised application of the conventions in the member states and significantly accelerated the harmonisation process.

European Union law-making changed drastically as a consequence of the 1997 Treaty of Amsterdam amending the Treaty of the European Union.<sup>19</sup> That treaty introduced the substantial legislative powers of the European Union in the fields of civil law and civil procedure, as the Union aimed to establish an area of freedom, security and justice for its citizens, that is, a European law-enforcement area.

Subsequently, in 2002, the European Union changed the Brussels Convention into a supranational instrument in the form of a regulation<sup>20</sup> that

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with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

16 Brussels Convention, art 26(1).

17 See *ibid* art 31.

18 Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, Supplement 4/71, Annex to Bulletin 7-1971 of the European Communities pages 17-30. First Protocol on the interpretation by the Court of Justice of the European Communities of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and Second Protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, OJ L 48, 20.2.1989, at 1 and 17.

19 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ C 340, 10.11.1997, p. 1 (hereinafter referred to as Treaty of Amsterdam).

20 Brussels I Regulation, *supra* note 2.

is directly applicable in the member states. The Brussels I Regulation, as it became known, was revised, reworked, and recast as recently as 2012.<sup>21</sup> In 2007 the European Union introduced the so-called Rome II Regulation on the Law Applicable to Non-Contractual Obligations.<sup>22</sup> And, in 2008, the 1980 Rome Convention on the Law Applicable to Contractual Relations was replaced by the supranational so-called Rome I Regulation.<sup>23</sup>

Thus, for more than 30 years, European private international law operated within the framework of classical international law, which still forms the heart of uniform European secondary law. This perfectly reflects the higher degree of integration the European Member States were willing to undertake in the 1997 Treaty of Amsterdam. European history proves that a process of legal harmonisation of private international law can start at a much lower level of integration than that which the Treaty of Amsterdam represents.

The question remains which substantive principles were enacted by the European member states. This question will be addressed in the following section.

#### 4. PRINCIPLES OF EUROPEAN PRIVATE INTERNATIONAL LAW

The more technical question of what constitutes the basic principles of European private international law can be answered by explaining how Europeans addressed the most pressing practical problems in this field of law. From the beginning, it has been evident that provisions on the mutual recognition and enforcement of foreign judgments play a paramount role when establishing an internal market.<sup>24</sup> It is therefore worth starting with this aspect, even though it corresponds to the last phase of international proceedings, which usually begin with conflicts of jurisdiction and conflicts of substantive laws.

21 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1 (hereinafter referred to as Brussels I *bis* Regulation).

22 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007, p. 40 (hereinafter referred to as Rome II Regulation).

23 Rome I Regulation, *supra* note 2.

24 See Jenard's Report, *supra* note 6 at 3: "In a note sent to the Member States on 22 October 1959 inviting them to commence negotiations, the Commission of the European Economic Community pointed out that a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships."

## 4. MUTUAL RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

### 4.1 Procedure Regulated by the *Lex Fori*

The Brussels I Convention and the Brussels I and I *bis* Regulations did not involve Europeans having to depart from the general idea that procedural matters should be regulated by the national *leges fori*. These instruments copied mechanisms that are internationally well known and accepted in the field of international arbitration in order to achieve mutual recognition and enforcement of member states' judgments: court decisions of other member states are legally put *ipso facto* on par with domestic court decisions.<sup>25</sup> A party who in one member state wishes to invoke a judgment given in another member state has only to produce certain documents verifying the authenticity of the original decision.<sup>26</sup> Of course, legal recognition is not unlimited. It fails, for instance, in a case where the original decision is in manifest contradiction of public policy in the member state in which recognition is sought, if it is irreconcilable with a judgment given between the same parties in this member state, or if the original proceedings infringed the defendant's due right to arrange for his defence.<sup>27</sup>

### 4.2 *Exequatur*

Traditionally, however, recognition has never been sufficient grounds for initiating enforcement proceedings. Under the original Brussels Convention and the original Brussels I Regulation it was necessary to convert the foreign judgment into an enforceable order by means of *exequatur*.<sup>28</sup> The 2012 recast Brussels I *bis* Regulation with respect to the enforcement of foreign judgments has taken the significant step of introducing an even higher level of integration: the recast Regulation provides that a judgment rendered by the courts of one member state shall be enforceable in the other member state without any declaration of enforceability being required.<sup>29</sup> Nowadays, therefore, practitioners in Europe can save the costs and expenditures of initiating *exequatur* proceedings.<sup>30</sup>

25 See Brussels Convention, art 26; Brussels I Regulation, art 33; Brussels I *bis* Regulation, art 36.

26 See Brussels Convention, arts 26 and 31; Brussels I Regulation, arts 33 and 38; Brussels I *bis* Regulation, art 37.

27 See Brussels Convention, art 27; Brussels I Regulation, art 34; Brussels I *bis* Regulation, art 45.

28 See Brussels Convention, art 31; Brussels I Regulation, art 38.

29 Cp. Brussels I *bis* Regulation, art 39.

30 See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the

### 4.3 A Provisional Conclusion

In my view, a well-balanced mechanism for the recognition and enforcement of foreign judgments is a prerequisite for building an economic union. As a minimum, member states must trust that the judiciary of the other member states is functioning well.

It is my belief that states that are willing to recognise and enforce foreign arbitral awards pursuant to the 1958 New York Convention should be willing to recognise and enforce court decisions of partner states in an economic union, at least by means of reasonable *exequatur* proceedings. In my view, and following the example of the New York Convention rules,<sup>31</sup> *exequatur* seems reasonable if it allows for swift recognition as a principle, whilst permitting the defendant to invoke exceptional circumstances to refuse recognition, such as public policy issues, irreconcilabilities with other judgments or the disrespect of due process principles. I lay particular stress on this point as all Partner States of the East African Community – with the exception of its newest Partner State South Sudan – are now parties to the New York Convention, after Burundi recently signed this Convention, bringing it into force in that country in 2014.<sup>32</sup> Like the Europeans did in 1968, the Partner States of the East African Community could therefore also sign an international convention on the mutual recognition and enforcement of judgments.

In such a convention, the Partner States could also address conflicts of jurisdiction. This is what the Europeans did when they agreed on the 1968 Brussels Convention on Jurisdiction and the Recognition and the Enforcement of Judgments. The European perspective on international jurisdiction is outlined in the following section.

## 5. INTERNATIONAL JURISDICTION

### 5.1 The Principle of *Actor Sequitur Forum Rei*

At least at first sight, the matter of conflicts of jurisdiction has always seemed less problematic for Europeans. Pragmatically, Europeans have agreed on a

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recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, at p. 6. See also Gilles Cuniberti & Isabelle Rueda, 'Abolition of Exequatur, Addressing the Commission's Concerns' (2011) 75 *RebelsZ* 286 at 291.

31 Cp. New York Convention, Art V.

32 See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

very simple principle insofar as international jurisdiction is concerned: persons domiciled in a certain state shall be sued in the courts of that state.<sup>33</sup> Jurisdiction can, therefore, always be exercised by the member state in which the defendant is domiciled, regardless of his or her nationality. This corresponds to the well-known Latin maxim of *actor sequitur forum rei*.

Such a uniform rule of international jurisdiction helps to coordinate the different jurisdictions of the member states' courts in a very simple manner; and it also helps a defendant to establish a certain "balance of weapons".<sup>34</sup> The principle of *actor sequitur forum rei* also reflects the common legal tradition of continental Europe.<sup>35</sup>

## 5.2 Limiting Negative Conflicts of Jurisdiction

One should be fully aware that the principle of *actor sequitur forum rei* is not universally accepted, for instance, it is not applied in the common law legal tradition. Furthermore, the European Court of Justice<sup>36</sup> has held that the discretion usually attributed to judges pursuant to the common law doctrine of *forum non conveniens* to be incompatible with the Brussels I Regulation. This doctrine has potential to conflict with the *actor sequitur* principle as it doctrine opens a window for national courts to decline jurisdiction even if a defendant is domiciled in the country of the court seised. *Actor sequitur*, however, at least in the interpretation of the European Court of Justice,<sup>37</sup> obliges courts to accept jurisdiction which they may not decline at their own discretion. Courts can only decline jurisdiction if the Brussels I Regulation grants explicit exemption. In the system of the Brussels Convention/Regulation, *forum non conveniens* has deliberately not been provided for as it would create the risk of negative conflicts of jurisdiction.<sup>38</sup>

33 See Brussels Convention, art 2; Brussels I Regulation, art 2; Brussels I *bis* Regulation, art 4.

34 Cp. Martin Šrámek, 'Brussels I: Recent Developments in the Interpretation of Special Jurisdiction Provisions for Internet Torts' (2015) 9 *Masaryk University Journal of Law and Technology* 165 at 167.

35 See Jenard's Report, *supra* note 6 at 18 et seq.

36 ECJ, 1.3.2005, C-281/02, *Owusu/Jackson*, EuZW 2005, 345. See also Court of Appeal of England and Wales, 16.12.2009, *Lucasfilm v Ainsworth*, 2010 IIC 864.

37 ECJ, 1.3.2005, C-281/02, *Owusu/Jackson*, EuZW 2005, 345, 348.

38 For a skeptical approach, see Sarah Wall, 'End of Forum non Conveniens: Has the European Court of Justice Gone beyond its Boundaries?' (2012) 2 *King's Inns Student Law Review* 49 at 56 et seq.

### 5.3 Limiting Positive Conflicts of Jurisdiction

Positive conflicts of jurisdiction that stimulate forum-shopping do not find favour within the Brussels Convention/Regulation regime.<sup>39</sup> The principle of *actor sequitur forum rei* is complemented only by some other legal venues or special jurisdictions,<sup>40</sup> such as the place of performance of contractual obligations or the tort-related *forum loci delicti commissi*.

Despite the apparent differences in the common law and civil law traditions, the principles embedded in the Brussels I Regulation regime have so far proven to be a good basis for coordinating jurisdiction in Europe.<sup>41</sup> This may also explain why Ireland and the United Kingdom opted to participate in the Brussels I Regulation although they made a reservation against the law-making competences of the European Union in civil and procedural matters that the Union acquired in the Amsterdam Treaty.<sup>42</sup> The same is true with respect to Denmark, which also withdrew its assent to apply Union Law in the area of private international law regulations when the Treaty of Amsterdam was negotiated. By its own choice, Denmark has always voluntarily applied the Brussels I Regulation mechanisms of jurisdiction.<sup>43</sup>

## 6. APPLICABLE LAW

The conflict of substantive laws is another aspect of private international law. Such conflicts can endanger the free movement of persons, goods, capital and services, if states choose discriminatory connecting factors and aim to shield national markets.<sup>44</sup> Market shielding and discriminatory connecting factors can

39 ECJ, 15.11.1983, 288/82, *Duijnstee/Goderbauer*, (1985) IIC 584. See also Guiliano/Lagarde-Report, at p. 5; Commission of the European Communities, Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, at p. 9; and Ekaterina Ivanova, 'Choice of Court Clauses and Lis Pendens under Brussels I Regulation' (2010) 27 *Merkourios Utrecht Journal of International and European Law* 12 at 15.

40 See Brussels Convention, art 5; Brussels I Regulation, art 5; Brussels I *bis* Regulation, art 7.

41 Cp. Peter Arnt Nielsen, 'The State of Play of the Recast of Brussels I Regulation' (2012) 81 *Nordic Journal of International Law* 585 at 586: "Brussels I is a cornerstone within the area of EU law on justice and home affairs".

42 See Recital 40 of the Brussels I *bis* Regulation.

43 See, for instance, Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79, 21.3.2013, at 4.

44 Cp. Wiese, *Der Einfluss des EG-Rechts auf das Internationale Sachenrecht der Kulturgüter* (2005) at 227 et seq.



easily be used, for instance, in matters of competition law.<sup>45</sup> Take the following example: certain products are required by the laws of a certain member state to meet particular technical requirements.<sup>46</sup> Assume further that this particular state refers to its own national competition law when answering the question whether products can be lawfully marketed within its territory. Through such a combination of national technical laws and a particular mechanism for solving a conflict of competition laws, a member state could force all market participants in the entire union to either respect its national laws or be excluded from its local market.<sup>47</sup> Similar questions arise within the field of company law when the capacity of legal entities to act is exclusively determined with respect to the so-called *lex situs* which refers to the place of the entity's seat of business or operations. This method of solving conflicts of laws creates the risk that a legal entity loses its capacity to act when it changes its seat of operations from the country in which it was originally created to a member state that does not know the legal form in which it was originally created.<sup>48</sup> Thus, an internal market within an economic union needs harmonised rules on the conflict of substantive laws.

The Rome I and II Regulations have brought about uniform European conflict of laws rules with regard to contractual and non-contractual obligations. The Regulations do so by following the same basic principles of private international law that are outlined below.

## 6.1 The Basic Principle: Party Autonomy

Both Rome Regulations endorse the principle of freedom of choice: contracts shall be governed by the law chosen by the parties<sup>49</sup> and parties may also agree to submit non-contractual obligations to the law of their choice.<sup>50</sup> In principle, it is irrelevant whether the choice is made before or after a dispute arises. However, within the Rome Regulations weaker parties like consumers are

45 Cp. ECJ, 6.7.1995, C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln/Mars GmbH, 1995 NJW 3243.

46 Cp. ECJ, 20.4.1983, 59/82, Schutzverband gegen Unwesen in der Wirtschaft/Weinvertriebs GmbH, 1983 NJW 2753.

47 Wiese, *supra* note 44 at 234.

48 See ECJ, 5.11.2002, C-208/00, Überseering/NCC, 2002 NJW 3614; ECJ, 30.9.2003, C-167/01, Kamer van Koophandel/Inspire Art, 2003 NJW 3331; ECJ, 16.12.2008, Cartesio Oktató és Szolgáltató bt, 2009 NJW 569; BGH, 13.3.2003, VII ZR 370/98, 2003 NJW 1461.

49 Rome I Regulation, art 3.

50 Rome II Regulation, art 14.

protected against imprudent and premature choices through cogent law.<sup>51</sup> Since parties may additionally agree on a choice of forum,<sup>52</sup> they have the power to autonomously select the applicable law as well as the competent forum to resolve their dispute.<sup>53</sup>

## 6.2 Protection of the Weaker Party

The Rome I Regulation explicitly seeks to protect a weaker contractual parties by conflict of law rules that are more favourable to their interests than the general rules.<sup>54</sup> The same is true pursuant to the Rome II Regulation when parties submit non-contractual obligations to the law of their choice,<sup>55</sup> as well as with respect to prorogation agreements under the Brussels I *bis* Regulation.<sup>56</sup> The freedom of choice, for instance, is typically constrained to express or at least clearly demonstrate agreements<sup>57</sup> and, thus, protection against precipitate action is introduced through formal requirements. The Regulations also provide that a choice may not have the result of depriving a consumer of his usual protection in contractual matters.<sup>58</sup>

## 6.3 Closest Connection

If parties do not validly choose the law applicable to their legal relationship, under both Rome Regulations, the principle of the proper law will apply. The proper law is the law with which the contractual or non-contractual obligation in question has the closest connection.<sup>59</sup>

The following is an example of what this principle actually means. A French tourist and an Italian service provider enter into a contract to climb the French, Italian and Austrian Alps. Due to a mistake made by the Italian service provider, an accident occurs which could legally constitute a violation

51 See Rome I Regulation, art 6(2) and Rome II Regulation, art 14(1)(b).

52 See Brussels I *bis* Regulation, art 25.

53 For more details, see Jan-Jaap Kuipers, 'Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice' (2009) 10 *German Law Journal* 1505.

54 See Recital 23 Rome I Regulation.

55 See Recital 31 Rome II Regulation.

56 See Recital 18 Brussels I *bis* Regulation.

57 See Rome I Regulation, art 3(1); Rome II Regulation, art 14(1); Brussels I *bis* Regulation, art 25.

58 See Rome I Regulation, art 6(2). For greater detail see also Giesela Rühl, 'Consumer Protection in Choice of Law' (2011) 44 *Cornell International Law Journal* 569.

59 See Rome I Regulation, art 4(3); Rome II Regulation, art 4(3).

of the service contract, as well as a tort (for the sake of convenience, in terms of all legal orders involved). The accident occurs while the parties are climbing the Austrian Alps. Which law is applicable to the contractual and the non-contractual relationship between the Frenchman and the Italian if they have failed to agree on the applicable law? This example shows that there is a bundle of connecting factors, in particular, the habitual residence of the French tourist (France), the habitual residence of the Italian service provider (Italy), the different places of performance (France, Italy and Austria) and the place where the accident actually occurred (Austria), which a judge must weigh in the balance when deciding on the applicability of French, Italian or Austrian Law. There is no guarantee that one judge will find the same solution as another judge. Harmonised rules, however, lead to the same solution union-wide. This predictability ensures acceptance of the material result, since the same law will end up applying in all the courts that are competent to hear the case.

Harmonised rules exist in the Rome Regulations. Without going into the details of the balancing test,<sup>60</sup> we may highlight a remarkable detail in the Rome II Regulation on applicable law in non-contractual matters. The Rome II Regulation specifies that the closest connection with another country is based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question.<sup>61</sup> Thus, in the above example, the legal order is clear, regardless of whether the liability of the service provider is assessed as contractual or non-contractual. All judges in the European Union will arrive at the same result.

It is worth highlighting that the solution provided by harmonised conflict of laws rules is not only coordinated and predictable, but also counteracts forum-shopping. It also helps to stimulate business. Take the service provider in the aforementioned example: in such a harmonised system of private international law it might be much easier and more cost-efficient<sup>62</sup> for him to find an insurer to cover his risks.

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60 See in particular Rome I Regulation, art 4(1)(b) with respect to the contractual relationship which would lead to the application of Italian law (habitual residence of the Italian service provider).

61 See Rome II Regulation, art 4(3). This would mean that legal questions of tort would also be regulated by Italian law. The application of Austrian law pursuant to Article 4(1) of Rome II Regulation as the law of the place where the accident actually occurred would be overridden.

62 Since mainly Italian law applies. Cp. also the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final, at 4 et seq.

## 7. CONCLUSION

In this paper, I have tried to show that the three main objectives of private international law, i.e. to overcome conflicts of jurisdiction, conflicts of substantive laws and conflicts concerning the recognition and enforcement of foreign judgments, can be satisfactorily accomplished through legal harmonisation. The Europeans have to date had good experiences and enacted appropriate principles.

In my view, an economic union can only benefit from the harmonisation of various aspects of private international law. A very first step should be the establishment of a set of rules that obliges the member states to recognise and enforce each other's court decisions. If mutual trust in the competence and fairness of court proceedings and decisions in other member states cannot be established, legal harmonisation within an economic union will eventually fail. In my view, failure to harmonise endangers and undermines the very idea of an economic union.

Whether an economic union dares to take the further step of establishing a regional court, like the European Court of Justice, that is in the position to ensure uniform application of private international law within its territory,<sup>63</sup> is a question only the member states can answer. In this paper, I have briefly demonstrated that the European Court of Justice has been a major force in accelerating the harmonisation process in Europe. This was possible because the member states of the European Community were willing to integrate more intensively. Whether the Partner States of the East African Community follow the European example is directly dependent on the degree of integration the Partner States eventually want to accomplish. But, a regional court like the European Court of Justice is not a prerequisite for legal harmonisation in the field of private international law.

This paper has also shown that rules of private international law are extremely relevant within the internal market of an economic union. Private international law is not an economically neutral aspect of the legal order as it can degenerate into a very powerful barrier to the principles of a common market. Up to the present, in my view, the European Union has provided an excellent example of how problems of this kind can be addressed.

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63 Cp. Henry G Schermers, 'The European Court of Justice: Promoter of European Integration' (1974) 22 *American Journal of Comparative Law* 444.

# LABOUR LAW AND LEGAL HARMONISATION



# HARMONISATION OF LABOUR LAWS IN THE EAST AFRICAN COMMUNITY: AN ASSESSMENT OF PROGRESS AND PROSPECTS

JULIANA MASABO\*

## 1. INTRODUCTION

Harmonisation of labour laws, loosely defined in this chapter as approximation of employment and labour regulations, is increasingly seen by policy makers as an important element in deepening economic integration. It fosters exchange of skills and facilitates effective utilisation of human resources available in regional economic organisations. The Treaty Establishing the Economic Community of Africa, 1991, and instruments establishing Africa's economic communities have consistently underlined the importance of harmonised labour laws and policies. They all include provisions through which the commitment to harmonise labour laws is registered.<sup>1</sup> In keeping with the trend in sister economic communities, the East African Community (EAC) has identified this as one of the key strategies for achieving its major objective.<sup>2</sup> This paper presents an assessment of the progress achieved so far in creating harmonious labour regulations across the EAC Partner States.

## 2. RATIONALE AND MODELS OF LABOUR LAW HARMONISATION

The underlying principle behind labour law harmonisation is well captured by Harry Arthurs and Katherine Van Wezel Stone.<sup>3</sup> Both share the view that

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1 Article 3(2) (a) of the Treaty Establishing the Economic Community for West Africa (ECOWAS Revised Treaty) provides that, in order to achieve its goals, ECOWAS shall, "stage by stage ... ensure the harmonization and coordination of national policies and the promotion of integration programmes, projects and activities, particularly in ... human resources". Also, Article 143 of the Treaty Establishing the Common Market for Eastern and Southern Africa provides that "the Member States shall promote especially in the area of employment and working conditions; labour laws; and the right of association and collective bargaining between employers and workers".

2 See Articles 76 and 104(3) of the Treaty Establishing the East African Community, 1999 [EAC Treaty] read together with Article 5(2)(c) of the Protocol on the Establishment of the East African Community Common Market, 2009.

3 Harry Arthurs, 'Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture' (2001) 22 *Berkeley Journal of Employment and Labor Law* 271; Katherine van Wezel Stone, 'To the

harmonisation of labour laws is an important tool for addressing the negative impact of globalisation on labour and employment law. Globalisation encourages regulatory competition whereby nations compete with each other by lowering labour standards so as to attract investment.<sup>4</sup> Harmonisation of labour laws is, therefore, considered to be “...an imperative force to offset the negative effects of world-wide competition for jobs, investment and prosperity which tends to direct rewards to countries whose labour policies are deemed as business friendly”.<sup>5</sup> Labour law harmonisation creates a fair ground upon which inter-jurisdictional competition can take place without tempting the competing states to lower their wages and to alter their regulations so as to remain competitive.<sup>6</sup>

The importance of labour law harmonisation is even more glaring in regional integration processes. It cannot be overemphasised that harmonisation of labour law is a decisive element for successful economic integration and development. This is due to the fact that, apart from prescribing rights, labour law harmonisation performs a supervisory role by setting common rules for enterprises with a view to warding off unfair competition resulting from multiplicity and disparities between national labour law systems which create an uneven playing field for employers. The process of integration, therefore, needs to be underpinned by harmonisation of labour laws so as to overcome the obstacles resulting from multiplicity of employment and labour relations laws and practices as well as those resulting from the stiff competition over foreign investment and the race to deregulation.

Harmonisation of labour laws is also an essential element in realisation of intra-regional labour mobility and transfer of skills across the countries. The EAC, like other regions in sub-Saharan Africa, has intensive intra-regional mobility of workers, most of which takes place in defiance of the law and is insufficiently documented.<sup>7</sup> Some of these movements are remnants of the great mobility which existed before and during the defunct East African Community of 1967-1977.<sup>8</sup> A considerable increase of intra-regional labour migration has

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Yukon and Beyond: Local Laborers in a Global Labor Market' (1991) 3 *Journal of Small & Emerging Business Law* 93.

4 Stone, *ibid* at 96.

5 Arthurs, *supra* note 3 at 271.

6 Katherine van Wezel Stone, 'Labour and the Global Economy: Four Approaches to Transnational Labour Regulation' (1995) 16 *Michigan Journal of International Law* 987 at 998.

7 Intra-Africa emigration rate is about 52%. In sub-Saharan Africa, intra-regional emigration is as higher as 65%. See Abebe Shimles, 'Migration Patterns, Trends and Policy Issues in Africa' (Working Papers Series N° 119, African Development Bank, 2010) at 8.

8 Juliana Masabo, *The Protection of the Rights of Migrant Workers in Tanzania* (PhD Thesis, University of



been reported following the entry into force of the EAC Common Market Protocol in 2010. For instance, in Rwanda, about 37,960 workers from EAC Partner States and their dependants are reported to have been admitted into the labour market since 2011. In the same period, Kenya issued a total of 2,755 work permits to workers from other Partner States.<sup>9</sup> Multiplicity and inconsistency of labour laws between the Partner States could undermine the growth of these movements, especially because the decision to migrate to another country could, in itself, constitute a risk of being subjected to lower employment standards or loss of employment-related rights already acquired.

Labour law harmonisation can be achieved in various ways. Woolfrey describes six possible models of labour law harmonisation. First is harmonisation by Directive. This entails adoption of directives binding Partner States as to the results to be achieved, while at the same time allowing national authorities a choice concerning the form and methods of achieving the desired result. Second is the Social Clause, which entails the provision of sanctions directed at exporters who fail to observe minimum labour standards. Third is Regional Collective Bargaining where a regional alliance is formed through national trade union bodies, employers' organisations, states and multi-nationals. Fourth is through the formulation of international and regional codes of practice in the form of non-binding instruments that serve to establish guidelines for industrial and employment practice in the region. Fifth is the adoption of a regional social charter enshrining a wide range of labour standards that all member states should apply. Finally, there is the option of ratification and adoption of ILO core labour standards.<sup>10</sup>

These models are not mutually exclusive; they can be used simultaneously. Indeed, experience suggests that a combination of these models can be effective. For instance, in the European Union, the Social Charter co-exists with several Council Directives, including Directive 75/117/EEC of 10th February 1975 on the approximation of the laws of Member States regarding the application of the principle of equal pay for men and women, and Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment

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Cape Town, South Africa, 2012) at 92.

9 See 'Priority Questions for Oral Answers' (4th Meeting of the 2nd Session of the East African Legislative Assembly, Kampala, Uganda 19th-31st January 2014) Online: [file:///C:/Documents%20and%20Settings/winuser/My%20Documents/Downloads/NEWELA%20Priority%20Qns%20for%20Oral%20Answ\\_%2027th%20Jan%202014\\_%20\(2\).pdf](file:///C:/Documents%20and%20Settings/winuser/My%20Documents/Downloads/NEWELA%20Priority%20Qns%20for%20Oral%20Answ_%2027th%20Jan%202014_%20(2).pdf).

10 David Woolfrey, 'Harmonisation of Southern Africa's Labour Laws in the Context of Regional Integration' (1991) 12 *Industrial Law Journal* 703.

for men and women as regards access to employment, vocational training and promotion, and working conditions. The Directives set certain minimum standards while allowing member states some flexibility in transposing these standards into their domestic labour laws. Likewise, the Southern African Development Community has a Charter on Fundamental Social Rights adopted in 2003; a Code of Conduct on Child Labour, 2000, a Code on Social Security, 2008; and a Protocol on Employment and Labour, 2014. The choice of an appropriate model or models depends on the form of integration preferred by each state.

### **3. LEGAL BASIS FOR LABOUR LAW HARMONISATION**

There is a broad recognition, both in the Treaty Establishing the East African Community (the EAC Treaty) and the Protocol on the Establishment of the East African Community Common Market (the Common Market Protocol) of the urgency and the importance of harmonised labour policies in widening and deepening economic cooperation between the Partner States. Articles 76 and 104 of the EAC Treaty express a conviction as to the importance of harmonised labour policies in fostering the mobility of workers across the region and in ensuring equitable distribution of foreign investment. Article 104(3) of the Treaty is an expression of mutual agreement and commitment by all Partner States to maintain common employment policies; to harmonise their labour policies, programmes and legislation (including those on occupational health and safety); and to establish a regional centre for productivity and employment. The Partner States also agreed to enhance social partnership between government, employers and employees with a view to increasing the productivity of labour through efficient production. The specific areas for cooperation agreed on by the EAC Partner States as outlined in Article 5(2) of the EAC Common Market Protocol are elimination of restrictions on the movement of labour and harmonisation of labour policies, programmes, legislation and social services. Other relevant areas of cooperation agreed on by the Partner States are provision of social security benefits, establishment of common standards and measures for association of workers and employers, as well as the establishment of employment promotion centres.

Further commitment by the Partner States in this area is registered in Article 39 where the Partner States have mutually agreed to harmonise their social policies with a view to promoting and protecting decent work and improving the living conditions of the citizens of the Partner States. The undertakings by

the Partner States in this provision are in respect of implementing programmes central to labour law harmonisation, namely, programmes for the promotion of employment creation; strengthening labour laws and improving working conditions; elimination of compulsory and forced labour; promotion of occupational safety and health at the workplace; abolishing child labour, in particular the worst forms of child labour, and promotion of social dialogue between the social partners and other stakeholders. These provisions together constitute a strong basis for the harmonisation of labour laws and policies.

#### **4. ESSENTIAL FEATURES OF THE EAC LABOUR MARKET AND LABOUR REGULATION**

Before we proceed to examine the level of harmonisation achieved so far, it is worth considering the main features of the EAC labour market as they provide a basis for understanding both the foundations of labour law harmonisation and the best models for harmonisation.

##### **4.1 Labour Market Profile**

The first feature defining the EAC labour market is poverty. Poverty levels in EAC countries have remained very high, although the sub-region has been experiencing steady growth in terms of trade volumes between member countries and in terms of the international investment profile. The number of persons below the poverty line, i.e. below \$1.25 a day, is consistently high across the sub-region. A report published by the Society for International Development in 2012 observed that 53 million East Africans (38 percent of the regional population) were living below the poverty line in 2010.<sup>11</sup> A year before the publication of this report, Tanzania was listed by the World Bank as one of the top 10 countries with the largest share of global extreme poor, with around 12 million of her population living below the poverty line.<sup>12</sup> The most recent Human Development Report by UNDP has reported that the incidence of poverty in Tanzania Mainland is 64 percent of which 31.3 percent is in extreme

11 Society for International Development (SID), *The State of East Africa 2012: The State of Deepening Integration, Intensifying Challenges* (2012). Online: <http://www.sidint.net/content/state-east-africa-2012-deepening-integration-intensifying-challenges>.

12 Poverty is said to be more pervasive in the rural areas where around 70 percent of the Tanzanian population live. About 10 million people in the rural areas live in poverty. See World Bank, *Global Monitoring Report 2014/2015 Ending Poverty and Sharing Prosperity* (2015) at 20. Also, see World Bank Group, *Tanzania Mainland Poverty Assessment* (2015). Online: <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Tanzania/Report/tanzania-poverty-assessment-05.2015.pdf>.

poverty. In Zanzibar, the percentage of poverty is estimated to be at 43.3 percent of the entire population.<sup>13</sup>

Poverty is exacerbated further by unemployment which is especially high among the youth and in rural areas. The development taking place at the regional level and in individual countries has not kept pace with the steady growth of labour supply. The different policy interventions undertaken at both national and regional levels, have also not yielded much in terms of narrowing unemployment. The EAC Facts and Figures – 2014 report has estimated that, as of 2013, the unemployment rates in Kenya and Tanzania were 12.7 and 11.0 percent respectively.<sup>14</sup> Rwanda had the lowest unemployment rate of 3.2 percent.<sup>15</sup> As the EAC labour force of 138 million is expected to increase by 27 million people between 2010 and 2020, it is unlikely that these figures will improve.<sup>16</sup> These two factors have a detrimental effect on labour market growth. Because of poverty levels and diminished prospects for decent jobs, the workers find themselves compelled to accept jobs in which earnings and conditions of employment are below the acceptable standards.

The level of informalisation is correspondingly high. The informal sector, defined broadly as encompassing an array of people and economic activities such as home-based work, street vendors, entrepreneurs who employ other workers and self-employed persons, has rapidly grown in size. Although there are variations across the countries, the informal sector accounts for the majority of employees in all the EAC countries. In Tanzania, it is estimated that more than 90 percent of the employed population is in the informal economy and almost 89 percent of these are engaged in vulnerable employment.<sup>17</sup> Other reports available suggest that in Kenya the informal sector accounts for 82.6

13 United Republic of Tanzania and United Nations Development Programme, *Tanzania Human Development Report 2014 Economic Transformation for Human Development* (2014) at 6–7.

14 East African Community, *East African Community Facts and Figures – 2014*, (EAC, Arusha, 2014) at 28.

15 EAC, *East African Community Facts and Figures – 2012*.

16 In the EAC region, the youth population aged between 15 and 34 years was 48 million or 35% of the total population of 139 million in 2010. See Juma V Mwapachu, 'SMEs As Strategic Drivers of African Socio-Economic Transformations: Challenges and Policy Prescriptions' (Keynote speech delivered by Ambassador Juma V Mwapachu, President of the Society for International Development and former Secretary General of the East African Community, at the 3rd African Governance, Leadership and Management Convention, August 5–9, 2012 at Whitesands Hotel, Mombasa, Kenya). Online: <http://www.sidint.net/content/smes-strategic-drivers-african-socio-economic-transformations-challenges-and-policy>.

17 Tanzania Decent Work Country Programmes 2013–2016 at 7. Online: <http://www.ilo.org/public/english/bureau/program/dwcp/download/tanzania.pdf>.

percent of total employment whereas in Rwanda it accommodates 72.3 percent of the workforce.<sup>18</sup>

Informalisation is compounded further by the problem of casualisation of the workforce. Employers are increasingly reducing the proportion of permanent full-time employees in their enterprises by replacing the same with casual employees who by virtue of their status have limited labour law protection.<sup>19</sup>

Practices of outsourcing and sub-contracting have also gained unprecedented momentum in almost all the EAC countries. The number of jobs lost as a result of these practices is rapidly growing. One example is the restructuring of Kenya Airways Limited which saw the retrenchment of substantial numbers of staff as a result of outsourcing of some non-core services. While outsourcing services, as the Court of Appeal of Kenya rightly observed in *Kenya Airways Limited v Aviation & Allied Workers Union Limited*, is a “...widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands,”<sup>20</sup> it can have severe negative impacts on the labour market if not well regulated. Unscrupulous employers could use this as a way of circumventing their statutory obligations. In 2014, the Tanzanian government had to impose a temporary ban on labour outsourcing on discovering that unscrupulous employers were using the practice to evade tax and responsibilities arising from industrial relations.<sup>21</sup> In Kenya, the Industrial Court in *Washeke v Airtel Networks (K) Ltd*<sup>22</sup> also warned that the absence of specific laws in respect of outsourcing in a business, creates a possibility of abuse and circumvention of the statutory protections by unscrupulous employers.

Inequality between men and women in terms of access to employment opportunities and income earned is also prevalent. Although most of the countries in the EAC have over the years recorded considerable success in

18 East African Community, East African Community Facts and Figures – 2014, *supra* note 14.

19 In Kenya, the proportion of casual employment in the formal sector increased from 20 percent in 2003 to over 30 percent in 2011. See KENYA Making Equality Employment the Driver of Development, at 13. Also, see Kenya Decent Work Country Programme 2013 – 2016 at 7. Online: [http://www.ilo.org/addisababa/countries-covered/kenya/WCMS\\_248018/lang--en/index.htm](http://www.ilo.org/addisababa/countries-covered/kenya/WCMS_248018/lang--en/index.htm).

20 *Kenya Airways Limited v Aviation & Allied Workers Union Limited*, Civil Appeal No. 46 of 2013 (Court of Appeal of Kenya).

21 Henry Mwangonde, ‘Government Bans use of Agents in Labour Relations in Companies’ (The Citizen, Tanzania, 28 January 2014).

22 *Washeke v Airtel Networks (K) Ltd* [2013] eKLR.

increasing the participation of women in the domestic labour market, inequality persists between men and women in accessing wage-earning employment opportunities. Women have continued to face greater challenges compared to men in accessing wage employment due to many factors including low education and skills, cultural attitudes and practices, animus-based discrimination and limited opportunities to access productive resources. Identifying this as one of key challenges, the EAC Strategic Plan for Gender, Youth, Children, Social Protection and Community Development 2011–2015 observes that, even though women in the region are increasingly becoming the main income earners, their traditional domestic chores, and various cultural traits and taboos have continued to underpin the marginalisation of women in the development process.

The gender pay gap also persists as women who actively participate in the labour market tend to be over-represented in the informal sector and in elementary occupations, as well as in clerical jobs where they tend to earn less compared to men, who dominate most of the occupations that are regarded as good occupations and attract a good income.<sup>23</sup> According to the World Economic Forum's Global Gender Gap Report, 2015, Kenya has the highest gender pay gap in the region. A Kenyan woman is paid 62% of what a Kenyan man on a similar job earns.<sup>24</sup> In Tanzania, women earn 65% of men's income,<sup>25</sup> followed by Uganda where the figure is 77%.<sup>26</sup> The narrowest gap is in Rwanda where women earn 88% of the estimated income earned by men.<sup>27</sup> The narrow pay gap between women and men in Rwanda echoes Rwanda's commitment to promoting gender equality. Rwanda has distinguished itself as the world champion in gender equality. It is the first country in the world to achieve a female majority in Parliament. Her Constitution mandates 30% minimum female representation in decision-making bodies.<sup>28</sup> Currently, women in

23 For instance, in Tanzania it is reported that in 2006 men represented 84% of administrators, managers and legislators, while women formed 77 percent of workers in agriculture and fisheries. See ILO: Decent Work Country Profile: Tanzania Mainland (2010) at 27.

24 World Economic Forum, *The Global Gender Gap Report 2015* (Geneva: World Economic Forum, 2015) at 218. Online: <http://www.weforum.org/reports/global-gender-gap-report-2015>.

25 *Ibid* at 354.

26 *Ibid* at 365.

27 *Ibid* at 306.

28 See Article 9(4) of the Constitution of Rwanda, 2003, which states that Rwanda is committed to building a state with equality of all Rwandans and between women and men by ensuring that women are granted at least 30 percent of posts in decision-making organs. Article 82 provides further that the Senate shall be composed of twenty-six members, at least thirty percent of whom shall be women.

Rwanda occupy 64% of the seats in the Chamber of Deputies and 38.5% in the upper house (Senate).<sup>29</sup> The proportion of women in other sectors is also high. Child labour also warrants consideration.<sup>30</sup> Although there have been notable attempts to address this problem, the Eastern and Southern Africa (ESA) region are said to have the highest proportion of children involved in child labour. About 36 percent of all the children in Eastern and Southern Africa are involved in child labour. The first Child Labour Report released by the Uganda Bureau of Statistics (UBoS) in 2011 revealed that about two million children aged between 5 and 17 (approximately 30 percent of the total population of children in Uganda) were in child labour.<sup>31</sup> In Tanzania, it was recently reported that about 4,600 children are working in small-scale mining, where children as young as eight years old dig 30 metres underground in mines for eight hours a day, without proper lighting and ventilation.

## 4.2 The Nature of Labour Regulation

Labour law in the EAC is diverse and fragmented. Each of the Partner States has its own labour laws constituting, among other things, a set of regulations with respect to key employment rights and standards, labour administration, collective labour law, occupational health and safety, and social security. Most of these are based on traditional concepts of labour law which, as articulated by Kahn-Freund, are generally geared at regulating the employment relationship with the goal of correcting an imbalance in bargaining power between employer and employee.<sup>32</sup> In all the countries, labour law as it exists today was introduced as part of the colonial legal transplant aimed largely at ensuring that there was an adequate labour supply for the plantations and mines which

29 See Elizabeth Bennett, 'Rwanda Strides towards Gender Equality in Government'. Online: <http://harvardkennedyschoolreview.com/rwanda-strides-towards-gender-equality-in-government/>.

30 The term 'child labour' is defined by the ILO as "any work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development".

31 The Republic of Uganda, National Action Plan on Elimination of the Worst Forms of Child Labour in Uganda 2012/13-2016/17, Elimination of the Worst Forms of Child Labour: Making Schooling the Principal Occupation of Children, Kampala: Government of Uganda, 2012 at 1. Also, the Uganda National Household Survey Report 2009/10 (UNHS 2009/10) estimated that 2.75 million children aged 5-17 years were engaged in economic activities. Fifty one percent of them (1.4 million children) were engaged in hazardous activities.

32 According to Kahn-Freund, "The main object of labour law has always been, and I venture to say will always be, a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation...and indeed most labour legislation altogether must be seen in this context". See Otto Kahn-Freund, *Labour and the Law* (London: Stevens, 1972) at 8.

were the backbone of the colonial economy. In Tanzania, for example, the first labour laws were the Decree Concerning the Legal Position of Native Workers, 1909 and Expositions of the Labour Decree, 1909,<sup>33</sup> both introduced during the period of German rule to regulate the recruitment process.<sup>34</sup> The Master and Servant Ordinance, 1923<sup>35</sup> and other legislation introduced thereafter, including the Employment Ordinance, 1956, which remained in force after independence, were British based. The major objective of these laws was to control the relationship between the Master and his Servant.

Much has been achieved in reorienting the employment and labour relations regulations from largely control instruments to rights-based instruments, especially after the major labour reforms discussed in section 5 of this chapter. Suffice it to say that the labour laws in the EAC as they stand today are modelled on the core labour standards of the International Labour Organisation (ILO). All the countries in the EAC are members of the ILO. Their membership in this organisation imposes on them obligations to respect, promote and realise the standards developed through Conventions and Recommendations including those concerning the designated four fundamental principles. These are: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation as provided for under the Declaration on Fundamental Principles and Rights at Work, 1998.

The EAC labour regulations have evolved along the traditional concept of labour law which has the formal sector at heart. Protection is most often given to workers in the formal sector leaving those in the informal sector without sufficient protection. The current decline of formal-sector employment and its replacement by the informal sector means that the majority of the workers in the EAC do not enjoy any legal protection. Even though some countries have indicated their willingness to extend labour law protection to these workers, the general trend across the sub-region is not promising. A sharp contrast between “employment of service” and “employment for service” under which labour protection is exclusively reserved for the former, still persists.<sup>36</sup>

33 Decree Concerning the Legal Position of Native Workers, 27 Feb 1909 and Expositions of the Labour Decree, 23 March 1909, *Landesgesetzgebung des deutschostafrikanischen Schutzgebietes* (Dar es Salaam/Tanga, 1911).

34 Masabo, *supra* note 8 at 112–113.

35 Master and Native Servant Ordinance (Cap 32 of 1923).

36 For instance, in Kenya protection is only available to employees defined under section 2 of the



## 5. WHAT HAS BEEN ACHIEVED?

### 5.1 Adoption of a Regional Labour Instrument

Save for the Common Market Protocol and its annexes, especially Annex II on Free Movement of Workers and Annex III on the Right of Establishment, which touches on different aspects of labour law, the EAC is yet to adopt a labour-specific instrument. However, this does not mean that there have been no developments. In 2001 the EAC signed a memorandum of understanding (MOU) with the ILO which envisaged cooperation between the ILO and the EAC in the pursuit of policies aimed at creating a conducive environment for investment and the development of the private sector with a view to creating employment opportunities for poverty reduction.<sup>37</sup> Harmonisation/approximation of labour laws was specifically earmarked as an important area of this cooperation. Harmonisation of employment policies and labour legislation was also singled out during the meeting of East African Ministers of Labour held in Zanzibar from 16–18 May 2005 and the follow-up meeting held in Kampala on 28–29 August 2006. At the later meeting, a proposal for the development of an employment policy suitable for the sub-regional labour market was tabled and discussed. This issue came up again during the meeting of Ministers held in Arusha in October 2007 which was attended by Ministers from Rwanda and Burundi, and for the first time by employers and workers' representatives as well. At this meeting it was agreed, among other things, that a model employment policy and a model labour legislation for the EAC should be developed. Disappointingly, neither of the two has been developed.

The confederation of trade unions, the East African Trade Union Confederation (EATUC), has also contributed positively by developing an EAC Social Charter and submitted it for consideration.<sup>38</sup> The objectives of the Draft Charter as outlined in Article 3 are to facilitate harmonious labour relations,

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Employment Act where “employee means a person employed for wages or a salary and includes an apprentice and indentured learner”. Similarly, under Section 2 of Uganda’s Employment Act, labour law protection only applies to employees defined under section 2 of the Act as “Any person who has entered into a contract of service or an apprenticeship contract, including, without limitation, any person who is employed by or for the Government of Uganda, including the Uganda Public Service, a local authority or a parastatal organisation but excludes a member of the Uganda Peoples’ Defence”.

37 The Memorandum of Understanding between the International Labour Organisation and the East African Community. Online: <http://www.ilo.org/public/english/bureau/leg/agreements/eac.htm>.

38 The First Draft of the EATUC Social Charter was unveiled in 2009 followed by a Revised Draft in 2011.

and strengthen labour administration and labour inspection, including the enforcement of applicable labour legislation, principles, standards and policies; to strengthen the protection of employment and social rights; to promote just and fair competition in the labour market; to enforce regulations relating to occupational health and safety standards at workplaces; to promote gender equality and empower women to actively participate in all sphere of the labour market; to promote and strengthen the realisation of fundamental principles and rights at work; and to promote the establishment and harmonisation of social security schemes with a view to achieving universal coverage.

The Draft Social Charter also has provisions seeking to impose obligations on Partner States to create a conducive environment enabling realisation of the right to employment, formalisation of informal work, elimination of discrimination and promotion of gender equity and equal opportunities for men and women, persons with disability and for persons living with HIV/AIDS. The importance of harmonisation of minimum working standards as laid down in national labour legislation, and especially the need for harmonious standards on basic working and living conditions, provision of a minimum living wage, annual paid leave, housing, medical treatment, sick leave, compassionate leave, paid maternity and paternity leave, occupational health and safety protection and retirement age is underlined in Article 11 of the Draft Charter. The protection envisioned under the Draft Charter is indeed generous and optimistic. Although the envisaged areas of protection are largely drawn from the existing international, regional and national legal and policy instruments, it cannot be overemphasised that some of the areas identified in the Draft Charter, such as universal social security, can only be realised progressively.

In collaboration with the ILO, the EAC has adopted a five-year decent work programme, the East Africa Community Decent Work Programme (EAC-DWP) 2010-2015.<sup>39</sup> The EAC-DWP supplements the national decent work programmes by focusing on areas that are best talked about at the regional level. It focuses on three priority areas, namely, youth employment creation, extension of social protection, and enhancement of social dialogue capacity. The three areas were jointly agreed upon by ministers responsible for Labour, Employers, and workers' representatives from the Partner States. At the time of writing this paper, implementation of the EAC-DWP was still in progress.

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39 The East Africa Community Decent Work Programme (EAC-DWP) 2010-2015. Online: <http://www.ilo.org/public/english/bureau/program/program/dwcp/download/eacfinal.pdf>.

Social security has also been in the limelight of the EAC's engagement on labour. Regrettably, the plan to adopt a set of regulations in this area parallel to the Common Market Protocol in 2009 did not materialise, and was left to be finalised by the Council of Ministers. With the support of the ILO Addis Ababa Office under the Migrant Social Security Project (MIGSEC), the Council has organised several consultation meetings with social security experts. The draft Annex/Directive was finalised and presented for consideration by the relevant EAC authorities in February 2011. Sadly, the Partner States were unable to reach consensus on certain operational principles, and the draft was returned to the Secretariat for further study and consultations.

Different studies to assess the possibility of establishing a region-wide portability scheme have been conducted. One of such is the review of the structure of the pension sector in the EAC whose report was published in 2013. The report made important observations regarding the slow pace in regionalisation of social security and the best portability model. The report named the different legal traditions in the Partner States, the unclear and uncoordinated taxation rules for old-age provision and pensions, and the disparate regulatory and supervisory frameworks as the key obstacles to the regionalisation of social security.<sup>40</sup> Having observed the challenges and the differences between pension schemes in the Partner States, especially multiplicity and fragmentation at national level and low levels of coverage, the report opined that any attempt to "...quickly move towards an EAC Pension Act may be premature".<sup>41</sup> According to this report, "co-ordination is the advisable starting point to ensure that the Common Market principles of freedom of movement for citizens and pension service providers can be implemented sooner rather than later."<sup>42</sup> The national social security supervisory authorities have established an umbrella body under the name of East African Pension Supervisory Association (EAPSA). Established in July 2014, EAPSA provides a forum for communication and information sharing for the pension sector with the aim of creating an effective, sound and robust pension sector in the EAC region.<sup>43</sup> The creation of this body is indeed in line with the recommendation by the report that the national social security supervisory authorities and national pension schemes should create an environment for coordination.

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40 East African Community, *Review of the Structure of the Pension Sector in the East African Community, Final Report* (2013) at 10, 103-111, and 116-118.

41 *Ibid* at 10.

42 *Ibid* at 10.

43 The inaugural meeting for EAPSA was held on 28 to 30 July, 2014 in Arusha.

Also, the EATUC has prepared a draft bill for social security portability.<sup>44</sup> The EATUC's Draft Social Security Portability Bill, 2015 was presented to the Partner States of the East African Legislative Assembly at EAC Headquarters in Arusha Tanzania on 18 May 2015.

## 5.2 Ratification and Adoption of Core ILO Standards

In exercising its standard-setting role, the ILO has adopted several instruments in the form of Conventions and Recommendations through which minimum labour standards are provided. There are currently 189 Conventions and 203 Recommendations. Conventions require ratification by member states. EAC countries have ratified a number of these instruments. The Republic of Kenya is leading in terms of number of ratifications with a total of 50 ratified Conventions, of which 36 are in force. Tanzania is second with 35 ratifications (30 Conventions are in force), followed by Burundi and Uganda, each with 31 ratifications and Rwanda with 28 ratifications.<sup>45</sup> These ratifications are inclusive of ratifications of the eight core Conventions which provide for the most fundamental principles and core labour rights.<sup>46</sup> According to the records available on the ILO website, the EAC countries have ratified all the eight Conventions, except Kenya which has ratified seven Conventions.<sup>47</sup> The application of these instruments in the Partner States is determined by the national legal systems. In countries with dualist legal systems like Tanzania, ratification has to be followed by incorporation of these Conventions in the domestic legal systems. By contrast, incorporation is not required in Kenya as

44 See 'EATUC Present the Draft Social Security Portability Bill 2015 to the Members of the East African Legislative Assembly at EAC HQ, Arusha Tanzania, 18<sup>th</sup> May 2015'. Online: <http://www.eatuc.org/news/162-eatuc-present-the-draft-social-security-portability-bill-2015-to-eala>.

45 See the ratification status see: <http://www.ilo.org/ilolex/english/index.htm>.

46 These principles are contained in the eight most fundamental Conventions under the ILO system which, according to paragraph 2 of the Declaration, binds all ILO members, even if they have not ratified the Conventions. These Conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), Right to Organise and Collective Bargaining Convention, 1949 (No 98), Forced Labour Convention, 1930 (No 29), Abolition of Forced Labour Convention, 1957 (No 105), Minimum Age Convention, 1973 (No 138), Worst Forms of Child Labour Convention, 1999 (No 182), Equal Remuneration Convention, 1951 (No 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No 111).

47 Kenya is yet to ratify the Freedom of Association and Protection of the Right to Organise Convention, 1948.

all duly ratified conventions form part of Kenya's law.<sup>48</sup> In Rwanda, ratification is to be followed by publication of the treaty in an official gazette.<sup>49</sup>

Apart from ratifications, the EAC Partner States have made significant strides in aligning their laws with key international labour standards. Major labour law reforms involving enactment of new legislation and introducing fundamental amendments to the existing legislation have been undertaken in the past decade with technical assistance from the ILO. As part of these reforms, Tanzania has enacted new labour laws, including the Employment and Labour Relations Act, 2004, the Labour Institutions Act, 2004, and the Employment and Labour Relations (Code of Good Practice) Rules, 2007. In Kenya, the reforms ended in 2007 with enactment of 5 new laws namely, the Employment Act, 2007; the Labour Relations Act, 2007; the Occupational Safety and Health Act, 2007; the Work Injury Benefits Act, 2007; the Labour Institutions Act, 2007.<sup>50</sup> In Uganda, the reform led to enactment of the Employment Act, 2006; the Equal Opportunities Act, 2007; the Labour Disputes (Arbitration and Settlement) Act, 2006; the Labour Unions Act, 2006; the Minimum Wages Boards and Wages Councils Act, 2000; the Occupational Safety and Health Act, 2006; and the Workers Compensation Act, 2000.<sup>51</sup> Also, new labour/employment policies and programmes have been launched across the sub-region as part of these reforms.<sup>52</sup>

These reforms have incorporated into domestic law the core labour standards, namely freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour;

48 Section 2(6) of the Constitution of the Republic of Kenya recognises any treaty or convention ratified by Kenya as part of the law of Kenya.

49 Article 190 of the Constitution of Rwanda provides that, "Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws".

50 These replaced the following laws: Employment Act, Cap 226; Regulation of Wages and Conditions of Employment Act, Cap 229; Trade Unions Act, Cap 233; Trade Disputes Act, Cap 234; Factories and Other Places of Work Act, Cap 514; and Workmen's Compensation Act, Cap 236.

51 The following regulations were also passed as part of the broader reforms: Employment Regulations, 2011; Employment (Sexual Harassment) Regulations, 2011; Employment (Recruitment of Uganda Migrant Workers Abroad) Regulations, 2005; Labour Disputes (Arbitration and Settlement) (Mediation and Conciliation) Regulations, 2011; Labour Unions (Check Off) Regulations, 2011; Labour Union (Access of Union Officials to a Workplace) Regulations, 2011; and Workers' Compensation Regulations, 2011.

52 Tanzania Mainland launched her National Employment Policy in 2008 and finalised her Employment Creation programmes in 2007. The Youth Action Plan was finalised in 2009, followed by the Employment Policy, 2009. In Rwanda, The National Employment Policy was launched in 2006, followed by a National Action Plan in 2007.

the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. At this level, it can rightly be argued that there is a considerable degree of proximity between national labour laws, especially regarding protection of fundamental labour principles and rights. Under Tanzania's ELRA, these principles, namely prohibition of child labour, prohibition of forced labour, prohibition of discrimination in the workplace, prohibition of discrimination in trade unions and employer associations, employee's right to freedom of association, employer's right to freedom of association, and protection of rights of trade unions and employers' associations are found in Part II of the Act.<sup>53</sup> In Kenya, forced labour is prohibited under section 5 of the Employment Act, whereas prohibitions of discrimination in employment and child labour are found in sections 6 and 32, respectively.

### 5.3 Some Areas of Convergence and Divergence

Labour legislation in the EAC Partner States exhibits a notable degree of approximation because of the remnants of the colonial legacy and transplantation of ILO standards into domestic law. As a result of these influences, labour laws in these countries largely apply to workers in the formal sector while excluding in totality or exceptionally granting limited protection to workers in the informal sector, which, as noted above, comprises an outstanding proportion of workers in the labour market.

Convergence is displayed in terms of the ILO fundamental principles named above. Similarities are also notable in provisions regarding employment standards, which include, among other things, employment contracts, hours of work, remuneration and termination of employment. For instance, the wording of section 37 of Tanzania's ELRA on unfair termination is identical to section 45 of Kenya's Employment Act. Under both provisions, termination of employment by an employer will be deemed unfair if the employer fails to prove any of the following three things. These are, first, that the reason for the termination is valid. Second, that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility or is based on the operational requirements of the employer. And, finally, that the employment was terminated in accordance with a fair procedure.

Admittedly, there are some slight, and sometimes major, variations engrained in the provisions of these statutes, as discussed in the following paragraphs.

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<sup>53</sup> See sections 5 to 11.

### 5.3.1 Abolition of Child Labour

The legal standards on abolition of child labour are provided for under the ILO's Convention 138 concerning Minimum Age for Admission to Employment, 1973 (Convention 138), and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention), 1999 (Convention 182). According to Article 2(1) of Convention 138, the minimum age upon which a child can be admitted to employment is 15 or 14 years for countries whose economy and educational facilities are insufficiently developed. For worst forms of child labour, the threshold is 18 years.<sup>54</sup>

The EAC Partner States have demonstrated commitment to fight against and progressively eliminate the problem of child labour which, as indicated above, is acute in all the countries. Various legislative and non-legislative measures on elimination of child labour have been undertaken at national and regional level. The non-legislative measures include tracer studies to establish the actual impact of child labour, educational programmes, and intervention programmes. All the countries have established a strong partnership with the ILO's International Programme on the Elimination of Child Labour (IPEC) through which joint programmes are developed and implemented.<sup>55</sup> With the assistance of the International Programme on the Elimination of Child Labour, the United Nations Children's Education Fund (UNICEF) and other partners, the EAC Partner States have adopted national action plans on elimination of child labour which serve as national tools and roadmaps.<sup>56</sup>

54 Article 3 of the ILO Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour defines the worst forms of child labour as "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children".

55 Information on projects, programmes and plans implemented jointly with IPEC can be found in IPEC's child labour Country Dashboard. Online: <http://www.ilo.org/ipec/Regionsandcountries/lang--en/index.htm>.

56 Government of Kenya, *National Action Plan for the Elimination of Child Labour in Kenya* (2004–2015); The United Republic of Tanzania, *National Action Plan for the Elimination of Child Labour*, 2009. Online file:///C:/Users/User/Downloads/TZA94604.pdf; Government of Uganda, *National Action Plan on Elimination of the Worst Forms of Child Labour in Uganda* 2012/13–2016/17. Elimination of the Worst Forms of Child Labour: Making Schooling the Principal Occupation of Children MAY 2012. Online: [http://www.unicef.org/uganda/NAP\\_Uganda\\_June\\_2012.pdf](http://www.unicef.org/uganda/NAP_Uganda_June_2012.pdf).

The commitment to eliminate child labour features prominently in EAC Partner States' statutes books. Their labour laws are in agreement concerning the urgent need to abolish child labour, and especially, the worst forms of child labour. However, variations are notable in two areas, namely the age at which a child can be employed and the scope of prohibition. For instance, the relevant provision under Tanzania's Employment and Labour Relations Act specifically prohibits employment of children under the age of fourteen, whereas under the corresponding provision in the Kenya's Employment Act the prohibition apply to children of thirteen years and below.<sup>57</sup> Children between fourteen and sixteen years may be employed to perform light work in Kenya provided that the said work is not harmful to their health or development and does not prejudice their school attendance.<sup>58</sup> In Uganda, the minimum age is 12. According to section 32(2) of Uganda's Employment Act, a child of 13 to 14 years can be employed to perform light duties on condition that the work is supervised by a person above the age of 18 and that it is not injurious to the child's education.

Regarding the degree of prohibition, this differs in respect of the worst forms of child labour. Kenya has taken a stiffer approach by prohibiting all worst forms of child labour as broadly defined under ILO Convention 182, whereas Uganda's approach is rather soft and prone to abuse. The relevant provision provides that "a child shall not be employed in any employment or work which is injurious to his or her health, dangerous, hazardous or otherwise unsuitable and an employer shall not continue to employ a child after being notified in writing by a labour officer that the employment or work is injurious to health, dangerous or otherwise unsuitable for that child". The prohibition of the worst forms of child labour in Uganda's Children Act, 2000, is, however, firm. Section 8 of this Act states that "No child shall be employed or engaged in any activity that may be harmful to his or her health, education or mental, physical or moral development".

While the progress made by Partner States in this area is commendable, there are a number of challenges which negatively affect the realisation of intended results. These challenges include weak enforcement of laws and policies in relation to child labour; limited awareness of laws accentuated by the high levels of adult illiteracy; inadequate mainstreaming of child labour into

57 See Kenya: Employment Act, s 29(1); Section 56 (1) of Uganda: Employment Act, s 56(1); and Tanzania: ELRA, s 33(6)(a).

58 See Employment Act, s 56; Children Act, s 10(4); Fourth Schedule of the Employment (General) Rules, 2014, ss 35-37.



other sector policies; limited access to quality education; and social cultural practices.<sup>59</sup> The total elimination of child labour will be better achieved if the necessary measures to address these challenges are met.

### 5.3.2 *Employment Discrimination*

Employment discrimination laws in the EAC largely correspond to the requirements of the ILO Convention 111 on Discrimination (Employment and Occupation), 1958, and the Equal Remuneration Convention, 1951, which seeks to outlaw discrimination, promote equality of opportunities and equal pay for work of equal value. In all the countries, employment discrimination is prohibited.<sup>60</sup> The scope of protection in terms of who is protected and what is prohibited is very wide. The list of prohibited grounds includes race, colour, sex, language, religion, political opinion, nationality, ethnic or social origin, disability, pregnancy, mental status and HIV status. Tanzania has gone a step further by including on its list such grounds as age, status of life, marital status and family responsibility. It cannot be over emphasised that although not as expansive as in the Constitution of Kenya, the list of prohibited grounds in these statutes provides a strong legal basis for gradual elimination of employment discrimination.<sup>61</sup>

The inclusion of gender, pregnancy and marital status and family responsibility in Tanzania's ELRA is an important stride in creating an enabling legal framework for eliminating discrimination and promoting gender equality in employment and thereby enhancing women's participation in the labour market. The ability of women to combine work with family responsibilities, such as bearing children, taking care of sick family members and other unpaid household work, is one of the major factors inhibiting their active participation in the labour market in the EAC, the rest of Africa and the world at large. In 1981, the ILO adopted the Workers with Family Responsibilities Convention, 1981 (No. 156) and a corresponding Recommendation (No. 165) in a bid to address this challenge. Article 3 of this Convention obliges State parties to formulate policies aimed at creating effective equality of opportunity and

59 See Uganda: National Action Plan on Elimination of the Worst Forms of Child Labour, *supra* note 57 at 9; and Tanzania: National Action Plan for the Elimination of Child Labour, *supra* note 57 at 7-11.

60 Kenya: Employment Act, s 5; Uganda: Employment Act, s 6; Tanzania: ELRA, s 7.

61 The list of grounds for discrimination under the Constitution of Kenya, 2010, which is the most expansive list in the entire region, is provided under Article 27(4). They include race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

treatment for men and women workers. The policies so formulated should, among other things, enable workers with family responsibilities to exercise their right to free choice of employment; and take account of their specific needs in terms and conditions of employment and social security.

As regards persons protected, there is a consensus that protection against discrimination should extend to employees and prospective employees. There is also consensus on the nature of protection. All the statutes are in agreement that the prohibition of discrimination is not absolute; it can be allowed in certain circumstances. For instance, when the inherent requirement of a job justifies discrimination; or when discrimination is part of affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace. Also, discrimination could be justified where, for example, the employers exclude or prefer a citizen in accordance with the national employment policy.<sup>62</sup> In Kenya, discrimination could further be justified if the restriction to certain categories of employment is deemed to be necessary in the interest of state security.<sup>63</sup>

### **5.3.3 Employment Relationship**

The existence of an employment relationship is a *sine qua non* for entitlement to labour law protection in many jurisdictions. Traditionally, labour law protection is extended to persons deemed as ‘employees.’ These are persons who have entered into or work under a contract of service, whether the contract is express or implied, written or oral. It is therefore important for a labour law statute to include an explicit definition of the term “employee”, and to provide clarity as to how the contract of service is distinguished from other contracts, that is, how an employee is distinguished from an independent contractor. Of course, there are serious challenges emanating from the narrow definition usually accorded to these two terms and the scope of labour law protection, especially when considered in the context of contemporary labour market trends, which are marked, among other things, by a preference for fixed term contracts and disguised employment relationships adopted by employers to circumvent legal obligations.

Tanzania has commendably attempted to address these challenges by including in its definition of employees such workers who would otherwise

62 See Kenya: Employment Act, s 5(4); Uganda: Employment Act, s 6(4); Tanzania: ELRA, s 7(6).

63 See Kenya: Employment Act, s 5(4)(6).

not qualify as employees under traditional labour law. The term employee is broadly construed under section 4 of Tanzania's Act to include a person who has entered into a contract of employment, and any person who has entered into any other contract under which he/she undertakes to work personally for the other party to the contract where that other party is not a client or customer of any profession, business, or undertaking carried on by the said individuals.<sup>64</sup> On the contrary, Kenya and Uganda have continued to hold on to the traditional narrow construction of this term. In both countries, the term "employee" is narrowly understood as a person employed for wages or a salary.<sup>65</sup> In Rwanda, the term "worker" is broadly interpreted as "any person who commits him/herself to professional activity in return for payment under the direction and authority of another physical or moral, public or private person".<sup>66</sup>

These differences cause a large gap regarding the scope of labour law protection. The broad construction of the term employee and the term worker in Tanzania and Rwanda means that arrangements other than contracts of service can sufficiently trigger protection of labour rights prescribed in the relevant legislation. Indeed, these are progressive statutory adjustments and commendable innovations in providing protection to categories of workers who are traditionally outside the framework of labour law protection, and especially those in disguised employment relationships. Disguised employment relationships occur where the employer uses contractual arrangements that treat an individual as other than an employee and in a manner that hides his or her true legal status as an employee thereby depriving the workers of rights arising from labour law.<sup>67</sup> Even more interesting, in Rwanda, labour law protection is extended to informal workers who are defined under Article 1(38) as workers who perform informal activities and who work for a company or an individual other than a registered employer. Although labour law protection for this category of workers only covers issues pertaining to social security, trade union organisations and health and safety at the workplace, the extension of labour law to this group is a ground-breaking step worthy of emulation by other countries.

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64 Paul Benjamin, 'No longer at ease: Approaches to the scope of the employment relationship in SADC countries' (Paper presented at the IIRA 5th African Regional Congress, Cape Town, March 2008) at 10-11.

65 See Kenya: Employment Act, s 2; Uganda: Employment Act, s 2.

66 Section 32.

67 R198 - Employment Relationship Recommendation, 2006 (No. 198).

### 5.3.4 *Leave*

Labour laws in the EAC provide three broad categories of leave, namely annual leave, sick leave and family responsibility leave (maternity leave, paternity leave and compassionate leave). The qualifying criteria and the duration for each category of leave differ significantly. For instance, while all the countries acknowledge the importance of allowing an employee a paid annual leave, the duration of that leave in Tanzania and Uganda is 28 days, while in Kenya it is a minimum of 21 days, meaning that the parties to a contract of service can agree on more days.<sup>68</sup>

Regarding maternity leave, the laws of these countries concur on the major principles, namely provision of maternity leave at full pay, and the right of female employees on maternity leave to return to the job they held immediately prior to maternity leave or to a reasonably suitable alternative job. As with the case of annual leave, variations are notable on the conditions of leave and the duration of the leave. In Kenya, the duration is three months; in Uganda, the duration is 60 working days; and in Tanzania, the duration is 84 days or 100 days (if the employee gives birth to more than one child).<sup>69</sup> Concerning the qualifying conditions, in Tanzania maternity leave is granted once in every 36 months, except if the child dies within a year of birth, and can be granted for four terms only. Therefore, for purposes of enjoyment of these rights, a female employee in Tanzania is obliged to bear only four children with an interval of three years after each birth.<sup>70</sup> As if this is not enough, the blanket exclusion of employees with less than six consecutive months of service from leave entitlement means a female employee cannot exercise her right to paid maternity leave if she has not completed the minimum of six months of employment with her employer. There are no such conditions in Kenya and Uganda. The conditions in Tanzania put female employees in Tanzania at a disadvantage compared to their counterparts in other countries who have the flexibility to decide on the number of children, and the interval between their children, without fearing negative employment effects.

Such inconsistencies are also noticeable in paternity leave. In Tanzania, three days paid paternity leave is given within the leave cycle of 36 months, whereas

68 See Tanzania: ELRA, s 31, Uganda: Employment Act, s 54(1)(a); Kenya: Employment Act, s 28(1)(a).

69 See Tanzania: ELRA, s 33, Uganda: Employment Act, s 56; Kenya: Employment Act, s 29.

70 See section 30(ii)(b) read together with section 33(6) and (8).

in Kenya the duration of paternity leave is two weeks, and in Uganda, the duration is four days granted annually.<sup>71</sup>

### ***5.3.5 Standards Applicable to Migrant Workers***

Minimum standards regarding free movement of workers within the region and their ability to access domestic labour markets in the Partner States are provided for under the Protocol on the Establishment of the East Africa Common Market (Common Market Protocol), 2009 and the East African Community Common Market (Free Movement of Workers) Regulations (Annex II to the Protocol). The Common Market Protocol was officially opened for signature in November 2009, and came into force on 1 July 2010. The Common Market Protocol is accompanied by four sets of regulations which are incorporated into the Protocol by way of Annexes: the East African Community Common Market (Free Movement of Persons) Regulations (Annex I); the East African Community Common Market (Free Movement of Workers) Regulations (Annex II); the East African Community Common Market (Right of Establishment) Regulations (Annex III); and the East African Community Common Market (Right of Residence) Regulations (Annex IV).

Article 10 of the Common Market Protocol read together with the Regulations on Free Movement of Workers as provided for under Annex II to the Common Market Protocol guarantees the right of citizens of the EAC countries to move across the member states' territories for purposes of accessing employment opportunities and the right to enjoy equal treatment with nationals in terms of employment conditions. The rights of migrant workers to join and participate in trade union activities, have access to social security benefits, and be accompanied by family members in their chosen countries of destination are also provided for.<sup>72</sup> Detailed procedures for accessing the labour market, including the process for acquisition of work permits for the principal migrants and their dependants, are also provided for to facilitate uniform admission procedures in the Partner States.

A worker seeking to enjoy the opportunities of the Common Market in a Partner State is required to seek and obtain legal authorisation in the form of work and residence permits. Two kinds of work permits, namely, long-term permits (work and residence permits) and temporary permits (referred to in the

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71 See Kenya: Employment Act, s 29(8); Uganda: Employment Act, s 57.

72 Common Market Protocol, art 13.

regulation as a ‘special pass’ or simply a ‘pass’), have been designed to facilitate access to Partner States’ labour markets. Long-term work permits are issued to workers with a contract of employment for a period exceeding ninety days in the territory of another Partner State.<sup>73</sup> The special pass is a cost-free permit for 90 days or six months granted to workers whose contracts of employment in the host country do not exceed 90 days and those waiting for their employment to be concretised. It is also granted to long-term employees and self-employed persons pending the formalities for obtaining a long-term permit. The special pass, once issued, gives its holder the right to remain and to work or to engage in an economic activity within the specified period.<sup>74</sup>

The implementation of the Protocol and its Regulations is a work in progress. Different levels of implementation have been achieved so far, with Rwanda being ahead of all the Partner States both in terms of incorporating the EAC framework into its domestic laws and actual opening of borders to allow admission of workers from fellow EAC countries. Rwanda has made notable progress ahead of the other Partner States. It incorporated the EAC framework into its laws in May 2011.<sup>75</sup> Citizens from other Partner States who secure employment in Rwanda are issued with a work permit for two years, renewable upon application. Those with contracts for a lesser period are issued with a special pass in accordance with the provisions of the Protocol.<sup>76</sup> All these documents are issued to the citizens of other Partner States free of charge. In addition, EAC citizens are granted preference if they are competing for a position with nationals from outside EAC region.<sup>77</sup> Kenya has also followed suit. East African citizens wishing to work in Kenya obtain work permits gratis.<sup>78</sup> In

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73 See Annex II, Regulation 6.

74 See Annex II, Regulation 5(4) and Regulation 6(1) – (3).

75 See Law No 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda. See also Ministerial Order No 02/01 of 31 May 2011 Establishing Regulations and Procedures Implementing Immigration and Emigration Law, and Ministerial Order No 03/01 of 31 May 2011 Determining the Fees Charged on Travel Documents, Residence Permits, Visas and Other Services Delivered by the Directorate General of Immigration and Emigration.

76 *Ibid.*

77 [http://www.eac.int/migration/index.php?option=com\\_content&view=article&id=127&Itemid=93](http://www.eac.int/migration/index.php?option=com_content&view=article&id=127&Itemid=93).

78 *Ibid.* Kenya’s Citizenship and Immigration Act, No. 12 of 2011 and Citizens and Foreign Nationals Management Act, No. 31 of 2011 repealed and replaced the Kenya Citizenship Act (Cap 170), Immigration Act (Cap 172), Alien Restriction Act (Cap 173) and Visa Regulations. Kenya has also amended some of her employment and labour relations legislation to address discrimination of citizens and workers from other Partner States seeking employment in Kenya.

the same spirit, in February 2015, Uganda unveiled its decision to remove work permit fees for Kenyan and Rwandan workers.<sup>79</sup>

Other countries are lagging behind. Their laws and policies relevant to labour migration predate the sub-regions' labour migration framework, making it difficult for workers to access the opportunities available in these countries.<sup>80</sup> Non-legal limitations including a lack of political commitment to implement the policy and legislative reforms required by the Common Market Protocol also persist. In Kenya, where legislative reforms have been undertaken, the administrative bottlenecks have remained in place making it difficult for workers from other Partner States to take up employment in Kenya's labour market.<sup>81</sup> Surprisingly, even Tanzania's recently adopted Non-Citizens (Employment Regulation) Act, 2014 failed to incorporate the standards set under the Common Market Protocol, although one of the objectives for its enactment, was to "... set out a good base for the implementation of various regional agreements and protocols on movement of labour, such as the Common Market Protocol of the East African Community".

## 6. CONCLUSION

The above discussion leads to the conclusion that the implementation of commitments regarding harmonisation of labour laws has been rather slow. Unlike the sister organisation, SADC, and the European Union, which have labour law instruments in place, a labour law instruments in the EAC is yet to be promulgated. The only available framework is in respect of facilitation of admission of labour migrants into Partner States labour markets. Nevertheless, there is a notable level of convergence between labour regulations on specific areas of labour law which have been achieved through the incorporation of ILO core labour standards at the national level. These provide a sound basis for the creation of convergence in other areas so as to narrow the inconsistencies that exist.

79 Fredrick Musisi, 'Uganda scraps work permits, visa fees for Kenyans, Rwandans' (The Monitor, Uganda, February 21, 2015).

80 Such laws include the Employment Promotion Services Act, 1999 and Immigration Act, 1995 in Tanzania and Uganda's Citizenship and Immigration Control Act, Cap 66, and Employment Act, 2006.

81 Victor Ogalo, 'Achievements and Challenges of Implementation of the EAC Common Market Protocol in Kenya: Case of Free Movement of Labour'. Online: <http://www.fes-kenya.org/media/activities/EAC%20Common%20Market%20Protocol%20and%20Free%20Labour%20Mobility%20Workshop/Papers/CMP%20Implementation%20in%20Kenya.pdf>.





# INTEGRATING PERSONS WITH DISABILITIES IN THE LABOUR MARKET: COMPARATIVE ANALYSIS OF EMPLOYMENT AND DISABILITY LAWS OF TANZANIA, KENYA AND UGANDA

ABDALLAH POSSI\*

## 1. INTRODUCTION

With the objective of widening and deepening cooperation, the partner states of the East African Community (EAC) have undertaken to establish among themselves a common market,<sup>1</sup> which also entails free movement of labour.<sup>2</sup> As free movement of labour is, *inter alia*, aimed at strengthening the labour market by making it more competitive, it is important that the labour market should, to the greatest extent possible, be inclusive by making available equal opportunities to all persons, thereby making it possible to make use of the productive potential of persons who could otherwise be unjustifiably left out. It follows therefore that efforts to make the East African labour market more competitive should not ignore interests of some groups of persons, such as persons with disabilities,<sup>3</sup> many of whom have experienced marginalisation throughout the world, East Africa being no exception. Income from work can address issues of economic dependency and marginalisation among persons with disabilities. Work creates a feeling of usefulness and self-fulfilment, gives satisfaction, builds up personal dignity, and brings a rhythm into daily life. Work also develops social networks and civic skills, among several other benefits.<sup>4</sup> With

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1 Treaty for the Establishment of the East African Community, art 5(1)(2).

2 *Ibid* art 7(1)(c), 76(1), and 104(1).

3 On 20 June 2014, it was resolved at the EAC Conference on Persons with Disabilities held in Nairobi that the EAC Secretariat should develop a regional framework for harmonisation of existing national legislations, policies and frameworks for Persons with Disabilities to facilitate their harmonisation by all EAC partner states.

4 J Boardman et al., 'Work and Employment for People with Psychiatric Disabilities' (2003) 182 *British Journal of Psychiatry* 467; AF Lehman et al., 'Improving Employment Outcomes for Persons with Severe Mental Illnesses' (2002) 59 *Archives of General Psychiatry* 165–172; L Schur et al., 'Corporate Culture and the Employment of Persons with Disabilities' (2005) *Behavioral Sciences and the Law* 3 at 4.

such remarkable attributes, work should without doubt be the most reliable means of enhancing economic empowerment and self-advocacy for persons with disabilities.<sup>5</sup> On the other hand, unequal employment opportunities deepen the exclusion of persons with disabilities, and makes them dependent on others, and “a liability to themselves, as they tend to accept and purposefully demand that everything be done for them, hence encroaching on the time available to other members of the family and the community to do productive work”.<sup>6</sup> Economically empowering persons with disabilities will make them part of the growing East African market.

This paper compares legal provisions on disability and employment of Tanzania (both mainland and Zanzibar), and those of Kenya and Uganda, with the aim of determining the extent to which laws are harmonized with respect to persons with disabilities’ access to the labour market. This is of essence considering the fact that with the free movement of labour, there should be no different treatment (on the ground of disability) in different EAC partner states. To investors, this is also of importance because accommodating employees with disabilities involves costs, and where these are unnecessarily high in one or some EAC partner state, it would defeat the general purpose of harmonising the relevant laws within the region.

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5 G Henderson & VW Bryan, *Psychosocial Aspects of Disability* (Springfield, Illinois: Charles C Thomas Publisher, 4th edition, 2011) at 72; R N Sharma, ‘Employment Leads to Independent Living and Self-Advocacy: A Comparative Study of Employed and Unemployed Persons with Cognitive Disabilities’ (2006) 17 *Asia Pacific Disability Rehabilitation Journal* 50 at 57.

6 SK Tororei, ‘The Right to Work: A Strategy for Addressing the Invisibility of Persons With Disability’ (2009) 29 *Disability Studies Quarterly* 12. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a) of the EU Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See *Coleman v Attridge Law* (2008) C-303/06.

## 2. THE CONCEPT OF DISABILITY

There is no universal definition of disability.<sup>7</sup> Despite being crucial, the meaning of disability continues to be one of the most controversial issues.<sup>8</sup> This is the result of variations in perceptions, different classificatory systems of disability and variations in understandings in different national and cultural contexts.<sup>9</sup> Disability is described according to different approaches (models) reflecting different ways in which people perceive disability.<sup>10</sup> Perhaps the most general approaches to disability are individual (medical) and social approaches.<sup>11</sup>

7 The CRPD defines “a person with disability” (but not disability) (Article 1 Convention on the Rights of Persons with Disabilities), and recognises disability as an evolving concept (Paragraph (e) of the Preamble, *ibid.*). The reason for this was due to disagreement within the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (established by UN General Assembly Resolution 56/168 of 19th December 2001) regarding whether or not the Convention should include a definition of disability (AS Kanter, ‘The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law and Commerce* 287 at 291; R Kayess & P French, ‘Out of Darkness into Light?: Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1 at 23). There was a concern that without including a specific definition of disability in the Convention, States would feel free to exclude people with certain disabilities from protection under their laws, thereby putting at risk the entire purpose of the Convention. (Kanter, *ibid.*). On the other hand, a definition of disability was objected to on the basis that any definition would inevitably derive from the medical model and necessarily include some people and not others. There was also a view that over time, the definition may change to give room for the inclusion of people who may not now be considered as persons with disabilities, and therefore the incorporation of a definition of disability runs the risk of being inflexible (“time-locking the convention”), and thereby significantly impairing new evolutions from taking place, or at least from being recognised by the law or policy (AC Hendriks, ‘Different Definition – Same Problems – One Way Out?’ in ML Breslin & SYee eds., *Disability Rights Law and Policy: International and National Perspectives*, (New York: Transnational Publishers Inc, 2002) at 206.). The definition would also risk ignoring variations among societies – by “imposing a western view of disability on non-western cultural systems” (Kanter, *ibid* at 292), “compelling [States] to recognise... a large number of impairment groups not traditionally understood as persons with disabilities within their societies” Kayess & French, *ibid* at 23). Therefore, by not defining disability, the CRPD seems to allow more flexibility in the conceptualisation of disability.

8 R Traustadóttir, ‘Disability Studies, the Social Model and Legal Developments’ in OM Arnardóttir & G Quinn eds., *UN Convention on the Rights of Persons with Disabilities* (Leiden: Martinus Nijhoff Publishers, 2009) at 8.

9 P Parnes et al., ‘Disability in Low-Income Countries: Issues and implications’ (2009) 31 *Disability Rehabilitation* 1170 at 1171.

10 AS McDonald, ‘Cultural Beliefs about Disability in Practice: Experiences at a Special School in Tanzania’ (2012) 59 *International Journal of Disability, Development and Education* 393 at 394.

11 However, it should be noted that settling on this way of classifying approaches to disability has been viewed by some scholars as an over-simplification, and therefore does not do justice to the complexity of disability. See Traustadóttir, *supra* note 8. It has been argued that disability issues cannot be solely addressed in terms of these approaches only, since there are much more complex issues which require a deeper understanding of the various intrinsic and extrinsic factors determining (and hindering) the independent functioning and social participation of individuals (Hendriks, *supra* note 7) There have always been different views of what exactly disability is. See M Priestley, ‘Introduction: The Global Context of Disability’ in M Priestley ed., *Disability and the Life Course: Global Perspectives*

Between them, there are differences in emphasis, especially with respect to areas of intervention. This article adopts the human rights approach to disability, which requires a shift from medical-oriented towards a more social-oriented definition. This approach treats persons with disabilities as “rights holders”, and its main objective is to promote inclusion through the elimination of barriers which hinder effective participation of persons with disabilities in various social activities. This approach builds on the social model of disability, and the “normative nature of human rights”.<sup>12</sup>

The UN Convention on the Rights of Persons with Disabilities (CRPD) furthers the human rights approach to disability by re-stating the existing human rights (appearing in general human rights conventions) and then creating incidental rights to ensure that existing rights are realised.<sup>13</sup> It is the first internationally binding human rights instrument of the twenty-first century in the area of disability rights, and is therefore a significant instrument for persons with disabilities around the world.<sup>14</sup> The reasons which necessitated the thematic (disability) convention may be summarised as follows:

First, [the requirement of] tangible acknowledgement of humanity [of persons with disabilities] ... Second, it would [have been] iniquitous to allow abuse to continue unchecked... Third, [the need to] move beyond the ubiquitous rhetoric, reports and resolutions, [as] there [was] a compelling case for the international community to implement measures of substance. Finally, whatever political horse-trading is necessary to achieve a convention, the *process* of elaborating such a convention has intrinsic value.<sup>15</sup>

The CRPD signifies a shift of emphasis from “the most urgent needs”, towards a more right-based approach, in which disability is viewed as a human rights issue,<sup>16</sup> thereby elevating the importance of disability in international human rights, and providing an excellent opportunity to inquire into the

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(New York: Cambridge University Press, 2001) at 5.

12 M Mulumba, *Mainstreaming Disability into the Poverty Reduction Process in Uganda: The Role of the Human Rights-Based Approach to the National Development Plan* (Saarbrücken: LAMBERT Academic Publishing GmbH & Co. KG, 2011) at 17, citing CJ Hisayo (2007).

13 P Harper, ‘Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities’ (2012) 27 *Disability & Society* 1 at 2.

14 Kanter, *supra* note 7 at 288.

15 R Light, ‘Disability and Human Rights: The Persistent Oxymoron’ in A Lawson & C Gooding eds., *Disability Rights in Europe: From Theory to Practice* (Oxford, Portland: Hart Publishing, 2005) at 13.

16 D Fritz et al., ‘Making Poverty Reduction Inclusive: Experiences from Cambodia, Tanzania and Vietnam’ (2009) *Journal of International Development* 673.

protection accorded to persons with disabilities.<sup>17</sup> The CRPD is said to be a “potential catalyst” for progressive change, because of its ability to trigger, *inter alia*, the social integration of persons with disabilities.<sup>18</sup>

### 3. GENERAL STATE OF AFFAIRS OF PERSONS WITH DISABILITIES AND THE CHALLENGE OF ACCESSING THE LABOUR MARKET

In Africa, it has been reported that 80 million people experience some form of disability.<sup>19</sup> However, data from EAC partner states do not appear to give a certain figure.<sup>20</sup> Based on the formula created by the World Health Organisation (WHO), which estimates that one tenth of a population in any given community could have a disability, it was estimated in 2004 that Tanzania had approximately 3.5 million persons with disabilities.<sup>21</sup> In Kenya, based on the 2009 census, the number of persons with disabilities was then 1,330,312, or 3.5% of the Kenyan population.<sup>22</sup> Uganda’s 2014 census stated the number of persons with disabilities to be 6,466,798, about 18.5% of the total population.<sup>23</sup> It should be noted however, that the statistics given may have been based on different criteria of recognizing disability. Nevertheless, these are significant numbers, and there should be no doubt that persons with disabilities are a potential labour force.

17 A Dimopoulos, *Issues in Human Rights Protection of Intellectually Disabled Persons: Medical Law and Ethics* (Liverpool: Ashgate, 2010) at 217.

18 M Stein & JE Lord, ‘Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities’ in OM Arnardóttir & G Quinn eds., *UN Convention on the Rights of Persons with Disabilities* (Leiden: Martinus Nijhoff Publishers, 2009) at 39.

19 J Biegon, ‘The Promotion and Protection of Disability Rights in the African Human Rights System’ in IG Du Plessis & T van Reenen eds., *Aspects of Disability Law in Africa* (Pretoria: Pretoria University Law Press, 2011) at 53.

20 For example: In 2008, Kenya’s National Coordinating Agency for Population and Development conducted the National Survey on Disability, according to which about 4-6 % of Kenyans have a disability. However, according to the Kenya National Bureau of Statistics, following the 2009 population census, the number of persons with disabilities made up 3.5% of the population.

21 LHRC/ZLSC, *Tanzania Human Rights Report 2008* (LHRC; ZLSC, Dar Es Salaam, Zanzibar 2009) at 93. However, it should be noted that official statistics do not show a consistent picture concerning the prevalence of disability in Tanzania. According to the 2002 national census, 3% of the Tanzanian population have a disability. The 2002–2003 Poverty Analysis, however, claims that 10% of the population have a disability (mainly physical or visual impairments) which is roughly equivalent to 3.5 million people (Fritz et al, *supra* note 16 at 679). According to the National Bureau of Statistics (2008), up to 3.2m Tanzanians (7.8%) of the population aged 7 years and above have some form of activity limitation, and up to 5.4m (13.2%) are affected by one form of disability or the other. See the United Republic of Tanzania, *National Disability Mainstreaming Strategy 2010-2015* at 8.

22 See KNBS (2013) *Number of Persons with Disability*, <https://www.knbs.or.ke/number-of-persons-with-disability>.

23 Uganda Bureau of Statistics 2016, *The National Population and Housing Census 2014 – Main Report*, Kampala, Uganda, p. 83.

Despite the significant numbers, persons with disabilities are among the poorest of the poor,<sup>24</sup> and are more likely than their able-bodied peers to be uneducated, unemployed or under-employed.<sup>25</sup> The increasing need to be 'intellectually abled' and 'physically fit' for work, makes persons with disabilities economically vulnerable.<sup>26</sup> Generally, unemployment of persons with disabilities is mainly a result of negative attitudes and inaccessible work environment.<sup>27</sup>

Reliable data on the employment of persons with disabilities is difficult to obtain, but the available data indicates that unemployment among the persons with disabilities is as high as 80% in some countries.<sup>28</sup> When employed, the conditions of work for persons with disabilities are likely to be less advantageous than those of other workers.<sup>29</sup> Persons with disabilities are also more likely to lose their jobs than those without disability.<sup>30</sup> Unemployment, poverty and general marginalisation infringe on persons with disabilities' access to social services such as education, health, food, shelter, transport and technical aid facilities.<sup>31</sup>

Removal of barriers which either hinder persons with disabilities' access to employment, or limit their chances of maintaining employment, is crucial in recognising "potentials for a more productive, more diverse, better prepared and more highly motivated workforce".<sup>32</sup> This benefits not only persons with

24 R Yao, *Chronic Poverty and Disability: Action on Disability and Development* (Frome, 2001) at 5.

25 AM Cotter, *This Ability: An International Legal Analysis of Disability Discrimination* Hampshire (Burlington: Ashgate, 2007) at 138; CV McClain, 'Democracy and Disability in South Africa: Still Three Nations' (2002) 14 *Disability World*.

26 D Goodley, *Disability Studies: An Interdisciplinary Introduction* (London: SAGE, 2011) at 2.

27 National Policy on Disability in Uganda, 2008; Schur, *supra* note 4 at 10.

28 Priestley, *supra* note 11 at 8.

29 A Downing, *Power and Disability in the Global South: A Case Study of Ghana's Disability Rights Movement* (MA Dissertation, University of Lund, 2011) at 27.

30 C Barnes, *Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation* (London: C. Hurst and Co. Publishers, 2000) at 121; J Morris-Wales, 'Literature Review on Job Retention and Career Progression for Persons with Disability in Canada and Internationally' (2010). Online: <http://disabilitystudies.ca/wp-content/uploads/2010/08/Job-Retention-and-Career-Progression-Among-People-with-Disabilities-Final-Report.htm>.

31 G Quinn, 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability' (2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 33 at 35; UN Enable, UN Convention on the Rights of Persons with Disabilities: Some Facts about Persons with Disabilities (2006). Online: <http://www.un.org/disabilities/convention/facts.shtml>; Goodley, *supra* note 26 at 2; M Deegan, 'Feeling Normal and "Feeling Disabled"' in SN Barnartt ed., *Disability as a Fluid State: Research in Social Science and Disability* (Bingley: Emerald Group Publishing, 2010) at 39.

32 JA Cook, 'Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission' (2006) 57 *Psychiatry Services* 1391 at 1402.

disabilities, but also employers;<sup>33</sup> and it should contribute towards dealing with general unemployment problems. Persons with disabilities are an asset whose productive potential cannot be ignored, and they must be thought of as part of the general population, entitled to the same rights, privileges, services, and consideration enjoyable by man, and subject to the same responsibilities and obligations to themselves, their families, and the nation.<sup>34</sup> Any exception to modern human rights (to the detriment of persons with disabilities) is unacceptable.

#### 4. WORK AND DISABILITY UNDER THE EAC TREATY

All the EAC partner states have signed and ratified the CRPD.<sup>35</sup> Under the Treaty establishing the East African Community (EAC), which came before the CRPD, the partner states agree to adopt measures to achieve the free movement of labour<sup>36</sup> as part of the process of creating a common market among the partners states.<sup>37</sup> The Common Market Protocol of 2009 provides for the harmonisation of social policies by partner states in various areas, including promotion of equal opportunities, and promotion and protection of the rights of marginalised and vulnerable groups. From the disability rights perspective, free movement of labour ought to include the harmonisation of laws with the aim of ensuring that employment opportunities are made accessible to persons with disabilities within the EAC. This is in fact not a new idea, since, for example, the Employment Guidelines for 2000 agreed on by the European Council at Helsinki on 10 and 11 December 1999, stressed the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disabilities. This is reiterated in the preamble to the Council of the European Union's Directive establishing a General Framework for Equal Treatment in Employment and Occupation of November 2000.<sup>38</sup>

The EAC treaty is itself not a human rights treaty, although among the fundamental principles of the EAC is good governance, which includes equal opportunities, as well as the recognition, promotion and protection of human

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33 Schur et al, *supra* note 4 at 18.

34 Tororei, *supra* note 6.

35 Convention on the Rights of Persons with Disabilities, *supra* note 7.

36 EAC Treaty, art 104(1).

37 *Ibid* art 76(1).

38 Council Directive 2000/78/EC of 27 November 2000.

and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.<sup>39</sup> The partner states are therefore obliged to maintain the universally accepted standards of human rights.<sup>40</sup> The East African Court of Justice has occasionally held that although it does not have jurisdiction to adjudicate disputes concerning human rights *per se*, it has jurisdiction over matters related to Articles 6(d) and 7(2) of the EAC Treaty (rule of law, good governance, transparency and human rights).<sup>41</sup>

To elevate the status of human rights within the EAC, the East African Legislative Assembly passed the EAC Human Rights Bill in April 2012. The Bill prohibited direct and indirect discrimination on various grounds, including disability,<sup>42</sup> and the partner states were urged to take measures, including affirmative action to address their past history of marginalisation.<sup>43</sup> Although the specific rights of persons with disabilities listed under section 14(2) did not include the right to work, under Section 14(1) of the Bill, persons with disabilities were granted all the rights stated in the Bill, including rights related to labour relations,<sup>44</sup> but without comprehensively addressing matters like reasonable accommodation. The bill had not come into force.<sup>45</sup>

In an attempt to address the rights of persons with disabilities, the EAC adopted a Disability Policy, which can be used as a reference and coordination point for action on disability rights within the EAC.<sup>46</sup> The policy appears to have been influenced by the CRPD, among other factors,<sup>47</sup> and adopts the human

39 EAC Treaty, art 6(d).

40 *Ibid* art 7(2). Reference No. 5 of 2011.

41 See *James Katabazi v Secretary General of the EAC*, East African Court of Justice, First Instance Division, Ref. No. 1 of 2007; *Attorney General of Rwanda v Plaxeda Rugumba*, East African Court of Justice, Appellate Division, Appeal No. 1 of 2012; *Samuel Mukira Mohochi v Attorney-General of Uganda*, First Instance Division, No 5 of 2011.

42 East African Human and People's Rights Bill, s 8(1)(2).

43 *Ibid* s 8(4).

44 *Ibid* s 31.

45 The procedure for assent of Bills passed by the East African Legislative Assembly is provided for under Article 63(1), (2), (3) and (4) of the EAC Treaty. The Heads of State may assent to or withhold their assent to a Bill. A Bill that has not received assent within three months from the date on which it was passed by the Assembly shall be referred back to the Assembly, giving reasons, and with a request that the Bill or a particular provision thereof be reconsidered by the Assembly. If the Assembly discusses and approves the Bill, the Bill shall be resubmitted to the Heads of State for assent. If a Head of State withholds assent to a re-submitted Bill, the Bill shall lapse.

46 LN Murungi, 'Disability Rights in Sub-Regional Community During 2013' in *African Disability Rights Year Book* (Pretoria: Pretoria University Law Press, 2014) at 324.

47 The executive summary to the policy refers, *inter alia*, to the CRPD and the EAC Assembly's adoption of a Resolution urging Partner States to ratify the Convention. See EAC Policy on Persons



rights based approach to disability.<sup>48</sup> In addressing poverty among persons with disabilities, the policy promotes affirmative action for employment of persons with disabilities,<sup>49</sup> and obliges the EAC to develop measures and incentives to support employment and self-employment of persons with disabilities.<sup>50</sup> The adoption of the disability policy is a good step, although it does not have the same legal effect as the binding Act could have had.

In 2015, the East African Legislative Assembly passed the EAC Persons with Disabilities Bill, whose objectives are, *inter alia*, to harmonise services rendered to persons with disabilities in the community and to coordinate provisions of international conventions on disability. Significantly, the Bill provides that the provisions of CRPD shall inform decisions taken in the administration of the Act.<sup>51</sup>

While Article 6(d) of the EAC treaty does not mention any other human rights treaty apart from the African Charter, it is important to note that having signed and ratified the CRPD, EAC partner states are bound by the provisions of Article 27 of the CRPD, which include “the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”. Article 27 provides for the inclusive nature of the work environment, and to achieve this, the obligation to protect persons with disabilities from harassment, or to ensure the provision of reasonable accommodation. These are among the important interventions of the CRPD, and so are issues like vocational guidance, job placement, promotion of self-employment, or the obligation to employ persons with disabilities in the public sector. Matters like equal remunerations, safe and healthy working conditions or trade union rights also exist in the ICESCR. Their inclusion in the CRPD should be perceived as placing more emphasis on equality of persons with disabilities with respect to such matters. In this sense, Article 27 moves away from the traditional approaches to equality that ignored the specific requirements of persons with disabilities, and the reality of marginalisation.

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with Disabilities (2012) at 6.

48 Paragraph 4.1 of the policy states that, in implementing this policy, the Human Rights Based Approach shall be used. This will ensure that all legislation and programming at the secretariat and by partner states will enhance the rights of PWD's. For the expression “normative nature of human rights”, see Mulumba, *supra* note 12.

49 EAC Policy on Persons with Disabilities (2012) at 34.

50 *Ibid* at 38.

51 See EAC Persons with Disabilities Bill, s. 3 (a) and (c) and 4.

Article 27 does not mention such arrangements as segregated work settings or sheltered employment, but Article 27 should be read together with both the purpose and general principles of the CRPD. The unique aspect of the CRPD is that there is a requirement to interpret it 'in context', which requires that one reads a specific provision in the CRPD in light of the overall convention.<sup>52</sup> One of the purposes of the CRPD is to "ensure the full and equal enjoyment of all human rights ... by all persons with disabilities";<sup>53</sup> and the general principles of the CRPD include equality of opportunity, full and effective participation and inclusion in society, as well as respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.<sup>54</sup> In other words, the purpose and general principles of the CRPD stated in Article 1 and 3 signify that the provisions of the CRPD, including Article 27, should be construed in the best interests of persons with disabilities.

## 5. PROMOTING PERSONS WITH DISABILITIES' ACCESS TO THE LABOUR MARKET

There are substantial differences in the means by which different States have sought to achieve integration of persons with disabilities in the labour market, despite what seems to be a general move from the welfare approach to a more work-promoting and integrationist approach.<sup>55</sup> In general, measures aimed at ensuring persons with disabilities' access to the labour market may include general equality measures, employment quotas, prohibition of denial of employment opportunities to persons with disabilities, or imposition of a duty to provide reasonable accommodation.<sup>56</sup> This section provides an analysis

52 J Allain, *Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities: Legal Report No. 2 issued on behalf of Disability Action's Centre on Human Rights for People with Disabilities* (Belfast, Queen's University, 2009) at 6.

53 Convention on the Rights of Persons with Disabilities, art 1.

54 *Ibid* art 3(c), (d) and (e).

55 SR Bagenstos, 'Comparative Disability Employment Law from an American Perspective' (2003) 24 *Comparative Labour Law and Policy Journal* 649 at 652-653.

56 The concept of reasonable accommodation did not originate in the context of disability. The term reasonable accommodation was originally employed in the United States Civil Rights Act of 1968 in reference to discrimination on the grounds of religious practice. The Civil Rights Act requires employers to "reasonably accommodate" an employee or potential employee's religious observance or practice unless such accommodation would cause undue hardship to the employer's business. The concept of reasonable accommodation was first applied to the disability context in the United States Rehabilitation Act of 1973. See Department of Economic and Social Affairs, *The Concept of Reasonable Accommodation in Selected National Disability Legislation: Background conference document prepared by the Department of Economic and Social Affairs, Department of Economic and Social Affairs*, New York, 2006.

of legal measures which have been adopted by EAC partner states for purposes of integrating persons with disabilities in the labour market. The focus is on the category of persons protected under the law, employment quotas, reasonable accommodation, provision of assistive devices, job placement services and incentives.

## 5.1 Protected Persons

In disability rights discourse, the legal definition of disability is crucial because it serves a “gatekeeping function” by identifying the class of people entitled to reasonable accommodation, protection against discrimination,<sup>57</sup> or other such matters aimed at eliminating or minimising barriers against persons with disabilities. Despite its significance, the definition of disability in East Africa still displays a “mixed picture”.

The first official definition of disability in Tanzania (mainland) was medically based and appeared in the first (former) disability legislation of 1982. The Disabled Persons (Employment) Act defined a “disabled person” to mean:

A person who, on account of injury, disease or congenital deformity, is substantially handicapped in obtaining employment, or in undertaking work on his own account, of a kind which apart from that injury, disease or deformity would be suited to his age, experience and qualification.

Different from the former law, the current disability legislation in Tanzania, which was enacted after the ratification of the CRPD, embraces the human rights approach to disability, and defines “disability” and “person with disability” as follows:

“Disability” in relation to an individual means loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical, mental or social factors.

“person with disability” means a person with a physical, intellectual, sensory or mental impairment and whose functional capacity is limited by encountering attitudinal, environmental and institutional barriers.<sup>58</sup>

This seems to be a broader approach compared to the old approach which viewed disability as a condition by which a person becomes “substantially handicapped in obtaining employment, or in undertaking work on [individual’s]

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57 Bagenstos, *supra* note 55 at 656.

58 Persons with Disabilities Act, 2010 s 3.

own account, of a kind which apart from [impairing conditions] would be suited to his age, experience and qualification”.<sup>59</sup> Furthermore, the addition of “social factors” to the causes of “loss of opportunity” places more emphasis to issues like social attitudes, which were not the centre of attention in the old definition of disability that was limited to treating disability as a result of specific biological conditions, i.e. injury, old age, disease or deformity. Thus, the new law suggests that social barriers like discrimination, inaccessibility to work places, inaccessible information or marginalisation of persons with disabilities in decision making or policies tend to expose the limiting effects of impairment.

The disturbing element in the definition of a person with disability under the Persons with Disabilities Act is the reference to “limitation of functional capacity”, which seems to be a narrower approach compared to the “loss of opportunity” or “full and effective participation in society on an equal basis with others”.<sup>60</sup> That notwithstanding, the use of expressions like “loss of opportunity” in the definition of “disability”, or “functional limitations” in the definition of “a person with disability” may raise some interesting questions: for example, while some individual conditions (impairment) on their own may not impede employment, it is important to note that such conditions may be at the core of societal conception of disability.<sup>61</sup> That stated, can the loss of a finger qualify as a disability upon proof of discrimination hindering one’s employment chances? What about a person with disability who does not encounter discrimination in a work place, but whose condition is stigmatized by some sections of society? It should also be noted that when it comes to the “dichotomy” between illness and disability, the Employment and Labour Relations Act<sup>62</sup> appears not to distinguish the two. The terms used are “ill health” or “injury”.<sup>63</sup> But “[w]here an employee is injured at work (the cause), the employer shall go to greater

59 The original statutory text does not use the phrase “impairing conditions”. The phrase “impairing conditions” is used here in place of the words “injury, old age, disease or deformity” which appeared in the original text. See Disabled Persons (Care and Maintenance) Act s 2; Disabled Persons (Employment) Act s 2.

60 Convention on the Rights of Persons with Disabilities art 2.

61 PJ Devlieger, ‘At the Interstices of Classification: Notes on the Category of Disability in Sub-Saharan Africa’ in SN Barnartt ed., *Disability as a Fluid State: Research in Social Science and Disability* (Bingley: Emerald Group Publishing, 2010) at 81.

62 Employment and Labour Relations Act, 2004.

63 See Employment and Labour Relations (Code of Good Practice) Rules, 2007 Reg. 15(1)(2). It should be noted that while the law outlines ill health, injury and poor work performance as distinct reasons for termination, the three may be interrelated, i.e. while injury may result in impairment and disability, poor work performance may be a consequence of disability – where because of the nature of impairment caused by injury, the employee can no longer work in his normal capacity in the same working environment without some adjustments.

lengths to accommodate the employee (the ability to accommodate)”.<sup>64</sup> There are, however, separate provisions with respect to HIV/AIDS. It is prohibited to terminate the employment solely on the basis of HIV/AIDS status.<sup>65</sup> Where the employee becomes too ill to continue with the employment, the provisions related to incapacity on the ground of ill health (which include reasonable accommodation), or the provisions of any collective agreement with respect to incapacity on the ground of ill-health, shall be applied.<sup>66</sup>

The issues raised with respect to definitions should not imply that the official definition of disability in Tanzania (mainland) has remained unchanged. The mere fact that the law has accommodated factors outside the body is itself a significant step.

Zanzibar’s current employment legislation retains the previous medical definition of a person with disability under the 1997 employment legislation (since repealed).<sup>67</sup> Nevertheless, the definition of disability under the Persons with Disabilities (Rights and Privileges) Act of Zanzibar inclines towards a human rights approach to disability, and is more elaborate than the definition of disability in Tanzania (mainland). Under the said Act, disability is defined as:

A state of restricted participation that results from the interaction between persons of impairments, conditions, health needs or similar situations, and environmental, social, and attitudinal barriers, where the impairments, conditions, health needs or similar situations may be permanent, temporary, intermittent or imputed, and include those that are *inter alia*, physical, sensory, cognitive, psychosocial, neurological, medical or intellectual or a combination of those.<sup>68</sup>

The Persons with Disabilities (Rights and Privileges) Act also defines “a person with disability”. However, this definition appears to contain an “ideological confusion”, mixing up impairment and disability. The Act defines “a person with disability” as:

Any person who has a physical or sensory or mental disability wholly or partly, either congenital or not, causing functional limitation or an activity restriction of one or more of major life activities of such an individual.<sup>69</sup>

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64 *Ibid* Reg. 19 (2).

65 *Ibid* Reg. 20 (1).

66 *Ibid* Reg. 20 (4).

67 Employment Act, 2005 s 3(1).

68 Persons with Disabilities (Rights and Privileges) Act, 2006 s 3.

69 *Ibid* s 3.

Under the definition above, the word “disability” appears to be used as a substitute for “impairment.” The definition of a “person with disability” restricts the broader definition of “disability” under the same Act. It places emphasis on “restriction of major life activities of [an] individual,” and appears to exclude external barriers. Practical or easy to implement as it might seem, this definition does not appear to be compatible with the CRPD’s approach to disability, since it might exclude people who, despite having impairment and suffering discrimination, or being at the risk of suffering discrimination, cannot be biologically considered as suffering from restriction of one of their major life activities. It is also unfortunate that in Zanzibar there has not been any judicial interpretation of the matter. It should be noted, however, that a liberal interpretation of disability legislation should allow courts to overcome some definitional constraints and play a role in fulfilling the main objective of disability legislation – a substantial integration of persons with disabilities. As will be seen at a later stage of this paper, despite the fact that the Kenyan definition of disability leans towards a medical approach to disability, the Kenyan courts appear to play a leading role in East Africa in enforcing disability provisions.

The Constitution of Kenya is the only constitution in East Africa to define disability. However the definition subscribes to the medical approach to disability. Under Article 260 of the Constitution, disability is defined to include any physical, sensory, mental, psychological or other impairment, condition, or illness that has, or is perceived by significant sectors of the community to have a substantial or long-term effect on an individual’s ability to carry out day-to day activities. The Kenyan disability legislation defines disability as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.<sup>70</sup> This definition is also medically oriented.

In Uganda, despite the apparently social definition of disability in the framework of disability legislation, the definition still places emphasis on “substantial functional limitation”, and the law also provides for disability coding based on medical attributes, such as amputations, diseases, injuries or

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70 Persons with Disabilities Act, 2003 s 2.

disorders.<sup>71</sup> The problem also appears in Uganda's Employment Act,<sup>72</sup> which defines disability as any permanent physical disability or impairment; physical illness; psychiatric illness; intellectual or psychological disability or impairment; loss or abnormality of physiological, psychological or anatomical structural function; reliance on a guide dog, wheelchair, or any other remedial means; and presence in the body of organisms capable of causing illness.<sup>73</sup>

The medical approach to the definition of disability in Kenya and Uganda means that some persons with disabilities are likely to be excluded from the legal protection, especially where their disability is not generally perceived as such by the community.

## 5.2 Employment quotas

Under quota schemes, employers employing a specified minimum number of persons are obliged to ensure that a certain percentage (a quota) of their workforce is made up of persons with disabilities.<sup>74</sup>

Employment quotas have their origins in Europe, and there have been debates as to their appropriateness. Some have criticised the quotas as “yet another stigmatised form of special treatment;”<sup>75</sup> and for sending a wrong message and implying “that most workers with disabilities are less valuable economically and less productive, and if such workers are to be integrated into the open labor market, employers need to be obliged to hire them.”<sup>76</sup> By obliging employers to employ certain persons, it has been argued, quotas cause extra costs and risk sacrificing standards.<sup>77</sup> There have also been some studies, according to whose

71 Section 2 of the Persons with Disabilities Act, 2006 defines disability as “substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environment barriers resulting in limited participation”. Although Paragraph 22 of Uganda's Republic of Uganda, Initial Status Report on the UN Convention on the Rights of Persons with Disabilities, 2010 states that the definition is aligned to the CRPD's definition, the CRPD's definition does not require “substantial functional limitation”. Also, see the First Schedule to the Persons with Disabilities Act, 2006.

72 Employment Act, 2006 (Act No. 6 of 2006).

73 *Ibid.*, s. 2.

74 ILO, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines* (ILO, Geneva 2007) at 35.

75 KC Heyer, ‘The ADA on the Road: Disability Rights in Germany’ (2002) 27 *Law and Social Inquiry* 723 at 727.

76 Bagenstos, *supra* note 55 at 655. Also, see D Goss et al., ‘Disability and Employment: A Comparative Critique of UK Legislation’ (2000) 11 *International Journal of Human Resource Management* 807 at 829.

77 F Welch, ‘Employment Quotas for Minorities’ (1976) 84 *Journal of Political Economy* 105 at 106.

findings anti-discrimination legislation, which became effective in certain industrialised countries some years ago, have not been particularly effective in improving the employment situation of persons with disabilities.<sup>78</sup> Those in support of employment quotas have argued that employment quotas distribute the costs of disability accommodations equally across employers and assure that an increasing number of people with disabilities will be employed.<sup>79</sup> Therefore, despite the criticisms, quota schemes may be positively viewed as one means of promoting equality,<sup>80</sup> especially from the perspective of addressing the past history of marginalisation.<sup>81</sup>

Worldwide, approaches to quota schemes can be divided into three basic groups: (1) binding quotas backed up with effective sanctions/enforcement; (2) binding quotas not backed up with effective sanctions/enforcement; and (3) non-binding quotas based on a recommendation.<sup>82</sup> Under the third form, compliance with the quota obligation is voluntary and there is no sanction if employers fail to meet the recommended quota.<sup>83</sup>

In Tanzania (mainland), the disability legislation imposes a general obligation upon employers, public or private, to employ persons with disabilities, depending on availability of posts. The Act provides that:

Every employer, public or private, shall, where there is a vacant post fit for a person with disability and the person applies for the vacancy, give the employment to the persons with disabilities who meet the minimum qualification for such an employment.<sup>84</sup>

By extending its application to private employers, the law “cures” the limitations of the repealed disability legislation, which did not apply to private employers.<sup>85</sup> However, the expression “post fit for a person with disability” may be negatively interpreted to legitimise “job segregation,” implying that only certain jobs are fit for persons with disabilities. While it is acceptable that certain degrees of impairment (impairment being a significant factor in disability) may limit

78 A O'Reilly, *The Right to Decent Work of Persons with Disabilities* (ILO, Geneva 2007) at 107.

79 Bagenstos, *supra* note 55 at 563.

80 Welch, *supra* note 77 at 106.

81 P Nishith, 'Improving the Labour Market Outcomes of Minorities: The Role of Employment Quota' (IZA Discussion Papers, No. 4386, 2009) at 1.

82 *Ibid* at 35–40.

83 *Ibid* at 40.

84 See Persons with Disabilities Act, 2010 s 31(1).

85 LRCT, *Report on the Review of Legal Framework on the Rights of Persons with Disabilities in Tanzania* (Dar Es Salaam 2008) at 30.



persons with disabilities' opportunities with respect to certain jobs, the provision should have been designed in such a way that more emphasis was put on the possibility of reasonable accommodation than the availability of the "post fit for a person with disability". It is nevertheless fortunate that the expression does not relieve employers of the duty to provide reasonable accommodation.<sup>86</sup>

The requirement to hire persons with disabilities is backed up by employment quotas, which were introduced for the first time in Tanzania (mainland) through section 15 of the repealed Disabled Persons (Employment) Act, but they were not of very much help to persons with disabilities, especially after the liberalisation policies, the reason being that most employers were in the private sector, which was not covered by the then existing law. The public sector which was the sole employer, according to that law, did not provide a conducive environment for the employment of persons with disabilities.<sup>87</sup> In addition, it was argued that the required employment quota under the first disability legislation was not only small, but also difficult to implement, as most persons with disabilities and employers were not registered under the Disabled Persons Register and the Employers Register, respectively, as required by the first disability legislation.<sup>88</sup>

Following the repeal of the Disabled Persons (Employment) Act, by the *Persons with Disabilities Act*, the employment quotas were "re-enacted" in the later legislation, save for the amendment of the quota ratios. Section 31(2) of the Persons with Disabilities Act provides that:

The Minister shall, in consultation with the Minister responsible for labour, make Regulations requiring every employer with a work force of twenty and above to employ persons with disabilities based on a quota system and to ensure that three percent of it constitutes persons with disabilities.

Compared to the former disability legislation, the current legislation seems to be offering more opportunities: 3% of jobs for a workforce of twenty employees as compared to the former 2% of jobs in a workforce of fifty employees.<sup>89</sup>

86 The definition of "discrimination" under Persons with Disabilities Act, 2010 includes the denial of reasonable accommodation (Section 3); and that the prohibition of discrimination extends to job applicants with disability (Employment and Labour Relations Act, 2004 s 7(9)(b); Persons with Disabilities Act, 2010 s 33(1)(a)(b).

87 LRCT, *supra* note 82 at 30.

88 *Ibid.*

89 See Disabled Persons (Care and Maintenance) Act s 13(1). The number could have been less, subject to specifications from time to time either generally or in respect of any particular occupation, trade

Exceptions to the employment quotas under the Persons with Disabilities Act are similar to those contained in the former legislation.<sup>90</sup> The employer will not be bound by the employment quota upon proof of the following:

- (a) after reasonable efforts, he has failed to find a person with disability or a qualified person with disability for that post;
- (b) due to the nature of the employment, he could not get a person with disability with the skills or experience required;
- (c) due to the nature of work or the circumstance of the working place it may not be possible to employ a person with disability; and
- (d) taking into consideration the condition of the person with disability, he is not or would not be able to perform the work adequately as required.<sup>91</sup>

The employment quota provisions in Tanzania (mainland) appear not to be backed up by effective sanctions. Under these circumstances, although employers are obliged, through legislation, to comply with specific employment quotas for persons with disabilities, the quotas are not effective, either because there are no sanctions to enforce the quotas, or because the sanctions are not enforced.<sup>92</sup> The former legislation had a specific provision that made it an offence to contravene quota provisions,<sup>93</sup> but research has not traced any prosecution made under that provision. It was reported that the legal requirement under the former disability legislation to obtain the Director of Public Prosecution (DPP)'s consent before prosecuting employers who refuse to offer employment to persons with disabilities or to discontinue their employment<sup>94</sup> made it difficult to commence prosecutions, and the law was silent on the alternative remedy in case the consent of the DPP was not obtained. Lack of effective sanctions makes it difficult to achieve the desired objective.

There are no quota provisions in Zanzibar. In Kenya and Uganda, the law seems to favour quota recommendations. In Kenya, while the disability legislation requires the minister responsible for labour, in consultation with the employers' organisations, to determine employment quotas for persons

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industry or undertaking by an order made by the Minister. Also, see Disabled Persons (Employment) Act s 15(1), and Disabled Persons (Care and Maintenance) Regulations, 1985 Reg 10.

90 Disabled Persons (Employment) Act s 15(2)(a)-(d).

91 Persons with Disabilities Act, 2010 s 31(3).

92 ILO, *supra* note 73 at 38-39.

93 Disabled Persons (Employment) Act s 17.

94 *Ibid* s 17(2).

with disabilities,<sup>95</sup> the disability council is required to endeavour to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities.<sup>96</sup> There are no provisions binding employers to implement specific quotas.. In Uganda, the law requires the government to encourage all government and private sectors to promote the right of persons with disabilities to work on an equal basis with others and to earn a living by work through a quota system of employment.<sup>97</sup>

Experience from elsewhere outside Africa has shown that it is insufficient to impose an obligation on employers to employ persons with disabilities without effective sanctions for breach of the quotas. Such quota systems do little more than rely on the goodwill of employers, and do not greatly increase the chances of disabled people in the open labour market.<sup>98</sup> Lack of effective sanctions in the old quota scheme in Tanzania (mainland) did not provide a solution to the employment problems of persons with disabilities.<sup>99</sup> In the current legislation, it is an offence to deny employment to a person with disability without good cause.<sup>100</sup>

### 5.3 Reasonable Accommodation

Elimination of barriers in the labour market is essential to the effective integration of employees with disability. That stated, reasonable accommodation is fundamental to the human rights approach to disability.

Reasonable accommodation provisions exist in Tanzania (mainland)'s employment and disability legislation. In order to ensure that persons with disabilities retain their jobs, the Employment and Labour Relations Act prohibits termination of employment for reasons related to disability.<sup>101</sup> Furthermore, the Persons with Disabilities Act requires employers to make efforts to safeguard the employment of persons with disabilities, and to this effect, employers have the

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95 *Ibid* s 13(3).

96 Persons with Disabilities Act, 2003 s 13.

97 Persons with Disabilities Act, 2006 s 13(2).

98 L Waddington, 'Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws' (1996) 18 *Comparative Labour Law Journal* 62 at 67.

99 National Policy on Disability, 2004.

100 Persons with Disabilities Act, 2010 s 62(k).

101 Employment and Labour Relations Act, 2004 s 40(1)(a)(b) and (c).

duty to provide reasonable accommodation, which is in line with the CRPD's requirements.<sup>102</sup> To start with, section 32 of the Act provides:

For purposes of maintenance and safeguarding employment of persons with disabilities, every employer shall endeavour to maintain employment of the persons with disabilities on his working place.

This provision is backed up by section 34(1) (b) of the Act and Regulation 43(2) of the Persons with disabilities (General) Regulations, according to which it shall be the duty of every employer to provide reasonable accommodation and provision of working tools to meet the needs of persons with disabilities, and enable them to perform their work effectively. The Persons with Disabilities Act defines reasonable accommodation to mean the taking of "appropriate measures to design and adapt work places and work premises in such a way that they become accessible to persons with disabilities".<sup>103</sup>

The term "appropriate measures" is explained in the *Persons with Disabilities (General) Regulations* as follows:

- (a) Making existing facilities used by employers readily accessible and usable by employees with disabilities;
- (b) Job restructuring, modifying work schedules or reassignment to a vacant position;
- (c) Acquiring or modifying equipment or assistive devices, adjusting or modifying tests, training materials or policies; and
- (d) Providing sign language interpreters or readers to employees who have hearing impairment, visual impairment or low vision.<sup>104</sup>

Determining the required changes for purposes of accommodating an employee with disability may involve a variety of considerations, and will vary depending on the nature of the impairment, the job, the work environment, or the costs of such changes. Reasonable accommodation is intended to balance between the objective of maintaining an employee with a disability on the one hand, and the practical realities on the ground on the other hand. The *Persons with Disabilities Act* defines reasonable changes to mean:

Necessary, appropriate and adjustments offered in a manner that does not impose a disproportionate burden, where needed in a particular case, to ensure

102 Convention on the Rights of Persons with Disabilities art 27(1)(i).

103 Persons with Disabilities Act, 2010 s 3.

104 Persons with Disability (General) Regulations, 2012 Reg 43(1)(a)-(d).

persons with disabilities enjoy or exercise on an equal basis with others all human rights and fundamental freedoms.<sup>105</sup>

While the employment and disability laws provide for reasonable accommodation, an employer cannot continue to employ a person forever, where it is not possible to keep this particular person in employment through reasonable accommodation.<sup>106</sup>

Zanzibar's disability legislation defines reasonable accommodation to mean "measures to make existing facilities, programmes and services readily accessible to and usable by a person with disability". While the legislation does not expressly impose an obligation upon employers to provide reasonable accommodation for employees with disabilities, such an obligation is imposed by the employment legislation, which apart from making denial or termination of employment on the ground of disability illegal,<sup>107</sup> also obliges employers to provide reasonable office accommodation and a flexible working schedule for employees with disabilities;<sup>108</sup> and to provide alternative jobs for employees with disability when they are no longer able to carry out their existing responsibilities without loss of remuneration.<sup>109</sup>

Despite the provision in respect of reasonable accommodation, the employment legislation does not in fact define the term. The legal definition of reasonable accommodation is provided by the Persons with Disabilities (Rights and Privileges) Act, according to which reasonable accommodation means measures to make existing facilities, programmes and services readily accessible to and usable by a person with disability.<sup>110</sup>

Under the Persons with Disabilities (Rights and Privileges) Act, employers are exempted from the duty to employ persons with disabilities and to provide reasonable office accommodation upon proof that:

- (a) after reasonable effort, the employer has failed to find a person with disability;
- or

105 Persons with Disabilities Act, 2010 s 3.

106 See *Martin Oyier v Geita Gold Mine Ltd*, High Court of Tanzania (Labour Division) at Mwanza, Revision No. 226 of 2008; *Vodacom Tanzania v Zawadi Bahenge*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 12 of 2012.

107 Employment Act, 2005 s 88(3).

108 *Ibid* s 88(4).

109 *Ibid* s 88(5).

110 Persons with Disabilities (Rights and Privileges) Act, 2006 s 3.

- (b) due to the nature of the work an employer could not get a person with the skills or experience required; or
- (c) due to the nature of the work or the circumstances of the working place it may not be possible to employ a person with disability; or
- (d) the individual with a disability is unable to perform the essential job functions.<sup>111</sup>

In Kenya and Uganda, reasonable accommodation provisions exist in disability legislation, save for variations in languages or coverage. Generally, employers are required to provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be needed to accommodate persons with disabilities.<sup>112</sup>

Among the East African countries, Kenya seems to have made some significant progress when it comes to judicial interpretation of reasonable accommodation provisions. The judiciary has backed up reasonable accommodation provisions, even with respect to institutions which have been traditionally perceived as “for able bodied persons.”

In *Paul Pkiach Anupa v Attorney General*,<sup>113</sup> the first petitioner, who was a police constable, was involved in an accident while on official duties. He sustained spinal cord injury resulting in paralysis of his lower limbs. Medical doctors recommended “light duties” in the form of office or seated position duties, like receptionist, radio room operator, clerical or telephone duties. However, the Commissioner of Police did not accept this recommendation. The man was therefore retired from service on medical grounds. It was the petitioner’s case that despite the fact that the Commissioner was fully aware that the petitioner’s disability was limited to his lower limbs only, the Commissioner made no efforts to provide him with reasonable accommodation or to employ him in the categories of work that the members of the medical board had said the petitioner was capable of performing. The petitioner further contended that the Police Service possessed the economic power, facilities and logistics for accommodating the petitioner’s condition and that by assigning the petitioner alternative duties, the Police Service would not have suffered any undue hardship or prejudice. The petitioner claimed that he was discriminated against contrary

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111 *Ibid* s 8(2).

112 Persons with Disabilities Act, 2003 s 15(5); Persons with Disabilities Act, 2006 s 13(4)(b).

113 *Paul Pkiach Anupa v Attorney General*, High Court of Kenya at Nairobi, Petition 93 of 2011.

to the provisions of the Constitution of Kenya.<sup>114</sup> He also pleaded violation of the provisions of the Persons with Disabilities Act<sup>115</sup> and the Employment Act.<sup>116</sup>

The respondent contended, *inter alia*, that police officers play a crucial role in maintaining national security and that the responsibility bestowed on them demanded that the Police Force hire and retain persons who could effectively discharge this function. The respondent further submitted that the first petitioner was not retired for being “disabled” as claimed in the petition but for being “medically unfit for service”.

The court held *inter alia* that the Commissioner was required to direct his mind not only to the provisions of the Constitution but also to its values and principles. He was also required to consider the rights of persons with disabilities secured by the Persons with Disabilities Act which was in force. Justice DS Majanja also stated:

- 57 ... the petitioner’s rights guaranteed under Articles 27, 28 and 54 of the Constitution were violated by the Commissioner of Police retiring the petitioner on medical grounds under Regulation 30(c) of Chapter 20 of the Forces Standing Order without taking into account the possibility of reasonable accommodation. As a consequence of this failure to reasonably accommodate the petitioner, the Commissioner of Police violated Section 15(6) of The Persons with Disabilities Act by retiring the petitioner before the prescribed retirement age.
- 58 ... it is necessary for the Police Service Commission to review the Police Standing Orders to ensure that they are consistent with the provisions of the Constitution in order to provide enhanced protection to officers who suffer disability in the course of duty. This is what the Constitution demands.

It was also stated in *Duncan Otieno Waga v Attorney General*,<sup>117</sup> that the fact that police service was not employment as known to strict law, put the respondent to a higher obligation to protect and go an extra mile in ensuring that the welfare of those who suffered disability during their service and even after service was held supreme.

114 Constitution of Kenya, 2010.

115 Persons with Disabilities Act, 2003.

116 Employment Act, 2007.

117 *Duncan Otieno Waga v Attorney General*, Industrial Court of Kenya, at Mombasa, Cause No. 89 Of 2013.

Reasonable accommodation also entails fair procedure before any decision is reached to retire an employee on grounds of disability. In *Fredrick Gitau Kimani v Attorney General*,<sup>118</sup> the High Court of Kenya, while citing the South African case of *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools*,<sup>119</sup> reiterated that discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by adhering to procedural fairness. The petitioner was relieved of his duties on medical grounds. At the time he was a Prosecutor, and while attending treatment for an illness, he was diagnosed with diabetes and later while hospitalised, his left leg had to be amputated and he was forced upon being discharged, to have an artificial limb fitted. The petitioner was retired a few weeks before attaining the age of 55.<sup>120</sup> The court ruled the termination as unfair.

## 5.4 Placement Services

In theory, job placement mechanisms can be used to promote employment quotas if they are effectively utilised. Such services can be a guard against the general excuse that employers could not find a person with disability to fill a particular position. Placement services may also provide adequate information for persons with disabilities in search of employment opportunities, especially in circumstances where the information about such opportunities may not be easily accessible to some persons because of the nature of their impairment.

Tanzania (mainland and Zanzibar) and Kenya have in place legal provisions on placement services. There are variations with respect to the wording of these provisions, but their common feature is that they are all too general. Uganda's disability legislation does not provide for placement services.

118 *Fredrick Gitau Kimani v Attorney General*, High Court Kenya at Nairobi, Petition 157 of 2011.

119 *Mpumalanga v Executive Committee, Association of State-Aided Schools*, Eastern Transvaal [1998] ZACC 20.

120 Initially, the Kenyan disability law fixed the retirement age for persons with disabilities at 60, five years longer than the retirement age of persons without disability. On 29th May 2012, the Kenyan Government issued a circular to the public service raising the minimum mandatory retirement age for persons with disabilities to 65 years old. The courts in Kenya have on several occasions upheld the statutory requirement with respect to the retirement age of persons with disabilities, and have stressed that the provision applies to all employers and such employees in public service, the private sector and all other categories of employment. See *Joram Jotham Waluseshe v Mumias Sugar Co. LTD*, High Court of Kenya at Bungoma, Civil Suit 83 of 2005; *Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme*, Industrial Court of Kenya, Cause No. 665 of 2011; *Mary Wangui Gakunju v City Council of Nairobi*, Industrial Court of Kenya at Nairobi, Cause No. 27 of 2012; and *Silas Rukungu Karanja v Teachers Service Commission*, Industrial Court of Kenya, Cause No. 567 of 2012. In *Mary Wangui Gakunju's* case, the court "considered" the retirement age provisions along the lines of affirmative action measures.



In 1999, Tanzania (mainland) enacted the National Employment Promotion Service Act,<sup>121</sup> which established the National Employment Promotion Service (NEPS).<sup>122</sup> It was responsible for making arrangements for the registration, employment, counselling, vocational rehabilitation and placement of persons with disabilities.<sup>123</sup> While the National Employment Promotion Service Act was still in operation (and still in force), the Tanzania Employment Services Agency (TAESA) was established in 2001 under the Executive Agencies Act.<sup>124</sup> TAESA's functions including offering vocational guidance service to jobseekers for the purpose of helping them to develop and accept an integrated and adequate picture of themselves and their role in the world of work. In practice, the NEPS appears to be subsumed under TAESA.<sup>125</sup> It is unfortunate that TAESA does not have special job placement arrangements for persons with disabilities.<sup>126</sup>

The situation in Zanzibar appears to be similar to that of mainland. Zanzibar's Persons with Disabilities (Rights and Privileges) Act does not provide for clear job placement mechanisms. Under section 36(4) of the said Act, the use of particulars entered in the disability register is restricted, *inter alia*, to job placement. It is unfortunate that there are no special mechanisms on the ground which provide placement services for persons with disabilities.<sup>127</sup>

Under the Kenyan disability legislation, the National Council for Persons with Disabilities is responsible for establishing and maintaining a record of persons with disabilities who are in possession of various levels of skills and training and is required to update such records regularly for the purposes of job placement.<sup>128</sup>

While legal provisions with respect to job placement services and the respective government mechanisms appear to be weak, non-governmental entities dealing with disability can collaborate with governments to enhance job placement services. It is, however, not the purpose of this article to provide an analysis of the role of non-governmental entities with respect to matters of employment of persons with disabilities.

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121 National Employment Promotion Service Act.

122 *Ibid* s 3(1).

123 *Ibid* s 4(2)(i).

124 Executive Agencies Act.

125 T Ackson, 20.5.2014 Interview (E-mail).

126 TR Muhanza, 2.2.2014 Interview (E-mail); A Anastaz, 24.5.2014 Telephone.

127 RA Muhammed, 15.5.2014 Interview (E-mail); RA Abdallah, 10.6.2014 Interview (E-mail).

128 Persons with Disabilities Act, 2003 s 17.

## 5.5 Provision of Assistive Devices

Persons with disabilities require assistive devices to improve their practical ability. In Tanzania, some assistive devices are imported, and therefore expensive. The economic condition of the majority of persons with disabilities in Tanzania, and the need to ensure equality of opportunities, are good reasons to support the idea that these devices should be made affordable to persons with disabilities. Assistive devices may consist of a range of things, or even services, and in a way their provision could also be viewed as reasonable accommodation (if broadly construed). However, several issues may arise with respect to the provision of assistive devices: What should be included in the expression “assistive device”? Who is responsible for the provision of, or bearing the cost of, the assistive device? Should they exclude more personal items, even if these are useful for purposes related to employment?

Provisions with respect to assistive devices also exist under the disability laws in East Africa, with some variations in wording, coverage or “emphasis”. Such variations notwithstanding, one common feature of these different pieces of legislation is that the duty to acquire assistive devices is placed upon the governments, although this does not mean that other entities are “barred” from acquiring and distributing such devices.

Tanzania (mainland)’s disability legislation contains general provisions with respect to assistive devices. The law requires the minister responsible for disability matters to undertake and promote research in relation to the development, availability and use of assistive technologies suitable for persons with disabilities.<sup>129</sup> The minister is also required to take measures to ensure that information on technical aids, devices and assistive technologies is made accessible to persons with disabilities.<sup>130</sup> These measures may include the making of regulations prescribing the provision of assistive devices.<sup>131</sup> Furthermore, the National Advisory Council for Persons with Disabilities may advise the government on provision of assistive devices, appliances and other equipment to persons with disabilities.<sup>132</sup>

Zanzibar’s disability legislation contains general provisions with respect to the provision of assistive devices to persons with disabilities. According to the

129 Persons with Disabilities Act, 2010 s 5(1)(e)(ii).

130 *Ibid* s 5(1)(f).

131 *Ibid* s 12(2)(g).

132 *Ibid* s 61(d). *ibid*.

Act, persons with disabilities shall be entitled to assistive devices and other equipment to promote their mobility.<sup>133</sup> It is also among the functions of the Disability Council to provide, to the maximum extent possible, assistive devices.<sup>134</sup> Furthermore, the disability legislation provides that the Disability Council shall advise the government on the provision of assistive devices and appliances and other equipment to persons with disabilities.<sup>135</sup>

In Kenya, the Constitution provides for persons with disabilities' entitlement to access materials and devices to overcome constraints arising from the person's disability.<sup>136</sup> Furthermore, among the functions of the Kenyan National Council for Persons with Disabilities is to provide, to the maximum extent possible, assistive devices, appliances and other equipment to persons with disabilities;<sup>137</sup> and the resources of the National Development Fund for Persons with Disabilities may be allocated to provide or contribute to the cost of assistive devices and services.<sup>138</sup>

According to Uganda's disability legislation, the government shall provide supportive social services to persons with disabilities through the acquisition of assistance devices, and assistance personal services.<sup>139</sup>

From the wording of the law throughout East Africa, it is difficult to set a clear parameter as to which kind of assistive devices should be provided by the government or employers for purposes related to employment. Some of these devices may appear to be more personal, although they are useful for purposes related to one's employment.

## 5.6 Tax Incentives

Generally, a tax incentive is designed to encourage a particular pattern of behavior linked to an economic activity. Employers' attitudes towards employees with disabilities may be improved by rewarding employers who employ persons with disabilities. Legislation may entitle private employers who employ persons with disabilities to apply for tax deductions. These may be either for the general

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133 Persons with Disabilities (Rights and Privileges) Act, 2006 s 12(1).

134 *Ibid* s 29 (1)(x).

135 *Ibid* s 29(2)(ii).

136 Constitution of Kenya, 2010 art 54(1)(e).

137 Persons with Disabilities Act, 2003 s 7(1)(d)(i).

138 *Ibid* s 33(2)(b).

139 Persons with Disabilities Act, 2006 s 28(a).

purpose of encouraging employers to employ persons with disabilities, or specifically for remunerating employers in relation to the costs of improvements, or special services, where those employers modify their physical facilities or offer special services in order to provide reasonable accommodation for employees with disabilities.

Zanzibar's disability legislation entitles employers to apply for a deduction from taxable income equivalent to 10% of the total salary of an employee, apprentice or learner with disability. This provision may encourage employers to employ persons with disabilities in permanent and bigger posts.<sup>140</sup> Employers are entitled to apply for additional deductions from net taxable income equivalent to 10% of direct costs of improvements, modification or special services made or provided to ensure a reasonable working environment for employees with disability.<sup>141</sup> Under Kenya's disability law, a private employer who improves or modifies physical facilities or offers special services in order to provide reasonable accommodation for employees with disability is entitled to apply for additional deductions from his or her net taxable income equivalent to fifty percent of the direct costs of the improvements, modifications or special services.<sup>142</sup> Incentives to employers, with respect to reasonable accommodation costs, also exist in Uganda.<sup>143</sup> Such incentives do not exist in Tanzania (mainland).

Tax incentives may also extend to appliances and other equipment for use of persons with disabilities. Although some of these may seem personal, they are likely to improve general performance of persons with disabilities at work. Where such appliances are not acquired by employers, tax exemptions on them should be introduced to reduce their costs, and thereby making them easily accessible by employees (or potential employees) with disabilities.

In Tanzania (mainland), the disability legislation provides for tax exemptions with respect to appliances and other equipment for use of persons with disabilities, if the government is so advised by the National Advisory Council for Persons with Disabilities.<sup>144</sup> The list of such devices could be long, and also changing from time to time. For example, Tanzania's Finance Act of 2017 has amended the Value Added Tax Act, to the effect of exempting from value

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140 Persons with Disabilities (Rights and Privileges) Act, 2006 s 8(3).

141 *Ibid* s 8(4).

142 Persons with Disabilities Act, 2003 s 16(2).

143 Persons with Disabilities Act, 2006 s 13(4)(c) and 17.

144 Persons with Disabilities Act, 2010 s 12(2).

added tax motor vehicles specifically designed for persons with disabilities.<sup>145</sup> In Uganda, health materials or equipment relating to disabilities are exempt from tax.<sup>146</sup> In Kenya, materials, articles and equipment, including motor vehicles, that are modified or designed for the use of persons with disabilities are exempted from import duty, value added tax, demurrage charges, port charges and other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.<sup>147</sup> This also applies to all goods, items, implements or equipment donated to institutions and organisations of persons with disabilities.<sup>148</sup> Zanzibar exempts from postal and customs charges aids and assistive devices for persons with disabilities sent outside Zanzibar by mail for repair.<sup>149</sup> However, the exemptions in Zanzibar are not automatic: the law requires that the items be recommended for exemption by the Disability Council, and that the person with disability or organisation be registered with the Council.<sup>150</sup> Technically, this would mean that a person with disability not registered with the Council may not benefit from exemptions with respect to assistive devices, a situation which may have a discriminatory effect on persons with disabilities, contrary to the general objectives of the law and international instruments.

In order to motivate employees with disabilities, in particular with the view of enabling them to acquire personal assistive devices (which may also be useful at work), tax incentives may also extend to income from employment. In Kenya, employees with disabilities are entitled to exemption from tax on all income accruing from the employment.<sup>151</sup> This could be a significant boost to the motivation of employees with disability, especially if it helps to meet the costs of assistive devices or services, when such devices or services are not fully provided for by the employers.

## 6. CONCLUSION

Free movement of labour among the EAC partner states should be inclusive, taking into consideration the interests of persons with disabilities. The need to

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145 Finance Act, 2017, s 70(b).

146 Persons with Disabilities Act, 2006 s 7(2).

147 Persons with Disabilities Act, 2003 s 35(3).

148 *Ibid* s 35(4).

149 Persons with Disabilities (Rights and Privileges) Act, 2006 s 18(b).

150 *Ibid* s 18 (see the proviso thereto).

151 Persons with Disabilities Act, 2003 s 12(3).

fully integrate persons with disabilities in the labour market is necessitated by the fact that the majority of persons with disabilities live in extreme poverty, and under these circumstances, employment can be one of the means of empowering the marginalised groups. The integration of persons with disabilities is also in line with the EAC Treaty's fundamental principle of good governance, which includes equal opportunities. Furthermore, one cannot ignore the influence of CRPD on the recent approaches to disability among the EAC partner states.

This article has sought to determine the extent to which laws are harmonized with respect to persons with disabilities' access to the labour market in East Africa. There are various mechanisms through which laws promote persons with disabilities' access to the labour market, which include employment quotas, provision of reasonable accommodation, placement services, provision of assistive devices, and tax incentives. The legal definition of disability is central to determining the beneficiaries of the stated mechanisms.

One can sense a common purpose among the respective employment and disability legislation in East Africa, the situation which encourages harmonization of the laws. As for the existing variations, EAC partner states should learn from each other the better ways of safeguarding the interests of persons with disabilities in the labour market, and move towards harmonized legal provisions. It is not expected that the laws should be uniform, since the purpose of harmonisation is not to achieve a total unification of laws. Access to the labour market is very much dependent on creation of jobs – itself verily dependent the prevailing state of the economy, and on the other hand, disability is very much a social issue. Therefore, the different circumstances prevailing in individual states should determine the best practice for integrating persons with disabilities in the labour market in each country , but without allowing big variations among the EAC partner states.

# COMPETITION LAW AND LEGAL HARMONISATION





# HARMONISATION OF COMPETITION LAWS IN THE EAST AFRICAN COMMUNITY: SOME REFLECTIONS

DEO JOHN NANGELA★

## 1. INTRODUCTION

Competition law is one of the essential tools for economic growth and social development. This paper examines the issue of legal harmonisation from a competition law perspective and within the context of the East African Community (EAC) integration initiative. It argues that since competition law/policy is about markets, its harmonisation from a regional perspective is not only an essential agenda but also a tool to deepen the integration process. This being the case, the paper supports the view that in order to ensure proper and sound implementation of a regional competition policy framework, clarity in terms of its jurisdictional reach, as well as harmonised national frameworks between respective regional Partner States, are essential elements for sustainable and competitive regional economic growth. The paper also reflects on the wider Africa-based ambitions to forge intra-trade relations through the formation of a Tripartite Free Trade Area (TFTA) and ultimately a Continental Free Trade Area (CFTA). It concludes with the suggestion that the efforts to harmonise competition laws within the EAC region or, for that matter, the envisaged TFTA or CFTA, should also be made in other areas of law, and, in particular, conflict of laws. It is argued that with the EAC-SADC-COMESA tripartite arrangements afoot, considering such other important areas of law is important if the benefits of cross-border trade are to be fully realised.

The EAC, as one of the oldest regional economic groupings in Africa,<sup>1</sup> has adopted a competition law and policy seeking to deepen its integration drive. The region is also interested in harmonising this area of law to guarantee healthy cross-border interactions. There is a considerable volume of literature, in both print and electronic media, on the subject of harmonisation of laws,

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1. Sengondo E Mvungi, 'Legal Analysis of the Draft Treaty for the Establishment of the East African Community' in Sengondo E Mvungi ed., *The Draft Treaty for The East African Community: A Critical Review* (Dar es Salaam University Press, 2002) at 66.

including competition law. Essentially, competition law/policy, whether examined in a domestic or regional context, is one of the essential tools for economic growth and social development. It enhances the levels of productivity through efficiency gains, widens the frontiers of market access through increased entry opportunities that in turn result in increased investments and continuous innovation to capture new market niches. Its ultimate results include improved consumer and social welfare in the form of reduced prices, improved goods or services, increased employment opportunities, and eventually, poverty reduction. This paper examines the issue of legal harmonisation, from a competition law perspective, and within the context of the EAC integration initiative. Apart from adding to the existing literature on the topic of competition and harmonisation of laws, the paper also contributes to knowledge of the law of regional integration in East Africa.

## 2. HARMONISATION: ITS RATIONALE AND LIMITATIONS

### 2.1 The Rationale

The pace of harmonisation of competition law within the EAC regional integration context has been increased with the advent of the Common Market (CM) resulting from the adoption of the EAC Common Market Protocol by the EAC Partner States.<sup>2</sup> The CM has brought with it increased economic activities, thus reinforcing the need to operationalise the EAC Competition Act and its Regulations. As firms seek to break into new markets, availability of a functioning competition legal order, at both the regional and national levels, becomes essential. If the Common Market agenda is to be a success story, harmonisation of laws, including competition laws, should be seen as an essential aspect, not only for successful cross-border business but also for the entire integration process.<sup>3</sup> Several reasons may be given to explain the rationale for harmonisation of competition laws:

First, it is a fact that, in most cases, Regional Economic Communities (RECs), including the EAC, are made up of Partner States with different legal systems. Such legal disparity is a bedfellow of legal uncertainty and a hindrance

2 In terms of Article 5(2) of the Treaty Establishing the East African Community, 1999, a widened and deepened integration process is expected to be attained through the establishment, in accordance with the provisions of this Treaty, of a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation.

3 Damien Geraldin, *Competition Law and Regional Integration: An Analysis of the Southern Mediterranean Countries* (The World Bank, 2004) at 70.

to business growth and expansion.<sup>4</sup> Essentially, it has the potential to increase the cost of doing business due for example to difficulties arising from different requirements imposed by multiple regulatory regimes. It is also a hindrance to competition enforcement cooperation among national competition agencies. Through legal harmonisation, therefore, existing legal disparity is greatly reduced.

Second, in an integrated economic environment, harmonisation is necessary as a catalyst for ‘progressive law reform’, i.e. enabling an existing legal regime to conform to new or emerging modern commercial practices or norms.<sup>5</sup> Within the EAC region, for instance, competition regulation is a new phenomenon. However, given its importance in promoting economic growth, harmonisation of laws, not only in this area of practice but also other areas of law, becomes a prerequisite for successful cross-border transactions.<sup>6</sup>

Third, from a competition perspective, it is worth noting that competition policy/law is about markets. And, as one author puts it, since “Markets evolve, so, too, must the regulation of markets”.<sup>7</sup> But the central issue is: within an integrated regional economic setting, how should we regulate markets? Should market regulation in such a setting be an *ad hoc* exercise? For the sake of successful and deep integration of the economies, the answer should be in the negative, and the necessity to opt for a harmonised regime within a REC like the EAC becomes a compelling demand.

Fourth, with the advent of globalisation of markets, it is clear that the “days are past when each country was an insulated and self-contained market, where investors, traders and companies all operated within the isolated confines of a single national exchange”.<sup>8</sup> Currently, business entities in almost all countries the world over are more than ever exposed to global competition. Indeed, many of them no longer compete only with competitors from within their local boundaries, but due to globalisation they are increasingly being confronted

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4 Gary Low, ‘The (Ir)Relevance of Harmonisation and Legal Diversity to European Contract Law: A Perspective from Psychology’ (2010) 18 *European Review of Private Law* 285–305.

5 Loukas Mistelis, ‘Is Harmonisation a Necessary Evil? – The Future of Harmonisation and New Sources of International Trade Law’. Online: [http://www.jus.uio.no/pace/is\\_harmonisation\\_a\\_necessary\\_evil.loukas\\_mistelis/landscape.pdf](http://www.jus.uio.no/pace/is_harmonisation_a_necessary_evil.loukas_mistelis/landscape.pdf).

6 It is worth noting that facilitation of cross-border transactions is a crucial aspect of any successful REC, since such transactions are an essential element in the integration of a regional or global market, and a very necessary step towards the free movement of capital.

7 Scott McCleskey, *Achieving Market Integration: Best Execution, Fragmentation and Free Flow of Capital* (Butterworth–Heinemann, 2004) at 1.

8 *Ibid.*

with firms from virtually any other country. In view of this globalisation of markets, there is an unremitting demand for a restructuring, repositioning, and re-evaluation of all tools that facilitate economic growth, such as laws or policies, if a nation or a regional economic bloc like the EAC is to enhance its economic competitiveness and attract foreign direct investments. Consequently, and, since law is both “a tool for implementing economic integration” and “a basis for economic integration”,<sup>9</sup> its harmonisation, within the regional context, is one of the viable solutions that will enhance stability, clarity, reliability, and enforceability. And all these will eventually encourage local and foreign direct investments, increase employment opportunities, improve social well-being and propel regional market growth.

Fifth, the need to cope with other external demands, such as obligations arising from the World Trade Organisation (WTO) agreements, is also a factor to consider. As part of the net effects of the WTO's trade reform agenda in the search for market accessibility and free movement of goods and services, WTO Member States are forced to liberalise their economies and do away with barriers to trade. This trade reform agenda has been transposed into the RECs' environment thus necessitating reforms and/or realignment of national laws and policies in the search for consensus on the appropriate standards.<sup>10</sup> The fact thus remains that, through this drive for economic liberalisation, national legal regimes are gradually being “influenced by ‘external factors’ ...[and] ‘domestic’ decisions [are] conditioned, shaped or even actually made elsewhere as transnational legal regimes penetrate national legal fields”.<sup>11</sup> In order to remove barriers to trade, legal harmonisation becomes an essential agenda.

Other reasons may also include the need to avoid “reduced competitiveness, comparative advantage or lack of opportunity due to regulatory inconsistencies among jurisdictions” and reduced effectiveness and integrity of laws due to

9 Edward Kitonsa, ‘The Status of the EAC Legal Harmonisation Process in Uganda’ (Paper Presented at a Conference on Creating a Predictable and Facilitative Legal Environment for Business in the East African Community, 6-7 August 2012, Arusha Tanzania) Online: [https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Paper-on-Status-of-Legal-Harmonisation-Process-in-Uganda\\_Edward-Kitonsa.pdf](https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Paper-on-Status-of-Legal-Harmonisation-Process-in-Uganda_Edward-Kitonsa.pdf).

10 Such a demand has necessitated the adoption of market-based economic policies by the EAC countries, including the erstwhile socialist oriented countries like Tanzania.

11 See Francis Snyder, ‘Economic Globalisation and the Law in the Twenty First Century’ in Sarat Austin ed., *Blackwell Companion to Law and Society* (Blackwell Publishers, 2004) at 3. See also Qianlan Wu, ‘Harmonisation of Competition Law in Multilateral Trade Framework: China's WTO Membership and Its Anti-Monopoly Law’ in M Andenas & CB Andersen eds., *Theory and Practice of Harmonisation* (Edward Elgar Publishing Ltd, 2011) at 499.

regulatory inconsistencies among jurisdictions (e.g. law enforcement difficulties across international borders).<sup>12</sup>

## 2.2 Some Limitations or Difficulties

Nothing is without its own constraints. This is also true with regard to the process of harmonisation of laws within an inter-jurisdictional regional setting like the EAC. Drawing from the deliberations once made elsewhere,<sup>13</sup> one of the limitations of efforts to harmonise laws within a regional context like the EAC is the issue of costs which governments may incur in order to meet their obligations under the Treaty. This, however, is a necessary evil that was foreseeable from the moment the Partner States assumed their obligations under the Treaty.

Other limitations may include “difficulty of the process and achieving desired outcomes depending upon the mechanism utilized;”<sup>14</sup> and “discouragement of regulatory innovation among jurisdictions and reduced competitive pressure among jurisdictions to produce better laws”.<sup>15</sup> Perhaps the last point is of more concern, taking into consideration the fact that laws are context-specific. National laws in each jurisdiction, for instance, are enacted within a particular socio-economic or political context. Unless the regional integration gospel sinks deep into the minds of the lawmakers and enforcers, the drive to harmonisation and interpretation of laws to suit the demands of a supranational law may take a longer time than is necessary.

From an overall perspective, however, given the benefits derivable from legal harmonisation, the existence of limitations should not be taken as a bar to the harmonisation initiative. This is crucial because achieving regional sustainable economic growth in most cases is a function of regulatory reforms which, *inter alia*, include reforms geared at harmonisation of laws and policies; and, from a competitiveness perspective, such an initiative must essentially aim at eliminating or minimising the costs of doing business in order to stimulate investments, industrialisation, and ultimately providing new employment opportunities that add to stability and overall socio-economic and political welfare.

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12 Australia Parliament. *House of Representatives Standing Committee on Legal and Constitutional Affairs, Harmonisation of Legal Systems within Australia and between Australia and New Zealand* (Canberra: Commonwealth of Australia, 2006) at 5–6.

13 *Ibid.*

14 *Ibid* at 10.

15 *Ibid.*

### 3. COMPETITION LAW AND POLICY IN THE CONTEXT OF EAC HARMONISATION

#### 3.1 The Treaty-Making Level

Competition law deals with the prohibition of conduct that substantially distorts fair competition in the economy or a given sector. Competition policy is defined as “a number of regulatory activities that are aimed at ensuring competitive markets, including merger review, cartel and monopoly policies”.<sup>16</sup> Consequently, while competition policy is the overall environment in an economy that relates to control of anti-competitive practices, competition law is the first avenue to address competition policy. Both law and policy generally regulate competition in a market by regulating anti-competitive behaviours.<sup>17</sup>

Examined from the EAC’s regional viewpoint, competition law and policy in the EAC should be understood within the context of ‘harmonisation of laws’, this being one of the key concepts espoused by the EAC Treaty and its subsequent Protocols. Looking at the Treaty and some of its Protocols, Articles 83 and 126 of the Treaty, and Article 47 of the Common Market Protocol, for instance, are some of the pertinent provisions that espouse the concept of harmonisation at the national levels. Competition-related aspects are also addressed under Article 83 with regard to harmonisation of monetary and fiscal policy issues. In particular, Article 83(2)(d) requires the Partner States to “enhance competition and efficiency in their financial systems”.

Basically, the EAC has made significant economic integration steps compared to other RECs in Africa. Under Articles 75 and 76 of the Treaty, Partner States are required to establish, through the adoption of relevant Protocols, a Customs Union and a Common Market. These two have been established, and, as of 1 July 2010, the EAC became the first REC in Africa to begin the process of implementing a Common Market. One of the issues addressed in the Customs Union Protocol and the Common Market Protocol is competition. Article 5 of the Common Market Protocol, for instance, apart from providing for the scope of cooperation envisaged under the Protocol so as

16 Umut Aydin, ‘Promoting Competition: European Union and the Global Competition Order’ (Paper prepared for Presentation at the Biennial Conference of the EUSA, Los Angeles, CA, 23–25 April 2009) at 4. See also Chad Damro, *Cooperating on Competition in Transatlantic Economic Relations* (Basingstone: Hampshire and New York: Palgrave Macmillan, 2006) at 5.

17 These include all such conduct relating to abuse of monopoly power, mergers, and restrictive trade practices like collusion, price fixing, market sharing, boycott of suppliers, and bid rigging.

to achieve the free movement of goods, persons, labour, services and capital and to ensure the enjoyment of the rights of establishment and residence of their nationals within the Community, calls upon all Partner States to co-operate to ensure fair competition and promote consumer welfare in the region.<sup>18</sup>

Articles 33 and 36 of the Common Market Protocol are also relevant in this respect. Article 33(1) requires Partner States to “prohibit any practices that adversely affect free trade”. To amplify on this, Article 33(2), which makes reference to sub-article 1, provides for a list of prohibited business practices that adversely affect free trade and requires all Partner States to prohibit any such practices. The list, which also features under Article 21 of the Customs Union Protocol, includes, first, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Partner States and which have as their objective or effect the prevention, restriction or distortion of competition within the Community. Second, concentrations which create or strengthen a dominant position and as a result of which effective competition would be significantly impeded within the Community or in a substantial part of the Community. And, finally, any abuse by one or more undertakings of a dominant position within the Community or in a substantial part of the Community.

However, Article 33(3) of the Common Market Protocol provides for certain exceptions to the application of the above prohibitions. In particular, Article 33(3) provides as follows:

The provisions of paragraph 1 shall not apply in the case of:

- (a) any agreement or category of agreements between undertakings;
- (b) any decision by associations of undertakings; or
- (c) any concerted practice or category of concerted practices,

which improves production or distribution of goods, promotes technical or economic development or which has the effect of promoting consumer welfare and does not impose restrictions inconsistent with the attainment of the objectives of the Common Market or has the effect of eliminating competition in respect of a substantial part of a product.

Article 36 of the Common Market Protocol further urges Partner States to promote the interests of the consumers in the Community by appropriate measures that ensure the protection of life, health and safety of consumers; and

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<sup>18</sup> See Common Market Protocol, art 5(3)(d).

encourage fair and effective competition in order to provide consumers with greater choice among goods and services at the lowest cost. Implementation of Articles 33 and 36 is a mandate vested in the Council.<sup>19</sup>

### 3.2 The EAC Council and Legislative Initiatives

On 13 January 2004, pursuant to Article 36(2) of the Common Market Protocol, the EAC Council of Ministers adopted the East African Competitions Policy. Subsequently, in 2006, the East African Legislative Assembly adopted the East African Competition Act.<sup>20</sup> The Act stands as a supranational legislation which provides the framework for the promotion and protection of competition and consumer welfare in the Community, and establishes the EAC Competition Authority.<sup>21</sup> The Act applies only to economic activities and sectors having cross-border effects.<sup>22</sup> The justification for having this supranational legislation in place is the inability of the national laws to adequately address anticompetitive conduct of a cross-border or multi-jurisdictional nature. Moreover, while bilateral cooperation may still be relied upon to resolve or redress anticompetitive issues, having in place a regional framework is a more consistent and sustainable means of addressing regional competition issues. In 2010, the EA Competition Act was amended and the EAC Competition Regulations were passed to further elaborate some key aspects in the implementation of the EAC Competition Act. Of recent,<sup>23</sup> the EAC Council of Ministers appointed 1 December 2014 to be the date when the Act came into force.<sup>24</sup>

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19 *Ibid* art 36(2).

20 The Act was published under Legal Notice No. 2 of 2007 as a supplement by the Government Printer. In terms of the application of this Legal Notice, according to article 8(2)(b) of the EAC Treaty, each Partner State is required, “to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.”

21 Article 8(4) of the Treaty which provides that “Community ... laws *shall take precedence* over similar national ones on matters pertaining to the implementation of this Treaty”.

22 Section 4 (1) of the EA Competition Act, 2006. Its applicability is, however, limited as it does not apply in respect of conduct by persons acting in their capacity as consumers; collective bargaining agreements and conduct that constitute the sovereign acts of Partner States. It also excludes *regulatory restraints* imposed over a particular sector of a Partner as a matter of requirement within that sector or industry in its jurisdiction. See also Section 4(2) and (3) of the Act.

23 See EAC Gazette, Vol. AT 1 – No. 1 ARUSHA, dated 23 January, 2015. A Legal Notice No. EAC/2/2015 published in the gazette reads: “IN EXERCISE of the powers conferred on the Council of Ministers by Section 1 of the EAC Competition Act, 2006, the 1<sup>st</sup> day of December, 2014, is hereby appointed as the date upon which the EAC Competition Act, 2006 shall come into force”.

24 Article 1(2) of the Act provides that the ‘Act shall come into force on such date as the Council may, by notice in the Gazette, appoint’.



### 3.3 At the National Levels

For smooth operationalisation of the EAC Competition Act, taking into account the principle of subsidiarity,<sup>25</sup> all Partner States are required to have in place competition policy and law, as well as functioning national institutions, in order to enforce the EAC Competition law. Tanzania and Kenya are the first EAC Partner States to have in place fully functioning national competition laws and institutions. The Kenyan Competition Act<sup>26</sup> was revised in 2012 to make it conform to the EAC Competition Act. Tanzania has had its legislation since 2003<sup>27</sup> and the same is currently expected to be amended to make it more compatible with the EAC, since it has been found to have some weaknesses.<sup>28</sup> Recently, Burundi and Rwanda enacted their national laws,<sup>29</sup> and in 2004 Uganda drafted a Bill which, to date, is yet to be finalised.<sup>30</sup> According to *The East African*, the “[d]elay in coming up with the law ... stems from the absence of a competition policy and clear cost estimates relating to the implementation of the law”.<sup>31</sup> Be that as it may, the prolonged delay in enacting the law may be construed as a lack of strong political will to take up the issue of competition law as a matter of priority, and it is said to be “affecting the implementation of the [EAC] law”.<sup>32</sup> In particular, a Ugandan ministry of trade official was recently quoted as saying that their ministry of trade “doesn’t have a mechanism of prioritising key issues to be implemented [as it lacks] clear mandates”.<sup>33</sup> This being the case, experts argue that “the lack of a law will render Uganda uncompetitive and consumers could be exploited through higher charges of

25 Article 1(1) of the EAC Treaty defines the “principle of subsidiarity” to mean ‘the principle which emphasizes multi-level participation of a wide range of participants in the process of economic integration’.

26 Act No.12 of 2010 (Rev.2012); Legal Notices 73/2011 & 23/2011.

27 The Fair Competition Act, No. 8 of 2003, Cap. 285.

28 For instance, the provision on abuse of dominance under the Tanzanian law is too general. This needs to be aligned with sections 8(1), 9(1)(2) and 10(1) of the EAC Competition Act.

29 Burundi, Law N°1/06 of March 2010 and Rwanda, Law N°36/2012 of 21/09/2012 relating to Competition and Consumer Protection.

30 See EAC Sectoral Council on Trade, Industry, Finance and Investment Report (Ref. EAC/SR/164/2013).

31 See Isaack Khisa, “Uganda’s Cabinet to Approve Competition Bill” (9 July 2014) Online: <http://www.theeastafrican.co.ke/business/Uganda-s-Cabinet-to-approve-Competition-Bill/-/2560/2389964/-/xx6m8/-/index.html>.

32 See “Experts Worry over Weak Regional Competition Laws”. Online: <https://www.trademarka.com/news/experts-worry-over-weak-regional-competition-laws-2/>.

33 *Ibid.*

goods and services”.<sup>34</sup> It is therefore crucial for the government of Uganda to speed up the enactment process because “the foundation of a sound regional competition framework starts at the national level”.<sup>35</sup>

The importance of having in place harmonised national competition laws cannot be overemphasised. The EAC bloc has increased its efforts to realise this goal. In 2013, for purposes of enhancing harmonisation of competition laws, the EAC convened a meeting of competition experts to review the EAC Competition Act and the Partner States’ national competition laws. The need has been emphasised for all EAC Partner States to give heed to the requirement of the Treaty and its Protocols, by putting in place, within their territories, policies and laws aimed at promoting and protecting competition. As noted above, Partner States that have enacted competition laws have done so taking into account the need to harmonise such efforts to avoid substantial inter-jurisdictional divergences. Through such a harmonised approach, they ensure uniform implementation of the regional framework at the national level, which will help to ensure the health of this regional bloc.

Looking at the provisions of the already enacted national laws in the region, one finds a general sense of harmony in terms of their objectives and their lining up with the Treaty, the Customs Union Protocol, the Common Market Protocol, and the EA Competition Act, 2006, this being a situation that promotes the spirit of harmonisation. In particular, and save for issues relating to trade remedies which are also addressed by the EAC Competition Act, the enacted national laws in place have provisions that prohibit restrictive trade practices in the form of agreements (both restrictive to trade or cartels), as well as abuse of dominance and regulation of mergers and acquisitions. The earlier enacted laws, such as the Fair Competition Act,<sup>36</sup> are also being amended to ensure that they conform to the EAC Competition Act.

Crucial to note in respect of the EAC Competition Act, however, is that it has supranational effects in all competition cases of a cross-border nature.<sup>37</sup> In my view, this enactment seems to transcend considerably the harmonisation or approximation ambition of a more *unified* competition legal regime in dealing

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34 *Ibid.*

35 Vincent N Angwenyi, ‘Competition Law and Regional Integration: The Common Market for Eastern and Southern Africa (COMESA)’ (Masters Thesis, Munich Intellectual Property Law Center, 2012/13) at 57.

36 The Fair Competition Act in Tanzania was enacted in 2003.

37 See EA Competition Act, 2006 s 4(1).

with competition cases of a cross-border or multi-jurisdictional nature. This means that, once the EAC Competition Authority envisaged under the Act becomes functional, all cases like mergers or cartels with cross-border or multi-jurisdictional effects will no longer be handled by the national competition authorities. These will be dealt with by the EAC Competition Authority.

### 3.4 EAC and beyond EAC: The Envisioned Tripartite TFTA

On 10 June 2015, the EAC concluded Phase I of the tripartite negotiations with the Southern African Development Community (SADC)<sup>38</sup> and the Common Market for East and Southern Africa (COMESA)<sup>39</sup> with the signing of a tripartite trade agreement aimed at launching a Tripartite Free Trade Area (Free Trade Area). The signing of this agreement has set the stage for the establishment of a single market for the 26 African countries in the Eastern and Southern African Region. The idea of a single Free Trade Area (FTA) was officially endorsed on 22 October 2008, a day when the three Regional Economic Communities (RECs) agreed and resolved, at their Tripartite Summit held in Kampala, Uganda, to establish a free trade area for their Member States.

The Free Trade Area agreement has both general and specific objectives. On the one hand, its general objectives are to: (a) promote economic and social development of the Region; (b) create a large single market with free movement of goods and services to promote intra-regional trade; (c) enhance the regional and continental integration processes; and (d) build a strong Tripartite Free Trade Area for the benefit of the people of the Region.<sup>40</sup> On the other hand, its specific objectives are listed as seeking to attain progressive elimination of tariffs and non-tariff barriers to trade in goods; liberalisation of trade in services; cooperation on customs matters and implementation of trade facilitation measures; establishment and promotion of cooperation in all trade-related areas among Tripartite Member/Partner States; and establishment and maintenance of an institutional framework for implementation and administration of the

38 SADC was established in 1992. SADC is composed of 15 member states committed to regional integration and poverty eradication within Southern Africa through economic development and ensuring peace and security.

39 The Treaty establishing the Common Market for Eastern and Southern Africa, COMESA, was signed on 5 November 1993 in Kampala, Uganda and was ratified a year later in Lilongwe, Malawi on 8 December 1994. Currently COMESA has 19 Member States.

40 See Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, art 4.

Tripartite Free Trade Area.<sup>41</sup> These specific objectives are meant to simplify the attainment of the overall objectives of the envisaged TFTA. In this regard, the Tripartite Member/Partner States' conviction is that a framework of trade co-operation among them, "based on equality, fair competition and mutual benefit will contribute to the creation of a viable development community".<sup>42</sup>

Currently, however, all issues relating to competition law and policy within the proposed TFTA have been scheduled for "Phase II Negotiations" with a view to concluding a specific protocol on competition. This is in accordance with Article 45 of the TFTA agreement which provides that:

Article 45: Phase II Negotiations

1. Recognising the need to conclude Phase II Negotiations, and to provide flexibility in the implementation of the Agreement, the Tripartite Member/ Partner States agree to negotiate and endeavour to conclude the following protocols within 24 months upon entry into force of this Agreement:
  - a) A protocol on trade in services; and
  - b) Protocols on trade-related matters, including Competition policy, Cross-Border Investment, Trade and Development, and Intellectual Property Rights.
2. The Tripartite Member/Partner States may conclude protocols in any other trade related matter agreed to by the Tripartite Member/Partner States.

Generally, the need to address competition-related issues within the TFTA framework cannot be overemphasised. This is so because of the population which is expected to benefit when the FTA becomes operational, and the different levels of economic development of the various Tripartite Member/ Partner States. According to a Report by the United Nations Economic Commission for Africa (UNECA), the established FTA will have "a combined population of 527 million people, a total Gross Domestic Product (GDP) of US \$624 billion and GDP per capita of US \$1,184".<sup>43</sup> This single FTA is established on a tariff-free, quota-free, exemption-free basis, and adopts the principle of variable geometry by simply combining the existing FTAs of COMESA, EAC

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<sup>41</sup> *Ibid* art 5.

<sup>42</sup> See the Preamble to the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community, 10 June 2015.

<sup>43</sup> UNECA, *Study on the Establishment of Inter-RECs' Free Trade Areas in Africa Drawing on Lessons from the COMESA-SADC-EAC FTA Experience* (Addis Ababa: UNECA, 2011) at 1.

and SADC into a single FTA.<sup>44</sup> In total, “the three RECs make up nearly half the African Union (AU) membership of 53 countries, contribute over 58% of the continent’s GDP, and account for 57% of the total population of the African Union”.<sup>45</sup>

In essence, as a precursor to the Grand African Continental Free Trade Area, the EAC-COMESA-SADC tripartite FTA will be one of the biggest FTAs in Africa. As such, it is expected to unfold more opportunities for economic growth in the region, more compelling reasons for broader harmonisation of laws and policies and, possibly, unification of certain areas of law. According to the Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area which was signed by the Heads of State and Government or duly Authorised Representatives of the tripartite Member States, competition law and policy is one of the key areas of consideration under the Phase II negotiations strategy of the tripartite arrangement. Other envisaged areas include trade in services, cooperation in trade and development, intellectual property rights and cross-border investments.

However, one of the important questions that call for critical thinking about the current developments is whether these attempts to create such a larger economic grouping instead of strengthening the already existing smaller groupings is a hurried journey to nowhere or whether it is otherwise a wise and timely idea to resolve the existing historical predicaments and the continued marginalisation of African economies by the developed economies. Ideally, as pointed out above, the envisaged TFTA is perceived as a precursor to the Grand African Continental Free Trade Area. Plans for such a pan-African trade pact are well underway following a resolution by the African Union Summit, which took place from 23 to 30 January 2012, and which endorsed a plan to set up such a Continental Free Trade Area (CFTA) by 2017. The aim of such a ‘big intra-African trade bloc’ is the same as that of TFTA: to enhance longstanding efforts to increase intra-regional trade within the continent. To many in Africa, intra-regional trade is considered to be an important engine of economic growth and development. Notwithstanding this fact, the feasibility of such a mammoth project was questioned by some of the African representatives from various regional groupings with the objection that to think of establishing a CFTA by 2017 was a premature and a hurried idea.<sup>46</sup>

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44 *Ibid.*

45 *Ibid.*

46 See ‘African Union Aims for Continental Free Trade Area by 2017’ (2012) 16:4 *Bridges*.

This concern is not without merit given that the envisaged TFTA is of itself a challenging project that needs careful attention and political dedication by its participants. It is an obvious fact that the existing regional economic groupings in Africa, such as ECOWAS, EAC, COMESA or SADC, are yet to consolidate themselves to the degree required of them to be able to reap the optimum economic benefits envisaged by their founding documents. They still face serious challenges that call for immediate attention and mature political will or dedication in order to realise their objectives. Most of their important infrastructures, including the laws in those countries which form the basis of their cross-border transactions, are, for instance, not fully integrated or harmonised. This is only one example of the challenges they have not been able to overcome, although they are now trying to overcome it. There are other critical issues such as stability and governance which impact heavily and negatively on any successful economic development agenda in Africa. Consequently, sceptics ask if, instead of struggling to implement a mammoth project, it would not be better to concentrate first on small but manageable groupings. This would make it easier to realise in full the potential of regional economic integration before creating a huge free trade area like the TFTA.

While the above sceptical opinions are not without their merits, in view, for instance, of the many years that existing regional groupings have been operating without achieving economic integration at the optimal 'deepened' level they first envisaged, optimists would argue that the TFTA, or for that matter the CFTA, is still a welcome agenda. It is a welcome agenda because its aim is to avoid the 'split-efforts syndrome' which is currently evidenced through multiple memberships in various economic groupings. In the EAC region, for instance, Tanzania is a member of both SADC and EAC, while Kenya, Uganda, Rwanda and Burundi are member states of both ECA and COMESA. The rationales for these regional blocs are essentially the same: to enhance the economic well-being of the member states through inter-state trade facilitation. In view of this, a tripartite free trade area in which all the interests of all states are accommodated will give them better opportunities than having their efforts split among various groupings.

While the above optimistic thinking is worth noting, overcoming the challenges that need to be addressed in order to achieve the integration ambition is an issue of paramount importance. It has been said that we have to 'think big, start small, and scale fast', this being a philosophy to achieve any

big dream.<sup>47</sup> This philosophy was ingrained in the ‘piecemeal’ Pan-Africanist approach of key African figures like the late Mwalimu Julius Kambage Nyerere, as opposed to the holistic approach favoured by his colleague, the late Dr. Osagyefo Kwame Nkrumah of Ghana. Through such a piecemeal approach, the aim of formulating a common policy and legal standards or harmonised developmental policies, as well as joint trade and investment strategies, can be more easily attained than by taking an expansive approach.

Indeed, in terms of the desire to harmonise competition laws under the TFTA umbrella, harmonisation of laws in such an expansive trading bloc will pose difficult and time-consuming challenges, given the number of countries that are involved, and the fact that COMESA and the EAC have in place their own regional legal framework on competition regulation. In 2008, the SADC, on the basis of Article 25 of the SADC Protocol on Trade and Services, adopted a Declaration on Competition and Consumer Policies which requires Member States to implement measures that foster competition and prohibit unfair business practices. In my view, legal harmonisation may be an easy task to undertake where a few countries are involved, but its implementation where many countries are involved may be challenging and, though not impossible, may take a longer time to complete due to historical, cultural, institutional and other jurisdictional differences that may be involved. As will be shown below, globally, competition law and policy is “the only regulatory area in which no formal body for harmonisation exists”.<sup>48</sup> Successful attempts have been confined to bilateral or regional arrangements, for instance through RECs. And such arrangements have to take into account the complex interrelationships in today’s globalised economy.

One of the harmonisation challenges with regard to the TFTA will be the lack of national competition laws in some member states. This situation is problematic since it may “lead to inconsistencies and uncertainties when businesses trading with several Member States expect similar practices throughout the Free Trade Area”.<sup>49</sup> Overall, it is clear from our discussion that attempts to promote competition culture, be it within the TFTA or in the EAC Regional bloc, will be more successful if legal harmonisation is made

47 See Saul Kaplan, ‘Innovation @ Scale: The Imperative to Think Big, Start Small, Scale Fast’. Online: <http://cs.brown.edu/events/25th-anniversary/kaplanSlides.pdf>.

48 Junji Nakagawa, *International Harmonisation of Economic Regulation* (Oxford: Oxford University Press, 2011) at 188.

49 SADC Competition Policy. Online: <http://www.sadc.int/themes/economic-development/trade/competition-policy/>.

an important pillar of the constitutive instrument and the Protocols. For meaningful results, we are therefore in agreement with the view that “a sound regional competition policy framework not only requires clarity especially in terms of its jurisdictional reach, but also an adequately harmonised national framework between the Member States if it is to be properly implemented on the Member State level and also function efficiently at the international level”.<sup>50</sup>

#### 4. IS HARMONISATION OF COMPETITION LAW AND POLICY AN EASY TASK?

A fair response and assessment of the above question is a “yes” and “no” answer: a “yes”, because the process has yielded some results in the context of RECs, such as the EAC, but, a “no” because the process has not yielded results if viewed from a global perspective.

Scholarly work and theoretical debates on this area of law can be divided into two camps: the positivists (whom I regard as the “Yes” Camp) on the one hand, and the “axis” of criticism (whom I regard as the “No” Camp). As for the “yes” camp, the belief is that such a move (harmonisation) is plausible, viable, desirable and should be encouraged. Indeed, they posit that it will increase and facilitate firms’ access to hitherto unaccessed markets, and resolve jurisdictional hitches in cases of cross-border nature.<sup>51</sup> Moreover, progress towards harmonisation of competition laws will be achieved as “a matter of necessity” and, thus, policy makers should “keep in mind that economics carries a universal message: that competition will generally provide the best means of maximising the national economic welfare”.<sup>52</sup> It has been said, therefore, that “[h]armonisation is something to which only a curmudgeon would take exception”.<sup>53</sup>

<sup>50</sup> Angwenyi, *supra* note 35 at ii.

<sup>51</sup> See, for instance, RS Khemani & R Schone, ‘Competition policy objectives in context of a multilateral competition code’ in Claus-Dieter Ehlermann & L Laudati eds., *European Competition Law Annual 1997: Objectives of Competition Policy* (Oxford: Hart Publishing, 1998) at 159.

<sup>52</sup> A Fels, ‘The Australian System of Competition Law and its Relationship to International Harmonisation of Competition Laws’ in J Cheng et al. eds., *International Harmonisation of Competition Laws*, (Martinus Nijhoff Publishers, 1995) at 355 and 360.

<sup>53</sup> Diane P Wood, ‘International Harmonisation of Antitrust Law: The Tortoise or the Hare?’ (2002) 3 *Chicago Journal of International Law* 391. For further scholarly views and proposals in favour of harmonisation, see Eleanor M Fox, ‘International Antitrust and the Doha Dome’ (2003) 43 *Virginia Journal of International Law* 911; Andrew T Guzman, ‘International Antitrust and the WTO-The Lesson from Intellectual Property’ (2003) 43 *Virginia Journal of International Law* 933; Ignacio G Bercero & Stefan D Amarasinha, ‘Moving the Trade and Competition Debate Forward’ (2001) 4 *Journal of International Economic Law* 481; Sharon E Forster, ‘While America Slept: The Harmonisation



As pointed out earlier, however, competition law and policy is “the only regulatory area in which no formal body for harmonisation exists”.<sup>54</sup> One of the reasons, and presumably a basis for the argument of those in the “no” camp, is that, as desirable as it may be claimed to be in its defence, harmonisation intrudes on national sovereignty and is thus controversial.<sup>55</sup> Sceptics of harmonisation of competition law argue that “substantive harmonisation, even if limited to core competition standards, would be a major mistake”.<sup>56</sup> It is contended that it would create high agency costs, would discourage beneficial change or innovation, and would not suit the needs of all countries bound by it.<sup>57</sup> Besides, it is argued that “the appropriate scope of antitrust law in different nations may differ, depending on such factors as the size of their markets, their openness to trade, and their administrative competence in enforcing regulatory laws”.<sup>58</sup> Thus, those opposed to harmonisation argue that, “competition laws are just like cars in that they improve through competition”.<sup>59</sup> For that reason, they consider the whole process of harmonisation to be “harmful, preferring instead a “competition of competition laws” where markets reign supreme and antitrust regimes can evolve freely”.<sup>60</sup>

From the above discussion, one may observe, as regards the arguments advanced by both proponents and sceptics of harmonisation of competition law, that the two camps have a point to make. The “yes” camp, if asked, for instance, will give examples of what has already taken place regionally, taking into account developments in other regions, such as in the EU, and in some other RECs like the EAC. So, if harmonisation in these regions has been possible

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of Competition Laws Based Upon the European Union Model’ (2001) 15 *Emory International Law Review* 467; Eleanor M Fox, ‘Toward World Antitrust and Market Access’ (1997) 91 *American Journal of International Law* 1.

54 Nakagawa, *supra* note 48 at 188.

55 Auke Haagsma, ‘An International Competition Policy as a Means to Create an Open Global Market Place’ in Chia-Jui Cheng et al. eds., *International Harmonisation of Competition Laws* (Martinus Nijhoff Publishers, 1995) at 411.

56 See, for instance, John O McGinnis, ‘The Political Economy of International Antitrust Harmonisation’ (2003) 45 *William & Mary Law Review* 549. See Karl M Meesen, ‘Competition of Competition Laws’ (1989) 10 *Northwestern Journal of International Law and Business* 17. See also Paul B Stephan, ‘Global Governance, Antitrust, and the Limits of International Cooperation’ (2005) 38 *Cornell International Law Journal* 173.

57 For a diversity of views, see Richard A Epstein & Michael Greve eds., *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AIE Press, 2004).

58 McGinnis, *supra* note 56 at 552.

59 Meesen, *supra* note 56 at 18.

60 Dietmar Baetge, ‘Competition Law and Perspectives for Harmonisation’ (2004) 3 *Unification Law Review* 501 at 502.

why not replicate the same for a global regime? However, looking at the global picture and what transpired during the WTO Doha discussions, the failure by the WTO regime to include competition law and policy in the final agreed texts may be seen as lending support to the sceptics of harmonisation who prefer that competition law and policy should be left to evolve innovatively at national level. However, this may also be a weak argument.

Indeed, although the Doha competition initiative did not culminate in “over-arching rules and principles, much like a European framework directive”, as some might have expected,<sup>61</sup> ironically, many of the WTO members who were opposed to the move, mostly from developing countries, have since then adopted competition laws/policies fashioned in a similar form. The structure of their competition regulation covers areas similar to competition law such as anticompetitive agreements, abuse of dominance and mergers. This testifies to the fact that the idea of harmonisation lived up to its promise. Although it was not given express global attention, it has indirectly bounced back to the stage through ‘a back door of voluntary convergence’. And this “voluntary harmonisation of competition laws has been promoted through regional integration or bilateral trade agreements, dialogue or technical assistances”.<sup>62</sup>

Overall, it is now an undeniable fact that “economic globalisation has provided grounds for competition law to be harmonised in order to safeguard efficiency and market access in the international trade”.<sup>63</sup> It does not matter whether such harmonisation takes a gradual form through RECs or FTAs, or by way of the model law approach through specialised agencies like UNCTAD<sup>64</sup> or by adopting a global convention on antitrust law. What is worth noting is that harmonisation or approximation of competition laws is an approach that is gaining ground right now.

## 5. CONCLUSION

This paper examined the issue of harmonisation of competition laws in the context of the EAC. It has been observed, in the course of the discussion, that regional harmonisation (or approximation) of laws is at the heart of the EAC Treaty and its Protocols, in particular, the Customs Union Protocol and the

61 Fox, *The Doha Dome*, *supra* note 53 at 913.

62 Wu, *supra* note 11 at 497.

63 *Ibid* at 518.

64 It is worth noting that UNCTAD has developed a Model Law on Competition. See [http://unctad.org/en/Docs/tdrbpconf7d8\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf7d8_en.pdf).

Common Market Protocol. Overall, in terms of competition laws in the region, legislative enactments that are currently in place are largely harmonised in line with the EAC's supranational competition legislation, the EAC Competition Act. The paper also examined the big picture on harmonisation of competition law and the debates attached to the process and concludes that, much as the process may face some challenges, if viewed from a global perspective, it has nevertheless been successful even in the absence of an express global instrument. Indeed, through regional approaches in the form of RECs or bilateral agreements, and by way of 'involuntary harmonisation', nearly harmonised legislation in this area of law has been adopted in many countries, including countries within the EAC Region.

In addition to the foregoing, the paper has gone further to point out other developments afoot in the region. These include the proposed launching of a Tripartite Free Trade Area (TFTA), the largest on the continent. While the desirability of the envisaged TFTA, at this time when the existing small economic groupings are yet to consolidate their gains and deepen their integration initiatives to optimum levels may be an issue worth debating, it is without doubt that, with this move in place, the landscapes of the legal harmonisation debate within the African continent will be further heightened. The move will provide more compelling reasons in favour of broader projects of harmonising regional laws and policies and, possibly, unification of certain areas of law.

In fact, there is a need to further the process of harmonisation in key areas of law, such as conflict of laws, if the benefits of cross-border trade are to be fully realised. This is partly due to the fact that, although competition law is predominantly regulatory law, and, hence, falls under the realm of public law, in other jurisdictions the same is currently being shaped through private enforcement mechanisms, meaning that it has passed into the realm of private law. In the EU, for instance, decentralisation of competition law enforcement and the stimulation of private damages actions is now a reality. In our case, even though the laws in the EAC region do not currently contain provisions that cater for private enforcement of anticompetitive conduct, this fact does not foreclose a future possibility for such developments in the region. Accordingly, and considering the varied jurisdictional and legal cultures which the EAC Partner States or the TFTA Member States enjoy, and, given the fact that effective legal harmonisation is at centre stage of regional integration, there is a need to devise a rule-based mechanism to address possible conflict-of-laws issues that

may arise in the course of cross-border trade. The on-going developments in other jurisdictions should thus inform the EAC regional integration process.

# STATE-RELATED RESTRAINTS OF COMPETITION AND SUPRANATIONAL ANTITRUST LAW: HOW A HARMONISED REGIONAL COMPETITION FRAMEWORK CAN SHAPE A MORE MARKET-ORIENTED ECONOMY

RUPPRECHT PODSZUN\*

## 1. INTRODUCTION

State-related restraints of competition are particularly harmful to the development of a market economy. Such restraints may have various forms, ranging from anti-competitive legislation to the ownership of public undertakings, from the encouragement of national market protection to privileges for selected companies. If such behaviour harms competition it is often hard to remedy the situation by enforcement. However, harmonised and supranational rules on antitrust law and an institutional setting at a regional level help to foster a pro-competitive environment in which state actors need to respect basic economic rules.

This paper explains the European experience of applying competition law to cases with state involvement. It identifies different kinds of state behaviour, names the legal rules in place that make it possible to challenge state agencies and tries to identify lessons from the leading cases in European enforcement practice. The purpose of this paper is to show how a harmonised competition law in a regional community like the European Union (EU) can help to tackle state-related restraints of competition. After this introduction, the second part of this paper is dedicated to identifying state actions that influence competition.<sup>1</sup> The third part presents the legal instruments available under EU law. In the fourth part, exemplary cases are analysed to show main aspects of enforcement practice. In the fifth part, this analysis is briefly summarised. Starting from this analysis, some suggestions are made regarding the key factors for a successful approach to state-related restraints of competition.

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1 On this topic, see Josef Drexler & Vincente Bagnoli eds., *State-Initiated Restraints of Competition* (Cheltenham: Elgar, 2015).

The *Round Timber* case, decided by the Bundeskartellamt, the national competition agency in Germany, may serve as an example of the type of situations that are addressed as “state-related restraints of competition”.<sup>2</sup> In this case, the Bundeskartellamt used the tools of European competition law to remedy a distortion initiated by a state agency in the markets for wood.

Wood is an important raw material in Baden–Württemberg, a German *Land* (sovereign federal state). This federal state owns several forests, and so do some municipalities (local governments) and private companies. The state-owned forest administration offers different services for marketing and administrating round timber. This public body entered into cooperation agreements with several independent private and communal forest owners, finally accounting for the marketing of 60% of round timber in Baden–Württemberg. According to the cooperation agreements, the state agency checks the forests of the cooperation partners, determines what trees are to be logged, sets the prices and conditions of the wood so collected, and determines the customers for the sale of timber. It claims that cooperation is important for preserving the forest as a place of natural reforestation and recreation.

Yet, this cooperation also leads to price-fixing and customer-sharing in a billion-Euro market. If a strong player with 60% market shares fixes the prices and allots customers, the mechanisms of supply and demand are out of function. According to economic analysis, this leads to considerable losses in welfare. Competition law, as the rules governing the market economy on its most fundamental level, therefore provides that price-setting is forbidden. Comparison shows that a market organisation of such activities is possible. In other German *Länder*, the markets for wood are organised on a purely private basis, e.g. in neighbouring Bavaria where no public state administration develops any marketing activities. There is, thus, no market failure that could legitimise state intervention.

The *Round Timber* case leads to several questions: Can a competition authority step in and prohibit such a state-initiated cartel? Could it set fines against another agency? And how does it account for the sovereign tasks of the state and the endeavour to preserve forests? Does it make a difference if the state

2 Bundeskartellamt, Round Timber Proceedings, decision of 15.7.2015, Case B1-72/12. Online: [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B1-72-12.pdf?\\_\\_blob=publicationFile&v=5](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Kartellverbot/2015/B1-72-12.pdf?__blob=publicationFile&v=5) (in German only), see the English press statement: [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/15\\_07\\_2015\\_Rundholz.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/15_07_2015_Rundholz.html).

does not actively initiate the cooperation but merely encourages private parties to enter into anti-competitive agreements or facilitates the organisation?

## 2. STATE INTERFERENCE IN THE MARKET ECONOMY

In Europe, the market economy is a concept that was established only in the early 19th century. Actually, the freedom to operate in the market as an entrepreneur, taking autonomous decisions, was unknown as a theoretical concept until Adam Smith, the Scottish moral philosopher, invented modern economics in the 18th century. Smith, author of “Wealth of Nations”,<sup>3</sup> died in 1790, one year after the call of the French Revolution had shattered Europe. While it is well-known that political freedoms like democracy and the freedom of speech were on the agenda of the revolutionaries, it is less known that the revolutionary programme also encompassed economic freedoms. With the Décret d’Allarde, a law passed in March 1791, freedom of profession and freedom to do business were established. Article 7 of the Décret reads:

*“A compter du 1er avril prochain, il sera libre à toute personne de faire tel négoce ou d’exercer telle profession, art ou métier qu’elle trouvera bon...”*<sup>4</sup>

This marked the legal start of a new age of doing business. A few months later, in June 1791, a law called “Loi Le Chapelier” established freedom to contract as a value in France (actually in the guise of an anti-workers-union law), and as of 1804 the Code Civil spread a liberal civil law in all territories conquered by French dictator Napoleon Bonaparte. Feudalism was abolished, the influential guilds were banned. The French Revolution was the political birth hour of economic freedom in Europe. Now, freed from state paternalism, “entrepreneurs” were able to undertake business ventures, to invest and to take risks. In Germany, where the reforms by Stein and Hardenberg followed the French example, modern economic legislation started at around this time with rules on share companies (enabling large scale investment) or rules on patent law (incentivising inventors).<sup>5</sup> The 19th century became a century of industrialisation in Europe, bringing enormous economic growth in productivity to the countries. It took a long time before it was understood that such economic freedom needs some

3 Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (edited by Edwin Cannan, Chicago: University of Chicago Press, 1976).

4 Translation by the author: “As of next April 1st, everyone is free to do commerce or to engage in such profession, art or craft as he likes.”

5 Cf. Hagen Schulze, *The Prussian Reformers and Their Impact on German History* (Proceedings of the British Academy, 1999) at 61 ff.

taming as well (although Adam Smith had already seen this)<sup>6</sup>. And so it took a long time to introduce social security, worker's rights or bans on unfair or abusive practices by companies. Yet, the benefit of economic freedom, freed from the grip of the state, is palpable in this century, marking the beginnings of the market economy in Europe.<sup>7</sup>

## 2.1 Characteristics of the Market Economy

The main feature of such a market economy is that decisions on the satisfaction of needs are taken autonomously by the individuals who meet in the market for this purpose. Prices, the best allocation of scarce resources, consumption and the distribution of goods are determined according to the laws of supply and demand. The actors act as "privates". The state only plays a minor role, ideally only guaranteeing the functioning of the necessary conditions for a market exchange.<sup>8</sup> There is of course debate amongst economists as to what exactly the state has to do, yet in general there is no doubt that the role of state agencies in a market economy is subsidiary to what private actors can achieve.<sup>9</sup>

Reality however is different. The state still has a lot to say in business – not just by enacting laws that may please some and not please others, but also by direct interventions in market processes. The state holds substantial investments in companies, buys and sells, legislates, intervenes, grants privileges, hands out state aid, or takes other decisions that influence competition.

All sectors of an economy are affected by state intervention.<sup>10</sup> Yet, some sectors in Europe, and probably beyond, have specifically strong ties with the state.<sup>11</sup> These are sectors that are deemed particularly relevant for the state, for instance because they produce goods or services that are vital for the public

6 Cf. Wolfgang Fikentscher et al. eds., *Fair Economy – Crises, Culture, Competition and the Role of Law* (Berlin: Springer-Verlag, 2013) at 13 ff.

7 For a historical account of later developments, see Vito Tanzi, *The Changing Role of the State in the Economy: A Historical Perspective* (IMF Working Paper WP/97/114, 1997).

8 Cf. UNCTAD, 'United Nations Conference on Trade and Development' (2015) 1 *Competition Law and the State* 1.

9 Cf. George J Stigler & Paul A Samuelson, *A Dialogue on The Proper Economic Role of the State* (Chicago: Graduate School of Business, University of Chicago 1963).

10 Cf. James C Cooper & William E Kovacic, 'U.S. Convergence with International Competition Norms: Antitrust and Public Restraints on Competition' (2010) 90 *Boston University Law Review* 1555 at 1567.

11 *Ibid* at 1560; UNCTAD, *supra* note 8 at 1.



good.<sup>12</sup> The expectation that undertakings in these sectors contribute to public welfare often leads to sector-specific regulation – adding up to the hodgepodge of legal requirements influencing the individual position of market actors.<sup>13</sup> Such sectors typically close to governments are energy, telecommunications, transport including railways, postal services, banking, insurance, media, and agriculture. Since the extraction of raw materials plays a minor role for European economies nowadays, this is no longer a field of particular state interest (even though the *Round Timber* case may suggest differently).

Without a doubt, many of the interventions of state actors in the economy are justified and have a positive impact.<sup>14</sup> However, from the pure theory of market economies, state interventions need to be restricted to situations of market failure. If competition is the best mechanism to organise the allocation of scarce resources, elements that distort free and fair competition need to be eliminated. This claim may be self-evident for competition and market economy enthusiasts, yet even they are aware that there is more to society than competition. However, this is not the place to discuss the pros and cons of economic systems. For the purpose of this paper, it is assumed that competition works best if state interventions that harm the basic mechanism of competition are reduced as far as possible.<sup>15</sup> The term “state-related restraints” is used in this paper to describe the actions involving ties to state agencies that have a negative impact on the economic process.

## 2.2 Forms of State Intervention

Four forms of competition-relevant state intervention may be distinguished. The first and most obvious intervention is the state itself acting like an entrepreneur, i.e. offering or buying goods or services for money in the market. As a supplier of goods, the state often acts through public undertakings, e.g. organising energy, water supply, airports, or postal services. The state also acts as a consumer, for instance through demand for office materials or when calling for tenders when new school buildings are built. In some of these demand cases, the state has substantial market power, in particular when the goods are

12 Cf. UNCTAD, *ibid.*

13 Cf. UNCTAD, *ibid.*

14 Cf. Cooper & Kovacic, *supra* note 10 at 1565.

15 Cf. UNCTAD, *supra* note 8 at 1; Cf. Maureen K Ohlhausen, ‘When Regulation Protects Privilege Instead of People: Government Restraints of Trade – A Competition Enforcer’s Perspective’ (2015) *Journal of Antitrust Enforcement* 3.

goods typically commissioned only by the state: military equipment or hospital materials (when hospitals are state-owned).

The second form of state involvement is encouragement or facilitation of private restraints of competition.<sup>16</sup> In some cases, the state reinforces the effects of such restraints and incentivises companies to collude or to keep markets foreclosed. This may be the case when the state supports “national champions” or retains older privileges once granted to specific companies.<sup>17</sup> For instance, in the famous *John Deere* case,<sup>18</sup> a British Ministry had introduced a market information system that amounted to a collusive system by producers and agents of agricultural vehicles. The Ministry wanted to have the information ready in order to organise the spare parts supply in rural areas, yet in fact it helped to organise a state-supported market foreclosure system.

The third relevant involvement is the distortion of competition through discrimination against particular market participants. This group of cases involves behaviour by state actors including state aid (e.g. giving a subsidy to a company seen as particularly important for a certain region),<sup>19</sup> positive or negative discrimination (e.g. the exclusion of foreign companies from a certain market),<sup>20</sup> setting standards or formulating demands that only specific companies may meet (e.g. by making it a requirement of a procurement offer that a company has a certain size while this size is – in reality – only met by one company in the market). The state also often claims the power to create legal monopolies (e.g. for postal services), grant exclusive rights (e.g. as a concession to operate a transport service) or give privileges in the form of special rights to some companies (e.g. by granting patents). These forms of discrimination are either rather subtle so that they escape the law or are generally legal in nature as long as they are undertaken by a state body with an objective justification.

Finally, a fourth form of state involvement in the market economy relates to the general framework of doing business. A legislative act or a judgment by a court may hinder or distort competition.<sup>21</sup> For instance, rules on trade practices, ownership, investment, licensing, advertising, consumer protection or safety standards not only define a neutral framework for doing business, but may have

16 Cf. UNCTAD, *supra* note 8 at 1.

17 Cf. Ohlhausen, *supra* note 15 at 4.

18 ECJ, 28.05.1998, Case C-7/95 P, ECLI:EU:C:1998:256 (*Deere v. Commission*).

19 ECJ, 3.09.2015, Case C-89/14, ECLI:EU:C:2015:237 (*A2A SpA v. Agenzia delle Entrate*).

20 ECJ, 11.07.1974, Case C-8/74, ECLI:EU:C:1974:82 (*Dassonville*).

21 Cf. UNCTAD, *supra* note 8 at 1.

a strong impact on the market position of different players.<sup>22</sup> For example, when the EU introduced a European regulation for the chemical industry, REACH,<sup>23</sup> the Commission found out in a review process after six years of operating REACH that the requirements of this piece of legislation were so tough that small and medium-sized enterprises found it harder to access the market.<sup>24</sup> Since they were not able to use economies of scale, and did not have enough staff to document and control the new standards for chemical production, they faced a stronger restraint than bigger players in the industry that were able to integrate the requirements more swiftly.<sup>25</sup> Regulation thus could have an impact on competition by raising the costs of competitors in different ways.<sup>26</sup>

### 2.3 The Harm Done

State intervention in the economy may be beneficial under certain circumstances. It may also depend upon the level of development of an economy whether it is helpful or not that the state engages in economic processes (and in which and to what degree). To explore this in more detail is a task of development economics, and it is not within the scope of this paper to discuss this.<sup>27</sup> From a conceptual viewpoint, the market economy is based on non-state intervention, at least in the mainstream, modern liberal versions of it. On the contrary, according to such a reading of economics, state-related restraints can be considered as particularly harmful for a number of reasons.

First, state interventions put the system of separation of powers out of balance. The checks and balances needed in every subsystem of society are hampered: if the state intervenes, it is a single actor making the rules, playing in the field and acting as referee in the case of foul play.<sup>28</sup>

22 Cf. Alexandra P Mikrouleas, 'Competition between Public and Private Undertakings' (2015) *Journal of Competition Law* 265 at 267 f.

23 Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

24 COM, General Report on REACH, 5.2.2013, COM (2013) 49 final, p. 5 f.

25 Cf. <http://ec.europa.eu/growth/sectors/chemicals/reach/>.

26 Cf. OECD (Organisation for Economic Co-operation and Development) ed., *Introductory Handbook for Undertaking Regulatory Impact Analysis* (Paris: OECD, 2008).

27 For a discussion of competition law related aspects of the development agenda, see Josef Drexel et al. eds., *Competition Policy and Regional Integration in Developing Countries* (Cheltenham: Edward Elgar 2012); Daniel Sokol et al. eds., *Competition Law and Development* (Stanford: Stanford University Press, 2013); W Lachmann, *The Development Dimension of Competition Law and Policy* (New York/Geneva: United Nations, 1999).

28 Cf. Cooper & Kovacic, *supra* note 10 at 1567; Cf. UNCTAD, *supra* note 8 at 1.

Second, the state as an actor is particularly powerful: it is backed by public finances (essentially, taxpayers' money) and thus does not have the same risk as a private undertaking. The state has better mechanisms of enforcement than a private company. Its authority may be derived not just from performance in the market but also from obedience or respect for the state.

Finally, at the same time, the state may take wrong decisions for different reasons: staff members are usually not business-minded and do not act in an entrepreneurial spirit. The state acts for different reasons (in the best case for the public good, in the worst case to provide incentives for the actors) than profit-oriented undertakings. The state may overestimate its capability of processing information and steering the economy. State intervention may have a chilling effect on market entries, even if other market-entry barriers do not exist.

Whether good or bad, the state is not a company. In a market economy, the state ideally guarantees the functioning of markets, but does not use its overwhelming power to influence the success of other market participants.<sup>29</sup>

### 3. COMPETITION LAW RULES AS A REMEDY

Competition law rules (rules on antitrust) could be the starting point for a market-economy-friendly regulation of state behaviour. Yet, if one state agency (the competition authority) tries to regulate another one (for example the forestry authority, as in the *Round Timber* case), this is a difficult trial of strength. It mirrors the difficulty of norm hierarchy: does the competition act supersede other laws? May one institution tell another one what to do?

#### 3.1 The Application of National Rules by National Agencies to Other Agencies

In *national* competition laws, there are often rules that grant the power to competition agencies to control the economic activities of other state actors.<sup>30</sup> For instance, section 130(1) of the German competition act provides for such power. It reads: "This Act shall apply to undertakings which are entirely or partly in public ownership or are managed or operated by public authorities".<sup>31</sup>

<sup>29</sup> Cf. Mikroulea, *supra* note 22 at 266 f.

<sup>30</sup> Eleanor Fox & Deborah Healey, 'When the State Harms Competition – The Role for Competition Law' (2014) 79 *Antitrust Law Journal* 769 at 775.

<sup>31</sup> Official Translation, cf. [http://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html](http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html).

Accordingly, entrepreneurial state activities are under the control of the competition act. The *Round Timber* case may serve as an example for such enforcement actions.

The Chinese Anti-Monopoly Law also has special provisions for the enforcement of the competition rules against state actors. Article 7 Anti-Monopoly Law (2008) reads:

With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses. The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions.

Even if this rule leaves a lot of leeway for state-owned enterprises it is a starting point for subduing such enterprises to market principles.

Article 8 of the Chinese Anti-Monopoly Law goes even further in assigning powers to the competition agencies with regard to some form of state intervention, the so-called administrative monopolies.<sup>32</sup> It provides that: “No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.”

In Tanzania, the Fair Competition Act, 2003 also contains a specific obligation for state bodies and local government bodies. Section 6 provides that:

- (1) This Act shall apply to Mainland Tanzania, state bodies and local government bodies in so far as they engage in trade.
- (2) Notwithstanding the provisions of sub-sections (1), the State shall not be liable to any fine or penalty under this Act or be liable to be prosecuted for an offence against this Act.
- (3) For the purposes of this section, without affecting the meaning of ‘trade’ in other respects

32 Cf. Thomas K Cheng, ‘Abuse of administrative monopoly in China’ in Josef Drexel & Vincente Bagnoli eds., *State-Initiated Restraints of Competition* (Cheltenham: Edward Elgar, 2015) at 135 ff.

- (a) the sale or acquisition of a business, part of a business or an asset of a business carried on by the State, a State body or a local government body constitutes engaging in trade; and
- (b) the following do not constitute engaging in trade: (i) the imposition or collection of taxes; (ii) the grant or revocation of licences, permits and authorities; (iii) the collection of fees for licences, permits and authorities; (iv) internal transactions within the Government, a State body or a local government body.

Yet, having such powers to deal with “public undertakings” does not mean that these powers can be applied in any meaningful way. Enforcement actions of one state agency against another are a delicate matter.

This is the point where a *supranational* competition law regime may step in. It is the charm of harmonisation at a supranational level that it transfers the problem of state involvement to a superior authority: all of a sudden, it is no longer a national competition authority with national laws wrangling with another legitimate and sovereign body in the state, but a regional (typically supranational) competition authority that investigates the conduct of a state agency in one member state. This is typically so when the European Commission as a competition watchdog intervenes with national authorities or public undertakings. Regarding substance, the laws of the regional body may supersede national laws (and they actually do according to EU law).

EU laws, including competition rules, claim superiority to any national law. This is also in accordance with international law. Accordingly, European competition law prevails over national regulations or acts by authorities of member states. Nowadays, after the introduction of Article 3(1) Regulation 1/2003 in 2004, European competition law must be applied by national courts and competition authorities in the EU member states in a decentralised way. Harmonised supranational law is therefore applied in national proceedings if the case has an appreciable actual or potential effect on trade between member states (a requirement widely defined).<sup>33</sup>

33 Cf. European Commission, *Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty*, OJ C 101, 27.4.2004, at 81–96.

### 3.2 The Application of Articles 101 and 102 TFEU

European competition law has different tools to remedy state-initiated and state-related restraints of competition. The fundamental rules are laid down in the Treaty on the Functioning of the European Union (TFEU).

Firstly, there are rules addressing undertakings directly: Article 101 TFEU, banning anticompetitive business agreements;<sup>34</sup> Article 102 TFEU, banning the abuse of a dominant position;<sup>35</sup> and the merger control laws laid down in the Merger Control Regulation (Reg. 139/2004).<sup>36</sup> If the state acts like an undertaking, i.e. offers goods and services in an economic way in the market, these norms are directly applicable since the notion of undertaking encompasses public undertakings or state agencies behaving like market actors.<sup>37</sup>

34 Wording of Art. 101 TFEU (ex Article 81 TEC): “1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: – any agreement or category of agreements between undertakings, – any decision or category of decisions by associations of undertakings, – any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

35 Wording of Article 102 TFEU (ex Article 82 TEC): “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.

36 Merger control rules require the notification of planned mergers and acquisitions to the European Commission if certain turnover thresholds are met. Companies need to wait for approval by the Commission before implementing the change of control. The Commission investigates whether the planned merger will lead to a significant impediment of effective competition.

37 Cf. Mikroulela, *supra* note 22 at 269.

Since Articles 101 and 102 TFEU only address undertakings they are not directly applicable to constellations of sovereign state intervention. The jurisprudence of the Court of Justice of the EU distinguishes between market-related actions of state agencies and those acts which serve to fulfil the specifically assigned tasks of the state as a sovereign subject of law. Such specific interventions that are based on the power conferred to the legislature, the executive branch or the judiciary of a member state are generally not addressed by competition law. Typical examples of such exemption are the collection of taxes, police operations, proceedings of a court or strictly political actions.<sup>38</sup> It is a matter of debate what may count as a sovereign public task. For instance, in former times postal services were regarded as a sovereign task of the state that did not fall under competition law. Nowadays, postal services have been deregulated and are subject to market forces. If the state is still involved, for instance through owning a postal company, it is liable to competition law. Disputed cases on EU level regarding the character of the task (more undertaking / more state) include air surveillance at airports<sup>39</sup> or the organisation of an official registry database for companies<sup>40</sup>.

### 3.3 Article 106 TFEU

A second set of rules addresses state agencies acting in a sovereign capability and deals with the state as an actor that encourages anti-competitive behaviour or the distortion of competition. According to Article 106 TFEU (ex-Article 86 TEC) the state may grant specific rights and privileges to certain public undertakings provided these do not distort competition.<sup>41</sup> This spectacular norm is a unique feature of European competition law. It specifically addresses the state and is a kind of harmonising at a high level. Article 106(1) TFEU acknowledges that member states may run public undertakings or undertakings to which specific rights are granted:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

<sup>38</sup> Cf. Ohlhausen, *supra* note 15 at 9.

<sup>39</sup> ECJ, 26.3.2009, Case C-113/07 P, ECLI:EU:C:2009:191 (*Selex Sistemi v Commission*).

<sup>40</sup> ECJ, 12.7.2012, Case C-138/11, ECLI:EU:C:2012:449 (*Compass-Datenbank v Republic of Austria*).

<sup>41</sup> Cf. Mikroulea, *supra* note 22 at 271; Cf. UNCTAD, *supra* note 8 at 1.



Thus, this freedom of the member states to pursue an economic policy with state-owned actors finds a barrier in the norms on competition and state aid (Article 101-109 TFEU) and non-discrimination (Article 18 TFEU). It is further restricted in Article 106(2) TFEU:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

This norm prescribes the requirements for the legitimate activity of such undertakings: they need to be entrusted (a formal act!) with the operation of specific services (of general economic interest) and may not violate competition rules unless this is necessary for performing their task.<sup>42</sup>

Article 106(3) TFEU grants a right to the Commission to address directives and decisions to the member states. It provides that “The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States”.

However, Article 106 TFEU can also be checked directly in national proceedings if the member state – in a given case – claims to have instituted an anti-competitive practice in line with Article 106 TFEU.<sup>43</sup> The general message of Article 106 TFEU is that states entrusting public undertakings with the operation of specific services for economic policy reasons need to comply with the competition law principles of the Treaty.

### 3.4 The Duty of Loyalty

In some cases, the Commission also used the argument of loyalty to the Union in order to invoke competition principles.<sup>44</sup> It reminded member states that competition principles are at the core of the Union’s economic system (the competition-oriented market economy).<sup>45</sup> Following this logic, it amounts

<sup>42</sup> Cf. UNCTAD, *supra* note 8 at 16.

<sup>43</sup> As an example, see the conflict regarding the exemption based on Art. 106 (2) TFEU in the German competition act for press publishers: Higher Regional Court of Düsseldorf, Germany (OLG Düsseldorf), 26.2.2014, Case VI-U (Kart) 7/12, WuW 2014, 638 (*Presse-Grosso*); overturned by Federal Supreme Court of Germany (BGH), 6.10.2015, Case KZR 17/14, WuW 2016, 133.

<sup>44</sup> ECJ, 12.09.2007, Case T239/04, ECLI:EU:T:2007:260 (*Italy v Commission*).

<sup>45</sup> Cf. UNCTAD, *supra* note 8 at 8.

to a breach of faith, if a member state encourages or obliges undertakings to foreclose markets or collude against consumers. Such a general obligation is necessary to ensure the effectiveness (*effet utile*) of the law of the Union.<sup>46</sup> A Union depends upon the loyalty of its members, and this finds a basis in Article 4(3) of the EU Treaty (TEU).<sup>47</sup>

It reads:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Read in conjunction with Articles 101 and 102 TFEU, this Article makes clear that the member states have a fundamental obligation to ensure that companies adhere to competition and to refrain from assisting in anti-competitive practices. The European Commission can, in principle, use Article 4(3) TEU and Article 101 TFEU to enforce a competition-friendly regulation of the economy. Article 4(3) TEU expands the possibilities of the European Commission as a competition “watchdog” since it may address state behaviour that does not amount to a case of Article 106 TFEU but is strong enough to incentivise companies (which may be directly subject to enforcement action under Articles 101 and 102 TFEU in such cases).

### 3.5 Competition Advocacy

While the norms mentioned so far give regulatory administrative powers to courts or competition authorities, there is an important “soft tool” for attacking state-initiated restraints of competition: competition advocacy.<sup>48</sup> Competition

46 Cf. Mikroulea, *supra* note 22 at 267 f.

47 A state intervention that limits competition could also be regarded as a direct breach of the Treaty, yet since the effect is a rather indirect one and the general obligation rather unspecific, the Commission chooses the way via Article 4(3) EU Treaty.

48 On the international standards, see the work of the Advocacy Working Group of the International Competition Network (ICN): <http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx>.

advocacy can take basically every form of action beyond official enforcement.<sup>49</sup> The idea is to raise public awareness of the benefits of competition.<sup>50</sup> Such advertising in favour of this value is all the more important since there is no natural focus group or “lobby” pushing this issue.<sup>51</sup> For instance, many competition authorities work with the media, and publish enlightening materials for the public, such as websites or brochures for industry or for educating children. They give official and unofficial statements, publish advisory opinions, and participate in all kinds of roundtables. Or they invite study groups into their offices, give talks and work with academia. In some countries, it may be necessary to have a specific competence under the law for doing some of these things.<sup>52</sup> Yet, since there is no direct effect on any specific member of the public, the administration is usually free to act. Such public relations work is part of the game and also part of the legitimate interest of the public in seeing how taxpayers’ money is spent. Rules on transparency and information rights strengthen the possibilities of competition advocacy.

### 3.6 Further Rules

While the focus of this paper is on competition law rules, some further rules deserve mentioning that help in taming the EU member states in their influence on undertakings and markets. First, public procurement rules deal with the state as a buyer. If certain thresholds for public demand are met, the demand needs to be satisfied in a fair and transparent procedure according to the rules on public procurement. Public tenders need to follow such rules.

Second, state aid rules deal with the distortion of competition through direct financial aid to companies by the state (Article 107 TFEU). Such aid can only be handed out by a member state under very strict requirements. Third, treaty rules on non-discrimination (Article 18 TFEU) safeguard the internal market within the EU by eliminating the most basic forms of discrimination, namely the one based on nationality. Finally, the four fundamental freedoms

<sup>49</sup> Cf. Mikroulea, *supra* note 22 at 295 f.

<sup>50</sup> Cf. Michael S Gal & Inbal Faibish, ‘Six Principles for Limiting Government-Facilitated Restraints on Competition’ (2007) 69 *Common Market Law Review* 13.

<sup>51</sup> Notable exceptions are the American Antitrust Institute (AAI) or Consumer Unity & Trust Society (CUTS).

<sup>52</sup> In Germany, for instance, the legislator plans to introduce a specific norm for this in the Act against Restraints of Competition: “The Bundeskartellamt may also inform the public continuously about its activity and about the state of affairs and the development in its field of responsibility” (section 53(4) of the draft bill for a new Act against Restraints of Competition, published 4 July 2016).

of the EU, the free movement of goods (Article 34 TFEU), services (Article 56 TFEU), labour (Article 45 TFEU) and capital (Article 63 TFEU), are the fundamental rules that affect sovereign state action. For example, if a member state passes a law that makes it more difficult for outsiders to enter the national market, this may be a violation of the free movement of goods. These rules addressing state behaviour are the twin sister of competition rules addressing private companies.

EU member states are also bound by the obligations in the framework of the World Trade Organisation (WTO). The WTO creates rules in favour of cross-border trade. In a case of violation of the obligations (laid down, particularly, in GATT (General Agreement on Tariffs and Trade), GATS (General Agreement on Trade in Services) and TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights), the three core elements of WTO), sanctions may include retaliation measures.<sup>53</sup> The obligations apply to member states that can be sanctioned in the WTO dispute settlement procedure.

While EU law, from the beginning, entailed a clear commitment to tackle private restraints of competition (via antitrust law) and state restraints (via the four freedoms), WTO law left out the antitrust pillar: in the World Trade arena, it is still not sanctioned that companies collude or abuse their power. In two cases this was the subject of debate. They are the *Kodak Fuji* case<sup>54</sup> dealing with market foreclosure through vertical restraints in Japan, and the *Mexican Telecommunications* case<sup>55</sup> dealing with access to the Mexican market that was hindered in an allegedly anti-competitive way.

#### 4. EXEMPLARY CASES

Where state agencies intervene in markets provoking state-related restraints of competition, several tools may be applied. The first important step is to acknowledge the role of public actors as “normal” undertakings. This makes the core rules (Article 101, 102 TFEU, merger control) applicable. Secondly, some state interventions fall in between the classic divide of antitrust rules and fundamental freedoms. To remedy this, rules like Article 106 TFEU and the loyalty obligation were developed.

53 Cf. Art. 22.2 of the WTO Dispute Settlement Understanding.

54 WTO Ruling, 31.3.1998, WT/DS44/R (*Kodak v Fuji*).

55 WTO Ruling, 2.4.2004, WT/DS204/R (*Mexico Telecoms*).

Some leading cases may illustrate how this framework works in practice. The cases touch upon different aspects of state-related restraints of competition but they all feature the typical difficulties with state actions. These difficulties are mirrored in four key questions for analysis:

- What is the particular competitive problem with state-related restraints?
- Who is the addressee of proceedings?
- Is there a public interest defence or how do competition agencies and courts deal with the public goods obligation of state actors?
- What is the decision and does it take the specific role of state actors into account?

## 4.1 Application of Articles 101 and 102 TFEU

In the majority of cases dealing with state-related restraints of competition, Articles 101 and 102 TFEU are directly applied.

### 4.1.1 CIF (*Consorzio Industrie Fiammiferi*)

A leading case is the *CIF* case (*Italian Matches*) decided by the European Court of Justice (ECJ) in 2003.<sup>56</sup> CIF is the association of match producers in Italy. It had come into existence in 1923 when it was created by a state decree and obtained a fiscal monopoly, i.e. it was responsible for assembling and taxing Italian match producers. As of 1993, match producers were liable to pay their dues directly to the state. Membership in CIF was no longer compulsory for match producers. Yet, the influence of CIF on the Italian matches market and the ties to the government remained strong. In practice, CIF continued to assign “production quotas” according to “traditional shares”. A state authority rubber-stamped these quotas and thereby approved of them. A German manufacturer that wanted to enter the Italian market complained to the Italian authorities. The authorities referred the case to the ECJ in order to get clarification how to evaluate the role of the state in this matter.

In the case, the competitive problem was that competition was only possible within the boundaries of quotas, making it difficult for new market entrants to acquire a substantive share of the market based on their performance. The

<sup>56</sup> ECJ, 9.9.2003, Case C-198/01, ECLI:EU:C:2003:430 (*CIF*). On this case cf. Fox & Healey, *supra* note 30 at 793.

whole system amounted to a price-fixing and market-sharing agreement under the umbrella of the association. The state involvement made this “official”.

The Court stated that the private Association, CIF, was liable for violations of competition law. As long as there was some scope for action for the undertaking or the association it could infringe these rules. Scope for action means that not all measures are prescribed by the state, but that the association can decide autonomously.<sup>57</sup> In this case, the assignment of quotas was such an autonomous decision by CIF. Even if possibilities to act were limited, this suffices – in the view of the Court – to require competition in these residual areas of private initiative.

The Court did not accept any public interest defence with regard to taxation, arguing that the Italian State was generally able to tax companies without the involvement of associations or quotas.

The Court asked the national authorities to issue injunctions against the hard-core cartel. Regarding sanctions, the Court came to a differentiating conclusion:

Where undertakings engage in conduct contrary to Article 81(1) EC [now Art. 101(1) TFEU] and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC [now Art. 101 TFEU] is observed:

- has a duty to disapply the national legislation;
- may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation;
- may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard;
- may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.

With this judgment, the Court established that state interventions did not exempt companies or associations of undertakings from their liability to act in accordance with competition law, as long as they have some scope for

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57 Cf. Gal & Faibish, *supra* note 50 at 17.

autonomous economic decisions left. It also made clear that in the calculation of fines for the anti-competitive behaviour the state encouragement needs to be taken into account.

#### **4.1.2 *Aéroport de Paris***

In the *Aéroport de Paris* (AdP) case, decided by the ECJ, the Commission directed its enforcement action not against a private company or association but against a public undertaking.<sup>58</sup> The company, owned by the French state and governed by a French aviation law, is the owner and operator of airport premises in Paris (Orly and Roissy-Charles-de-Gaulle). The government considered airports a vital element of the country's infrastructure so that it wanted to keep its influence. In 1992, AdP entered into a 25-year agreement with Alpha Flight Services (AFS). AFS provides airline catering services (including, for instance, the loading and unloading of food and beverages and cleaning the aircraft). AFS was authorised to provide the services for a certain fee. Shortly after, AdP granted a further concession to provide such services to the company Orly Air Traiteur (OAT), a subsidiary of then state-owned national airline Air France. The 25-year concession granted to OAT contained conditions that were more favourable than those for AFS (in particular regarding the fees). This prompted AFS to turn to the European Commission.

The competitive problem in this case was a discrimination of trading partners. The different fee scheme placed OAT in a better starting position in the market for providing ground services to airlines. The conditions set by the public undertaking influenced the market success of the companies on a secondary market. The public undertaking therefore held a gatekeeping position. It enjoys a dominant position on the first market of granting concessions to provide ground services at the Paris airport premises. The Court rejected the argument of AdP that the rights enjoyed over the publicly owned premises did not amount to an economic power position but simply constituted property rights. The Court stuck to the notion of undertaking and emphasised the ability of AdP to wield economic power by offering goods or services (here: offering concessions) on a market. The discrimination is an abuse of a dominant position, violating Article 102 TFEU.

The Court also dealt with AdP's claim that the company performed sovereign tasks in the public interest. It found that it actually does, but the Court

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<sup>58</sup> ECJ, 24.10.2002, Case C-82/01 P, ECLI:EU:C:2002:617 (*Aéroports de Paris v Commission*).

distinguished the performance of tasks conferred upon AdP by public law in an exclusively sovereign function from those actions that constitute market activities. As long as it is possible to draw such a line, the market activities fall under the scope of application of Articles 101 and 102 TFEU. In AdP, the Court makes clear that it approves of the Commission's stance to define the scope of sovereign tasks as narrowly as possible.

The Court did not accept any public service defence: neither does public property (like the airport premises) indicate an exemption from competition law, nor is any exemption applicable for air traffic in the current case. While the Court accepted (then) that air transport may involve tasks public in nature, it also made clear that this does not amount to a general exemption for all tasks undertaken by a company involved. Only those activities directly necessary for regulating flying were exempt.

AdP was granted a two-month time limit to propose a new, non-discriminating agreement.

## 4.2 The Buying Power of State Agencies

In some sectors, state agencies can exercise enormous buying power. There are different approaches to this problem in German and EU case law.

### 4.2.1 Fire Equipment

The German example is the *Fire Equipment* case.<sup>59</sup> Several German municipalities of one region had formed a public company to centralise their demand for different goods. By this measure, these local governments aimed at bundling their buying power in order to have better conditions with suppliers. Their agreement also related to equipment for fire engines. Fire departments in this region are organised as local units performing specific public tasks under the control of the local government. Before the cooperation of the municipalities, they sourced their equipment individually. Now, the newly formed company bundled the demand and called for tenders to equip the fire departments. Two smaller-sized dealers offering the relevant equipment went to court (in private proceedings) and filed for injunctive relief against the call for tender. They alleged that the bundling of buyer power distorted competition. Since the fire

<sup>59</sup> Bundesgerichtshof (BGH, German Federal Supreme Court), 12.11.2002, Case KZR 11/01, BGHZ 152, 347 – *Ausrüstungsgegenstände für Feuerwehrfahrzeuge*.



departments were basically their only customers (since firefighting is mostly in public hands in Germany) the competitive impact of the decision to coordinate sourcing was hard-felt: one tender decided on a large chunk of business. For producers of fire equipment it became interesting to offer their goods directly instead of using trading partners.

The German Bundesgerichtshof, the highest court in civil matters, decided that the buying company was a public undertaking formed by the municipalities in a market actor capacity: even though the equipment was directly used for sovereign purposes and not in an end consumer sort of way, the company's demand behaviour was seen as an economic activity that fell under competition law rules.

The court saw coordination (a buying cartel) through identical agreements between the company and the participating municipalities. The bundling of buyer power constituted a horizontal restraint of competition. The court did not accept any public interest defence. In particular, it did not agree that the principle of austerity was a justification for the public bodies since saving costs is an issue for private and public companies, but not a specific public interest. Furthermore, the buying of equipment did not form part of exercising the sovereign task of fighting fires. It was a preparatory step that could be organised according to competition principles.

Still, the cooperation was exempted from the application of competition law since the court found that the power of the company on the buyer market was below 10%. With a small market share the cartel was deemed to have no appreciable effect in the market, and consequently the demand-side cooperation was allowed. The principle established in the case was groundbreaking, however: even in pure demand-side activities that are in preparation of sovereign tasks, public companies take autonomous decisions in the market and are thus liable to conform to competition rules.

#### **4.2.2 *Fenin***

In a similar case, the ECJ refused to apply Article 102 TFEU to a Spanish institution that sourced material for hospitals and social care through abusive practices. In this *Fenin* case, the ECJ held that pure demand activities with no further downstream market activity for which the goods are bought do not constitute a relevant action in competition law.<sup>60</sup> There was no elaborate

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60 ECJ, 11.7.2006, Case C-205/03 P, ECLI:EU:C:2006:453 (*Fenin v Commission*).

justification why such demand-side activities should be exempt from competition law. The rationale seems to be that pure consumption is not a topic for competition law.

Thus, according to *Fenin* public authorities that demand goods for the performance of their public obligations are not liable to European competition law.<sup>61</sup> Under German law, the decision of the Bundesgerichtshof still stands.

### 4.3 Article 106 TFEU

The spectacular norm of Article 106 TFEU has often been used to remedy competitive problems. This norm, as pointed out earlier, addresses member states that grant privileges to certain public undertakings.

#### 4.3.1 *Rødby*

In the *Rødby* case,<sup>62</sup> a Danish public undertaking (DSB) owned the port of Rødby in Denmark and operated a ferry line between Rødby and Puttgarden in Germany. All operations needed the approval of the Danish Ministry of Transport. Stena, a private undertaking, also wanted to operate a ferry on this route, and it turned to the Ministry in order to ask for permission to build a new terminal in the port of Rødby or to operate from the terminal owned by DSB. The Ministry declined. With the Danish “No”, the public undertaking stayed in a monopoly position and was not allowed to grant Stena access to the port facilities.

The European Commission therefore took an Article 102-decision, marking this behaviour as abusive of a monopoly situation on the basis of the essential facility doctrine. According to this doctrine, it constitutes an abuse of a dominant position if a company “refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate remuneration, provided that without such concurrent use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market”.<sup>63</sup>

61 Cf. UNCTAD, *supra* note 8 at 8.

62 European Commission, 21.12.1993, 94/119/EG.

63 Official translation of the German legislative version of the essential facilities doctrine in section 19(2) No. 4 of the German Act against Restraints of Competition. Under European law, the essential facilities doctrine is a case under Article 102 TFEU without being explicitly mentioned.

The company may refuse use, however, if concurrent use is impossible or cannot reasonably be expected. Here, the port was an essential facility; the secondary market for the operation of ferry services was foreclosed.

The Commission's decision was addressed to the Ministry of Transport as an administrative agency, based on Article 106(1) TFEU, since the state actor (the Ministry) controlled an undertaking (DSB) to the extent that DSB was no longer able to act without an infringement of competition laws. The Commission did not accept any defence arguments presented by the Ministry or DSB. For instance, the Ministry argued that there was no need for a second ferry line. But the Commission held that competition is also necessary in saturated markets, even if this reduces the profits of a public undertaking. The Ministry also argued that DSB had a particular "transport obligation" and was obliged to provide certain transport and ferry services. However, such an obligation does not require a monopoly, the Commission argued. Obligations like this one can also be fulfilled by private undertakings.

The Commission gave the Danish government two months to address the issue.

#### **4.3.2 *GSM Italy***

In the *GSM Italy* case,<sup>64</sup> the Commission dealt with the new market for licences for GSM-based mobile phone companies in Italy. GSM is the Global System for Mobile communications, a standard to operate mobile phones. This case from 1995 is paradigmatic in its approach to new markets and the role of governments. The Italian government handed out the first licence without any particular fee or procedure to Telecom Italia, a public undertaking and the landline phone incumbent in Italy. The European Commission intervened and called upon the Italian government not to establish a monopoly in the mobile phone sector. The Italian government organised a call for tender for a second licence. In this tender, one of the criteria for decision was (without exact weighing) the offering of a "starting fee". Omnitel, a competitor to Telecom Italia, won this tender and was best in all categories. Omnitel accepted the conditions of the tender.

The Commission however saw a competitive problem in the fact that Telecom Italia still had the first-mover advantage *and* did not have to offer a starting fee. This distorted competition according to the Commission. It addressed

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64 European Commission, 4.10.1995, 95/489/EG.

the Italian government on the basis of Article 106 TFEU in conjunction with Article 102 TFEU, stating that the state must not force public undertakings to automatically infringe competition rules.<sup>65</sup> It saw such an “automatic” violation in the fact that Telecom Italia was dominant and necessarily abused its position: it could offer tariffs below Omnitel’s tariffs since starting conditions were simply better. Telecom Italia was also better able to delay the introduction of the GSM standard (thereby harming consumers and reaping more profits from the traditional monopoly technology forming a financial basis in times of competition). The new market of mobile phoning needed fair starting conditions for all companies involved. This, so the Commission claimed, was the chief responsibility of the government – “making markets”. Since competition law protects the competitive process and the consumers, it did not matter that Omnitel accepted the conditions. The Commission also did not accept as a defence that Telecom Italia had investments before the liberalisation of the telephone markets.

As a sanction, the Commission obliged the Italian government to come up with compensation within three months, equalising the starting terms for Telecom Italia and Omnitel.

#### 4.4 Loyalty Obligation (*effet utile*)

In a 2008 judgment, the ECJ summarised the possibility of using Article 4(3) TEU in combination with Articles 101 and 102 TFEU. Article 4(3) TEU obliges member states to act loyally within the EU and not to counter the aims of the EU. Actions of member states that do not fall under Articles 101 or 102 TFEU directly (since the state does not act as an undertaking) can be challenged under the Treaty through the obligation of loyalty to the Union:

According to settled case-law, although it is true that Articles 81 EC and 82 EC [now Articles 101 and 102 TFEU] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10 EC [now Art. 4 TEU], which lays down a duty to cooperate, none the less require Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see Joined Cases C94/04 and C202/04 *Cipolla and Others* [2006] ECR I11421, paragraph 46). The Court has held that Articles 10 EC and 81 EC are infringed where a Member State requires or encourages the adoption of agreements, decisions or concerted

<sup>65</sup> Cf. Mikroulea, *supra* note 22 at 286 f.

practices contrary to Article 81 EC or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (*Cipolla and Others*, paragraph 47).<sup>66</sup>

For two reasons, the combination of the duty of loyalty with competition rules poses difficulties in practice. Firstly, the competition rules are addressed to undertakings, not to member states. Enforcing them with a circumvention of the notion of undertakings is problematic – the economic regulation of member states should be addressed via the fundamental freedoms, not via the competition rules. Secondly, assigning such a competence to the European organs touches upon the sensitive issue of assigning competences in general. Economic regulation in the EU is based on a balance of EU and member states' competences; it is a matter for political negotiations.

Actual enforcement has thus been rare. The cases seen as leading cases in this field always state that it is generally possible to base an action on the duty of loyalty, but none of the decisions in these cases is actually based on this ground.<sup>67</sup>

## 4.5 Further Forms of Competition Law Application

Apart from these possibilities, two other typical activities of competition agencies should be mentioned.

### 4.5.1 Merger Control

Firstly, competition authorities that exercise merger control may submit mergers with state-involvement to merger control scrutiny. This is done on a regular basis in the EU as soon as the state agency can be qualified as an undertaking. The market activities of state actors may constitute undertakings that need to notify mergers and acquisitions to the Commission. This is true even if the merger takes place in the form of an act of state or a statutory act.

A vital question is the calculation of turnover, necessary to see whether merger control thresholds are met. Here, the competition authorities take the whole turnover of all entities controlled by the legal entity. For instance, the

<sup>66</sup> ECJ, 13.03.2008, Case C-446/05, ECLI:EU:C:2008:157 (*Doulamis*) at para 19 f.

<sup>67</sup> ECJ, 16.11.1997, Case 13/77, ECLI:EU:C:1977:185 (*GB-Inno v ATAB*); ECJ, 21.09.1988, Case 267/86, ECLI:EU:C:1988:427 (*Van Eycke*); ECJ, 19.02.2002, Case C-35/99, ECLI:EU:C:2002:97 (*Arduino*); ECJ, 5.12.2006, joined Cases C-94/04 and C-202/04, ECLI:EU:C:2006:758 (*Cipolla*); ECJ, 13.03.2008, Case C-446/05, ECLI:EU:C:2008:157 (*Doulamis*).

German Federal Cartel Office regularly investigates mergers when hospitals are owned by the state or municipalities. If a local hospital owned by a public authority acquires control over another hospital, this may trigger merger control procedures. The turnover for the calculation of thresholds encompasses the turnover of the target hospital plus the turnover of all market activities in the hand of the acquiring entity (the public authority). If, for instance, a municipality also owns a savings bank or a TV station, the revenues of the savings bank and the TV station and the hospital are taken into account.<sup>68</sup> Similarly, the office scrutinised – with the help of merger control – the takeover of a regional public transport company by the national railway operator.<sup>69</sup> These transactions are submitted to merger control review to find out whether they significantly impede effective competition, once the formal thresholds are met. The competition authorities do not hesitate to deal with public companies or state-owned companies in exactly the same manner as with private undertakings.

#### 4.5.2 Competition Advocacy

The second important instrument of competition authorities is competition advocacy. This may take on different forms.<sup>70</sup> For instance, the European Commission's Directorate General for Competition advises on numerous economic policy projects or does public relations work for opening markets and sticking to certain rules. The British Office of Fair Trading has published guidelines for policy makers on how to assess the competitive impact of their regulatory measures.<sup>71</sup>

### 5. SUMMARY OF ANALYSIS

The above review of norms and cases shows a variety of possibilities for intervention with the aim of fostering competition. The typical competitive problem of state-related restraints is that these are particularly harmful and hard to remedy on an intra-state level. However, supranational enforcement of

68 Bundeskartellamt (Federal Cartel Office, Germany), 13.12.2006, Case B3-1003/06, WuW/E DE-V 1335 – *Enzkreis-Kliniken*.

69 Bundesgerichtshof (Federal Supreme Court, Germany), 7.2.2006, Case KVR 5/05, BGHZ 166, 165 – *DB Regio/üstra*.

70 Cf. Mikrouleá, *supra* note 22 at 295 f.

71 Office of Fair Trading, Completing competition assessments in Impact Assessments – Guideline for policy makers, August 2007, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/191489/Green\\_Book\\_supplementary\\_guidance\\_completing\\_competition\\_assessments\\_in\\_impact\\_assessments.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191489/Green_Book_supplementary_guidance_completing_competition_assessments_in_impact_assessments.pdf).

harmonised rules solves this hierarchical problem. The emphasis of enforcement action is on two aspects: firstly, competition opens up markets where the state keeps markets artificially foreclosed. Secondly, where the state is in a gate-keeping position, competition allows to remedy discrimination issues.

A main feature of competition law enforcement in cases of state-related restraints of competition is the question of who is the addressee of an enforcement measure. Sovereign state actions are not addressed if these are the expression of public tasks based on statutory obligations. However, the Commission, in a pro-competitive stance, defines sovereignty rather narrowly and accepts that many tasks can be fulfilled by private companies as well (e.g. the transport obligations on the Puttgarden line). A notable exception is the controversial *Fenin* judgment exempting pure demand-side activities from competition law. The state is addressed directly through Article 106 TFEU and possibly Article 4(3) TEU with Articles 102 or 101 TFEU if undertakings cannot act without violating competition law (accessory violations). If there is any autonomous scope of action for private players on the market, they are directly addressed, even if the scope for action is restricted heavily by state regulation (cf. *CIF*). Competition law does not distinguish public undertakings and private ones.

In the cases analysed here, public interest defences have not been accepted. The focus of competition law enforcement is a purely economic one, interested only in the competitive effects of a measure. Behind this is the fundamental belief that competition works best for organising the economy. Yet, in some areas, competition law is not enforced at all (such as exemptions for agriculture), or state intervention overrides competition law. This is hardly possible, though, on the harmonised level (except for fundamental rights or equally entrenched principles). Often, there will be a less impeding possibility to secure the public interest than the restriction of competition through cartels or abuses.<sup>72</sup>

In state-related cases, the Commission shows some leniency in the decisions, in line with *CIF*: it usually stops the infringement but leaves the concrete remedy to the state agencies involved. There are usually no fines or prescriptive measures on how to act in the market. If companies are addressed in a state-related context it is usually taken into account that they thought themselves in line with governmental actions. The judgment of the European Court of Justice in *Fenin* may even mark a turning point in the jurisprudence. It actively tackled state restraints before it became more lenient in recent cases,

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72 Cf. Mikroulea, *supra* note 22 at 266 f.

dealing with public health (as in *Fenin*),<sup>73</sup> air control (as in *Selex Sistemi*),<sup>74</sup> or public business databases (as in *Compass-Datenbank*).<sup>75</sup> In all three cases, the notion of undertaking was limited in favour of government-related activities. It is necessary to watch how the jurisprudence develops in such cases.

## 6. KEYS TO SUCCESS

Even though a variety of instruments and decades of experience could be read as a story of success, the enforcement of competition laws against state-related restraints of competition meets a lot of criticism and opposition in many cases. The *Round Timber* case mentioned at the beginning has triggered enormous protests in the media and on political levels against the actions of the Bundeskartellamt, although to competition lawyers this looks like a straightforward cartel and abuse case.

Is there anything to learn from the European story of taming state influence? When does it work without protests and the additional costs of lengthy litigation or political intervention that does more harm than good? This is hard to tell. In this conclusion, five hypotheses are suggested in this regard.<sup>76</sup>

One market of reference for testing these hypotheses may be the market for telecommunication services that – in the eyes of many – has been opened up successfully for competition in Europe.

### 6.1 Clear-Cut Competences

If one authority intervenes with the actions of another state actor it becomes vital to clarify the institutional and material competences of each actor. Which is the relevant body to decide what? What is the legal basis? How far is the reach of a decision?

It is hardly possible to imagine interventions without a clear-cut regime of competences. A supranational, harmonised competition law regime enhances the possibilities of competition authorities to serve as a watchdog in general economic matters.<sup>77</sup> Yet, if there are other bodies dealing with sector-specific

73 ECJ, 11.7.2006, Case C-205/03 P, ECLI:EU:C:2006:453 (*Fenin v Commission*).

74 ECJ, 26.3.2009, Case C-113/07 P, ECLI:EU:C:2009:191 (*Selex Sistemi v Commission*).

75 ECJ, 12.7.2012, Case C-138/11, ECLI:EU:C:2012:449 (*Compass-Datenbank v Republic of Austria*).

76 Cf. Fox & Healey, *supra* note 30 at 812.

77 Cf. Gal & Faibish, *supra* note 50 at 32 f.



regulation or general economic policy it needs to be clarified from the outset what impact different authorities may have. It may be important to discuss issues together and to find mechanisms of coordination (e.g. a round table or an obligation to give notice of draft decisions in advance).<sup>78</sup> Alternatively, it is up for the courts to decide. The lines established in judgments like *CIF* for instance were path-breaking.

Part of the institutional regime is the question of independence of authorities. Competition authorities that are dependent on political supervision may act less straightforwardly than authorities that have formal and factual independence with well-trained and well-paid staff.

## 6.2 Regulation as Temporary Phenomenon

Often, sectors of special importance are prone to government intervention. Traditionally, such sectors (like energy or telecommunications) are heavily regulated. Competition law interventions function better if sector-specific regulation and state-ownership are seen as necessary but temporary tools in order to make markets fit for free and open competition. This requires an understanding that competition is possible *at all* without excessive costs for public welfare. Economic theory tells us that competition is the best mechanism in all sectors to achieve efficiency and innovation and a fair distribution of assets and resources. The only exceptions are natural monopolies (market failure). Yet even in cases of natural monopolies it works to establish “as-if-competition” or to open up the residual parts of markets where competition is possible.

It would be untrue to hide the fact that competition also brings about change. No company subject to competition ever has comfortable times. Yet, the costs in the long run of a protectionist regime (inefficiency, insolvency) are usually higher than the costs of adaptation at an early stage (as forced through competitive pressure).

It may be important for competition agencies to show that many non-economic goals can be more effectively achieved in a competition-friendly environment than in a strongly regulated, state-planned environment. For example, the desire to have access to telecommunication does not necessarily require a monopolist but is often easier to achieve with competition. Competition-friendly solutions may entail less grave interventions than keeping up monopolies. For instance, those companies that guarantee non-

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78 Cf. *ibid* at 29 f.

profitable public services (such as delivering goods to remote areas) may be given a government tax exemption or special remuneration instead of granting them a monopoly position for the whole territory.

### 6.3 Comprehensive Strategy with a Mix of Tools

It is key to devise a comprehensive strategy for each sector, using a mix of different tools. In telecommunications, the European Commission combined several political measures with the enforcement of competition laws. Markets were liberalised, legal and technical market entry barriers reduced. Incumbents, the national telecommunication firms, were privatised or dissolved. Competition law enforcement was blended in with these measures and was directed against individual companies or member states using different norms. Additionally, other economic policy tools (in particular the fundamental freedoms) were actively enforced. All this needs some coordinated effort at the regional level.

Competition advocacy and consumer education should not be underestimated as soft tools for changing the rules of the game from monopolistic to competitive. This may require a mandate and capacities for competition agencies to engage in advocacy activities.

### 6.4 Focus on Market Entry Barriers and Innovation

In the substantive application of competition law it seems key to focus on market entry barriers and innovation. Whenever the state steps in, the danger of market foreclosures is particularly high due to the general nature of state measures and the privileges conferred upon public undertakings.<sup>79</sup> Competition authorities should therefore try to open up markets and guarantee market access to others.

The main driver in breaking up traditional state monopolies is innovation. Disruptive technologies often do a lot more for competition than all interventions by authorities. In the telecommunications sector, the start of mobile phoning was a huge game-changer – a technological development, not a legal or political intervention. However, for mobile phones to enter the markets, it was important to abolish regulation or market behaviour that stood in the way. Competition authorities therefore need a good eye to spot barriers to innovation and to tame incumbents that try to fight off new technologies with the help of state regulation.

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<sup>79</sup> Cf. Mikroulea, *supra* note 22 at 287 f.

## 6.5 Countervailing Bargaining Power

State interventions usually make one market player particularly strong, such as a public company that is operated by the government. Competition authorities need to point out that this comes at huge costs: usually, if one company is better off, another is losing out. One strong company on one side of the bargain means that there is the risk of exploitation of a weak party on the other side. Such victims of state intervention may be entrepreneurs, private companies, end consumers.<sup>80</sup> State interventions, privileges, state aid or monopolies mean that there are victims somewhere who are not able to use their right to economic development in the same way as others. Consumers pay more than necessary; companies lose profits or cannot become active in certain fields.<sup>81</sup> Some of these victims may not even be aware of the state-imposed restraint of their economic freedom since they are so used to government-backed profits on the other side.<sup>82</sup> Yet, these victims are potential allies in the fight for competition.

It is therefore important to strengthen countervailing bargaining power. Competition authorities should point out what the costs of state interventions are and should identify those companies and customers that are harmed by the dominance of state interference.<sup>83</sup> Competition law can also be used, particularly the abuse provisions, to confer additional rights to the opposing market side, making it stronger in negotiations with incumbents and public undertakings.

One important development in the EU in this regard is the strengthening of private enforcement of competition law. The EU encourages private plaintiffs to go to court and sue for injunctions or damages on the basis of competition law violations. The EU obliges member states to set procedural incentives in this regard. This right makes it harder for governments to steer and plan the economy since courts act independently and embrace competition law in ever more cases, thereby upsetting state plans for regulation.

In the *Round Timber* case mentioned at the beginning, proceedings started with a complaint by one of the customers in 2002. In 2008, after lengthy investigations and negotiations, the national competition authority accepted a compromise with the *Land*, the sovereign federal state of Baden-Württemberg.

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80 Cf. Cooper & Kovacic, *supra* note 10 at 1560.

81 Cf. *ibid* at 1566.

82 Cf. *ibid* at 1560.

83 Cf. Mikroulea, *supra* note 22 at 296; cf. Ohlhausen, *supra* note 15 at 17; cf. Cooper & Kovacic, *supra* note 10 at 1610.

The negotiated compromise foresaw a lot of amendments and essentially an abolishment of the anti-competitive cartel. Monitoring of the results in the market showed, however, that the *Land* in practice rejected the compromise and continued to circumvent it. Thus, after new negotiations and investigations, the national authority issued an injunction in 2015 with strict wording and exact provisions what had to be done.<sup>84</sup> In a similar case, concerning national lotteries, the Bundeskartellamt drafted its longest decision ever against a state cartel. Shortly after, the involved state actors enacted new laws, essentially aiming at a complete monopolisation of the lottery business in state hands.<sup>85</sup>

These experiences show that it is a hard and thorny path to enforce competition law against state actors. It could have been easier, though, if the European Commission had taken the decisions on the basis of its supranational authority. This feature of regional harmonisation should not be underestimated.

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84 Bundeskartellamt (German Federal Cartel Office), 9.7.2015, Case B1-72/12 – *Rundholzvermarktung*.

85 Bundeskartellamt (German Federal Cartel Office), 23.08.2006, Case B 10-148/05 – *Lottoblock*.

# **HARMONISATION OF COMPETITION LAWS WITHIN THE EAST AFRICAN COMMUNITY: A COMPARATIVE ANALYSIS OF THE EAC COMPETITION ACT, 2006 AND THE COMPETITION LAW OF BURUNDI**

**ANATOLE NAHAYO\***

## **1. INTRODUCTION**

This paper undertakes a comparative analysis of the East African Community Competition Act, 2006 and the Competition Law of Burundi of 2010. The focus is laid on key substantive competition rules in each competition law. The paper reveals that though Burundi enacted its competition law four years later than the East African Community (EAC), it did not seek inspiration from the Community law, maybe due to the difference between its civil law tradition and the common law tradition of most of the other Partner States. There are minor differences in the objectives pursued by both laws, and some discrepancies in respect of the principles underpinning the two legal texts, particularly the principle that the Partner State should align its competition policy with that of the EAC. Moreover, the competition restraints covered in the two laws differ to a great extent, with Burundi including provisions on unfair commercial practices in categories different from those recognised by the EAC competition law, regulation of prices and invoices and differentiation between competition restraints effected individually and those effected collectively. In respect of the substantive competition provisions which are the main focus of this paper, both laws regulate the three core areas of anti-competitive agreements between firms, abuse of market dominance and mergers and acquisition control. They also add some specific provisions on the protection of consumer welfare. In respect of each of these aspects, there are mismatches between the two laws that need to be addressed before the harmonisation process can record any success.

Harmonisation of policies and laws in an area of regional cooperation, such as the EAC is crucial to the attainment of the objectives of regional integration. The Customs Union and the Common Market stages of the EAC integration have already been reached, and entail free movement of goods, labour, services and capital within the common market. A number of socio-economic expectations were placed in these freedoms, such as accelerated

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economic growth and development driven by efficient allocation of the factors of production,<sup>1</sup> and a very competitive environment for both business and consumers,<sup>2</sup> which could make the Community an investment destination.<sup>3</sup>

However, the aforementioned benefits cannot be realised if the competition arising from the increased cross-border trade and operations is not regulated to avoid harmful anti-competitive practices. To achieve this, the EAC enacted the EAC Competition Act, 2006. This Act has remained dormant even after the EAC Council decided that it should come into effect in December 2014. The Act is already in a process of amendment by the East African Legislative Assembly, as the EAC Competition (Amendment) Bill (2015).<sup>4</sup>

Although this regional competition law, as a Community Act, will be applied across the EAC with precedence over national law, it is understood that the efficacy of the Community competition system depends on consistency between the EAC competition regime and the competition laws of the Partner States. Healthy competition in the EAC may also be adversely affected by lack of harmonisation of the tax laws of the Partner States, especially where tax laws are harmful for investment. This particular issue has been investigated by author in his doctoral thesis on tax harmonisation within the EAC.<sup>5</sup> In this paper, the focus will be laid on competition law.

Burundi enacted its first ever Competition Law in 2010, four years after the EAC Competition Act was adopted.<sup>6</sup> Like the EAC Act, this law has also remained dormant in Burundi, mainly due to the lack of political will, and the lack of awareness in the business community and the general public.<sup>7</sup> The national independent competition commission which was to enforce the law is yet to be established. Meanwhile, a number of EAC-based enterprises have established

1 Treaty Establishing the East African Community, 1999 art 80(1)(d) [EAC Treaty].

2 *Ibid* art 79(b).

3 *Ibid* art 80(1)(f).

4 Andreasstargard, 'Proliferation of Active Multi-Nation Competition Regimes Continues' (2015). Online: <http://africanantitrust.com/category/eac/>.

5 Anatole Nahayo, 'East African Community Tax Harmonisation: A Critical Assessment of its Viability for Income Tax Laws' (2014) 3 *TGCL Research Series*.

6 See Loi N°1/06 du 25 mars 2010 portant régime juridique de la concurrence, (Law N°1/06 of 25 March 2010 on the Competition Regime of Burundi: in the following: Competition Law). Prior to that legislation, the only provisions relating to competition law were those of the commercial code on unfair dealings. Contracts law or any other law or general principle does not address competition issues in Burundi. The author is not aware of any competition case that has been brought before a court in the country.

7 This situation explains why (to the best knowledge of the author) no competition case has been initiated in Burundi, except for some issues relating to unfair commercial dealings.

themselves in Burundi, especially in the banking and insurance sectors (such as the Kenya Commercial Bank, the Cooperative Rural Development Bank, the Diamond Trust Bank and Jubilee Insurance). The people of Burundi are still waiting to see the benefits they can gain from this increased competition.

This paper examines the EAC Competition Act and the Competition Law of Burundi. It explores the impact of the EAC Competition Act on the Competition Law of Burundi and vice versa, with a view to highlighting the discrepancies between the two laws and the extent to which they affect the harmonisation drive. To this effect, a comparative analysis of the EAC Competition Act, 2006 and the Competition Law of Burundi of 2010 is carried out. The focus is laid on key substantive competition rules in each competition law.

After this introductory section, section two offers a general overview of the Community and the Burundian competition laws. It analyses the objectives of each law, its underpinning principles and the competition restraints that it covers. The analysis seeks to find out the extent to which the national Competition Law of Burundi is aligned with the Community law in each of these areas. Section three investigates, from a comparative point of view, the convergences or differences between the two laws in the areas of core substantive competition provisions. These are concerted anti-competitive practices, abuse of dominant position, mergers and acquisition control and protection of consumer welfare. The barriers to harmonisation resulting from the discrepancies existing between the two laws are also highlighted. Section four concludes this paper.

## **2. GENERAL OVERVIEW OF THE TWO LAWS**

### **2.1 The Objectives of the Two Competition Laws**

A comparison of the objectives of the two laws reveals convergence between them. One way to test harmony between different laws is to find out how their respective objectives are aligned. The goals of the EAC Competition Act, 2006 are clearly indicated in Section 3 of the Act. They relate to five elements. The first element refers to enhancement of the welfare of the EAC people. This is to be done by ensuring freedom to compete for all market participants (protection against anti-competitive practices); opening up markets through protection against barriers to interstate trade and economic transactions; ensuring that all market participants have equal opportunities in the Community, particularly

small and medium-sized enterprises; eliminating nationality or residence-based discrimination so as to guarantee a level playing field for all market participants in the Community; guaranteeing consumers access to products and services within the Community at competitive prices and better quality; improving production and products by ways of technical and organisational innovation through incentives granted to producers within the Community; and stimulating economic integration and development in the Community.<sup>8</sup>

The second element is enhancement of the competitiveness of Community enterprises in world markets. This enhancement is thought to result from their exposure to competition within the Community.<sup>9</sup> The third, the fourth and the fifth elements refer respectively to the creation of an environment conducive to investment in the Community,<sup>10</sup> alignment of the Community's competition policy and practice with international best practices,<sup>11</sup> and strengthening of the Partner States' role in relevant international organisations.

Compared to the goals of competition policy in some jurisdictions where competition law is well established, such as the US and European Union (EU), the foregoing objectives match the objectives generally pursued. In particular, though economic efficiency is not explicitly stated like in the US, it is assumed that it will automatically result from a healthy competitive market as mentioned for the protection of consumer welfare.<sup>12</sup> Moreover, the objectives of the EAC competition policy give due consideration to "industrial policy" which is generally considered as influential in competition policy.<sup>13</sup> It is comprehended as "overt efforts to strengthen domestic firms to serve goals other than competition and efficiency, such as successful competition in global markets".<sup>14</sup> Industrial policy is referred to in section 3(b) of the EAC Competition Act, 2006.

Furthermore, like in the EU<sup>15</sup>, the EAC competition policy places a focus on economic integration, particularly in addressing barriers to "interstate trade and economic transactions" as explicitly referred to in section 3(a) of the EAC

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8 EAC Competition Act, 2006, s 3(a).

9 *Ibid* s 3(b).

10 *Ibid* s 3(c).

11 *Ibid* s 3(d).

12 Eleanor M Fox, 'US and EU Competition Law: A Comparison' (Institute for International Economics) at 340.

13 *Ibid* at 341.

14 *Ibid* at 340.

15 *Ibid* at 340.



Competition Act, 2006. Equal opportunities for small and medium-sized enterprises are also expressly mentioned.<sup>16</sup>

When considering the objectives of the Competition Law of Burundi, one should not expect them to be similar to some of the goals of competition law at the Community level, such as the elimination of barriers to interstate trade and economic transactions. Nonetheless, some other objectives can be compared *mutatis mutandis*, taking into account the fact that the national law is primarily designed for the national market.

The Competition Law of Burundi does not name detailed objectives, unlike the EAC Competition Act, 2006. The explicitly stated objectives of that law are indicated in its Article 1 and refer to protection against restraints of competition and unfair commercial practices, as well as regulation of prices. However, though not expressly mentioned, some of the goals of the EAC Competition Act can easily be found in the Competition Law of Burundi. This is the case with welfare of the people, which can be derived from a vigorous competitive national market, competitiveness of national enterprises in the global markets after surviving competition in the national jurisdiction,<sup>17</sup> a conducive environment to investment in the national market and the role of the national competition authority in relevant international organisations.

Particularly in respect of the role of the national competition authority in relevant international organisations, Article 11 of the law mandates the national competition authority ("*Commission Indépendante de la Concurrence*"), among others, to serve as the national liaison organ ("*Organe national de liaison*") with the Common Market for Eastern and Southern Africa (COMESA) Competition Commission, the EAC competition authority and any other regional integration organ.

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16 EAC Competition Act, 2006, s 3(a)(iii).

17 Of course, the ability of a Burundian national enterprise to compete in the global markets hardly compares to that of a Community enterprise. The first step would reasonably be to compete regionally before attempting world-wide competition.

## 2.2 Underpinning Principles of the EAC Competition Act, 2006

The EAC Competition Act, 2006 can be viewed as providing a “mechanism for implementation of the EAC Competition Policy”.<sup>18</sup> The general principles of that policy are rightly highlighted by PM Njoroge as follows:

### 2.2.1 *The Principle of Subsidiarity*

In accordance with the principle of subsidiarity, the EAC deals with competition issues occurring at the Community level while competition issues within the Partner States’ individual jurisdiction are left to the Partner States.<sup>19</sup> In other words, the EAC Competition Act, 2006 applies to restraints of competition that have a “cross-border effect”.<sup>20</sup>

In this respect, the Competition Law of Burundi, as a national law, applies to restraints of competition occurring within the national jurisdiction.<sup>21</sup> This means restraints of competition by enterprises established in Burundi and having effects within the national jurisdiction.

However, there are two cases in which the national competition law can have extraterritorial application. The first refers to application of the “effects doctrine” where the national competition law of a state applies to restraints of competition that have effects within its territory, “regardless of where and by what enterprise it is effected”.<sup>22</sup> In the case of Burundi, the Competition Law applies to restraints of competition that are effected by enterprises located outside Burundi but have effects on the national territory, provided that there are relevant international treaties between Burundi and the home countries of the enterprises.<sup>23</sup> The other case of extraterritorial application of the Competition Law of Burundi refers to restraints of competition effected by locally based

18 PM Njoroge, ‘Regional Cooperation on Competition Policy and Law - The East African Community Experience’ (Paper presented to the Intergovernmental Group of Experts on Competition Law and Policy (IGE), United Nations Conference on Trade and Development (UNCTAD), GENEVA, 30 October to 2 November, 2006) at 3.

19 *Ibid* at 6.

20 EAC Competition Act, 2006 s 4(1).

21 See Article 4 first indent of Law N°1/06 of 25 March 2010 on Competition Legal Regime.

22 Wernhard Möschel, *US versus EU Antitrust Law* (2007). Online: <ftp://ftp.sew.de/pub/sew-docs/veranstaltungen/rnic/papers/WernhardMoeschel.pdf>.

23 See Article 4 second indent, point one of Law N°1/06 of 25 March 2010 on Competition Legal Regime.

enterprises that affect the commerce between parties to international treaties on competition ratified by Burundi or restraints of competition on the relevant market specified under the aforementioned treaties.<sup>24</sup>

The aforementioned exceptional extraterritorial application of the Competition Law of Burundi results in a potential divergence between that law and the EAC Competition Act. Burundi may claim the application of its Competition Law to restraints of competition originating in a Partner State that have effects within its jurisdiction; yet these are restraints of competition that are captured by the EAC Competition Act. Likewise, Burundi may seek to apply its Competition Law to restraints of competition originating in its territory that have effects on intra-Community commerce, yet these are restraints dealt with by the EAC Competition Act because they have a cross-border effect.

However, it is worth mentioning that this potential divergence between the EAC Competition Act and the Competition Law of Burundi is addressed by the principle of precedence of Community laws over similar national laws, as shown below.

### ***2.2.2 The Principles of Supranationality and Voluntarily Ceded Supremacy<sup>25</sup>***

A combination of these two principles results in precedence of the competition policy and law established at Community level over the individual Partner States' competition policies and law, whenever the competition issues involved have an EAC dimension.<sup>26</sup> These principles are reflected in Section 44 of the EAC Competition Act, 2006. Section 44 provides for exclusive original jurisdiction of the EAC Competition Authority in the determination of any violation of the Community competition law;<sup>27</sup> powers conferred upon the EAC Competition Authority to issue legally binding resolutions and decisions upon Partner States' authorities and subordinate courts;<sup>28</sup> and for obligation of Partner States to enforce decisions of the EAC Competition Authority.<sup>29</sup>

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24 *Ibid.*

25 Njoroge, *supra* note 18 at 6.

26 *Ibid.*

27 EAC Competition Act, 2006 s 44(1).

28 *Ibid* s 44(2).

29 *Ibid* s 44(5).

### 2.2.3 The Effects Principle

The effects principle refers to the international territorial reach of the EAC Competition Act, 2006. Indeed it suffices that a restraint of competition has effects within the EAC, regardless of the place of its origin,<sup>30</sup> be it outside or within the Community. It should be noted that this principle constitutes one of the common features of the US antitrust law and the European Union competition law.<sup>31</sup> However, as Wernhard Möschel contends, the difference remains as to the extent to which each system is able to assert itself on the “world-wide market”.<sup>32</sup> That is to say that the international territorial reach of the EAC Competition Act in practice depends on the extent to which globally acting undertakings are interested in the EAC market.

In this respect, it has already been mentioned that the Competition Law of Burundi may have extraterritorial application only under relevant international treaties to which the country is party, and that the potential mismatch between that law and the EAC competition law is resolved by way of application of the principle of precedence of the Community competition law over the national one.

### 2.2.4 The Duty of Loyalty Principle<sup>33</sup>

Under the EAC Competition Act, 2006, Partner States have the duty to cooperate and provide support in its implementation. This duty is expressed in section 43 of the Act, which provides that: “The [EAC Competition] Authority and the Partner States shall mutually co-operate in the implementation of the East African Community Competition Law. The Partner States shall support the activities of the Authority”.

In some respects, the Competition Law of Burundi can be viewed as being in line with this principle of the EAC Competition Act. This opinion is based on Article 11 of the national Competition Law which, as already highlighted, gives to the Burundian competition commission the mandate to serve as the national liaison organ with the COMESA competition authority, the EAC competition authority and any other regional integration organ in competition matters.

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30 Njoroge, *supra* note 18 at 6.

31 Möschel, *supra* note 22 at 3.

32 *Ibid.*

33 Njoroge, *supra* note 18 at 6.

### **2.2.5 Alignment of Partner States and EAC Competition Policies**

The EAC competition policy that the EAC Competition Act, 2006 seeks to implement requires that the Partner States' competition policies be brought in line with the Community policy.<sup>34</sup> This leads to the question whether the Competition Law of Burundi is in line with the EAC Competition Act, 2006. This requires taking into account a number of aspects of the two laws. In this section, Article 38 of the Competition Law of Burundi is worth mentioning. It provides that "Anti-competitive concerted practices may be considered as those practices considered as such under conventions or international agreements to which the Republic of Burundi is party".<sup>35</sup> This provision may be viewed as a mark of the reception of EAC competition law in the national jurisdiction of Burundi. However, as will be discussed below, this reception concerns only one aspect of competition law (anti-competitive concerted practices).

## **2.3 Competition Restraints Coverage**

As its title indicates, the EAC Competition Act, 2006 deals with the promotion and protection of fair competition within the Community, consumer welfare, the establishment of the East African Community Competition Authority and related matters.

The Act comprises nine parts. These are: (1) preliminary provisions, (2) competition restraints by enterprises (or prohibited anti-competitive concerted practices), (3) abuse of market dominance, (4) control of mergers and acquisitions, (5) issues pertaining to Partner States' subsidies, (6) public procurement, (7) enforcement procedure, (8) consumer welfare and (9) the EAC Competition Authority.

The Competition Law of Burundi covers (1) general provisions, (2) institutional framework for competition, (3) unfair commercial practices, (4) competition restraints practices (a distinction is made between individually or collectively effected practices), (5) regulation of prices (prohibition of illegal prices) and invoices (mandatory indications and invoice keeping), (6) commercial information, (7) criminal offences and sanctions in relation to unfair commercial practices and competition restraints, (8) procedure for application of criminal sanctions, and (9) transitional and final provisions.

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34 *Ibid.*

35 Translation from French by the author.

A comparison of competition restraints coverage in the two laws shows that some competition-related aspects are dealt with by both texts, while others are covered by only one text.

### *2.3.1 Aspects Dealt with by Both Laws*

Competition restraints dealt with by both legal texts are (1) the interpretation of key terms such as bid-rigging,<sup>36</sup> competition,<sup>37</sup> dominant position,<sup>38</sup> relevant market<sup>39</sup> and undertaking;<sup>40</sup> (2) substantial competition restraints issues, namely anti-competitive concerted practices,<sup>41</sup> abuse of market dominance,<sup>42</sup> mergers and acquisitions<sup>43</sup> and consumer welfare;<sup>44</sup> (3) institutional framework;<sup>45</sup> (4) the enforcement procedure;<sup>46</sup> and (5) criminal offences and sanctions in relation to competition restraints. Three of the aforementioned terms are crucial for a better understanding of competition law. These are “competition”, “undertaking” and “relevant market”.

In the EAC Competition Act, competition is defined as “the process whereby two or more persons: (a) supply or attempt to supply the same or **substitutable goods or services** to persons in the relevant market; or (b) acquire or attempt to acquire the same or substitutable goods or services from persons in the **relevant market**”.<sup>47</sup>

It flows from this definition that there can be competition only between two (or more) persons who acquire or supply substitutable goods or services in the relevant market.

Under the Competition Law of Burundi, competition is construed as “the freedom of any natural or legal person to undertake a commercial activity or exercise a profession or art as he or she deems fit subject to compliance with

36 EAC Competition Act, s 2; Competition Law of Burundi, art 37.

37 EAC Competition Act, s 2; Competition Law of Burundi, art 2,1.

38 EAC Competition Act, s 2; Competition Law of Burundi, art 44.

39 EAC Competition Act, s 2; Competition Law of Burundi, art 2,6.

40 EAC Competition Act, s 2; Competition Law of Burundi, art 2,3.

41 EAC Competition Act, ss 5-7; Competition Law of Burundi, arts 37-42.

42 EAC Competition Act, ss 8-10; Competition Law of Burundi, arts 43-45.

43 EAC Competition Act, ss 11-13; Competition Law of Burundi, arts 46-56.

44 EAC Competition Act, ss 28-36; Competition Law of Burundi, arts 65-69.

45 EAC Competition Act, ss 37-50; Competition Law of Burundi, arts 8-16.

46 EAC Competition Act, ss 21-27; Competition Law of Burundi, arts 12-16 and 99-127.

47 EAC Competition Act, s 2 [Emphasis added].

the laws and professional standards”.<sup>48</sup> This appears to be a definition of the freedom to compete rather than a definition of competition. However, the missing defining elements (**substitutable goods or services and relevant market**) are found in the definition of relevant market in the Competition Law of Burundi. It is defined as the general conditions under which suppliers and purchasers exchange goods. It implies that **the area within which competition between groups of suppliers and purchasers can be constrained** is delimited. It requires definition of the product and the geographical zone within which specified goods, purchasers, suppliers interact so as to fix price and production. It shall include all **goods and services that are reasonably substitutable** and all neighbouring competitors to whom consumers may turn in the short term if the constraint of competition or abuse causes a substantial increase in prices.<sup>49</sup>

Under the EAC Competition Act, 2006, the relevant market for competition is understood as “the area of competition between undertakings [... as determined by] the substitutability of goods and services for consumers in light of their intended use, characteristics and prices as well as by the substitutability of different sources of supply located in different regions”.<sup>50</sup>

As regards the definition of undertaking for competition purposes, the EAC Competition Act, 2006 refers to “any private or public entity, including natural and legal persons and affiliated groups of companies under joint control, irrespective of their legal form, carrying on any business”.<sup>51</sup> The Competition Law of Burundi uses the term enterprise and defines it in an equivalent way as undertaking, except that enterprise does not include natural persons.<sup>52</sup> Nonetheless, as already indicated, natural persons are included in the definition of competition under the Competition Law of Burundi.

It should be noted that under both laws, the undertaking or enterprise concerned is defined irrespective of the economic activity carried out or the sector in which it operates, except that under the EAC law, the activity must have a cross-border effect.<sup>53</sup> However, some economic activities are explicitly

48 Competition Law of Burundi, art 2,1 [Translation from French by the author].

49 Competition Law of Burundi, art 2,6 [Translation from French by the author].

50 Combined reading of Section 2 and Section 5 (5) of the EAC Competition Act, 2006.

51 EAC Competition Act, 2006 s 2.

52 Competition Law of Burundi, art 2,3.

53 See EAC Competition Act, s 4(1); Competition Law of Burundi, art 4 first indent.

excluded from the application of both laws. These refer to collective industrial bargaining and sovereign acts of the Partner States.<sup>54</sup>

To conclude this point, the two legal texts under consideration provide for a similar, or at least equivalent, definition of competition, undertaking and relevant market. However, as indicated below, there are quite a number of practices addressed under the Competition Law of Burundi as competition restraints that are not included in the restraints dealt with under the EAC law or are included in a different category of competition restraints (these are unfair commercial practices, competition restraints effected individually by enterprises, regulation of prices on a temporary basis and invoices, mandatory indications and invoice keeping).

### ***2.3.2 Aspects Dealt with Solely by the EAC Competition Act, 2006***

There are two aspects related to competition restraints that are addressed only by the EAC Competition Act, 2006. These are issues pertaining to Partner States' subsidies<sup>55</sup> and issues related to public procurement.<sup>56</sup>

In Burundi, there is no specific legislation on state subsidies, aids or grants. With regard to public procurement, the relevant law is Law N° 1/01 of 4 February 2008 on the Code of Public Procurement. The same law provides for the establishment of the Public Procurement Regulatory Authority (*Autorité de Régulation des Marchés Publics, ARMP*) and the National Directorate for Public Procurement Control (*Direction Nationale de Contrôle des Marchés Publics, DNCMP*) charged with the enforcement of that law.<sup>57</sup>

In Burundi, public procurement constitutes a big part of the overall national market. It is therefore important to guarantee free competition among all market participants from the EAC in public procurement. In this respect, the EAC Competition Act, 2006 prohibits discriminatory treatment of all suppliers and all products or services originating from or affiliated with other Partner

54 EAC Competition Act, s 4(2)(b)(c); Competition Law of Burundi, art 129.

55 EAC Competition Act, ss 14-17.

56 EAC Competition Act, ss 18-20.

57 Article 10 of the Law N°1/01 of 4 February 2008 on the Code of Public Procurement.



States,<sup>58</sup> technical specifications that create obstacles to trade between Partner States,<sup>59</sup> and non-transparent and discriminatory tendering procedures.<sup>60</sup>

It should be noted that some provisions of the Code of Public Procurement of Burundi violate relevant provisions of the EAC Competition Act, 2006. Indeed, Articles 65 and 66 provide for national preference to be given to the tender of a national contractor under the specified conditions which are, to some extent, discriminatory on the basis of the nationality of the bidder. Briefly, these Articles are based on the principle of national preference (not exceeding 10% of the amount of the tender for works and 15% for supplies and services), and provide for equal treatment of any bidder located in a Member State of a regional organisation to which Burundi is a party (in this case, the EAC) on condition that the Member State accords the same treatment to Burundian bidders (the reciprocity principle which is not required in the EAC), and the tender is not below the regional threshold defined in a relevant regional agreement.

Besides, a foreign bidder who wants to benefit from a national preference not exceeding 5% of the amount of the tender offer must subcontract at least 30% of the overall value of the market to a national company.

### ***2.3.3 Aspects Dealt with Solely by the Competition Law of Burundi***

There are five competition-related aspects that are only dealt with by the Competition Law of Burundi. These are: unfair commercial practices; competition restraints effected individually by enterprises;<sup>61</sup> regulation of prices (on a temporary basis) and invoices (mandatory indications and invoice keeping); criminal offences and sanctions in relation to unfair commercial practices and competition restraints effected individually; and the procedure for application of criminal sanctions.

After this general overview of the Burundian and Community competition laws, the rest of this paper will deal with substantive competition aspects covered by both texts. These are anti-competitive concerted practices, abuse of market dominance, anti-competitive mergers and acquisitions, and consumer welfare.

58 EAC Competition Act, s 18(1).

59 *Ibid* s 18(2).

60 *Ibid* s 18(1).

61 These are competition restraints practices which are unilaterally effected by an enterprise (as opposed to concerted practices), such as the refusal to sell, dumping practices, resale at loss, see Article 21 of the Competition Law of Burundi.

### 3. SUBSTANTIVE ASPECTS OF THE EAC COMPETITION ACT AND THE COMPETITION LAW OF BURUNDI

In most jurisdictions, there are four categories of substantive competition restraints, namely restrictive horizontal conduct, restrictive vertical conduct, abuse of market dominance and anti-competitive mergers and concentrations among firms.<sup>62</sup> All four categories are addressed by the EAC Competition Act, 2006. Horizontal and vertical conduct are treated as prohibited anti-competitive concerted practices,<sup>63</sup> abuse of market dominance is dealt with under Part III of the Act<sup>64</sup> and mergers and acquisitions are addressed under Part IV of the Act.<sup>65</sup> In addition to these four categories, the EAC Competition Act also deals with consumer welfare in its Part VIII.<sup>66</sup> As indicated above,<sup>67</sup> the above categories of substantive competition restraints are also addressed in the Competition Law of Burundi.

#### 3.1 Anti-Competitive Concerted Practices

Under the EAC Competition Act, 2006, concerted practices are prohibited if they have, or are intended to have, “an anti-competitive effect in the relevant market”.<sup>68</sup> A concerted practice is understood as “any agreement, arrangement or understanding, formal or informal, written or oral, open or clandestine, between competitors”.<sup>69</sup> These concerted practices refer to agreements between undertakings or firms often discussed in competition-related doctrine.<sup>70</sup> The EAC Competition Act, 2006 deals with them under the rightly chosen title “Restraints By Enterprises”.

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62 Bowman Gilfillan Africa Group, Engen Petroleum Limited. International Business Division, *Competition Law Training* (unpublished).

63 EAC Competition Act, ss 5-7.

64 *Ibid* ss 8-10.

65 *Ibid* ss 11-13.

66 *Ibid* ss 28-36.

67 *Ibid* s 2.3.1

68 EAC Competition Act, s 5(1) [Emphasis added].

69 *Ibid* s 2.

70 See for instance Alden F Abbott, *A Brief Comparison of European and American Antitrust Law* (The University of Oxford Centre for Competition Law and Policy, The Competition Law and Policy Guest Lecture Programme, Paper (L), 2015) at 3.

However, the Act makes a distinction between concerted practices that are absolutely prohibited and others that may be exempted if the relevant Authority permits them.<sup>71</sup>

### ***3.1.1 Absolutely Prohibited Concerted Practices***

Six concerted practices are absolutely prohibited. They are: (1) price-fixing,<sup>72</sup> (2) bid-rigging and collusive tendering,<sup>73</sup> (3) market-sharing (through allocation of market or customer),<sup>74</sup> (4) limitation of production or supply through “quantitative restraints on investment, input, output or sales”,<sup>75</sup> (which applies only if the combined market share of the competitors involved in the concerted practices exceeds 10% of the relevant market),<sup>76</sup> (5) excluding competitors from access to the market or from access to an association or arrangement which is crucial for competition,<sup>77</sup> and (6) restricting movement of goods within the EAC,<sup>78</sup> (this applies only if the combined market share of the competitors involved in the concerted practices exceeds 10% of the relevant market).<sup>79</sup>

The first four practices (price-fixing, bid-rigging and collusive tendering and market-sharing) are often considered as “the most serious cartel activities.”<sup>80</sup>

### ***3.1.2 Prohibited Concerted Practices that May Be Permitted***

Prohibited concerted practices which may be permitted are as follows: First, joint research and development, specialisation of production or distribution and standardisation of products or services. This concerted practice may be permitted if the following two conditions are met: (1) the combined market share of the competitors involved in this practice does not exceed 20% of the relevant market, and (2) it does not take any of the forms of absolutely prohibited

71 EAC Competition Act, s 6.

72 *Ibid* s 5(2)(a).

73 *Ibid* s 5(2)(b).

74 *Ibid* s 5(2)(c).

75 *Ibid* s 5(2)(d) and 6(1) [Emphasis added].

76 *Ibid* s 6(1).

77 *Ibid* s 5(2)(e).

78 *Ibid* s 5(2)(f) and 6(1).

79 *Ibid* s 6(1).

80 Office of Fair Competition (UK), *A Quick Guide to Competition and Consumer Protection Laws that Affect your Business* at 6. Online: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284428/ofc911.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284428/ofc911.pdf).

concerted practices mentioned above.<sup>81</sup> Second, any concerted practice that restricts exports to or imports from foreign countries, provided that it has or intends to have anti-competitive effects on the relevant market within the EAC or restricts the access of Community undertakings to exports or imports.<sup>82</sup>

This concerted practice and any other category of concerted practice may be exempted if the following four conditions are satisfied: (1) it is “limited to objectives which lead to an improvement of production or distribution”, and (2) its beneficial effects outweigh its negative effects on competition, and (3) the combined market share of the competitors involved in the practice does not exceed 20% of the relevant market, and (4) the concerted practice does not take any of the forms of absolutely prohibited practices.<sup>83</sup>

In sum, the EAC borrows from both the US and EU competition laws in respect of anti-competitive agreements between firms. The first three absolutely prohibited concerted anti-competitive practices (price fixing, market allocation and bid-rigging) correspond to the “naked agreements among competitors” named in section 1 of the Sherman Act of the US.<sup>84</sup>

The EAC adds three more practices justified by the peculiar elements of its context. All these absolutely prohibited practices should, as in US practice, be considered as “illegal per se”, because they have “no possible efficiencies and are only directed at reducing competition”.<sup>85</sup>

On the contrary, there are other concerted practices which may bring about economic efficiencies though they have anti-competitive effects. For this category of practices, the EAC follows the US model in applying the “anti-trust rule of reason” which calls for a weighing of the efficiencies created against the anti-competitive effects of those practices.<sup>86</sup> If the beneficial effects (efficiencies) outweigh their negative effects on competition, the practices can be permitted by the competent authority.<sup>87</sup>

81 EAC Competition Act, s 6(2) and 6(4).

82 *Ibid* s 5(3).

83 *Ibid* s 6(3) and 6(4).

84 Abbott, *supra* note 70 at 3.

85 *Ibid*.

86 *Ibid* at 4.

87 See Section 6(3) of the EAC Competition Act, 2006. This condition is one of the four cumulative conditions, the others being that the practice is limited to the objectives of improving production or distribution, that the market share of the competitors involved does not exceed 20% of the relevant market and that the practice does not take any of the forms of “naked” anti-competitive concerted practices.

From the EU, the EAC borrows the improvement of production or distribution of goods as a condition for exempting anti-competitive concerted practice.<sup>88</sup> Therefore, in the EAC, the improvement of production or distribution of goods should be included in the “rule of reason” test in weighing the efficiencies against the anti-competitive effects of the practices concerned.<sup>89</sup>

As regards anti-competitive concerted practices in Burundi (“*ententes*”), the competition law provides for their prohibition, like the EAC.<sup>90</sup> Anti-competitive concerted practices are agreements and alliances, express or implied, between undertakings that have, or may have, the effect of preventing, restricting or distorting competition in the national market or a substantial part of the national market.<sup>91</sup>

Similar to the EAC Competition Act, the Competition Law of Burundi provides for a list of prohibited anti-competitive concerted practices. These are: (1) restricting the access of competitors to the market, (2) interference with price setting through market forces, by falsely increasing or decreasing prices, (3) distorting the markets allocation, distribution channels and sources of supply, (4) refusal to sell goods or to provide services to a potential purchaser or refusal to purchase goods or services from a potential supplier, (5) restricting the production capacity or controlling production, markets (quantity of manufactured products, products sold on the market, rented or transported), restricting investment or technical development, and (6) collusive tendering and bid-rigging.<sup>92</sup>

Five of the six elements from this list of anti-competitive concerted practices are also found on the list established under the EAC Competition Act, 2006 as “naked” anti-competitive agreements that are absolutely prohibited. The remaining element (refusal to deal) is dealt with under the EAC Competition Act as one feature of exclusion of competitors by an abusing market-dominant undertaking.<sup>93</sup>

88 Abbott, *supra* note 70 at 4. For the EAC, see Section 6(3) of the EAC Competition Act, 2006.

89 See Section 6(3) of the EAC Competition Act, which reads as follows: “*The authority may exempt any other category of concerted practice, provided the concerted practice is limited to **objectives which lead to an improvement of production, or distribution and whose beneficial effects, in the opinion of the Authority, outweigh its negative effects on competition***”. Emphasis added.

90 Competition Law of Burundi, art 37, first indent.

91 *Ibid.*

92 *Ibid.*

93 See EAC Competition Act, s 9(2)(a).

However, under the Competition Law of Burundi, all the above-listed practices may be permitted by the relevant authority (National Independent Competition Commission) by applying the above-mentioned “rule of reason”. Indeed, the law provides that the Commission may exempt those practices if the following three conditions are met: (1) they contribute to economic efficiency through reduction of prices of a good or a service, improvement of quality or efficiency gain in the production or distribution of the good or service,<sup>94</sup> (2) the efficiency associated with the practices concerned cannot be achieved in any other way, and (3) the practices concerned are less restrictive of competition than any other agreements which have the same efficiency gain.<sup>95</sup>

This is an important divergence between the EAC Competition Act and the Competition Law of Burundi, as these anti-competitive concerted practices may be admitted in Burundi while they are not permitted under the EAC Act.

Although, as indicated above, all anti-competitive concerted practices defined under the EAC Act may also be considered as prohibited in Burundi,<sup>96</sup> it is yet to be seen how the five practices prohibited under both laws but permissible under the prescribed conditions in Burundi (“rule of reason”<sup>97</sup>) will be treated in Burundi. If Burundi applies its own law and permits them, it will be violating the EAC law. If Burundi complies with the principle of precedence of EAC law over similar national law, it will be applying double standards in allowing them if they do not have a cross-border effect and absolutely prohibiting them if they do. If Burundi considers these practices as unacceptable even under national law, it will have to amend its law in this respect.

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94 Competition Law of Burundi, art 39 first indent.

95 *Ibid* art 39 2nd indent.

96 *Ibid* art 38.

97 *Ibid* art 39 1st and 2nd indents.

### 3.2 Abuse of Dominant Position

The abuse of a dominant position on the market is also prohibited under the competition law of most jurisdictions. It should be noted that the problem is not the fact of being in a dominant position on the market. The only issue concerned is the abuse of such a position. So the first step should be to find out what factors constitute a dominant position for a firm, before investigating the conduct which is prohibited as an abuse of the dominant position.

Under the EAC Competition Act, 2006, a dominant position is defined as “a position of **economic strength** enjoyed by one undertaking individually or by more undertakings collectively **which enables them to prevent effective competition** being maintained in the relevant market by giving the undertaking or undertakings **the power to behave to a material extent independently of its or their competitors, customers and consumers** and in particular **to foreclose other undertakings from competing in the relevant market.**”<sup>98</sup>

Under the Competition Law of Burundi, no definition of a dominant position is provided. It is to be inferred from the conduct which is prohibited and should be understood as the position which allows a firm to adopt such behaviour.

There is still a debate in the relevant doctrine and case law of what conduct of a dominant firm should be prohibited for the sake of competition.<sup>99</sup> Two precedents can serve to illustrate this. One is the *Trinko* case decided by the US Supreme Court according to which only exclusionary conduct by a market-dominant undertaking is forbidden.<sup>100</sup> And exclusionary conduct has constantly been defined by the US Supreme Court as conduct that “excludes rivals on some basis other than efficiency” or “that makes no economic sense but for its tendency to eliminate or lessen competition”.<sup>101</sup> Commenting on this, Abbott contends that “a conduct by a dominant firm that makes economic sense in that it promotes that firm’s efficiency does not violate Section 2 of the Sherman Act”.<sup>102</sup>

98 EAC Competition Act, s 2. Emphasis added.

99 Abbott, *supra* note 70 at 9–12.

100 *Verison Communications, Inc. v Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398 (2004).

101 *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

102 Abbott, *supra* note 70 at 9.

The second case is *Michelin I* decided by the European Court of Justice. That Court asserts that: “A finding that an undertaking has a dominant position ... simply means that, irrespective of the reasons for which it has a dominant position, the undertaking concerned **has a special responsibility not to allow its conduct to impair genuine undistorted competition** in the common market”.<sup>103</sup>

In Abbot’s opinion, this shows that there are different approaches to abuse of market dominance in the US and in the EU. While under US law, conduct by a dominant firm that promotes its own efficiency is not viewed as an abuse even if the conduct eliminates its competitor or lessens competition, “a dominant firm’s verifiable efficiency reasons for conduct that promotes the firm’s dominance are looked at askance under European case law”.<sup>104</sup>

Under the EAC Competition Act, abuse of a dominant position consists in the following acts which are all prohibited without any exemption: (1) consumer exploitation, (2) exclusion of competitors (including the intention to exclude them), (3) preventing a competitor from access to the market, forcing the exit of a competitor, price fixing or any other anti-competitive restraints, preventing distributors from distributing the products of competitors, (4) restricting importations or production of goods or services on the market to the prejudice of consumers, falsely maintaining high prices by increasing production costs for competitors, (5) refusal to deal, tying arrangements, applying discriminating selling conditions, and wrongful termination of commercial relationships,<sup>105</sup> (6) fixing resale prices or conditions, (7) foreclosure of consumers or competitors from access to sources of supply or from access to outlets, (8) restricting movement of goods or services between different geographical areas, and (9) using an intellectual property right in a way that goes beyond the limits of its legal protection.<sup>106</sup>

Consumer exploitation is effected by: (1) imposing unfairly high selling or unfairly low purchasing prices or other unfair trading conditions, (2) limiting production or technical development and innovation to the prejudice of consumers, and (3) discriminating against consumers or suppliers on the basis of

103 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, ECJ, 9.11.1983, Case 322/81, ECLI:EU:C:1983:313 at para 57 – *Michelin I*. Emphasis added.

104 Abbott, *supra* note 70 at 10.

105 Competition Law of Burundi, art 44.

106 EAC Competition Act, s 10(1).



non-commercial criteria such as nationality or residence.<sup>107</sup> It should be noted that the provision on consumer exploitation also applies to small or medium-sized undertakings that are dependent on a dominant firm.<sup>108</sup>

Exclusion of competitors<sup>109</sup> is effected by: (1) predatory pricing (i.e. selling goods or services below their marginal or average variable cost), (2) price squeezing, which means the “pricing practice of an undertaking which is operating in an upstream market as well as in a downstream market, and charges its consumers in the upstream market prices which do not allow such consumers to compete in the downstream market”,<sup>110</sup> (3) cross subsidisation, which means “the internal transfer within an undertaking of profits resulting from one line of business to a less profitable line of business”,<sup>111</sup> and (4) causing competition harm to competitors by refusal to deal, refusing to give a competitor access to an essential facility, tying or bundling arrangements,<sup>112</sup> and discriminating (unreasonably) against customers or suppliers. It is noteworthy that this provision on competitive harm also applies to small or medium-sized undertakings that are dependent on a dominant firm.<sup>113</sup>

Under the Competition Law of Burundi, abuse of market dominance consists in abusive exploitation by a dominant firm that has the effect of preventing, restricting or distorting free competition.<sup>114</sup> Like the EAC Competition Act, 2006, this law gives a non-exhaustive list of conducts which constitute abuse. These are: (1) preventing a competitor from access to the market, forcing the exit of a competitor, price fixing or any other anti-competitive restraints, (2) preventing distributors from distributing the products of competitors, (3) restricting importation or production of goods or services on the market to the prejudice of consumers, falsely maintaining high prices by increasing production costs for competitors, and (4) refusal to deal, tying arrangements, applying

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107 *Ibid* s 8(1).

108 *Ibid* s 8(2).

109 *Ibid* s 9(1).

110 *Ibid* s 2.

111 *Ibid* s 2.

112 This means selling “on condition that the buyer purchases separate goods or services unrelated to the object of the original contract, or forcing a buyer to accept a condition unrelated to the object of the original contract”. See Bowman Gilfillan Africa Group, *supra* note 62.

113 EAC Competition Act, s 9(3).

114 Competition Law of Burundi, art 43.

discriminating selling conditions, and wrongful termination of commercial relationships.<sup>115</sup>

Apart from the fact that the list of abusive conducts of a dominant firm in the Competition Law of Burundi is less developed than that in the EAC law,<sup>116</sup> all the abusive conducts described in the Competition Law of Burundi can be exempted if any of the following conditions are met: the conducts have the effect of improving production (in terms of costs and quality); the conducts have the effect of improving the distribution of services or consumer welfare; the conducts have the effect of promoting technical and economic progress; the conducts allow consumers a fair share of the resulting benefit; the conducts are indispensable to the attainment of the aforementioned objectives; and the conducts do not eliminate any form of competition on a substantial part of the relevant market for the concerned products.<sup>117</sup>

Again, this mismatch between the two laws under consideration in respect of abuse of market dominance erects a barrier to the harmonisation of competition laws within the EAC. If such a large number of recognised abusive conducts of a dominant firm can be permitted on the Burundian market upon meeting the prescribed conditions that are only sensitive to a national benefit, while they are prohibited for economic activities which have cross-border effect, the harmonisation sought cannot be achieved.

### 3.3 Mergers and Acquisitions Control

Certain transactions between firms have the potential to harm or lessen competition on the market. This is the case for mergers and acquisitions. For this reason, competition regulators around the world are often involved in mergers and acquisitions so as to ensure that they do not harm competition.

Under the EAC Competition Act, 2006, acquisition is: “any acquisition by an undertaking of direct or indirect control of the whole or part of one or more other undertakings, irrespective of whether the acquisition is effected by merger, consolidation, take-over, purchase of securities or assets, contract or by

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115 *Ibid* s 44.

116 Overall, however, the conducts are similar though the terminology is different to some extent.

117 Competition Law of Burundi, art 45. Only the last two conditions are cumulative.

any other means”.<sup>118</sup> Merger is defined as “an amalgamation or joining of two or more firms into an existing firm or to form a new firm”.<sup>119</sup>

The Competition Law of Burundi uses the term “concentration” but its definition is equivalent to that given for mergers and acquisitions under the EAC Competition Act, since concentration is defined as the situation resulting from mergers and acquisitions or any other form of amalgamation.<sup>120</sup>

Under the EAC Competition Act, an obligation is imposed on every person intending to execute a merger or an acquisition to notify the transaction as soon as the respective agreement has been reached (irrespective of the turnover thresholds of the merger or other criteria).<sup>121</sup> The coming into effect of the agreement is subject to approval of the proposed merger or acquisition by the competent authority.<sup>122</sup> The timeframe for approval is 45 days,<sup>123</sup> after which the transaction is deemed approved if the competent authority has failed to make a decision.<sup>124</sup> Failure to follow this procedure constitutes an offence<sup>125</sup> and the transaction will be void.<sup>126</sup>

The criteria for rejecting a proposed merger or acquisition are (1) the creation of or strengthening of an already existing dominant position and (2) substantially lessening competition in the relevant market.<sup>127</sup> The undertaking or undertakings aggrieved by the rejection of the proposed merger or acquisition have the right to lodge an appeal before the EAC Council. In deciding on the appeal, the Council may approve the merger or acquisition initially rejected by the EAC Competition Authority only if the purpose of the proposed merger or acquisition “is to fulfill an **overriding public interest**”.<sup>128</sup>

In Burundi, the Competition Law provides for a similar procedure to control anti-competitive mergers and acquisitions, with some difference in terms of a minimum threshold for strict control, extended timeframe for deciding on

118 EAC Competition Act, s 2.

119 *Ibid* s 2.

120 Competition Act of Burundi, arts 46–47.

121 EAC Competition Act, s 11(1)(2).

122 *Ibid* s 12(1).

123 *Ibid* s 12(2).

124 *Ibid* s 12(3).

125 *Ibid* s 12(4).

126 *Ibid* s 12(5).

127 *Ibid* s 13(1).

128 *Ibid* s 13(4) [Emphasis added].

the proposed merger and acquisition and justification of permissible anti-competitive mergers or acquisitions.

More precisely, the Ministry in charge of commercial affairs is yet to issue an ordinance to fix a threshold for the combined annual turnover of the firms involved in a merger or acquisition transaction.<sup>129</sup> Below such a threshold, a merger or acquisition can be carried out without any prior notification to the competition regulator.<sup>130</sup> However, the undertaking concerned must notify the regulator within 15 days after realisation of the transaction, so as to allow him to investigate whether the transaction will harm competition to an extent which is unacceptable. The regulator may also carry out the investigation on his own initiative.<sup>131</sup>

Undertakings whose turnover is above the fixed threshold must report the proposed merger or acquisition to the competition regulator and stay the process for a period of three months from the date of notification.<sup>132</sup> If the regulator fails to make a decision within these three months, he can still take a provisional measure and inform the interested undertakings accordingly.<sup>133</sup> A final decision must be taken within four months of the date of the provisional decision, after which the merger or acquisition will be deemed approved.<sup>134</sup> This time frame for reaching a final decision is too long.

The criteria for not approving a proposed merger or acquisition are similar to those defined in the EAC Competition Act (creation or strengthening of an already existing dominant position or substantially lessening competition in the relevant market).<sup>135</sup>

However, under the Competition Law of Burundi and unlike the Competition Act of the EAC, any merger or acquisition that is anti-competitive may be approved if it meets the following conditions: (1) the merger or acquisition brings about efficiency gains to the national economy which outweigh its anti-competitive effects on the relevant market, and (2) the merger or acquisition is indispensable for that gain of efficiency.<sup>136</sup> Unlike for the EAC,

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129 Competition Act of Burundi, art 49.

130 *Ibid* art 50.

131 *Ibid* art 50.

132 *Ibid* art 49.

133 *Ibid* art 49.

134 *Ibid* art 52 first indent.

135 *Ibid* art 49.

136 *Ibid* art 58.

there is no reference to an overriding public interest in exempting an anti-competitive merger or acquisition.

This is another discrepancy between the Competition Law of Burundi and the Competition Act of the EAC which adversely affects the process of harmonisation of competition laws in the EAC. Unlike for anti-competitive concerted practices, there is no provision referring to the reception of Community merger and competition control standards in the national jurisdiction.

### 3.4 Consumer Welfare

At the beginning of this section dedicated to the discussion of consumer welfare related provisions of the EAC Competition Act and the Competition Law of Burundi, it should be noted that the efficiency associated with healthy competition is expected to yield benefits in terms of consumer welfare. As rightly contended by Bowman Gilfillan, “Competition law is premised on the assumption that free and unfettered competition is the most efficient way of ensuring **a supply of the highest quality of goods and services at the lowest possible prices.**”<sup>137</sup>

However, both the EAC Competition Act and the Competition Law of Burundi have provisions specifically dedicated to the promotion of consumer welfare, in addition to the other provisions aimed at ensuring robust competition within the Community.

Under the EAC law, these provisions relate to: (1) false representations in connection with supply of goods or services,<sup>138</sup> (2) unconscionable conduct in consumer transactions in relation to supply of goods or services,<sup>139</sup> (3) publication of dangerous goods,<sup>140</sup> (4) compliance with safety standards and unsafe goods,<sup>141</sup> (5) product information standards,<sup>142</sup> and (6) information about unidentified manufacturer if the aggrieved person does not know the supplier of the concerned goods.<sup>143</sup>

137 Bowman Gilfillan Africa Group, *supra* note 62 [Emphasis added].

138 EAC Competition Act, s 28.

139 *Ibid* s 29.

140 *Ibid* s 30.

141 *Ibid* s 31.

142 *Ibid* s 32.

143 *Ibid* s 36.

Under the Competition Law of Burundi, the provisions presented as relating to consumer welfare address unfair dealings rather than consumer welfare issues. They refer to (1) right information on the purchase conditions, especially relating to prices of goods or services,<sup>144</sup> (2) advertisement of prices, general sales conditions, discount and limitation of liability,<sup>145</sup> and (3) information about the origin of the product and the date of expiry of the products.<sup>146</sup>

If the Competition Law of Burundi had been inspired by the EAC Competition Act in this respect, it would have filled the gap caused by the lack of specific regulations on consumer protection in Burundi.

#### 4. CONCLUSION

This examines the consistency between the EAC Competition Act and the Competition Law of Burundi in the broad perspective of harmonisation of competition laws within the EAC. It explores the impact of the EAC Competition Act on the Competition Law of Burundi and vice versa, with a view to highlighting the discrepancies between the two laws and the extent to which they affect the harmonisation drive.

The paper firstly analyses the objectives of each law, its underpinning principles and the competition restraints that it covers. This analysis reveals that there are minor differences in the objectives pursued by both laws, and some discrepancies in respect of the principles underpinning the two legal texts, particularly the principle of aligning the Partner State's competition policy with that of the EAC. Moreover, the competition restraints covered by the two laws differ to a great extent, with Burundi including provisions on unfair commercial practices, and regulation of prices and invoices, and making a difference between competition restraints effected individually and those effected collectively.

Secondly, substantive competition provisions are investigated. These are anti-competitive agreements between firms, abuse of market dominance, merger and acquisition control, and consumer welfare. A number of mismatches between the two laws can be found in respect of each area of competition law. These mismatches may be influenced by the difference between the legal tradition of Burundi (civil law) and the legal family of most of the other EAC Partner States (common law, as in Kenya, Tanzania and Uganda; Rwanda joined the

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144 Competition Law of Burundi, art 65.

145 *Ibid* art 66.

146 *Ibid* art 68.

Commonwealth in November 2009 and is still in the process of reforming its legal system from civil law to common law).

There is nothing to indicate that the EAC Competition Act, 2006 inspired the drafters of the 2010 Competition Law of Burundi. The discrepancies between these laws, as well as the resulting obstacles to harmonisation of competition laws, should be addressed without further delay for the benefit of the Community and its people.





# **HARMONISATION OF COMPETITION LAW REGIMES IN THE EAST AFRICAN COMMUNITY: CHALLENGES AND PROSPECTS**

**DANIEL BAITWABABO\***

## **1. INTRODUCTION**

Competition law is a relatively new phenomenon in the East African Community (EAC) and as the region moves towards a political and economic federation, harmonisation of competition law regimes is on the agenda, so as to have an effective and meaningful regional economic community. This need, however, has been slowed down by a number of bottlenecks that lie on the road towards harmonisation, including divergent legal systems in the EAC, limited intervention by national courts in cross-border jurisdiction, occasional conflicts between competition authorities and courts, and limited resources.

Despite these challenges, different sectors, like the telecommunication industry, have looked on the brighter side and come up with draft working principles that can help in addressing the hiccups hindering harmonisation. Their proposals include application of the essential facilities doctrine and of the protection of competition principle.

Are the challenges real? Can these proposed principles help in addressing the challenges? How practicable are these principles? These are some of the critical questions this paper seeks to answer. This paper addresses the bottlenecks faced in harmonisation of competition law and proposes possible solutions towards achieving full harmonisation of competition law regimes in the EAC.

## **2. MAJOR CHALLENGES IN HARMONISATION OF COMPETITION LAW REGIMES IN THE EAC**

Harmonisation of competition law regimes in the EAC has faced numerous legal, social and political challenges. To begin with, the Partner States in the EAC have different legal systems that are cumbersome to harmonise. According to Legrand, the presence of uniform rules does not translate into uniform laws because the legal *mentalité* is different from one jurisdiction to another

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and should be interpreted according to the cultural and national setup.<sup>1</sup> In distinguishing the two types of legal system, Legrand argues that Common Law system reasons inductively with an emphasis on facts and related case law, while in the Civil Law system, systematisation plays a crucial role.<sup>2</sup> A case in point is that Kenya, Uganda and Tanzania have legal systems modelled on Common Law, whereas Rwanda and Burundi use Civil Law. This sharp divergence in the legal systems creates serious holdups in any attempt to have the two legal systems harmonised.

In a bid to regulate competition regionally, the EAC enacted the EAC Competition Act of 2006 and its subsequent amendments. Despite gazetting this law to come into force in December 2014, its proposed enforcement is raising more questions than answers. The emerging questions include: Have the Partner States put in place legal instruments to confer precedence of Community law over similar national law?<sup>3</sup> How can the law be enforced without a properly functioning Competition Authority with duly appointed commissioners? How are commissioner to the EAC Competition Authority appointed since some Partner States have no competition authorities in their own jurisdictions? How will this EAC Competition Act take precedence over national laws if some Partner States have no similar national laws?

I am of the opinion that, as it stands, the EAC Competition Act is in force theoretically rather than practically, and its enforcement is still far off, unless the Partner States speed up the process of conferring precedence of Community law over similar national law and quickly iron out the hiccups involved in enforcement of this law. In addition, many stakeholders have limited or no knowledge of the existence of this Act. Mugisa argues that lack of awareness and domestication of the EAC Competition Act and its subsequent enforcement remains a major challenge in the harmonisation of competition laws in the EAC.<sup>4</sup> This is because some institutions in the region are not even aware of the existence of the EAC Competition Act and therefore cannot properly implement it. Despite the enactment of national legislation conferring upon

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1. Pierre Legrand, 'Against a European Civil Code' (1997) 60 *Modern Law Review* 44; Jan M Smits, 'Law Making in the European Union: On Globalisation and Contract Law in Divergent Legal Cultures' (2007) 67 *Louisiana Law Review* 1181 at 1194

2. Legrand, *ibid.*

3. Article 8(5) of the Treaty for the Establishment of the East African Community, which was signed on 30<sup>th</sup> November 1999 and entered into force on 1<sup>st</sup> July 2000, requires Partner States to put in place necessary legal instruments to confer precedence of Community law over similar national law.

4. Everist Mugisa et al., *An Evaluation of the Implementation and Impact of the East African Community Customs Union - Final Report* (2009).

legislation and regulations of the Community the force of law within Partner States' territories,<sup>5</sup> as provided in the Treaty, there has been slow progress in making the necessary legal instruments to confer precedence of Community law over similar national law. This may be due to the fact that some Partner States take longer in assessing the likely impact of these laws on their domestic laws, and others are reluctant to cede their sovereignty, thereby slowing down the whole process of harmonisation of laws in the region.

Whenever there is suspected trade malpractice in one Partner State originating from another Partner State, there is limited co-operation from the domestic courts in dealing with such cross-border trade malpractices. Domestic courts tend not to intervene in respect of the jurisdiction of the other country and the EAC Competition Act offers little or no help in this aspect. In agreement, Roger and MacCulloch argue that limited court intervention in cross-border jurisdiction is a cause of worry in harmonisation of competition law regimes.<sup>6</sup> Roger and MacCulloch further argue that in case an anti-competitive practice originates from within the jurisdiction, courts are inclined to take a more lenient view of such practice as opposed to practices originating from outside.<sup>7</sup> This leads to double standards that greatly hamper harmonisation of the law regimes. The double standards outlined above, the authors argue, are a result of each jurisdiction setting different goals of competition law and can be overcome if a unified goal of competition law is set.<sup>8</sup>

In Partner States, the national competition authorities tend to exercise original jurisdiction on all matters relating to competition law, thereby causing occasional conflicts over jurisdiction with the ordinary courts. Different courts require that all matters should be adjudicated upon by national courts and yet some competition authorities enjoy a certain level of monopoly in competition-related matters. This leads to collision and squabbles for supremacy amongst relevant national authorities and courts since there is no effective and overriding supranational authority as in the case of the European Union. This hampers the process of harmonisation of competition laws, as argued by Harris.<sup>9</sup>

5 Article 8 (2)(b) of the EAC Treaty requires Partner States to confer upon legislation and regulations of the Community the force of law within their territory. See also Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge: Cambridge University Press, 2011) at 192-193.

6 Barry Roger & Angus McCulloch, *Competition Law and Policy in the EC and UK* (London: Routledge-Cavendish, 4th ed., 2009).

7 *Ibid.*

8 *Ibid.*

9 Stephen Harris, *ABA Section of Antitrust Law, Competition Laws outside the United States* (2001).

The economies of the EAC Partner States differ in size, which poses a problem in harmonising competition regimes in the region. This is due to the fact that larger economies fear the risk of losing benefits to the smaller economies and therefore there is a tendency of either undermining harmonisation or striving to maintain the *status quo* so that the bigger economies can keep enjoying the benefits.<sup>10</sup> In addition, the level of legal and regulatory infrastructure development differs and some countries do not have adequate competition culture, law and infrastructure to address these issues.<sup>11</sup> For example, Tanzania and Kenya already have competition law implementation infrastructure in place, whereas Uganda has neither a competition law nor the infrastructure to address issues relating to competition law. In Uganda, the relevant provisions are scattered in various pieces of legislation used to regulate particular sectors, making harmonisation difficult.

This position has been further amplified by Round, who outline the challenges to harmonisation of competition laws, including differences in the size of economies, history, infrastructure, laws, enforcement mechanisms, political conventions, and social and economic goals.<sup>12</sup> The authors further argue that if the region considering harmonisation comprises developing countries, a major concern would be the treatment of state-owned enterprises, or recently privatised ones. Each economy has its own problems in dealing with such enterprises in transition, and these will be magnified greatly in a harmonised environment. The authors further argue that moving towards a fully harmonised competition law may be hampered by constitutional problems of operating one law across many jurisdictions, including limitations on sharing information, difficulties of investigation and enforcement across borders, and the nature and authority of appeals against any decision.<sup>13</sup> The authors additionally argue that even with harmonisation of statutory language and general policy approach between two national laws there is room for differences in their interpretation and application. This is because there are two separate and independent judicial systems and no supranational judicial authority or appeal procedure.<sup>14</sup>

10 Jurgita Malinauskaite, 'International Competition Law Harmonisation and the WTO: Past, Present and Future' (Paper presented at the Workshop 'Theory and Practice of Harmonisation' held at the IALS, on 24–26 June 2008).

11 *Ibid* at 13.

12 David K Round et al., 'Australasian Competition Law: History, Harmonisation, Issues and Lessons' at 80. Online: <http://search.ror.unisa.edu.au/media/researcharchive/open/9915912016801831/53109350170001831>.

13 *Ibid* at 69.

14 *Ibid*.

A case in point is that whereas Uganda and Kenya predominantly use English, Tanzania uses Kiswahili, and Rwanda and Burundi use French for their legislation. Maximum use should be made of the East African Court of Justice (EACJ), which is supposed to be the supranational court in the region, capable of interpreting the EAC Treaty and handing down binding judgments on Partner States.<sup>15</sup> However, as it stands, the EACJ is facing numerous constraints. These include the fact that the court operates on an *ad hoc* basis with respect to its judges, which implies the court does not have enough time to dispense justice due to short tenure of judges.<sup>16</sup> The court also has limited jurisdiction, and there is limited knowledge of Community law by different stakeholders, including lawyers and the judiciary.<sup>17</sup> All these factors severely restrict the operation of the EACJ, resulting into little contribution towards the development of Community law and jurisprudence. I am of the settled opinion that if the EACJ is fully supported and empowered, then it could hand down a uniform interpretation of Community laws and act as a reference point for the development of Community law and jurisprudence, an aspect currently lacking.

The Consumer Unity and Trust Society (CUTS)<sup>18</sup> argues that one of the challenges to harmonisation of competition law is the fact that the 7-Up<sup>19</sup> countries differ in terms of their geographical locations, population sizes, and specific developmental challenges. These countries are at different stages in terms of the development of their competition regimes and some of them do not have specific competition legislation in place. Further, CUTS argues that some countries have different levels of experience as regards the implementation of competition policy and therefore, it is not easy to have a harmonised competition law regime.<sup>20</sup>

15 Article 33 (2) of the EAC Treaty states that decision of the EACJ on interpretation and application of the Treaty shall have precedence over decisions of the national courts on a similar matter. See also John E Ruhangisa, 'The East African Court of Justice: Ten Years of Operation. Achievements and Challenges' (Kampala, 2011) at 21–22. Online: <http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf>.

16 See Harold T Nsekela, 'Overview of the East African Court of Justice' (Kampala, 2011) at 5. Online: <http://eacj.huriweb.org/wp-content/uploads/2013/09/Overview-of-the-EACJ.pdf>, where the Judge states that the current tenure of judges at EACJ is 7 years non-renewable. This leads to the EACJ becoming a training ground for judges who develop the capacity but cannot deliver because their time is very limited.

17 Ruhangisa, *supra* note 15 at 22.

18 CUTS, *Competition Law & Policy – A Tool for Development in Tanzania* (ESRF, 2002) at 54.

19 7-Up countries are countries in which competition research and advocacy is being conducted by CUTS. The countries are Kenya, Tanzania, Zambia, South Africa, Sri Lanka, Pakistan and India.

20 CUTS, *supra* note 18 at 54–55.

The pursuit and encouragement of different national visions constitute a very big challenge to the harmonisation of competition laws in the EAC region. This position was advanced by Jain who contends that different antitrust laws are aimed at addressing different needs of society, and therefore, harmonisation becomes very complex but must be aimed towards achieving the national objective.<sup>21</sup> Jain further argues that, due to political or other considerations, a country may draft a law that favours its own national interest but is to the detriment of the regional institutions, thereby making harmonisation of competition laws impracticable.<sup>22</sup> Jain additionally amplifies this reasoning by citing an example of a country adopting legislation aimed at protecting the social welfare of its population which is not viable and applicable on a regional level. This may lead to protectionism<sup>23</sup> because such a policy is aimed at protecting local firms against foreign firms, which indirectly makes harmonisation of competition law undesirable for such states.<sup>24</sup>

In expounding on the above, Guzman posits that a government promoting local interests for the benefit of either the public or policy makers aims at obtaining maximum benefits for locals at the expense of foreigners.<sup>25</sup> This favouritism explains the presence of export cartels that are exempted from local competition laws where production is entirely meant for export.<sup>26</sup>

For harmonisation to effectively take root, the national and regional competition authorities should have the requisite resources in terms of finance and personnel to deal with all competition-related matters. These resources are lacking in the EAC. According to Malinauskaite, due to national and international boundaries, national competition authorities are unable to address international anti-competitive behaviour effectively where the authority lacks the appropriate experience, knowledge or resources.<sup>27</sup> This has led to international anti-competitive transactions escaping any regulatory enforcement. Malinauskaite

21 Jitendra Jain, *Harmonisation of International Competition Laws, Pros and Cons* (Hamburg: Diplomica Verlag, 2012) at 42.

22 *Ibid.*

23 Dominick Salvatore, *Protectionism and World Welfare* (Cambridge: Cambridge University Press, 1993) at 1 defines protectionism as an economic policy of imposing restrictions on imports while subsidising exports.

24 Other benefits of protectionism are reducing unemployment, addressing the stagnant economy and revitalising declining industries. See Salvatore, *supra* note 23.

25 Andrew T Guzman, 'Antitrust and International Regulatory Federalism' (2001) 76 *New York University Law Review* 1142 at 1152.

26 *Ibid.*

27 Malinauskaite, *supra* note 10 at 9-10.

further argues that in a global world where multinational firms are becoming dominant, there is a vacuum that allows cross-border anti-competitive activities, because national competition authorities are not well trained, equipped and trained and lack the financial muscle to regulate such conduct.<sup>28</sup> This is the case within the EAC where competition authorities suffer from limited finances and a lack of skilled staff, thereby making it difficult to achieve full harmonisation of laws.

Similarly, Dube posits that due to the novelty of challenges relating to competition, developing countries that have adopted competition law and policy in recent times have faced problems related to manpower scarcity as there is a limited number of professionals with the skills and experience required to tackle international anti-competition issues.<sup>29</sup> This has made harmonisation of laws on a regional and international level difficult. Dube cites the example of Uganda which does not have a Competition Act or even a competition law implementation infrastructure in place and thereby occasioning a delay in harmonisation of competition laws on a regional level.<sup>30</sup>

An aspect of harmonisation of competition regimes involves Partner States giving the EAC Competition Act precedence over similar national laws so that the Community law acts as the supreme law when it comes to deciding on matters relating to competition law in the EAC. This indirectly means that Partner States have partly given up their autonomy and are subject to a regional law that is superior to national law in this aspect. This has caused discomfort amongst Partner States and their respective authorities who do not want to lose that autonomy and see the aspect of competition as fostering an individual country's national interest rather than regional interests. A typical example is where Kenya banned Uganda from exporting "cheap"<sup>31</sup> sugar into Kenya fearing the likelihood of Ugandan sugar outcompeting Kenyan sugar in the market.<sup>32</sup> However, the presidents of the two Partner States agreed to create a

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28 *Ibid.*

29 Cornelius Dube, *Competition Law in Uganda, A Tool Kit* at 81. Online: [http://www.cuts-ccier.org/7up3/pdf/Comp\\_Law\\_in\\_Uganda\\_Toolkit.pdf](http://www.cuts-ccier.org/7up3/pdf/Comp_Law_in_Uganda_Toolkit.pdf).

30 *Ibid.*

31 Neville Otuki, 'Uhuru Visits to Uganda Unlocks Trade in Cheap Sugar and Meat' (The Business Daily, Kenya, Tuesday 11 August 2015). In this article, Kenya argues that Uganda does not have the capacity to produce enough sugar for domestic consumption and let alone export surplus to Kenya. Another bone of contention in the eyes of Kenya is that Ugandan traders import cheap sugar from outside the EAC, repackage it and export it to Kenya.

32 Alon Mwesigwa, 'How Sugar Soured Trade Ties between Uganda and Kenya' (The Observer, Uganda, 30 July 2014).

Regional Body or Agency aimed at regulating the sugar industry in the two countries.<sup>33</sup>

In agreement with the above assertion, authors such as Phan point out that a possible loss of autonomy is a major bottleneck in the quest for harmonisation of antitrust rules in any jurisdiction.<sup>34</sup> Phan further argues that different jurisdictions use antitrust laws as a method to achieve policy objectives rather than fostering competition. The author cites the example of Japan framing its antitrust guidelines for licensing agreements to equalise its bargaining positions with foreign entities, while the EU structured its antitrust regulations with the aim of market integration.<sup>35</sup> In as much as Phan argues that competition should be used to promote competition in the market, this paper strongly emphasises that fairness and achieving market integration are the typical results of a competition law.

In a nutshell, challenges to harmonisation of competition law are divergent legal systems, limited court intervention in dealing with cross-border anti-competitive conducts, occasional conflicts between national courts and regulatory authorities in dealing with competition-related matters, differences in the size of the economy and level of development of the different states, existence of different goals of competition in each individual Partner State, and fear of loss of autonomy on the part of local institutions involved in handling competition-related issues. I am of the firm view that these challenges are real and must be addressed individually so as to come up with a good legal framework. Even though each state wants to protect its own local interests, these interests must be sacrificed at the regional level. The exercise of harmonisation may not be as swift as stakeholders may expect, but if carefully undertaken, harmonisation of competition laws will be achieved and the benefits will trickle down to each individual Partner State.

### 3. PROSPECTS

In as much as the Partner States in the EAC have expressed their willingness to harmonise all laws, harmonisation of competition laws still faces hiccups that

33 George Omondi, 'Win for Museveni as Kenya cedes Sugar Regulation' (The Business Daily, Kenya, 11 August 2015). This has been seen by Kenyan counterparts as ceding their national autonomy in regulating the sugar industry to a regional body or agency.

34 Nhat D Phan, 'Leveling the Playing Field: Harmonization of Antitrust Guidelines for International Patent Licensing Agreements in the United States, Japan, and the European Union' (1996) 10 *American University International Law Review* 447.

35 *Ibid.*



need workable solutions. To appreciate the gravity of the matter, one needs to consider the fact that there is evidence of agreement that a problem exists but no consensus on a proper solution.<sup>36</sup> For a society to address these challenges, it has to fully admit that a problem exists and then consider how such challenges can best be overcome. Some sectors have acknowledged this aspect and embarked on numerous programmes to harmonise competition laws. For instance, Working Group 8 of the East Africa Communications Organisation (EACO) has come up with draft working principles on harmonisation of competition framework in the telecommunication sector in the EAC. Even though these principles are restricted to the telecommunication sector, they cover areas and specialised concepts that need to be agreed upon, and provide guidance for areas and concepts that need defining to suit the current economic and regulatory climate in the region. Therefore, the principles can be borrowed and applied to other sectors to act as a starting point on the road to harmonisation of competition laws in the EAC. I am of the view that if these principles are put into practice, then a huge step on the road to harmonisation of competition law in the region will have been achieved.

In trying to harmonise competition laws in the EAC, the first principle that may be applied is the Essential Facilities Doctrine. This doctrine entails a scenario where one entity controlling an essential facility denies the second entity reasonable access to a product or service that the second entity must obtain in order to compete with the first entity.<sup>37</sup> Under this doctrine, the entity holding the essential facilities refuses to deal with other entities that need the facility to enter into and begin competing with the holder and this denial acts as a barrier to entry into the market.<sup>38</sup> A typical example in the telecommunication sector is where an entity owns spectrum frequencies which must be accessed by other entities before they begin operation so that they can compete with the entity holding the spectrum frequencies. In such cases, spectrum frequencies will be deemed an essential facility which other entities need access to in order to be able to compete. In applying this doctrine to other sectors, a definition of what constitutes an essential facility will be done on an

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36 Michael G Egg, 'The Harmonisation of Competition Laws Worldwide' (2001) 2 *Richmond Journal of Global Law and Business* 15.

37 *Alaska Airlines, Inc. v United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991) in Robert Pitofsky et al., 'The Essential Facilities Doctrine Under United States Antitrust Law' (2002) 70 *Antitrust Law Journal* 443 at 445-446. See also *ABA Section of Antitrust Law, Antitrust Law Developments* (6th ed., 2007) at 261-266. See also Thomas F Cotter, 'The Essential Facilities Doctrine' in Keith N Hylton ed., *Antitrust Law and Economics* (Cheltenham: Edward Elgar Publishing Limited, 2010) at 157-159.

38 Pitofsky et al., *supra* note 37.

individual basis, as such essential facilities differ from case to case. Once there is a definition of essential facility, then such entities will be required to share the identified essential facility on fair, equitable and competitive terms and conditions so as to promote competition and encourage entry of new players into the market.

Another principle advanced by the Working Group is the protection of competition principle. Protection of competition is primarily the main goal of competition law and policy in any jurisdiction.<sup>39</sup> This is aimed at guaranteeing and achieving free, fair and effective competition which is necessary for the development of an economy. This principle is aimed at streamlining the goals of competition law and policy in the EAC. With this alignment, stakeholders involved in harmonisation of the laws will appreciate the merits of having a sound competition legal regime. They will act in a manner that protects competition at all levels, thereby achieving full implementation of the enunciated principle.

Another principle that the Working Group agreed upon is having a properly drafted legal framework and transparency in its implementation. A well developed and consistent legal framework is paramount for full harmonisation of competition law in the EAC. A predictable, consistent and transparent legal system creates certainty in the investment climate thereby attracting investors that play a pivotal role in the economic development of a country. Competition law can be harmonised if there is a properly drafted legal framework that is supreme and there is transparency in its implementation. The legal framework should be unambiguous, focused on protecting consumer rights while balancing with investment benefits, non-discriminatory, efficient, fair and easy to be enforced by Partner States. It will not be easy to achieve a harmonised legal system in the region but once this principle is adopted, it can form a foundation for continuous harmonisation of the relevant laws. Further, formulation of competition laws and policies should be transparent and beneficial to those it is applied to. This is aimed at achieving transparency and justice for all stakeholders.<sup>40</sup> I am of the considered opinion that once the EAC Competition Act is fully enforced across the region as a supranational law, then it will form the basis for a uniform law that will be applied throughout

39 Raimundas Moisejevas & Ana Novosad, 'Some Thoughts Concerning Goals of Competition Law' (2013) *Jurisprudence* 627 at 630–632. See Also WIPO, *Protection Against Unfair Competition* (Geneva: WIPO, 1994) at 9–13.

40 To use the words of Lord Chief Justice Hewart in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

the EAC. This will definitely bring predictability, transparency and consistency because only one law will be used in all competition-related matters on the regional level.

The Working Group 8 in the telecommunication sector also proposed just accountability and proper reporting as another principle that can help in achieving harmonisation of competition law regimes in the EAC. It should be noted that for any work to be fully concluded, there must be a feedback to all the stakeholders so that they can keep abreast of all developments in the sector. This will be done through reporting guidelines that clearly define the responsibilities and accountability of each individual or Partner State. The above procedure, once adhered to will help in streamlining research and enforcement procedures in respect of the EAC Competition Act that will be a supranational law once fully enforced.

With the current dynamic environment and technological advancements in doing business, there are opportunities for mergers and acquisitions aimed at consolidating gains, obtaining market share and building interaction between companies. This can be described as “survival of the fittest,” a process that may clearly eliminate entities that are not performing well to the detriment of consumers. While assessing the likely impact of mergers and acquisitions on market structures and competition in the EAC, each transaction should be assessed on its own merit rather than making a blanket judgment. This will help in assessing the impact that a merger or acquisition may have on the Partner State’s economy or the spillover effect to another state, the quality of services or products offered in that market and the possibility of incidental benefits to the population like consumer protection. This principle can be made concrete if the current EAC Competition Act is fully enforced because it will be able to address such issues in a regional context.

As earlier noted, the Working Group also proposed a principle of non-discriminatory application of competition laws, rules and decisions by regulatory authorities to entities in the same sector within similar circumstances. It should be noted that the cardinal rule of regulatory application of the law is equitable and non-discriminatory application to entities in the same sector under same circumstances. However, this is not the case in practice, especially for entities that that are either partially or fully owned by the government. Such entities often get favourable treatment because the regulator is always a government agency and often takes a soft stance in respect of such entities. This breeds “selective application” of the law to the detriment of purely privately owned entities.

However, if the EAC Competition Act is given precedence over national laws in similar matters and effectively enforced, then such a law will be uniform and applied consistently to all entities, thereby putting all the entities on an equal footing irrespective of who the shareholders are.

Another principle proposed by the Working Group is the prohibition of competition-distorting activities induced or sanctioned by Partner States. Currently, there is a wave across the EAC of public-private partnerships aimed at providing affordable services to consumers. This is by and large a good thing, but it can be abused where such an entity receives favourable concessions from the government due to the nature of its shareholding. This will greatly distort the market and damage competition, as purely privately owned entities may find it difficult to compete with the partially state-owned entity. The resultant competitive disadvantage that purely private entities are subjected to will lead to increased forum shopping, as the private entities have no choice but to divert their business to places where they are able to compete.<sup>41</sup> However, where there is a harmonised legal regime and all entities are treated equally irrespective of the nature of their shareholding, then forum shopping will be eliminated, as the entities will see no legal and economic sense in moving their entities to other states.

#### **4. CONCLUSION**

In conclusion, harmonisation of competition law regimes in the EAC is a task that requires full involvement and participation of all stakeholders. The political will of leaders will be critical in harmonisation of the laws, as some sacrifices will have to be made in order to achieve full harmonisation. But with the current trend where each Partner State is pulling in its own direction, full harmonisation of competition law regimes in the EAC is a distant dream that can only be realised if substantial sacrifices are made by all Partner States.

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41 Paul J Wright, 'Challenges to the Harmonisation of Business Law: Domestic and Cross-Border Insolvency Law' (10 August 2015). Online: <https://ssrn.com/abstract=2658230> or <http://dx.doi.org/10.2139/ssrn.2658230>.

# INTELLECTUAL PROPERTY AND LEGAL HARMONISATION



# HARMONISATION OF INTELLECTUAL PROPERTY AND FOREIGN DIRECT INVESTMENTS LAW IN THE EAST AFRICAN COMMUNITY: THE CASE OF REGULATED INDUSTRIES

GRACE KAMUGISHA KAZOBA\*

## 1. INTRODUCTION

The significance of the differences between national and international intellectual property (IP) law has gained increasing prominence<sup>1</sup> especially as a result of the provisions of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and the Technical Barrier to Trade (TBT) Agreement.<sup>2</sup> These international treaties bring the World Trade Organisation's (WTO) law into play. An instance of the significance of WTO law is the WTO panel's confirmation that Article 16 of the TRIPS Agreement does not confer on the owner of Intellectual Property Rights (IPRs), in particular a trademark, a positive right to use a trademark.<sup>3</sup> The panel stated that Article 16 confers on the IPR owner the negative right to exclude third parties from using the IP in question in certain ways. Claims against plain packing legislation<sup>4</sup> (a regulatory

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1 See M Davison, 'International Intellectual Property Law' in Tania Voon et al. eds., *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) at 131-150; Enrico Bonadio, 'Interaction with Domestic Intellectual Property Law' in Tania Voon et al. eds., *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) at 151-180. This can be accessed from the Report of the Panel entitled: *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, complaint by Australia*, WTO Doc WT/DS290/R (adopted 20 April 2005). In this dispute, the Republic of Dominic raised a complaint arguing that there had been a violation of as a result of a legislation. According to the Dominican Republic, the plain packaging legislation denied proprietors of trademarks the right of benefiting or enjoying the rights that the complainant believed was bestowed by the impugned provision to the trademark owners.

2 The Technical Barriers to Trade (TBT) Agreement aims at ensuring that technical regulations, standards, and conformity assessment procedures are non-discriminatory and are not crafted in such a way that may create unnecessary obstacles to trade. At the same time, it recognises WTO members' right to implement measures to achieve legitimate policy objectives, such as the protection of human health and safety, or protection of the environment.

3 *European Communities – Protection of Trademarks*, *supra* note 3.

4 See the legislation in issue in *Phillip Morris v Australia*; *British-America Tobacco v Kenya*, and *British*

measure that among other things is intended to control the way tobacco products are marketed) also intensify the need to pay attention to international as opposed to domestic IP law.

IP law was for years solely regulated within different domestic and other territorial jurisdictions in accordance with what is known as the territoriality of intellectual property rights.<sup>5</sup> With the signing and coming into force of the TRIPS Agreement, a minimum standard international IP law regime was created. At national level (even though all WTO Member States are required to comply with the minimum standards created under the WTO), each EAC Partner State has a national legal and institutional framework regulating IPR protection<sup>6</sup> and most of the EAC states are members of other IP protection regimes such as the World Intellectual Property Organisation (WIPO), the Madrid system and the Africa Regional Intellectual Property Organisation (ARIPO).<sup>7</sup> EAC Partner States envisage cooperation in different areas including the domain of IP law within the EAC legal and institutional frameworks.<sup>8</sup>

This paper briefly discusses the IP legal frameworks of the EAC Partner States at international, regional and national levels. The discussion focuses on the relevance of IP law to promoting trade and foreign direct investments within the EAC. The discussion will pay particular attention to the relevance of IP to the respective state's ability to conduct trade and enter into investment contracts with foreign investors' home countries, either through the EAC as an economic bloc or with individual states. The paper explores and examines the relevance of IP law to investments in regulated industries, such as the tobacco and pharmaceuticals industries, and proffers some recommendations on the importance of harmonising IP law in the EAC so as to protect investments. It is noteworthy that while coffee, cut flowers, tea, tobacco, fish and vegetables dominate EAC exports to the EU, machinery and mechanical appliances,

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*America Tobacco v New Zealand.*

- 5 Such legal frameworks include the World Intellectual Property Organisation (WIPO) system, and the African Intellectual Property Organisation (ARIPO) system, which is relevant to EAC member states, among others.
- 6 For instance, in Tanzania, intellectual property law is governed by several pieces of legislation such as the Trade and Service Marks Act, Cap 326 RE 2002; Patents (Registration) Act, Cap 217 RE 2002; Copyright and Neighbouring Act, 1999; and the Merchandise Marks Act, Cap 85 RE 2002. The main institutions dealing with the protection of such rights or bearing on IPRs are the Business Registration and Licensing Agency (BRELA), Fair Competition Commission (FCC), and the judiciary.
- 7 For instance, Kenya is a member of the Madrid system and Tanzania, Uganda and Rwanda are members of the ARIPO system, whereas Burundi has observer status within the ARIPO system.
- 8 See East African Customs Union Protocol, art 38(1)(a)-(e),



equipment and parts, vehicles and pharmaceutical products are the main imports from the European Union (EU) into the EAC region.<sup>9</sup> At the same time, some EU companies (investors) invest in the EAC region, for instance in the agricultural and agribusiness sectors, including tobacco cultivation and processing. Thus, tobacco was the first product to be affected by the EAC Single Customs Territory framework.<sup>10</sup>

The paper achieves its goal by discussing the basic principles of investment law including the right of the host state to regulate. Finally, the paper discusses the importance of taking into account international human rights law, in particular the WHO Framework Convention on Tobacco Control, 2005, the International Convention on Economic, Social and Cultural Rights, 1966 and the health protection aspects of the TRIPS Agreement, when harmonising IP law in the EAC. It demonstrates how such an approach will secure investment contracts entered into either between a foreign investor's home country and the EAC as an economic bloc, or between a foreign investor's home country and any Partner State of the EAC. Part one of this paper is this introduction. Part two explores the legal framework in the EAC and beyond relating to intellectual property, international trade and investment laws and their relevancy in promoting investments in East African region. Part three analyses cases in Australia, South Africa, Canada and Kenya in the tobacco sector and shows how such litigation jeopardises investments. Part three also presents a brief review of the legal framework relating to tobacco control in some of the EAC countries. The fourth and final part makes some recommendations for harmonising the legal framework so as to create a sustainable investment environment for the future economic development of the EAC.

## **2. THE EAC INTERNATIONAL INTELLECTUAL PROPERTY, INTERNATIONAL TRADE AND INTERNATIONAL INVESTMENT LEGAL AND INSTITUTIONAL FRAMEWORK**

The EAC legal and institutional framework is anchored in the Treaty establishing the East African Community.<sup>11</sup> The trade and investment relations of the EAC

<sup>9</sup> Tanzania Investment Report, 2014.

<sup>10</sup> GK Kazoba, 'Combating Counterfeit and Substandard Pharmaceuticals in Tanzania: Consumer Protection within the Framework of the East African Community Single Customs Territory' in JL Kanywanyi et al. ed., *Regional Integration and Law: East African and European Perspectives* (Dar es Salaam University Press, 2014).

<sup>11</sup> Signed on 30 November 1999 and entered into force on 7 July 2000, following its ratification by the three original Partner States, Kenya, Uganda and Tanzania. The Republic of Burundi and the

Partner States, most of which are developing countries, are driven by economic factors that derive from their poor economic development. Such countries succumb to unfair trade negotiations<sup>12</sup> in order to avoid economic pressures from developed countries that dictate the terms of international economic relations.<sup>13</sup> Countries within a certain region form economic blocs such as Free Trade Areas or Customs Territories in an effort to address economic issues.

Thus, upon the adoption of the Protocol on the Establishment of the East African Community Common Market (the EAC Common Market protocol), many people in the EAC sub-region, including leaders,<sup>14</sup> were very optimistic that the market population of one hundred and thirty three million (133,000,000)<sup>15</sup> would tackle some of these economic problems. At the official launch of the EAC Common Market Protocol on 1 July 2010 the then President of Kenya, Mwai Kibaki, stated that the common market would lead to “greater opportunities for the trade in goods and services” and chances for “greater capital mobilisation to boost investment”. The President directed the Minister for Migration in Kenya “to waive work permit fees for all East Africans to facilitate those seeking work in Kenya”.<sup>16</sup> Accordingly, Kenya, Rwanda and Uganda did abolish work permits requirements for people hailing from any of the EAC Partner States.<sup>17</sup> Correspondingly, the United Republic of Tanzania amended its law so as to remove Capital Account restrictions on free movement of capital to and hence enable EAC residents to invest in other Partner States and participate in each country’s capital and financial markets.<sup>18</sup> The operationalisation of a number of initiatives within the EAC is in place, including the single passport for all East Africans, a grace period of seven days

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Republic of Rwanda acceded to this EAC Treaty on 18th June 2007 and became full members of the Community with effect from 1st July 2007. It was last amended on 14th December 2006 and 20th August 2007.

12 P Roffe & S Christoph, ‘The Impact of FTAs on Public Health Policies and TRIPS Flexibilities’ (2006) 1 *International Journal of Intellectual Property Management* 79.

13 *Ibid.*

14 President Mwai Kibaki’s speech at the official launch of the EAC Common Market protocol as broadcast live (and recorded) by various media houses.

15 According to the EAC website, as per June 2010 the EAC has a surface area (including water) of 1.82 million square kilometres, a population of 133.5 million, a GDP of United States Dollar 74.5 billion and an average GDP per capita of United States Dollar 558.

16 STRATFOR Global Intelligence accessed on 10 March 2010.

17 See Trademark East Africa, ‘Rwanda, Kenya, Uganda Agree to Scrap Work Permits’ (16 June 2015). Online: <https://www.trademarka.com/news/rwanda-kenya-uganda-agree-to-scrap-work-permits/>.

18 The East African, ‘Tanzania now Allows Free Flow of Capital for EAC’ (Joint Report of 2 August 2014). Online: <https://us-mg5.mail.yahoo.com/neo/launch?.rand=dj6hrc8idsun#769074704>.

allowable for East Africans' personal motor vehicles when crossing national borders between the EAC Partner States, specialised immigration counters for East African nationals at all points of entry within the region, and harmonisation of immigration forms at points of entry. All these initiatives are intended to facilitate cross-border trade within the EAC region. All these measures have been put in place to increase trade and promote cross-border business in the region.

The overall objective of the Common Market Protocol as set out in Article 4(1) is to widen and deepen economic and social cooperation among the Partner States for their mutual benefit. The Protocol generally provides for the free movement of goods; the free movement of persons; the free movement of labour; the right of establishment; the right of residence; the free movement of services; and the free movement of capital.<sup>19</sup> Thus, as can be observed from the different actions and initiatives taken by EAC Partner States all efforts are geared towards increasing investments in the region. According to the International Monetary Fund (IMF), Tanzania's decision to liberalise the country's capital market for EAC residents will allow freer movement of capital within the region, facilitate intra-EAC trade, and lead to increased financial flows and investments.<sup>20</sup> Having briefly discussed the commitment to increasing investment volumes in the region demonstrated by the EAC Partner States, it is now pertinent to examine the legal framework governing foreign direct investments, an aspect that is dealt with in the following part.

## **2.1 Trade and Investment in the EAC**

### ***2.1.1 Legal Framework of the EAC in Respect of International Trade and Investment***

The basic instrument governing cooperative relations amongst the six EAC Partner States is the EAC Treaty,<sup>21</sup> supplemented by other instruments (Protocols) such as the Protocol for the Establishment of the East African Customs Union and the Protocol for the Establishment of the East African Common Market. These constitute the legal regime for the regulation of trade and investments in the region. According to the Protocol for the Establishment of the East African

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19 Common Market Protocol, art 2(4), 76 and 104.

20 *Supra* note 20.

21 *Supra* note 13.

Customs Union (the Customs Union Protocol), the EAC Partner States intend to deepen and strengthen trade among themselves and thus, as members of the WTO, contribute to the harmonious development of world trade.<sup>22</sup> One of the underlying objectives of the Customs Union Protocol, like the WTO's Marrakesh Agreement, is to liberalise intra-regional trade.<sup>23</sup> Article 10(1) of the Protocol commits the Partner States to eliminating all internal tariffs and other charges of equivalent effect on trade among themselves in order to achieve this objective.

The EAC Common Market Protocol which provides for the free movement of goods, persons, labour and capital, among others,<sup>24</sup> is geared towards boosting economic development in the region. The "free movements" mentioned above are reinforced by the EAC Customs Union Protocol which provides for further liberalisation of intra-regional trade in goods among the Partner States and enhances domestic, cross-border and foreign investment in the community, among other objectives.<sup>25</sup> The Single Customs Territory created under the relevant instrument presents the EAC region to external investors as a single economic bloc (EAC-external investor arrangement) with intra-community trade and investment partnerships/arrangements, while allowing individual EAC Partner States to enter into investment contracts with any foreign investor's home country. Such trade and investment arrangements may be made as described in investment chapters contained in Free Trade Agreements (FTA) between one economic bloc and another, or through Bilateral Investment Treaties (BITs) between any of the EAC Partner States and a capital-exporting country.

In particular, Article 28 of the EAC Common Market Protocol<sup>26</sup> provides that in the EAC, capital and related payments and transfers include direct investment. In Article 5(2)(f) of the same EAC Common Market Protocol, the Partner States agree to promote investments in capital markets (including stock exchange or shares, dealing in bonds and other long term investments) eventually leading to an integrated financial system. This relates, for instance, to pharmaceutical or tobacco product related companies registering in one

22 See the Preamble. Under the Protocol "goods" includes "all wares, articles, merchandise, animals, matter, baggage, stores, materials, currency and postal items other than personal correspondence, and where any such goods are sold under the auspices of the Protocol, the proceeds of sale".

23 Customs Union Protocol, art 3.

24 EAC Common Market Protocol, art 4(1).

25 EAC Customs Union Protocol, art 4(a)(c).

26 Signed on 20 November 2009, fully ratified in April 2010 and came into effect on 1 July 2010.

of the stock exchange markets of any of the EAC Partner States. In line with the foregoing provision, the Partner States agree to cooperate to ensure the protection of cross-border investments.<sup>27</sup> The core principles of protection of cross-border investments are contained in Article 29 of the Common Market Protocol as follows:

1. The Partner States undertake to protect cross border investments and returns of investors of other Partner States within their territories.
2. For the purposes of paragraph 1, the Partner States shall ensure:
  - (a) protection and security of cross border investments of investors of other Partner States;
  - (b) non-discrimination of the investors of the other Partner States, by according to these investors treatment no less favourable than that accorded in like circumstances to the nationals of that Partner State or to third parties;
  - (c) that in case of expropriation, any measures taken are for a public purpose, non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation.<sup>28</sup>

The provisions cited above underscore the principles of international investment law that include national treatment, most favoured nation and equitable treatment, as well as protection against expropriation. In this regard, a Partner State has the duty to protect the investment and returns of investors of nationals of other Partner States that are held in the respective host Partner State. The treatment that a Partner State accords to investments from other Partner States should not be less favourable than the protection afforded to its own nationals or third parties, which may include investments from developed countries under different arrangements. Furthermore, by virtue of Article 29(3) the Partner States took measures to secure the protection of cross-border investments within the community two years after the EAC Common Market Protocol came into force. Article 29(4) of the EAC Common Market Protocol defines cross-border investment as “any investment by a national of a Partner State in the territory of another Partner State”; and it defines investment as “any kind of asset owned or controlled by an investor of a Partner State in another

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27 EAC Common Market Protocol, art 5(3)(b).

28 EAC Common Market Protocol, art 29.

Partner State in accordance with the national laws and investment policies of that Partner State and includes...intellectual property rights”.

In respect of dispute settlement procedures relating to cross-border investments, the East African Court of Justice (EACJ) has developed consistent jurisprudence, especially in relation to jurisdiction, and in particular concerning who may make reference to the court and who may be made a party/respondent to such a reference. The jurisprudence includes the cases of *Anyang' Nyong'o v the Attorney General of the Republic of Kenya*;<sup>29</sup> *Modern Holding LTD v Kenya Ports Authority*;<sup>30</sup> and *Alcon International Ltd v Standard Chartered Bank of Uganda*.<sup>31</sup> Through these cases/references, the EACJ has emphatically confirmed that legal and natural persons may make reference for interpretation in accordance with Articles 30 and 27 of the EAC Treaty and that the only proper respondents to references by legal and natural persons under Article 30 of the Treaty are Partner States or Institutions of the Community the legality of whose Acts, regulations, directives, decisions or actions are brought into question. Accordingly, the EACJ has confirmed that in accordance with Article 54(2) of the EAC Common Market Protocol, Partner States guarantee that “any person, whose rights and liberties as recognized by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities”.<sup>32</sup> However, the EACJ has also held that such redress must be sought [first] in accordance with national constitutions, national laws and administrative procedures of national institutions, as set out in Article 54(2)(b) of the Common Market Protocol which provides that: “the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress.”<sup>33</sup> The Court stated that the exception to the foregoing rule is with respect to inter-state disputes as envisaged by Article 54(1) which may settle in accordance with the provisions of the Treaty.

A well-established legal framework for international trade is expected to promote fair competition among traders (i.e. adhere to the principles of Most Favoured Nations (MFN); National Treatment), protect investments against expropriation, and generally promote equitable treatment of traders and

29 Reference No. 1 of 2006.

30 Reference No. 1 of 2008.

31 *Alcon International Ltd v The Standard Chartered Bank of Uganda, Attorney General of Uganda and Registrar of High Court of Uganda*, Appeal No. 3 of 2013.

32 See *supra* note 32 at [68].

33 *Ibid* at [76].

investments. Sometimes, the emphasis on trade may focus on the economic growth benefits of trade liberalisation without paying adequate attention to other areas of life such as a healthy society. Striking such a balance is never an easy task for policy makers and it requires them to put in place a carefully considered regulatory system.

Unfortunately, investors do not always pay adequate attention to such regulatory policies which are usually 'hidden' in different branches of law other than commercial or international trade and investment laws. It is the objective of this paper to uncover such other relevant principles in protecting trade and investments.

For instance, Voon and Mitchell assert that:

Trade liberalization also has potential to increase certain unhealthy habits such as smoking and over consumption of alcohol and unhealthy foods, leading to a corresponding increase in non-communicable diseases (NCDs). A range of measures designed to reduce consumption of these products may implicate international trade rules. For example, NCD risk factors may be addressed through: product bans; packaging and labelling requirements; import tariffs; sales taxes; subsidies; licences; restrictions on advertising, promotion or sponsorship; regulation of product content through disclosure of restriction of ingredients; restrictions on ages of sale or purchase; exclusion areas e.g no smoking or no alcohol areas; and education.<sup>34</sup>

Such regulatory rules as those mentioned above obviously have the potential to affect negatively or to reduce the potential benefits of international trade liberalisation, for example by limiting the use of trademarks or authorising the manufacture and sale of pharmaceuticals without the authorisation of the owner of the relevant intellectual property rights.

From the foregoing, it is clear that trade and investment policies do not operate freely; they are subject to limitations that may be imposed on them from either other branches of law or from within the same areas of law. The background to, and the Doha Declaration on TRIPS and Public Health itself, for instance, signify the need to promote international trade liberalisation in the area of IP law, but also promote measures to protect public health that limit IPRs.<sup>35</sup> The following part discusses different principles of international investment law and demonstrates how such principles have been challenged in a number of cases.

34 Voon et al., *supra* note 3.

35 The Doha Declaration on TRIPS and Public Health at [5].

### 2.1.2 Principles of International Investment Law and Dispute Settlement

The legal framework governing international investment, in contrast to that governing international trade, does not comprise a single unifying international agreement or institution. Some have referred to international investment agreements as a ‘spaghetti bowl’ of primarily bilateral agreements.<sup>36</sup> A variety of international legal instruments, including bilateral investment treaties (‘BITs’), investment chapters in free trade agreements (‘FTA’) (together: International Investment Agreements (IIAs) and investment contracts make up international investment law. Thus, International investment law may be presented in one or more of the forms discussed below.

#### 2.1.2.1 Bilateral Investment Treaty

Bilateral Investment Treaties (BITs) are treaties entered into between states. BITs protect investments and investors emanating from one State Party to the Treaty (investment exporting country) who invest in another State Party to the Treaty (investment host state or investment importing country). The terms and conditions enshrined in such instruments are usually enforced by individual investors against investment hosting states as discussed below. For instance, the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay Concerning the Reciprocal Promotion and Protection of Investments<sup>37</sup> can demonstrate the point. Philip Morris brought a claim against Uruguay under the Switzerland–Uruguay BIT which protects Swiss investors and their investments in Uruguay and Uruguayan investors and investments in Switzerland.

Therefore, while under international investment law investors can bring claims against states on the basis of BITs involving contracting states, in international trade law only states can pursue claims under WTO law. For instance, in the recently ended case of *Philip Morris v Australia*, Philip Morris, a cigarette multinational, lodged an investment claim with the Permanent Court of Arbitration alleging breach of the Australia–Hong Kong bilateral investment treaty as a result of Australia introducing plain packaging legislation, as discussed below. It argued that this amounted to indirect expropriation. At the same time, Philip Morris lodged a parallel claim, that is pending at the time

36 Benn McGrady, ‘International Investment Law’ in Tania Voon et al. eds., *Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues* (Routledge, 2014) at 110–131; Bonadio, *supra* note 3.

37 Signed on 7 October 1988 (entered into force 22 April 1991).



of writing, within the WTO dispute settlement framework (in addition to that pursued under investment dispute settlement procedures based on the same cause of action) alleging that the plain packaging legislation breached Australia's obligation under the WTO's Technical Barrier Treaty (TBT) and TRIPS.<sup>38</sup>

#### *2.1.2.2 Investment Chapters in Free Trade Agreements (FTAs)*

Investment Chapters in Free Trade Agreements are chapters that are contained in instruments establishing Free Trade Areas or Custom Territories. A Free Trade Agreement is an international treaty which eliminates barriers to trade and expedites stronger trade and commercial bonds, backing up increased economic integration between participating countries. FTAs can cover the whole regions with numerous participants or link just two economies. Thus, investment chapters within FTAs explain how investments between parties to the instruments shall be managed and regulated, and the rights and duties of parties in protecting investors and investments from each contracting party in the territory of the investment hosting contracting state. The provisions contained in the EAC Common Market Protocol discussed above could be considered as an example of such investment chapters. According to the WTO website as of 1 July 2016, GATT/WTO had received some 635 notifications of Regional Trade Agreements (RTAs) out of which 423 were in force. Free Trade Agreements (FTAs) and partial scope agreements account for 90% of the RTAs, while customs unions account for 10%. The enforcement of terms and conditions contained in investment chapters of Free Trade Areas is always carried out in accordance with the provisions of the treaty establishing the trade area and respective chapters, as discussed above.

#### *2.1.2.3 Investment Contracts*

Investment contracts are contracts entered into between an investor and an investment hosting state. This type of agreement is most common in cases of investors purchasing a state-owned asset or if the investor agrees to invest in the host state following an inducement offered by the host state.<sup>39</sup> Contracts involving an investor and a foreign state are more common in certain sectors than others. For instance, such contracts are common in the extractive industry,

38 See Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute. Online: <http://tinyurl.com/jd7wlf>.

39 McGrady, *supra* note 38.

and in the tobacco, alcohol and food sectors. Such contracts are usually important, as they are useful in allocating investment risks such as risks relating to regulation. There are also instances involving enterprises that are state-owned or partly state-owned. In such cases, states contract directly with the investor, potentially leading to liability of the state, especially where the act leading to liability is attributable to the state. The above elaborated forms of international investment instruments are generally referred to as International Investment Agreements (IIAs). The next section discusses the nature of international investment agreements.

### 2.1.2.4 International Investment Agreements

IIAs protect the investments and the investors of each contracting party within the territory of the other contracting parties.

The terms of one IIA may differ from one another but they provide substantially similar terms and standards of protection for investors and their investments. The basic principles contained in most IIAs are protection of investors and their investments against discrimination by host states in favour of their nationals or nationals of other states, and protection against unfair or inequitable treatment. A standard provision found in most IIAs confers the right to compensation, for instance where an investment is nationalised or expropriated. Nationalisation or expropriation may also be imputed to the host state on the ground that the action, though not actual nationalisation or expropriation, has an equivalent effect.

An investor consequently has the right to bring a claim on his own behalf (i.e *locus standi*). Thus, one can argue that BITs and FTAs replace the law of diplomatic protection (under customary international law) whereby a state would otherwise be expected to bring a claim on behalf of its nationals. The result is that as a general rule under international investment law, claims are brought directly by investors under arbitral rules such as those provided by the International Centre for Settlement of Investment Disputes (ICSID)<sup>40</sup> and

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<sup>40</sup> ICSID is a creature of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) of 1965. The drafting of ICSID took place between the years 1961 and 1965 within the framework of the International Bank for Reconstruction and Development (IBRD), hence commonly referred to as World Bank's ICSID. The Convention was adopted by the IBRD's Executive Directors on 18 March 1965. It entered into force on 14 October 1966. It created the International Centre for Settlement of Investment Disputes (ICSID). Likewise, the Convention is usually referred to as the ICSID Convention.

the United Nations Commission on International Trade Law (UNCITRAL).<sup>41</sup> The arbitral rules usually permit enforcement of awards in the domestic courts of the parties and provide for the manner of ensuring enforceability. The rules usually permit investors to bring claims for specific performance such as withdrawal of regulatory rules or measures; however, enforcement of such orders is problematic in practice. The most common remedy chosen is compensation. Resource-poor economies like those in the EAC should always agree to compensation clauses with great caution as they are likely to have a devastating impact on their economies. In addition, it should also be noted that such agreements provide for important matters such as choice of law and arbitration clauses.

McGrady describes the complexity associated with international investment law and the right of the host state to regulate the investment (through enactment, enforcement and implementation of law as may likely arise in EAC region) in cases of investment contracts as follows:

Two legal risks associated with state contracts stand out. First, a contract creates a set of legal obligations that may alter the legal implications of regulation. The most prominent example of this is found in the form of stabilization clauses, which seek to prevent the host state from changing its laws, or provide a remedy for the investor in the event of particular changes being made.

Second, a contract may also increase the risk of liability under IIAs. In this respect, umbrella clauses in IIAs may oblige the host state to respect commitments made to investors, such as those in an investment contract. The legitimate expectations of an investor, which may be established by reference to a contract or inducements to invest, are also relevant in the application of provisions in IIAs governing fair and equitable treatment, and to a lesser extent indirect expropriation.<sup>42</sup>

Given the nature of possible contracts that may contain clauses that limit the ability of the state to regulate the investments or impose an obligation on the host state to compensate the investor in case of a regulation that impacts negatively on the investment, it is pertinent to consider the role of other branches of international law, such as international human rights law, and their impact on the obligations created.

For instance, a stabilisation clause in an investment contract may prevent a change in domestic law in a way that has a potentially negative effect on

41 Under such dispute settlement mechanisms, a panel of three independent arbitrators, one of which is appointed by each of the parties, usually decides claims.

42 McGrady, *supra* note 38 at 113.

the investment. Such clauses are rightly referred to as ‘freezing clauses’ because they are essentially intend to freeze the host state’s law as it was at the time of making the investment contract for the duration of the investment. In the EAC, this means, for instance, that if an investor was to enter into a contract with a particular state to market medicines or tobacco in a certain way (through advertising), the stabilisation clause would require that the investor had a right to advertise tobacco provided it complies with the applicable law as it is at the time of the contract. If Kenya then introduced restrictive laws on packaging (which have an impact on advertising and the use of trademarks) after the commencement of investment in Kenya, the investor would have two options. One option would be to contest the newly introduced law in Kenya against packaging because it is in breach of the investment contract clause which prevents Kenya from introducing a regulatory measure after commencement of investment. A second option would be to advertise the investment products in the other EAC Partner States (excluding Kenya) as part of the single customs territory, where Kenyans would still be able to access the products discouraged by the regulation in Kenya.

Studies show that the possibility of investors to successfully enforce clauses such as a stabilisation clause, an economic equilibrium clause (a clause providing compensation to the investor as a result of a regulatory measure taken by the host state and hence affecting the economic equilibrium of the investor) or a hybrid clause which combines stabilisation and economic equilibrium clauses, is not absolute. For instance, it is now established that such stabilisation clauses pose a number of human rights risks, including the right to health, and that developing countries are more likely to agree to freezing clauses than Organisation for Economic Co-operation and Development (OECD) countries. An economic equilibrium clause in an investment contract, for example, even though not preventing a host state from regulating the investment, may impose somewhat onerous compensatory terms on the host state. After considering the budgetary implications of its choice, a state may end up not introducing a regulation, however important it may be for the protection of human health or the environment.

An example can be drawn from large sporting event contracts where the state hosting the sporting event may enter into a contract with the organising body of the event as an investor. In such a case the economic equilibrium clause of the contract may be crafted in such a way that it requires the state first and foremost to pay a fee in return for hosting the event. In addition to the fee

payment requirement clause, contracts often go further to require that in the event the host state restricts advertisement of certain products such as tobacco or any medicine then the fee would increase. In such cases, states have to choose between allowing advertisement of such products and hence ignoring public health, not hosting the sporting event and paying compensation to the investor.

The above discussion shows that the EAC as an economic bloc, or one of the EAC Partner States, may enter into investment contracts with another regional economic bloc or with another country. The contracting parties will ordinarily utilise the traditional terms of the investment agreement as described above, or investment contracts involving the host and the investor/capital exporting state to protect the investors and their investments. Experiences from other jurisdictions, however, demonstrate that the clauses of investment agreements such as IIAs, BITs and FTAs are seldom sufficient to protect the interests of investors and their investments on their own.<sup>43</sup> Similarly, experience also shows that drafting investment contracts or IIAs without taking into account the impact they have or are likely to have on IP and human rights exposes host states to litigation, which combined with the inadequacy of protection, is not healthy for investment promotion. It is therefore pertinent to draft IIAs with other state obligations in mind, especially those bearing on public health. In particular, this paper analyses the potential clash of interests between international investment law and international intellectual property law, and demonstrates the importance of harmonisation of intellectual property law, while taking into account its possible effect on international investment law.

### ***2.1.3 Clash of Interests: Trade and Investments and Public Health***

Apart from the multilateral TRIPS Agreement providing for general minimum standards including the need to protect public health worldwide,<sup>44</sup> there are other international instruments which create obligations for individual Partner States of the EAC.<sup>45</sup> The EAC countries, as autonomous entities, each have individual international obligations, especially those flowing from the 1966 International Covenant on Economic, Social and Cultural rights (ICESCR)

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43 See for instance the case of *BATSA v Minister of Health* [2012] ZASCA 107 in which a South African Court of Appeal held that the protection of human rights and constitutional rights of individuals were paramount when assessed against the interests of investors from the tobacco industry.

44 TRIPS Agreement, art 7-8.

45 For instance, the International Covenant on Economic Social and Cultural Rights, 1966, and the WHO Framework Convention on Tobacco Control, 2005.

providing for the right to health,<sup>46</sup> the TRIPS Agreement,<sup>47</sup> the WHO Framework Convention on Tobacco Control, and others, not dealt with in this paper, for instance obligations to protect the environment.

These obligations require, among other things, a balance of interests between trade and investment on the one hand, and health or environmental protection on the other. However, investment relationships may exist while the goods and services subject to foreign investment contracts are free to move within the EAC. Should individual countries observe their obligations under the above-mentioned conventions without regional harmonisation of intellectual property law which governs several types of IPRs, there will be a potential for disputes to the potential detriment of investments, hence discouraging investments in the EAC. In order to appreciate the clash of interests referred to above, it is important to get an overview of the relevant intellectual property laws and rights in the context of the EAC.

## **2.2 The Intellectual Property Law Framework and Its Relationship to Investment Contracts**

### ***2.2.1 Introductory Remarks***

The EAC Partner States envisage cooperation in areas other than trade and investments, including the area of intellectual property rights and standards, as well as technical regulations on trade.<sup>48</sup> Article 103 of the EAC Treaty provides that the “Partner States undertake to promote co-operation in the development of science and technology within the community through the harmonisation of policies on commercialisation of technologies and promotion and protection of intellectual property rights”.

Moreover, the EAC Treaty recognises the significance of co-operation in matters of health as enshrined in Article 118 of the Treaty. The Partner States undertake to take joint action to ensure there are appropriate measures to

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46 For instance, article 12 of the International Covenant on Economic and Cultural Rights of 1966 (ICESCR) provides for the highest standard of physical and mental health as an entitlement of each individual in the state parties to the Convention.

47 The TRIPS Agreement provides in article 7 that the enforcement of IPRs must not negatively impede on social and economic welfare and the balance of rights and obligations. Article 8 enjoins members to adopt measures to protect public health while also ensuring that such measures are consistent with the TRIPS Agreement itself.

48 Customs Union Protocol, art 38(1)(a)–(e).

prevent and control the spread of communicable and non-communicable diseases. Under the same provision of the Treaty, State Parties are enjoined to foster the promotion and management of health delivery systems and ensuring better planning mechanisms so as to augment the efficacy of health care services within the Partner States. The treaty further enjoins State Parties to develop a common drug policy with stable quality control capacities and good procurement practices; to harmonise drug registration procedures to attain good control of pharmaceutical standards while ensuring the movement of pharmaceutical products within the community; to harmonise national health policies and regulations; to promote the exchange of information on health issues in order to achieve quality health within the community; and to cooperate in promoting research and development of traditional, alternative or herbal medicines.<sup>49</sup>

So far, the EAC has established an EAC Health Research Commission situated in Burundi for purposes of research in health areas in the region to facilitate implementation of Article 118 of the treaty for the establishment of the EAC. It has developed a non-communicable diseases (NCD) strategy informed by tobacco control, and the implementation mechanism is being addressed.<sup>50</sup> Noting the significance of the threat of tobacco in developing countries and in furtherance of support for the implementation of the Framework Convention on Tobacco Control (FCTC) to low and middle income countries, the WHO initiated contact with the EAC secretariat in February 2012 and has developed a five-year WHO/EAC Project on Implementation of the Framework Convention on Tobacco Control by East African Community Partner States (2013–2015).<sup>51</sup> The project covers implementation of various obligations to the World Health Organisation Framework Convention on Tobacco Control (WHO FCTC) including tax and price measures as a tool for public health.

Furthermore, the EAC Secretariat has established various technical working groups that deliberate on NCDs, research and policy development on health matters, namely the EAC technical working group on prevention

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49 EAC Treaty, art 118.

50 Nyakwana, 'East African Community Cooperation in Health' (Paper presented by a representative of the East African Cooperation ministry of the Republic of Kenya at the WHO-McCabe Centre for Law and Cancer Workshop on Promoting coherence between health, trade and investment in the prevention and control of non-communicable diseases in the East African Region, 25–28 May, Nairobi, Kenya.

51 *Ibid.*

of communicable and non-communicable diseases, and the EAC technical working group on health systems, research and policy.<sup>52</sup>

The medicines industry still operates under specific national laws, but there are attempts to harmonise standards within the region and also to legislate against counterfeit goods, including medicines.<sup>53</sup> Some are the contested EAC Anti-Counterfeiting Bill, 2010 and other processes for the standardisation of health care services.<sup>54</sup> Even though pharmaceuticals do not at present move freely from one state to another, once the harmonisation of standards is achieved, free movement will be possible.

There are to date no known efforts to harmonise IP law as it relates to the tobacco industry, and it is therefore assumed that the general IP law applies. However, the tobacco industry is considered as a regulated sector due to the fact that there are national<sup>55</sup> and international<sup>56</sup> laws that dictate how tobacco products should be sold, advertised, or offered for sale. The WHO for instance asserts that “the spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalisation and direct foreign investment”. Therefore, this paper examines the role of the WHO Framework Convention on Tobacco Control,<sup>57</sup> in particular the ICESCR and specific national laws on the marketing and promotion of tobacco products through use of IP standards, and demonstrates how they are likely to affect investments in this sector. In particular, the remaining part of this sub-section will explain the legal framework of the TRIPS Agreement and the WTO, and discuss specific IPRs as forms of investments likely to be affected by public

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52 *Ibid.*

53 Kazoba, *supra* note 12.

54 For a further discussion on the matter, see GK Kazoba, *Consumer Protection and a Guard against Counterfeit and Substandard Pharmaceuticals in Tanzania: Examining National, Regional and National Legal and Institutional Frameworks* (Dar es Salaam University Press, 2013) at 128.

55 See for instance the Tanzania Tobacco Control Act, 2003; Law N° 08/2013 of 01/03/2013 Relating to the Control of Tobacco of Rwanda; the Tobacco Control Act of Kenya of 2007 Cap.2454. In the case of Tanzania, the Tobacco Control Act of 2003 was enacted before the coming into force of the WHO Framework Convention on Tobacco Control of 2005. In Kenya, the law is more directed towards complying with the FCTC if compared to Tanzania and some of the other EAC countries. Moreover, in the recent past Kenya introduced the Tobacco Control Regulations of 2014 which were published on 5th December 2014, *vide* legal notice no. 169, and tabled before the Parliament on 11th December 2014. The regulations have been battled in the High Court of Kenya Constitutional Division by British American Tobacco Kenya Ltd (BAT Kenya) in *British American Tobacco Kenya Ltd v Attorney General of Kenya*, Petition No. 143 of 2015.

56 The main international legal instrument regulating tobacco is the WHO Framework Convention on Tobacco Control, 2005.

57 WHO Framework Convention on Tobacco Control, 2005.



health legislation or instruments. The IPRs discussed in this section include copyright, designs, patents, trademark and geographical indications.

### ***2.2.2 The TRIPS Agreement and the World Trade Organisation Framework***

The TRIPS Agreement was a result of the Uruguay Round of Multilateral Trade Negotiations which took place between 1986 and 1994. These negotiations resulted in a number of international agreements being adopted under the umbrella of the Agreement establishing the World Trade Organisation (WTO), which was signed at the Marrakesh (Morocco) Ministerial Meeting in April 1994. One of these international agreements was the TRIPS Agreement, which came into force on 1 January 1995 as Annex 1C to the Final Act establishing the World Trade Organisation. In addition to the objectives named in Article 7, the TRIPS Agreement enjoins the States Parties to “adopt measures to protect public health”, thus implementing its provisions. At the same time, it requires the States Parties to ensure that the measures taken are consistent with the TRIPS Agreement itself.

In the same vein, article 8 of the TRIPS Agreement provides that:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health... and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

The discussion that follows explains the relevant IPRs whose regulation may have a bearing on trade and investment in the EAC in the tobacco and pharmaceutical sectors. These regulations, if not properly handled, may discourage investments in the EAC or jeopardise public health.

#### ***2.2.2.1 Copyright***

Copyright refers to the protection of original artwork<sup>58</sup> pursuant to article 9 of the TRIPS Agreement.<sup>59</sup> Artworks and literary works are often created in

58 Artwork refers to illustrations, photographs, or other non-textual material prepared for inclusion in a publication. It also includes paintings, drawings, or other artistic works. The use and application of such artistic works may be restricted by legislation which prescribes their use in terms of colour and size.

59 Which incorporates the relevant provisions of the Berne Convention for the Protection of Literary

the course of designing branding for products. The protection extended to the owners of such literary and artistic works confers on them a right to authorise actions such as reproduction. It has been argued, as discussed above, that such a right does not include the positive right to place the reproductions on any item of commerce that the copyright owner deems fit or to offer those items of commerce for sale as the right owner deems fit.<sup>60</sup> The protection against third parties in relation to copyright is valid for the lifetime and 50 years after the death of the right owner following the last date of the year of first publication.

#### 2.2.2.2 *Industrial Designs*

Designs are often created in the course of a trader deciding how to package a product in a way that is considered convenient for marketing it. For instance, in relation to medications, design often determines the size of a tablet and outward appearance of the packaging, which have a significant influence on the acceptability of a drug and hence its rate of consumption. The marketing of all products, including tobacco, requires a carefully chosen appropriate packaging design. The owner of a new industrial design acquires design rights in such new and original designs. Again, the nature of the right is to prevent third parties from making unauthorised use of the industrial designs by making, selling or importing articles bearing or embodying the design, a copy, or substantially a copy, of a protected industrial design.<sup>61</sup>

#### 2.2.2.3 *Patents*

Patents are more relevant to the medicines industry than to tobacco. Article 27(1) of the TRIPS Agreement requires WTO member states to grant patents in all fields of technology, including pharmaceutical products and processes for a minimum of twenty years. Patents with respect to tobacco may be impacted by a regulatory measure that imposes a ban on the use of flavouring or colouring agents in the manufacture of tobacco products, if they make the products more attractive. For example, in a case involving the United States in the WTO dispute resolution framework, a WTO Panel considered a dispute where the US had introduced a ban on the sale of clove-flavoured cigarettes. The ban

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and Artistic Works, 1967, 828 UNTS 222.

60 Davison, *supra* note 2 at 133.

61 TRIPS Agreement, art 26(1).

was said to be aimed at discouraging young people from smoking.<sup>62</sup> Similarly, Brazil banned the use of additives such as chocolate, mint, fruit and cinnamon in tobacco products.<sup>63</sup> Regulatory measures which prohibit patented products (as discussed above) or processes will inevitably interfere with the interests of the patent holder.

Patent law with respect to pharmaceuticals is highly relevant to public health through the restriction it may place on access to medicines. The most relevant provisions of the TRIPS Agreement are Articles 30 and 31, especially sub articles (e), (f) and (h) which refer to compulsory licensing and use other flexibilities such as parallel importation, exhaustion of rights and the Bolar/regulatory exception.<sup>64</sup>

#### 2.2.2.4 Trademarks

The most relevant and controversial type of IP asset in the debate around securing investments in regulated sectors, particularly in the tobacco industry, is the trademark. Article 15 of the TRIPS Agreement describes the trademark as follows:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks.

The TRIPS Agreement incorporates the Berne Convention of 1971. Article 6(1) of the Paris Convention<sup>65</sup> provides that the conditions for the filing and registration of trademarks shall be determined in each country by its domestic legislation. Article 6(3) of the same Convention provides that a mark duly registered in a country shall be regarded as independent of marks registered in other countries, including the country of origin. These provisions form the basis of the trademark principle of territoriality (which also applies to all IPRs).

62 See Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO DOC WT/DS406/R (adopted 24 April 2012). The US lost the case because a WTO Panel found the measure to be discriminatory since similar products originating in the US, that is menthol cigarettes, could still be sold in the US, which constitutes discrimination in contravention of article 3(1) of the TRIPS Agreement.

63 See Resolution-RDC No. 14 of 15 March 2012 in Bonadio, *supra* note 3 at 157.

64 See Kazoba, *supra* note 58 at 109–114 for a thorough discussion on access to medicine and the TRIPS Agreement.

65 Paris Convention for the Protection of Industrial Property as amended on 28 September 1979.

In addition, Article 6*bis* of Paris Convention, which is incorporated in Article 16(2) and Article 16(3) of the TRIPS Agreement, protects well known marks even though they might be unregistered. The criteria for determining whether a mark is well known are: “the knowledge of a trademark in the relevant sector of the public, including knowledge in the member concerned which has been obtained as a result of the promotion of the trademark”.<sup>66</sup>

Although the Paris Convention refers to the countries of the Union formed under it, since these countries were primarily the negotiators of the IP law agreements, practice shows that the territory in respect of IPRs, as is the case with other rights, has evolved to include regions. Today the different regional territories in respect of trademarks includes those created by the Madrid system,<sup>67</sup> the ARIPO system,<sup>68</sup> the OAPI system<sup>69</sup> and the yet to be established EAC system envisaged under the EAC Customs Union Protocol.<sup>70</sup> It should be noted that the EAC Partner States are part of several trademark territories, i.e. the Madrid system that affects Kenya, the ARIPO system that affects Tanzania, Uganda and Rwanda, and the individual country territories that are determined by the national legislation of each EAC Partner State.

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66 TRIPS Agreement, art 16(3).

67 The Madrid system operated under the Madrid Agreement Concerning the International Registration of Marks (as amended up to 1979) and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol 1989), amended in 2006 and in 2007. As of 17 September 2014, it has a membership of 85 countries, including a few African countries such as Zambia, Algeria, Botswana, Egypt, Ghana, Kenya, Lesotho, Liberia, Morocco, Mozambique, Namibia, Sierra Leone and Swaziland. Kenya is the only EAC member that is a party to the Madrid Agreement.

68 The governing instrument is the Banjul Protocol on Marks which was adopted by the Administrative Council in 1993 and came into force on 6 March 1997 for Malawi, Swaziland and Zimbabwe. Other countries acceded to it later. The ARIPO website indicates that as of July 2009 there were eight parties to the Banjul Protocol on Marks: Botswana, Lesotho, Malawi, Namibia, Tanzania and Uganda as well as the founding members: Malawi, Swaziland and Zimbabwe (see Kazoba, *supra* note 58 at 149).

69 The OAPI system is governed by the Agreement Revising the Bangui Agreement of 2 March 1977 on the Creation of an African Intellectual Property Organization, 24 February 1999.

70 In addition to the system of registration of trademarks the Paris Convention also provides for the possibility of the protection of non-registered marks, which are termed as ‘well known marks’ and common law provides for a limited protection of unregistered marks. Article 6*bis* provides that state parties to it may permit in their legislation or upon request by the interested party, “to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country ... [from] being and used for identical or similar goods”. The concept of a well-known mark was initially recognised under article 6*bis* of the Paris Convention and is incorporated in article 16(2) and (3) of the TRIPS Agreement.

The function of a trademark is to differentiate the product of one business venture from that of another. Trademarks are used to acquire and maintain market share, to inform consumers about the source and origin of a product, and to influence their perception of its quality. Trademarks play a key role in the promotion of both specific brands and products generally. Trademark owners (investors) argue that they are concerned with the impact of regulatory measures that restrict tobacco advertising, thereby limiting the capacity of trademarks to distinguish brands in regulated industries. On the contrary, public health advocates raise concerns about the use of branding to promote products that are directly or indirectly responsible for NCDs or other public harm.

The foregoing section demonstrates that the provisions of the TRIPS Agreement, in particular Articles 7 and 8, require the consideration of public health interests when interpreting relevant IPRs such as trademarks, patents, copyrights or industrial designs. It also sheds light on the types of IPRs rights held by those who invest in regulated industries such as tobacco and pharmaceuticals. The following section analyses the potential risk of litigation for East African countries, based on the provisions of the WHO Framework Convention on Tobacco Control (FCTC) and the experience of other countries, such as Australia, South Africa and Kenya, and it describes the relevant legal framework obtaining in other EAC countries, such as Tanzania, Rwanda and Burundi.

## **2.3 The Risk of Litigation to Investments Involving Intellectual Property on the Basis of Public Health: The Case of the Tobacco Industry**

### ***2.3.1 The WHO Framework Convention on Tobacco Control***

The FCTC entered into force on 27 February, 2005,<sup>71</sup> and is the first treaty negotiated under the auspices of the World Health Organisation (WHO).<sup>72</sup> It was signed by 168 of the 192 WHO member states (including the European Union) and more than 170 WHO member states are now parties to the convention, including all the EAC Partner States.<sup>73</sup> The FCTC provides a coordinated response to combating the tobacco epidemic, setting out clear strategies to

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71 The FCTC was opened for signature on 16 June to 22 June 2003 in Geneva, and thereafter at the United Nations Headquarters in New York, the Depositary of the treaty, from 30 June 2003 to 29 June 2004 (see WHO Framework Convention on Tobacco Control, 2005).

72 WHO Framework Convention on Tobacco Control, 2005.

73 Tanzania ratified the FCTC in April 2007.

combat public health concerns related to tobacco use. It clearly sets out specific obligations of the Parties in relation to tobacco use, including adopting tax and price measures to reduce tobacco consumption; a ban on tobacco advertising, promotion and sponsorship; an obligation to create smoke-free work and public places; putting prominent health warnings on tobacco packages; and combating illicit trade in tobacco products.

It is noteworthy that the FCTC, the most widely embraced treaty in UN history,<sup>74</sup> does not oblige the parties to impose a complete ban on tobacco use. The absence of a provision requiring the parties to completely ban tobacco use and supply is due to arguments that the tobacco industry has some benefits.<sup>75</sup>

The Convention targets and seeks to address a number of key menaces. These can be grouped as ‘demand menaces’, addressed through demand reduction provisions, and ‘supply menaces’, addressed through supply reduction provisions. The demand reduction provisions are contained in Articles 6–14 of the FCTC and are sub-grouped as price and non-price provisions. Price measures are price and tax measures to reduce the demand for tobacco. Non-price measures are as follows: protection from exposure to tobacco smoke; regulation of the contents of tobacco products; regulation of tobacco product disclosures; packaging and labelling of tobacco products; education, communication, training and public awareness; tobacco advertising, promotion and sponsorship; and measures relating to tobacco dependence and cessation.

The core supply reduction provisions in the FCTC are contained in Articles 15–17, and are related to illicit trade in tobacco products, sales to and by minors, and provision of support for economically viable alternative activities.

This part of the paper deals with non-price measures to reduce the demand for tobacco, relating in particular to protection from exposure to tobacco smoke (which is addressed through international human rights or constitutional law); regulation of the contents of tobacco products (which usually touches on patents); regulation of tobacco product disclosures (partly an aspect of patent law); packaging and labelling of tobacco products; and tobacco advertising and promotion. The last three issues (i.e. packaging and labelling of tobacco

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74 WHO Framework Convention on Tobacco Control, 2005.

75 For instance, in Tanzania the Tobacco Industry Act of 2001 supports the growth and development of a domestic tobacco industry for both export and in-country use. This legislation was introduced to help make Tanzania competitive in the international tobacco market, as well as to develop the domestic market. Support is grounded on the economic rationale that tobacco production is a profitable agricultural industry in the country. Other EAC countries have similar legislation.

products, and tobacco advertising and promotion) are more concerned with trademarks.

The following analysis considers some countries that have implemented the FCTC and the consequences for investments.<sup>76</sup>

### 2.3.2 Australia

Australia was the first country in the world to introduce legislation for the ‘plain packaging’ of tobacco products.<sup>77</sup> In November 2011, Australia became the first country in the world to legislate for “plain packaging” of tobacco products. As of December 1, 2012, the packaging of tobacco products sold in Australia must be a standard, drab dark brown colour; and the printing of tobacco company logos, brand imagery, colours, or promotional text on that packaging and on individual tobacco products is prohibited.<sup>78</sup>

Davison describes the effect of plain packaging legislation from the IP point of view as follows:

The first effect is that it bans non-word trademarks and signs altogether. There can be no use of colours, artistic devices, or fancy script of any kind. The basic colour of the packaging is a drab brown, which takes up the space previously occupied by the get-up of packaging. The second effect is that it permits the use of word trademarks, but the particular use is heavily prescribed. They can only occupy a small percentage of the front of the packaging, in no more than 14 point font, and the colour and font face are dictated by the legislation. The third effect of the legislation is to very significantly increase the percentage of the packaging that is taken up by text and graphic warnings. Ninety percent of the back of a cigarette packet is taken up with warnings, as is 75 percent of the front. Consequently, some trademarks are totally prohibited (non-word trademarks), others are heavily regulated (word trademarks), and the space available for trademarks is restricted by the requirement that warnings take up the majority of the packaging.<sup>79</sup>

<sup>76</sup> The countries have been selected because of their special significance. Australia is a pioneer of ‘plain packaging legislation’ which is relevant to the issues analysed in this paper, i.e. investment and intellectual property rights. South Africa is an African country with a well-developed bill of rights recognised the world over, including a right to commercial expression, while at the same time having a well-crafted law on consumer protection. Kenya is the only EAC country that has faced litigation from investors in the sectors discussed in this paper.

<sup>77</sup> Jonathan Liberman, ‘Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia’ (2013) 39 *American Journal of Law & Medicine* 361–381.

<sup>78</sup> *Ibid.*

<sup>79</sup> Davison, *supra* note 3.

Introduction of this legislation<sup>80</sup> resulted in four major tobacco companies (or groups of companies) that operate in Australia<sup>81</sup> challenging the scheme in the High Court, Australia's highest court. The tobacco companies' claims were based on section 51(xxxi) of the Constitution, which empowers the Australian Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws", otherwise referred to as expropriation in most jurisdictions.

The tobacco companies argued that they had a range of intellectual property and related rights such as trademarks, get-up, copyright, design, patents, packaging rights, licensing rights, and goodwill. They argued that under the new law these rights had been taken without just terms being offered to them. Accordingly, they argued the Act should either be read down in accordance with section 15 so as not to apply to their property, or be held invalid.<sup>82</sup> There was no dispute that the tobacco companies did have intellectual property and related rights. What was disputed, however, was the "nature and amplitude" of those rights, and hence the nature and extent of the impact of the scheme upon those rights.

The case was eventually decided in the Australian Government's favour on the basis of what was described as the "bedrock principle" that "[t]here can be no acquisition of property without 'the Commonwealth or another acquir[ing] an interest in property, however slight or insubstantial it may be'".<sup>83</sup>

Put simply, to constitute acquisition, the government or another organ must have benefited from the taking; therefore, mere taking is not sufficient to establish acquisition. Following defeat in the Australian courts the tobacco industry instituted a claim within the WTO dispute resolution framework on the basis of the same cause of action<sup>84</sup> and under a bilateral investment treaty that existed between Australia and Hong Kong.<sup>85</sup>

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80 The specific content is scattered in several pieces of legislation aimed at providing a comprehensive scheme to deal with tobacco use and products.

81 They are British American Tobacco (BAT), Imperial Tobacco, Japan Tobacco, and Philip Morris.

82 Liberman, *supra* note 81.

83 *Ibid.*

84 See *Investor-State Arbitration – Tobacco Plain Packaging*, AUSTL. GOV'T ATT'Y-GEN'S DEP'T. Online: <http://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobacoplainpackaging.aspx>.

85 *Ibid.*



The governments of other countries such as New Zealand<sup>86</sup> and the United Kingdom<sup>87</sup> launched public consultations on the introduction of plain packaging. India and South Africa undertook some initiatives.<sup>88</sup>

I submit that the tobacco industry will probably not succeed,<sup>89</sup> because the main basis of its claims is Article 16(1) of the TRIPS Agreement which provides as follows:

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

There is already a precedent<sup>90</sup> in as far as the WTO Panel decided that the right is a negative right (to prevent unauthorised third parties from using the trademark) rather than a positive right to use the trademark as one wishes.

### 2.3.3 Uruguay

In a similar vein, the International Centre for Settlement of Investment Disputes (ICSID) has handed down a similar decision in favour of the Government of Uruguay against Philip Morris.<sup>91</sup> In 2008 the Ministry of Public Health of

86 Consultation Document: Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand, MINISTRY OF HEALTH NZ (23 July 2012). Online: <http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand>.

87 Consultation Launched on Standardized Tobacco Packaging, DEP'T OF HEALTH (16 April 2012). Online: <http://www.dh.gov.uk/health/2012/04/tobacco-packaging-consultation>.

88 For example, a private member's bill was introduced in India, and the South African Health Minister expressed support for plain packaging as the judiciary also upheld a constitutional right to health as opposed to the commercial interest of the tobacco industry.

89 As noted above, at the time of finalising this paper, the tobacco Industry (Phillip Morris) had already lost the case in the investor arbitration tribunal and Australia's preliminary objection prevailed. Even though at the time of writing the records of the proceedings are still confidential, some of Australia's preliminary objection arguments included abuse of process in that the company underwent restructuring so as to qualify under the Hong-Kong Bilateral Investment Treaty and enjoy investor and investment protection under the treaty, and did so after Australia had started to introduce the impugned legislation. The WTO website indicates that another case under WTO law is still pending.

90 See Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WTO Doc WT/DS290/R (adopted 20 April 2005).

91 See *Philip Morris Brands Sarl, Philip Morris Products S.A and Abal Hermanos S.A v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

Uruguay introduced the so called “single presentation” public health protection measure.<sup>92</sup> By this regulation, tobacco manufacturing companies were banned from marketing and selling multiple varieties of their brands but were allowed to market only one at a time. As a result, Philip Morris had to withdraw 7 of its 12 products from circulation in the market. Again, in the 2009 the Uruguayan President issued a presidential decree which required graphic health warnings on cigarette packages to constitute 80 percent. This means that tobacco companies could only use the remaining 20 percent for using their promotional trademarks and related information. Philip Morris challenged the two measures through its subsidiary under the Uruguay-Switzerland BIT. The ICSID was called upon to rule on two issues namely: firstly, that the single presentation measure affected the company’s value; and second that the 80/20 requirement violated its intellectual property rights. The tribunal held that: “under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use, free of regulation, but only an exclusive right to exclude third parties from the market so that only the trademark holder has the possibility to use the trademark in commerce, subject to the State’s regulatory power”.<sup>93</sup>

In response to Philip Morris’s argument that when it applied and attained registration of its trademarks Uruguay had committed itself to protect the said trademark and respective investor, the Tribunal ruled on the scope of the alleged commitments holding that: “a trademark is not a unique commitment agreed in order to encourage or permit a specific investment”<sup>94</sup> and that Uruguay had no commitment nor obligation in relation to an investment under the BIT [hence] “A trademark gives rise to rights, but their extent, being subject to the applicable law, is liable to changes which may not be excluded by an umbrella clause: if investors want stabilization they have to contract for it”.<sup>95</sup> Philip Morris’s General Counsel Marc Firestone, meanwhile was quoted upon delivery of the above discussed judgement saying Philip Morris “never questioned Uruguay’s authority to protect public health, but sought to clarify international law”.<sup>96</sup>

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92 See Ordinances 514 and 466 of the Oriental Republic of Uruguay.

93 *Ibid.*

94 *Philip Morris Brands*, *supra* note 95 at [480].

95 *Ibid* at [481].

96 See N Alexandra ‘The Significance of Uruguay’s Win Over Philip Morris International’ in *Update from Intellectual Property Watch*. Online: <http://www.ip-watch.org/2016/07/21/the-significance-of-uruguays-win-over-philip-morris-international/>.

The only unqualified rights in the TRIPS Agreement are those contained in Articles 3 and 4, save for the limitations contained in the same articles. These concern non-discriminatory treatment and equal treatment. This is a requirement to accord treatment to nationals of other state parties that is no less favourable than the host state accords to its own nationals with regard to the protection of rights (national treatment).<sup>97</sup> Equally, if a member state of the WTO grants any favour, advantage, privilege or immunity with regard to the protection of intellectual property to the nationals of any other country, the same favour, advantage or privilege and immunity shall be accorded immediately and unconditionally to the nationals of all other Members.<sup>98</sup> Plain packaging legislation does not infringe Articles 3 and 4 of the TRIPS Agreement as it applies in the same way to all citizens.

Another provision relevant to this discussion is Article 20 of the TRIPS Agreement which provides that:

The use of a trademark in the course of trade shall not be *unjustifiably encumbered by special requirements*, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings...

There can be no doubt that the plain packaging legislation affects the capability of a trademark to distinguish the goods of one undertaking from those of other undertakings. Therefore the important question here is whether its requirements are justifiable. The answer to that question can be found in Article 8 of the TRIPS Agreement. Article 8 provides that “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health...”. This provision, taken together with Article 7 which emphasises a balance of rights and obligations, will by necessary implication mean that the regulatory measures introduced by the plain packaging measures are justifiable encumbrances on the respective trademark. This view is also supported by paragraph 5 of the Doha Declaration on TRIPS and Public Health, 2001 where it was confirmed that the traditional interpretation of the Convention (TRIPS Agreement) concerning the convention’s objectives and purposes<sup>99</sup> is one of the flexibilities available as an aid to interpreting the TRIPS Agreement in favour of public health protection.

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97 TRIPS Agreement, art 3.

98 There are some exceptions that are not relevant to the arguments made in this paper.

99 Vienna Convention on Law of Treaties, 1969.

### 2.3.4 South Africa

The South African case of *BATSA v Minister of Health* is more about the protection of human rights and the constitutional rights of individuals as against the interests of investors. The 1993 South African Tobacco Products Control Act was amended by Amendment Act 63 of 2008, and section 3(1)(a) prohibits advertisement and promotion of tobacco products. The section provides as follows:

No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.

Advertisement is defined by section 1 of the Amendment Act which provides that 'advertisement' in relation to a tobacco product:

Means any commercial communication or action brought to the attention of any member of the public in any manner with the aim, effect or likely effect of -

- (i) promoting the sale or use of any tobacco product, tobacco product brand element or tobacco manufacturer's name in relation to a tobacco product; or  
...
- (c) excludes commercial communication between a tobacco manufacturer or importer and its trade partners, business partners, employees and shareholders and any communications required by law.

Promotion is defined as

The practice of fostering awareness of and positive attitudes towards a tobacco product, brand element or manufacturer for purposes of selling the tobacco product or encouraging tobacco use, through various means, including direct advertisement, incentives, free distribution, entertainment, organised activities, marketing of brand elements by means of related events and products through any public medium of communication including cinematographic film, television production, radio production or the internet.

The appellant in *BATSA v Minister of Health*, a tobacco manufacturer which has a business presence in 180 countries worldwide, was concerned about the impact the amendment would have on its ability to communicate one-to-one with consenting adult consumers of tobacco products. The issues were (1) whether the Act limits freedom of commercial expression including one-to-one communication and tobacco consumers' right to receive information under section 16(1) of the South African Constitution; (2) whether the limitation of the constitutional rights (commercial expression) and right to

receive information is reasonable, justified in an open and democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution.

The Court of Appeal found that it was obliged to consider on the one hand the rights of the smokers to receive information concerning the tobacco product, and on the other the government's obligation to take steps to protect its citizens from the hazardous and damaging effects of tobacco use, including those who are trapped in the habit and wish to get out of it, and those who have given up and would not want to relapse into the old habit of smoking again.

The Court therefore held that: "the impugned prohibition is aimed at discouraging all tobacco users, without exception, in the interest of public health". The court held further that:

There are powerful public health considerations for a ban on the advertising and promotion of tobacco products. The right to commercial speech in the context of this case is indeed important. But it is not absolute. When it is weighed up against the public health considerations that must necessarily have been considered when imposing the ban on advertising and promotion of tobacco products it must, I think, give way. The seriousness of the hazards of smoking far outweigh the interests of the smokers as a group.<sup>100</sup>

In a separate judgment, the Court further held that South Africa as a state party to the WHO FCTC is obliged under the terms of Article 13 to impose a comprehensive ban on all tobacco advertising, promotion and sponsorship in accordance with its constitution or constitutional principles, and therefore it was not open to the Minister and the legislature to ignore the Framework Convention when considering what steps to take to deal with the risks posed by tobacco use.

The Court concluded by referring to the Canadian case of *Attorney General v JTI-MacDonald Corp*, where it was held:

Tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of *the smokers will die of tobacco-related diseases* and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.<sup>101</sup>

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100 *BATSA v Minister of Health*.

101 *Ibid* at [9] (emphasis added).

The decision went against the tobacco industry despite the fact that the South African Constitution protects the right of commercial expression as opposed to the Australian Constitution discussed above.

### **2.3.5 Kenya, Rwanda and Tanzania**

All the EAC Partner States have Tobacco control legislation and regulations.<sup>102</sup> Tanzania adopted tobacco control health warnings in 2010 in accordance with Article 11 of the FCTC, but did not do so as comprehensively as required by the FCTC. Kenya has the Tobacco Control Act of 2007. This was enacted after the FCTC came into force in 2005, and contains stricter provisions against tobacco use compared to those of the Tanzanian legislation. In the recent past Kenya introduced the Tobacco Control Regulations of 2014 which were published on 5 December 2014.<sup>103</sup> The regulations have been challenged in the Constitutional Division of the High Court of Kenya by British American Tobacco Kenya Ltd (BAT Kenya) in *British American Tobacco Kenya Ltd v Attorney General of Kenya*.<sup>104</sup> This demonstrates that the risk of litigation involving host states and tobacco industry investors is not far from East Africa.

Rwanda has ratified the FCTC.<sup>105</sup> The Law Relating to the Control of Tobacco of Rwanda<sup>106</sup> provides that an accomplice to unlawful advertisement of tobacco and tobacco products or other unlawful acts shall be prosecuted as the main perpetrator. In addition, the law prohibits the sale of tobacco products to minors, advertisements, and smoking in public places. As can be observed, the three Partner States of the EAC discussed here, namely Kenya, Rwanda and Tanzania, have responded positively to the FCTC, notwithstanding the different levels of their implementation initiatives. At the same time, as discussed above, the EAC Partner States are keen to encourage and promote trade and investments within the region. Without harmonisation of EAC laws covering regulation of investment and protection of intellectual property, there is a risk of mushrooming and endless litigation. To address that eventuality, I recommend that the EAC should come up with a harmonised Community law to regulate

<sup>102</sup> Tanzania has the Tobacco Control Act of 2003 and the Tobacco (Products) Regulations of 2010; Kenya has a Tobacco Control Act of 2007 and Rwanda has Law number 08/2013 of 01/03/2013 relating to the Control of Tobacco of Rwanda.

<sup>103</sup> See Legal Notice No. 169 and tabled before the Parliament on 11th December 2014.

<sup>104</sup> Petition No. 143 of 2015.

<sup>105</sup> See Presidential Order Number 13/01 of 25/05/2005.

<sup>106</sup> Number 08/2013 of 01/03/2013.

foreign direct investment and protection of intellectual property, while taking into account public health needs.

## 2.4 Conclusion and Recommendations

This paper examined regulatory measures that are relevant to international intellectual property and investment for regulated industries such as the tobacco and pharmaceutical sectors. It has demonstrated that the East African countries not only have separate national territorial jurisdictions and respective legislation for intellectual property law, but are also members of several regional territorial jurisdictions of a similar nature. These regional IP territories include those created by the Madrid and ARIPO systems to which different EAC Partner States belong. The discussion has shown that the autonomous EAC Partner States have international obligations under various international conventions.

The East African region is moving towards a fully-fledged common market in which it is expected that there will be free movement of all goods. Investors looking at the EAC region are likely to be more attracted to invest in it, taking into account the bigger market of the region rather than that of individual countries. However, if each state implements its own IP policy, there is a risk to the security of investments, unless there is a review and harmonisation of intellectual property law in East Africa. There are some on-going low-level efforts in that direction, but it cannot be over-emphasised that these must involve a consideration of the international obligations of the EAC Partner States, in particular under the TRIPS Agreement (Articles 7 and 8), the WHO Framework Convention on Tobacco Control, 2005 (Articles 3-17), and the International Covenant on Economic, Social and Cultural Rights, 1966 (Article 12(1), which address public health issues.

Efforts have also been made to harmonise anti-counterfeiting legislation, which applies to all products including medicines, but the efforts have not yet yielded the positive outcome expected, namely the signing and coming into force of the relevant protocol. One of the primary reasons for this is that the Bill was drafted without taking into consideration the provisions of the TRIPS Agreement, in particular the authoritative interpretation of the Doha Declaration on TRIPS and Public Health, 2001.<sup>107</sup>

It is therefore recommended that, considering the importance of the protection of intellectual property rights in promoting investments in the EAC,

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<sup>107</sup> See Kazoba, *supra* note 12 at 125-131.

this branch of the law of the EAC Partner States must be harmonised to create a Community law. The EAC Partner States must understand the nature of their obligations under the international conventions discussed here, and decide whether they need to provide for broader protection of public health beyond their obligations under these international conventions. If it is left to individual countries to decide, different regulatory measures will result which will reduce the potential benefits of the single customs territory and common market.

Given the situation in developed countries as discussed in this paper and the initiatives already taken by some African countries, and in particular EAC countries, plain packaging legislation in respect of tobacco is a reality that EAC Partner States are likely to face. It is recommended that tobacco control legislation should be thought through at the Community level so as to adopt Community law on the subject. This will help not to render fruitless any efforts made by individual countries to attract investments and at the same protect public health.



# **BACK TO THE DRAWING BOARD: ASSESSING PRIORITIES FOR INTELLECTUAL PROPERTY RIGHTS INTERESTS IN THE EAST AFRICAN COMMUNITY**

**ANTHONY CK KAKOOZA\***

## **1. INTRODUCTION**

A nation's constitutional provisions are reflective of the level of commitment to be given, through domestic legislation, to a particular issue of significance. In that regard, Article 1, Section 8, Clause 8 of the Constitution of the United States of America provides as one of its founding objectives: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This Constitutional provision forms the foundation for the protection and advancement of intellectual property protection in the United States. It is noteworthy that the drafters of the U.S. Constitution recognised the importance of intellectual property (IP) protection in the advancement of science and the useful arts as well as the overall socio-economic development of the nation. In the same vein, borrowing from the U.S. position, as Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan move towards strengthening the East African Community (EAC) as a regional international trade bloc, there needs to be a re-alignment of their respective intellectual property rights (IPR) legal frameworks.<sup>1</sup> It is on the same premise that the later part of this paper points out where Constitutional provisions on IP have been applied by the respective Partner States and how far these provisions influence domestic legislation on IP.

It is pertinent, at the onset, to provide a brief understanding of the term intellectual property, as well as the various rights that accrue therefrom. Intellectual property refers to a set of intangible products derived from human ingenuity such as an idea, the expression of an idea, or a sign or symbol that can be attributed to a source. Intellectual property rights are thus rights of attribution

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1 The Republic of South Sudan was admitted into the East African Community on 2 March 2016 as its newest member. It gained independence from Sudan in 2011. As such, due to the existence of inadequate data on South Sudan's IP legal environment, this paper focuses on the older Partner States and does not give an analysis of the situation in South Sudan.

and protection that are granted to those that come up with intellectual property. IPRs include, but are not restricted to, the following:

- **Patent Rights:** These are granted for a man-made solution to a technical problem.
- **Copyrights & Related Rights:** These are granted for works of art, such as music, artistic works, broadcasts, and related works.
- **Trade and Service Marks:** This is protection afforded to a sign or group of signs capable of distinguishing between goods or services from one source and those from another.
- **Industrial Designs:** These are similar to Patents but lacking in some technical requirements. All that is required is that it should be new or original.
- **Geographical Indications:** This is protection afforded to a product based on a specific geographical origin and which possesses qualities or a reputation that is acquired by virtue of that place or origin.
- **Trade Secrets:** This is a right of protection for business secrets that contain commercially valuable information. The protection must be against disclosure, acquisition or use by others in a manner that is contrary to honest business practices.
- **Plant Variety Protection:** Protection in this category is given to persons who breed plants and have discovered and developed a new plant variety. A Plant Variety is basically a unique creation of a plant grouping as a result of distinctive characteristics established from a given combination of plants or seedlings.

Traditional Folklore or Traditional Cultural Expressions (TCEs) includes Traditional Knowledge (TK) and is a quasi-IPR. This falls in a separate but related category of intangible rights. It is regarded as quasi-IPR because, although it is also a creation of human ingenuity, the characteristics differ significantly from IPRs. For instance, the author is unknown; to a large extent they are not in a fixed form; the rights are communally owned; and such knowledge has been in existence for time immemorial, unlike IPRs which carry limited durations of protection. Traditional Folklore has thus been defined in the following manner:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group of individuals and recognized as reflecting its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others,

language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.<sup>2</sup>

Traditional Knowledge is therefore part and parcel of TCEs by virtue of being a “tradition-based creation of a cultural community”.

This paper focuses on the objectives of the EAC, particularly on principles related to cross-border trade and IPR protection. Suffice to note therefore that in going back to the drawing board, the paper is more focused on looking at how far the EAC Partner States are following up on the objectives of the EAC – through their domestic legislation – as opposed to giving a critique of an EAC Common Market Protocol. Nonetheless, the paper does not shy away from evaluating some of the provisions in the Common Market Protocol that are relevant to IPR. It posits that although the EAC Partner States have reformed old IP legislations that were enacted prior to their independence, such reformation in these key legislations should not be addressed in isolation from the need for uniformity. This would be to the benefit of the region, especially in terms of fulfilling the intents and purposes of the Common Market Protocol. It is for this very reason that the paper makes the claim that constitutional provisions that give direct reference to IP protection reveal the extent to which specific States are interested in protecting their IP through domestic legislation. Harmonisation of the laws would also be drawn from countries in the same region sharing common interests, especially interests that target boosting socio-economic development. A number of socio-economic advantages are associated with the harmonisation of IP laws. These include: smooth exchange of expertise across borders; easier enforcement of IPRs; a more stable market economy in the region due to increased adherence for IPRs; and meeting consumer needs and expectations through a more efficient cross-border trade in goods and services<sup>3</sup>.

These aspirations can only be effectively achieved through enablement of IPR policy and legislative frameworks within the EAC region that are principally a reflection of one another. The paper lays out this claim in the following five parts. First, as a starting point, the paper highlights the key provisions in the EAC Common Market Protocol that advocate for integration

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2 This is the United Nations Educational, Scientific & Cultural Organization (UNESCO) definition of Folklore, found in the Recommendations on the Safeguarding of Traditional Culture and Folklore, adopted in 1989.

3 Sandaro Sideri, ‘The Harmonisation of the Protection of Intellectual Property: Impact on Third World Countries’ (UNU/INTECH Working Paper No. 14, June 1994) at 21-22; Also, see Elizabeta Zirnstein, ‘Harmonization and Unification of Intellectual Property in the EU’. Online: <http://www.fm-kp.si/zalozba/ISBN/961-6486-71-3/293-306.pdf>.

of regional IP legislative and policy frameworks. This serves as the guiding tool to uniformity in EAC domestic legislation. Some challenges that lie in the way of putting the Protocol's objectives into practical effect are also highlighted.

Second, having analysed aspects of the Common Market Protocol that are a guiding tool through which harmonisation is envisaged, the paper examines IPR priorities within the Partner States of the EAC. This is seen in their constitutional provisions and policies, where existent, as well as key legislation. These show the extent to which they are in line with the Common Market Protocol and also reveals major weaknesses in the current IP structures that have generated the challenges pointed out earlier. The paper further highlights existing coordinated mechanisms, or the lack thereof, in the handling of IPRs in the different countries, as well as the impact that this can have on regional economic development. Third, the paper then proceeds to explore the current EAC IPR agenda regarding access to medicine. A comparison of the relevant principles is made with the respective national policies and laws of the Partner States, giving perspectives as to what this might mean for the EAC. The fourth part provides recommendations as to how harmonisation of IP laws and practices can be made to work in the EAC in line with the Partner State obligations under the Common Market Protocol. The final part is the conclusion to the paper.

## **2. KEY PROVISIONS OF THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL**

The focus on facilitating the smooth flow of trade and services between the EAC Partner States led to the conclusion of a Protocol on the Establishment of the East African Community Common Market (known as the Common Market Protocol). It was signed by the EAC Summit in December of 2009, and ratified by the Parliaments of all the then five EAC Partner States in April 2010, which paved the way for its implementation from 1 July 2010.

The Common Market Protocol aims to remove barriers to trade in goods and services as well as liberalising the movement of other factors of production.<sup>4</sup> This is in line with the parameters of IP, the rights to which are embodied in or associated with the goods and services.

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4 Preamble to the Protocol on the Establishment of the East African Community Common Market.

Part F of the Protocol covers “Free Movement of Services”. This is of relevance to IPRs which easily transcend the EAC borders, some of the most prominent being entertainment and communication services, as well as health-related goods and services. Article 18 in particular highlights the intent of the EAC Partner States to fulfil their obligations as members of the WTO under the TRIPS Agreement. This Article deals with the “Most Favoured Nation Treatment” and provides that:

Each Partner State shall upon the coming into force of this Protocol, accord unconditionally, to services and service suppliers of the other Partner States, treatment no less favourable than that it accords to like services and service suppliers of other Partner States or any third party or a customs territory.<sup>5</sup>

Article 18 therefore shows the importance attached to the Most-Favoured-Nation Principle within a harmonised IP legislative system in the EAC region. Indeed, paragraph 1 of Article 20 on “Domestic Regulation” is to the effect that Partner States should ensure that the domestic regulations for their service sectors should be consistent with the provisions of the Protocol and not constitute barriers to trade in services.

Another important provision regarding IP harmonisation is Article 29 of the Protocol which provides for protection of cross-border investments. This Article advocates the promotion of cooperation in the field of IPRs within the region. The strict application of the “Most-Favoured-Nation” principle is again emphasised in Article 29 (2)(b) which calls on Partner States to ensure non-discrimination of the investors of the other Partner States by according them the same treatment as that given to its nationals. Under Article 29(4), the definition of the term “Investment” is: “any kind of asset owned or controlled by an investor of a Partner State in another Partner State in accordance with the national laws and investment policies of that Partner State . . .”. Under Article 29(4)(f), listed investment includes IPRs.

Article 37 of the Common Market Protocol, which provides for the co-ordination of trade relations, is also essential to IP regulatory harmonisation within the EAC region, but falls short in this respect. It provides, in paragraph 1, for the co-ordination of trade relations with the purpose of promoting

5 Article 18 of the Protocol is similar to Article 4 of the TRIPS Agreement on the “Most-Favoured-Nation Treatment” which provides:

“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members”.

international trade (among the Partner States), as well as trade relations between the Community and third parties. In Article 37(2), it gives details as to common areas in which such co-ordination is pertinent. These are: tariff rates; conclusion of tariff and trade agreements; the achievement of uniformity of measures of liberalisation; export promotion strategies; and trade remedies.

However, the element of dealing with cross-border trade in IPRs is clearly missing from this list, which could create confusion as to how to deal with IPRs from one Partner State that are exported into another Partner State. The Java trademarks case between Kenyan and Ugandan corporate entities which is discussed as a Ugandan case study below is an illustration of the difficulties that may arise where co-ordination of cross-border IPRs is not clearly stipulated in the Protocol.

Protection of IPRs is jurisdictional in nature and yet the products covered by IPRs are enjoyed across borders. The EAC Partner States can thus make positive achievements in regional trade, particularly in matters of intellectual property if they agree on and adopt common principles in IP trade remedies. Inevitably, the same positive objective can arise from the establishment of co-ordinated mechanisms in the negotiation of IP trade relations and agreements between EAC partner States and third parties. This would ideally be the purpose envisaged in Article 37 of the Protocol, save for the fact that it lacks clarity on how cross-border IPRs can be co-ordinated among the Partner States.

Arguably, Article 43 of the Protocol gives us a better understanding as to how the objectives of Article 37 can be fulfilled by the Partner States. In that regard, Article 43 also makes direct reference to co-operation in IPRs. Article 43(1) stipulates that such co-operation is in the areas of promoting creativity and innovation, as well as enhancing their protection. Article 43(3) goes further to break down the obligations of the Partner States in actualising the objectives of the Article. It stipulates that Partner States are required to: put in place measures to prevent infringement, misuse and abuse of intellectual property rights; cooperate in fighting piracy and counterfeit activities; exchange information on matters relating to intellectual property rights; promote public awareness on intellectual property rights issues; enhance capacity in intellectual property; increase dissemination and use of patent documentation as a source of technological information; adopt common positions in regional and international norm setting in the field of intellectual property; and put in place intellectual property policies that promote creativity, innovation and development of intellectual capital.

However, since the Common Market Protocol came into place, hardly any substantial steps have been taken towards fulfilling its objectives in respect of IPR legislative and policy development. This can be put down to a number of challenging factors. First is inadequate awareness of the value of IPRs across the EAC hampers full enjoyment and utilisation of such rights, and slows down the progress of creativity and innovation in this sector of the economy.<sup>6</sup> Second is the economic imbalance in the region also creates an imbalance in creativity and innovation which means that there is no level development of IP in the region.<sup>7</sup> The third challenge lies in the weak enforcement mechanisms that are in place to protect IP rights across the region: inadequate awareness of IPRs within the region's enforcement agencies spills over into limited coordination of cross-border enforcement of IPRs.<sup>8</sup> Regardless of the fact that IPRs are territorial rights that are subjected to the respective legislations in each Partner State, they easily transcend borders. This means that there is trade across borders in services and goods which embody IPRs. Thus, there should be systems in place for cross-border administration and enforcement of IPRs. This would include, for instance, reciprocal agreements between Collecting Societies for the administration of IPRs, as well as cross-border checks against trademark infringement.

Quasi-IP rights are also provided for under the EAC Common Market Protocol. Article 43(4) of the protocol provides for Partner States to establish mechanisms to ensure: the legal protection of the traditional cultural expressions, traditional knowledge, genetic resources and national heritage; the protection and promotion of cultural industries; the use of protected works for the benefits of the communities in the Partner States; and the cooperation in public health, food security, research and technological development.

Each of the Partner States in the EAC has quasi-IPRs because of the abundant wealth embedded in its respective cultural heritage. Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources within EAC could be effectively utilised if there were sound policies and legislative structures in place within the region. The presence of such policies is of

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6 *Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy* (London, 2002) at 148–150. Online: [www.iprcommission.org/papers/pdfs/final\\_report/ciprfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf).

7 As of 2014, Kenya's GDP accounted for 40% of the EAC region's GDP, followed by Tanzania at 28%, Uganda at 21%, Rwanda at 8%, and lastly Burundi at 3%. See Mwangi S Kimenyi & Josephine Kibe, *Africa's Powerhouse*, Brookings, January 6, 2014. Online: <http://www.brookings.edu/research/opinions/2013/12/30-kenya-economy-kimenyi>.

8 *Supra* note 6 at 146.

importance because a good number of ethnic communities are divided by State boundaries. Ultimately, many border communities between Uganda and Kenya, such as the Samia, as well as between Kenya and Tanzania, such as the Maasai, are rooted within similar TKs, TCEs and Genetic Resources. An EAC policy on quasi-IPRs would thus offer guidance on their effective utilisation, especially for the benefit of the border communities.

The next part of this paper shows that not all Partner States have made significant progress in utilising their quasi-IPRs in line with the aforementioned provisions of the Protocol. The slow progress in this direction hinges significantly on the imbalanced political environment within the region. Uganda's socio-economic development was negatively affected by the civil wars from the late 60s to the mid 80s; Rwanda endured the same in the late 80s and early 90s; while South Sudan and Burundi are yet to witness full political stability. Such an atmosphere in the region has led to the current unequal socio-economic development. The Partner States struggle with inadequate human resource expertise, and financial, capital and infrastructural challenges in effecting their obligations under the Protocol. Kenya, which has maintained relative political stability since gaining independence in 1963, has emerged as a dominant economic power in the region with the status of a developing economy, while the other Partner States are ranked as Least Developed Countries (LDCs).<sup>9</sup> This imbalance in ranking creates a challenge in that it affects how the Partner States can jointly handle their obligations with the WTO TRIPS Agreement.

As members of the WTO, all the Partner States of the EAC are obliged to comply with the provisions of the TRIPS Agreement. One of the essential purposes of the TRIPS Agreement is to guide Member States of the WTO into coming up with IP laws that are – to the best extent possible – uniform, so as to foster better global trade. However, in view of the limited capacities in Least Developed Countries (in terms of infrastructure, affordability and expertise – among others), they are given transitional arrangements under Articles 65 and 66 of the TRIPS Agreement as to when they are obligated to domestically fulfil application of the Agreement's provisions. Paragraph 1 of Article 66, for instance, reads as follows:

In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need

9 According to a list of Least Developed Countries as of May 2016, released by the United Nations Committee for Development Policy, Kenya is not on the list of LDCs while all the other EAC partner States are on the list. Online: [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_list.pdf](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf).



for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5 for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.<sup>10</sup>

It therefore follows that the special status given to LDCs by the WTO through the TRIPS Agreement, does not apply to Kenya which is not an LDC. It is only the other EAC Partner States that can benefit from the extension period under which they are obligated to bring their IP laws in line with the TRIPS provisions.

The imbalance in economic status between Kenya and the other Partner States means that they are not subject to the same obligations under Article 66 of TRIPS. This can drastically affect the efforts towards harmonisation of IP regimes in the EAC region.

Furthermore, Article 33 of the Protocol is likely to breed disharmony among the EAC Partner States. Article 33 provides for prohibited business practices. Under Article 33(2)(a), it is stipulated that this is inclusive of agreements “which have as their objective or effect the prevention, restriction or distortion of competition within the Community”. This creates a potential problem for Tanzania which is also a Member State of the Southern African Development Community (SADC). SADC is a regional body that brings together countries in the southern part of Africa with objectives similar to those of the EAC. It is inevitable that the socio-economic interests of the EAC will compete with the interests of SADC, thus placing Tanzania in a very precarious position in respect of which regional body it owes greater allegiance to. By way of example, Article 2(c) of the SADC Protocol on Science, Technology and Innovation of 2008 provides for the objective of development and harmonisation of science, technology and innovation policies in the SADC Region.<sup>11</sup> Such policies are in line with IPRs, but in the same vein, under Article 47, the EAC Common Market Protocol also provides for the approximation and harmonisation of Policies, Laws and Systems for purposes of its implementation. Tanzania, as

10 The extension period is currently until 2033 for LDCs.

11 See [http://www.sadc.int/files/3013/5292/8367/Protocol\\_on\\_Science\\_Technology\\_and\\_Innovation2008.pdf](http://www.sadc.int/files/3013/5292/8367/Protocol_on_Science_Technology_and_Innovation2008.pdf). However, according to the New Vision newspaper of Monday, 21 March 2016, there was a signing of a free trade agreement between the partner states of COMESA (Common Market for Eastern and Southern Africa), EAC and SADC. See Amelia Kyambadde, ‘Why COMESA-EAC-SADC Free Trade Area is Important for Us’ (New Vision newspaper, Vol. 31, No. 57, 21 March 2016). This agreement is meant, amongst other things, to boost market integration within the African continent.

a member of SADC and EAC would thus be constrained to choose which regional body's obligations should be given priority, particularly with regard to harmonisation of the IP legal framework.

The approximation of laws that the Partner States are encouraged to implement through Article 47 of the Protocol also requires addressing the challenge of different legal systems within the Partner States. The legal system in the EAC region is mainly a common law or English system derived from Great Britain, which colonised Uganda and Kenya, and also took over the then Tanganyika from Germany after the First World War.<sup>12</sup> Rwanda and Burundi follow a mixture of customary law and the German and Belgian Civil Law system because Belgium took over colonial administration in Rwanda from Germany.<sup>13</sup> South Sudan's joining of the EAC adds weight to the same challenge. This is because South Sudan has a combination of statutory and customary law which have been poorly disseminated due to on and off political instabilities. As such, the historical mix of legal systems related to the former colonial masters in the EAC region, impacts upon the current situation of the law in each of the Partner States. This makes approximation a slow and challenging process due to the fact that creating uniformity of legal systems within any given environment requires adaptability which also takes time.

The EAC Protocol is, on the whole, beneficial for encouraging creativity and innovation through the IP environment in the fields of economic, technological, social and cultural development in the E.A Community. The biggest impediment to the success of the Common Market Protocol lies not in its structure but in the commitment of the EAC Partner States to implement it to the letter. The Partner States have a natural tendency to prioritise national business interests over and above EAC regional interests, which ultimately become overshadowed. Such tendencies are likely to hinder the fulfilment of the Protocol's objectives – particularly the boosting of regional trade – if they are not effectively addressed.<sup>14</sup> The next part of the paper analyses the extent to which approximation and harmonisation of the intellectual property legislative and policy framework has been effected within each of the EAC Partner States

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12 Nazifa Rashid, 'British Colonialism in East-Africa During the Nineteenth Century' (2014) 19 *IOSR Journal of Humanities and Social Science* 8-11.

13 The nation of Burundi was a break-away from Rwanda after Rwanda's independence in 1961.

14 Mary Karugaba, 'EAC Trade Unfair, Says Business Community' (New Vision Newspaper, 19 April 2016). In this article, the writer notes that: "[Ugandan] traders say member states, especially Rwanda and Kenya want to protect their own business community".

– with the exception of South Sudan – in line with the Common Market Protocol.

### **3. AN ANALYSIS OF INTELLECTUAL PROPERTY RIGHTS PRIORITIES IN THE EAC REGION**

The trans-border enjoyment of IPRs is good news for international trade in terms of spreading the market base, but it is – and has always been – a challenge with respect to the protection and enforcement of IPRs. On the positive side, IPR holders are able to enjoy the satisfaction of a large number of consumers for their IP at an international level. However, enforcement of laws against infringement of their IPRs is an overwhelming task in countries other than their host State in the absence of a policy and legislative spirit of harmony and cooperation. Article 5(1) of the EAC Treaty sets out the objectives of the Community, which include the development of policies and programmes aimed at widening and deepening cooperation among the Partner States.

The cooperation envisaged through the EAC Treaty focuses on creating a positive impact upon the overall marketing of goods and services in the EAC. This includes protecting the interests of IP holders in the market. The most pertinent type of IP in regional markets is the trademark.<sup>15</sup> This relates to identification of goods and services by their source. In a business sense, this equates to branding whereby market practices rely on signs, symbols and related schemes to attract – and hopefully retain – certain consumers to buy particular goods and services. The EAC is witness to a lot of cross-border trade in goods and services amongst the Partner States. Therefore trademarks are the type of IP most likely to involved in cross-border disputes.

The analysis below addresses the IP legislative and policy environment in each of the Partner States, save for South Sudan. The particular attention given to trademark registration in the Partner States highlights differences in duration of protection. This can be a cause for concern in matters of regional integration in trade for a variety of reasons, for instance, where a trademark is assumed to have been abandoned in one Partner State due to non-use in commerce over a period of time and yet is being put to good use in another Partner State; or where duration of protection expires in one Partner State but is still active in

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15 Similarly, Article 95 of the European Community Treaty (ex article 100a) focuses on the adoption of legislative acts that can create uniformity in laws amongst member states whose objective is the establishment and functioning of the internal market. It is argued that the initial attention of this Article was on trademarks. See Zirnstein, *supra* note 3 at 4.

another Partner State. Another area of concern is how a Partner State can be in a position to accommodate conflicting IPRs within the same market in an instance where the IPRs originate from different Partner States. Understandably, I reiterate the point that IP protection is territorial and as such, the protection afforded in each State should be appreciated as is. However, this works contrary to the targeted principle of uniformity among the different States in the EAC trading bloc. This part of the paper therefore evaluates the extent of harmony in IP protection within the respective Partner States of the EAC with a view towards curtailing future trade disputes within the region.

The Constitution of a State, as its supreme law, represents the will of the people by virtue of being the paramount legal authority in the land that guides its people's way of life. The Constitution is also one of the key sources of domestic legislation. In each of the EAC Partner States analysed below, I start by making reference to the different constitutional provisions of each Partner State that relate to IPRs – if any. The purpose is to show that effective harmonisation of IPRs across the EAC region starts with embracing IPR protection at the domestic level, more so if the Constitution is the guiding factor. I then look at existing domestic laws and policies on IP – particularly trademark law – and the extent to which there is a semblance of uniformity. Next, I consider the appreciation of quasi-IPRs (TCEs and TK), which is followed up by highlighting the national institutions charged with IP administration and enforcement. I finalise with an investigation of available case studies in as far as they bring out the significance of IP harmonisation in the EAC.

## **3.1 Kenya**

### ***3.1.1 Existing Laws and Policies on Intellectual Property***

The Constitution of the Republic of Kenya provides under Article 11(2) that the State shall: (a) Promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) Recognise the role of science and indigenous technologies in the development of the nation; and (c) Promote the intellectual property rights of the people of Kenya.

Kenya's commitment to promote its IPRs, TK and TCEs is thus clearly evident in the Constitution. The promotion of all forms of "national and cultural expression" stipulated in Article 11(2)(a) can be interpreted to include the

establishment of effective domestic legislation that encourages IP innovation, enjoyment and exploitation of cultural practices, while curbing illegal usage. There is, however, currently no IP policy in place, though a draft policy has been under discussion since 2005. Kenya's Draft IP Policy feeds into Kenya's Vision 2030 which aims to make Kenya a fully-fledged middle income industrialised country by the year 2030.<sup>16</sup>

In November 2016, the Kenyan Parliament passed a legislation on protection of TK and TCEs. This is titled as 'The Protection of Traditional Knowledge and Traditional Cultural Expressions Act, No. 33 of 2016'. As of 2017, this makes Kenya currently the only East African country with a policy (see 3.1.2 below) and legislation on TK and TCEs.

Origin-based IPRs in Kenya are protected by the Trade Marks Act of 1955.<sup>17</sup> Patents and Designs are protected under the Industrial Property Act of 2001, while Copyright is protected under the Copyright Act of 2001. Another related piece of legislation is the Seeds and Plant Varieties Act of 1972, which was last amended in 2002.

Contrary to the objectives of the Common Market Protocol highlighted in the previous part of the paper, there is an apparent lack of uniformity in the duration given for trademark protection within the EAC. For instance, the initial duration for trademark protection in Kenya, subsequent to registration, is a period of 10 years from the date of filing. The same applies to Rwanda and Burundi, but not to Uganda and Tanzania, as will be seen below. This can create complications in cross-border trade in goods and services within the EAC, particularly with regard to trademarked goods and services.

Another aspect of trademark legislation that lacks uniformity is the relevance of ARIPO in the registration of trademarks. Under Section 40D of the Trademarks Act of Kenya, trademarks registered by ARIPO are automatically protected in Kenya. Although this can be seen as encouraging regional registration of trademarks through ARIPO, Tanzania is the only other Partner State of the EAC that provides for registration of trademarks through ARIPO.

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16 See [http://theredddesk.org/sites/default/files/vision\\_2030\\_brochure\\_july\\_2007.pdf](http://theredddesk.org/sites/default/files/vision_2030_brochure_july_2007.pdf).

17 Kenya's Trademarks Act, No. 51 of 1955 was last amended by Act No. 7 of 2007.

### 3.1.2 Quasi-Intellectual Property Rights

Since July 2009, Kenya has had a policy on TK and TCEs. This is known as the National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. It was created to preserve and at the same time develop culture, and to guide the promotion and dissemination of innovations based on the continuing use of traditional knowledge. A matter in which Kenya's commitment to the protection of its cultural heritage came to light involved the use of the *Kikoi*, a well-known fabric in Kenya that is part of the country's cultural diversity. In 2008, a British company tried to register "*Kikoy*" (derived from *Kikoi*) as its trademark. Ultimately, such registration would have given the company the sole commercial rights to the term "*Kikoy*" and would have infringed the rights of Kenyans to free use of the term *Kikoi* – a Kiswahili word for the distinctive colourful wrappings worn by men and women all over Eastern Africa. The registration was successfully opposed by Traidcraft Exchange and a law firm (Watson Burton) acting on behalf of the Government of Kenya through the Kenya Industrial Property Institute (KIPI).<sup>18</sup> This case highlights the significant role played by the Kenyan government in acting as a watch dog over the State's TCEs and TK in line with a legislative provision to that effect. The Copyright Act of Kenya provides that any person who wishes to use TCEs for commercial purpose should obtain permission from the Attorney General.<sup>19</sup> This implies that the Kenyan Government, represented by the Attorney General, is the custodian of TCEs in Kenya on behalf of its indigenous societies.

Although the *Kikoi* was effectively protected by the Kenyan government, the term is not exclusive to cultural ethnicities in Kenya but also stretches to those in Tanzania. However, as will be discussed below, Tanzania has no structure in place for the protection of its TCEs. As such, only cross-border ethnic communities on the Kenyan side of the border can stand to benefit from protection of their quasi-IPRs. This goes to show the importance of having uniform protection of IPRs and quasi-IP such as TCEs for the benefit of the EAC, especially in such instances where cultural ethnicity transcends borders within the EAC.

18 See Vnzomo, The Intellectual Property Tale of how Kenya almost Lost the *Kikoi* Fabric (IP Kenya: Intellectual Property from a Kenyan Perspective). Online: [www.ipkenya.wordpress.com/2012/01/16](http://www.ipkenya.wordpress.com/2012/01/16).

19 Copyright Act, s. 49(d).

### **3.1.3 Institutions Responsible for IP Administration and Enforcement**

IP administration and enforcement in Kenya is the responsibility of the Office of the Registrar General in the Attorney General's Chambers (under which the Kenya Copyright Board falls); the Kenya Industrial Property Institute (KIPI); the Customs Department of the Kenya Revenue Authority and the Kenya Bureau of Standards (KEBS). Administrative efficiency within these institutions is adequate but they have been criticised for not being coordinated in their work.<sup>20</sup>

Appreciation of IPRs is more pronounced in robust economies. This is partly because commercialisation of IPs flourishes better in stable and growing economies which also have efficient systems in place for IPR administration and enforcement. As the leading economy in the EAC, it is evident that IPRs are better appreciated in Kenya than in any of the other EAC Partner States. For instance, specialised courts such as the Industrial Property Tribunal, have also been set up to handle IP-related matters.<sup>21</sup>

### **3.1.4 Case Studies**

Case law can provide a basis for improving the adequacy and efficiency of legislation. This is based on lessons learnt from cases that interpret legislation against the standards set out in the nation's constitution. It also goes back to the claim made at the outset that national constitutions express the will of the people. The Kenyan case of *P.A.O v the Attorney General and AIDS Law Project*<sup>22</sup> played an effective role in highlighting the will of the people vis-à-vis legislation that was contrary to the Constitution. In this case, three Kenyan Petitioners had been living with HIV/AIDS and receiving free imported anti-retroviral drugs. They felt threatened by the enactment of the Anti-Counterfeit Act of 2008. This was because sections 2, 32 and 34 of the Act were likely to affect their access to affordable and essential drugs and medicines inclusive of generic drugs. Their argument therefore, was that this was an infringement of their fundamental right to life, human dignity and health as guaranteed under Articles 26(1), 28 and 43 of the Constitution of Kenya.

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20 ICC/BASCAP/ACA: Kenya – Promoting and Protecting Intellectual Property in Kenya at 19.

21 International Chamber of Commerce (ICC)/Business Action to Stop Counterfeiting and Piracy (BASCAP): Kenya – Promoting and Protecting Intellectual Property in Kenya at 15.

22 High Court of Kenya, Milimani Law Courts, Petition No. 409 of 2009.

Section 2 of the Anti-Counterfeit Act defined counterfeit goods in such a manner that it was inclusive of generic drugs. Sections 32 and 34 provided for the criminalisation and seizure of counterfeit goods. The petitioners' contention, therefore, was that due to the vague definition of counterfeit goods – albeit intentional – they would ultimately suffer from seizure of generic drugs by law enforcement agents, thus rendering such drugs inaccessible to them. This would cost them their lives.

In April 2012, Justice Mumbi Ngugi of the High Court of Kenya gave judgment in favour of the petitioners. The court held that “Enforcement of the Anti-Counterfeit Act, 2008 in so far as it affects access to affordable and essential drugs and medication particularly generic drugs, is a breach of the petitioners' right to life, human dignity and health guaranteed under the Constitution”.

A Judgement of this nature can be used as a direct warning to the other Partner States not to hurriedly seek enactment of laws that favour IP protection for individuals at the expense of the public interest. Stakeholders in Uganda, in particular, watched the developments of this case with keen interest and delayed the passing of Uganda's anti-counterfeit law with a view to ensuring that a better law would eventually be passed. A balance should thus always be created between serving the interests of, on the one hand, the owner of the IP which is granted protection and the subsequent investments made in innovation; and on the other hand creating access for the public which stands to benefit from the product. This balance ultimately leads to socio-economic development. The Kenyan experience is thus a lesson that can be utilised within the EAC in ensuring that there is a creation of that balance across the EAC bloc pursuant to the objectives of the Common Market Protocol.

## **3.2 Uganda**

### ***3.2.1 Existing Laws and Policies on Intellectual Property***

All Uganda's IP statutes have been updated lately, the oldest being the Copyright and Neighbouring Rights Act of 2006. The most recent ones are the Trademarks Act of 2010; the Trade Secrets Protection Act of 2009; the Geographical Indications Act of 2013; the Industrial Properties Act of 2014, which protects Patents, Utility models and Industrial Designs, and the Plant Varieties Protection Act of 2014.



### ***3.2.2 Quasi-Intellectual Property Rights***

Uganda has not yet capitalised on its TK and TCEs in the sense of protecting its cultural diversity. There is no specific policy or legal framework in place on the protection of TK and TCEs. Nonetheless, there is a need for the Partner States to protect and utilise their TK and TCEs as one regional bloc due to the commonalities that bring the different ethnic communities together. The Swahili language, for instance, which is spoken throughout the region, is part of the cultural heritage that forms an East African identity.

### ***3.2.3 Institutions Responsible for IP Administration and Enforcement***

The Uganda Registration and Services Bureau (URSB) is responsible for the administration of IP in Uganda. Filing for patents, trademarks and copyrights, amongst other IPRs, goes through URSB. Protection for patents and trademarks filed at the URSB can be done with due cognizance of Uganda's membership of the Paris Convention and the Banjul Protocol respectively. However, the Trademark Act is silent as to protection of trademarks within member states of the African Regional Intellectual Property Organization (ARIPO). The initial duration of trademark registration after filing, is seven years; registration is thereafter renewable for consecutive periods of 10 years.

The Commercial Court, a Special Division of the High Court, handles IP litigation. There are no recorded patents disputes. This is attributed to the very low number of patents filed rather than the newness of the patent legislation.<sup>23</sup> Noticeably, there has also been an increase in the number of copyright infringement suits in Uganda over the past few years. Although there is no actual empirical data to this effect, this can be associated with the robust nature of the developing entertainment industry, as well as the gradual improvement in IP awareness. Litigation in copyright mainly concerns infringement of music rights and rights to works of fine art. On the other hand, a lot of attention is given to the marketing of products and services in the business environment. Disputes over signs and symbols associated with this environment have meant a large number of IP litigations concerning trademarks.

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23 Industrial Properties Act, No. 3 of 2014 repealed the Patents Act, Cap. 216.

### 3.2.4 Case Studies

The improvement of cross-border trade in goods and services has inevitably led to trademark disputes between different business entities within the EAC and increased the need for uniform legislation within the EAC. A case in point is that of a Kenyan business entity M/s Nairobi Java House which sought to register the device trademarks Nairobi Java House Coffee & Tea and Java House and Java Sun in respect of services within Uganda.<sup>24</sup> A business entity that has been operating a chain of restaurants and eateries in Kampala, Uganda for the previous seven years, and which is the registered owner of the trademark 'Café Javas' and 'Javas', filed an objection before the Registrar of Trademarks on the grounds of likelihood of confusion.

The Registrar noted that although the marks differed, there were elements of marked similarity that impacted upon the overall impression of the marks: both marks had the word 'JAVA' as a dominant element which played a prominent role in the perception of the marks. It was therefore likely that the services of the Ugandan applicant would be associated with the Kenyan opponent because both parties offered similar services – the provision of food and drink. A member of the public could easily be confused as to the source of both services. This would be to the detriment of the Ugandan entity which had built its reputation over a long period of time.

Interestingly, Nairobi Java House claimed honest concurrent use of the mark over the same period. The Registrar rejected this argument having opined that 'Use' was a question of fact requiring consideration of whether the mark in question was actually being used in the trademark sense. He added that 'Use' referred to use in connection with the services provided in Uganda prior to the date on which the applications were made. On that basis, there was no evidence from Nairobi Java House of relevant use in Uganda. The Registrar also rejected Nairobi Java House's argument that use and goodwill in Kenya amounted to use and goodwill in Uganda based on the IP principle of territoriality. This defeated the claim of honest concurrent use, resulting in Nairobi Java House's application for trademark registration being rejected. This case thus forms a true test of the adequacy of the EAC Treaty in fostering the enjoyment and free movement of goods and services throughout the EAC region.

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24 See: Ruling by Registrar, Trademarks: Uganda – Trademark Application No. 2013/48063, Nairobi Java House Coffee & Tea and 2013/48062 Java House and Java Sun in Class 43 in the Name of Nairobi Java House Limited and Opposition thereto by Mandela Auto Spares Limited.

On appeal, the relevance of the EAC relationship came up. Justice Christopher Madrama of the High Court of Uganda (Commercial Division) set aside the decision of the Registrar of Trademarks. In his judgment delivered on the 9th of February 2016, he took note of the obligations of the EAC Partner States with regard to creating uniformity in their IP laws. In rejecting the decision of the Registrar, the judgment states:

“... I have considered the fact that Kenya and Uganda are part of the East African Community and operate under the principle of complementarities under article 7 of the Treaty. The community law is that partner States which include Kenya and Uganda shall enact similar laws with regard to the removal of non-tariff and other technical barriers to trade and measures that restrict free movement of goods and services. Sections 44 and 45 of the Trademarks Act 2010 support freedom of movement of goods and services in the East African Community within the limitations contained in the sections.

In the Treaty for the Establishment of the East African Community (as amended on 14th December, 2006 and 20th August, 2007) article 7 provides that there shall be free movement of goods and persons, labour, services, capital information and technology. It provides in article 7 (1) (c):

“ARTICLE 7

Operational Principles of the Community

1. The principles that shall govern the practical achievement of the objectives of the Community shall include:
  - (c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;
  - (g) the principle of complementarity; and...

The decision of the Registrar stifles free movement of services within the East African Community by restriction on the registration of a trademark registered prior in time in Kenya on the ground of registration of a trademark albeit registered later in time to Uganda.

Conclusively, the court ruled that the two marks are not similar and are therefore capable of concurrent usage.<sup>25</sup> This case is significant in highlighting the need for EAC Partner States to jointly administer and enforce IP rights within their localities. It demonstrates the significance of encouraging regional trade while respecting the IPRs of each EAC Partner State. Clearly, Justice Madrama gave priority to the importance of boosting regional trade and protecting the

25 See *Nairobi Java House Ltd v Mandela Auto Spares Ltd*, Civil Appeal No. 13 of 2015.

objectives of the EAC treaty over and above the territorial principle in IP protection. Such a position, however, may not be sustainable since it can work against the individual interests of an IP holder who is interested in protection in a particular State above regional interests.

This case also supports the importance of protecting cross-border investments as provided for under Article 29(2)(b) of the Common Market Protocol. This Article is to the effect that Partner States shall ensure non-discrimination of investors from other Partner States by according such investors equal treatment to that accorded in like circumstances to the nationals of the Partner States or to third parties. This is in line with the principle of the ‘most favoured nation treatment’ stipulated in Article 3(1) of the TRIPS Agreement and re-echoed in Article 18 of the Common Market Protocol. The EAC Partner States should thus ensure that their legal frameworks on IP mirror one another in terms of principles that make trade in goods and services smoother within the EAC region.

However, given the territorial nature of IPRs, there is a thin line between ensuring on the one hand that business in Partner States are guaranteed the security of their IP within those States – such as the Ugandan owners of the trademark ‘Café Javas’, and on the other hand, allowing in other IP rights holders from Partner States, such as the Kenyan owners of the Nairobi Java House trademark. The local businesses in such instances may feel disheartened and perceive this as lack of prioritisation by their governments in protection of local businesses over foreign entrants. It therefore follows that although the objectives of the Common Market Protocol have good intentions within the region, there is an apparent difficulty in balancing each Partner State’s interests with those of the EAC region. It is therefore not enough to ensure uniformity within the domestic legislations, but it is also important to ensure that the East African legislative assembly can enact laws that provide for recognition of IPRs within the EAC.

### **3.3 Tanzania**

#### ***3.3.1 Existing Laws and Policies on Intellectual Property***

Tanzania’s IP legislation is among the oldest in the region. Patents and Utility Models are currently governed by the Patents (Registration) Act, a 1995 law which replaced the Patents Act of 1987. Trademarks and Service Marks are

governed by the Trade and Service Marks Act of 1986 which stipulates a seven year period of protection for trademarks followed by ten year periodic renewals. Copyright protection is granted through the Copyright and Neighbouring Rights Act of 1999 while Plant Varieties are protected by the Protection of New Plant Varieties (Plant Breeders' Rights) Act of 2002.

### ***3.3.2 Quasi-Intellectual Property Rights***

Tanzania, like Uganda, is rich in cultural diversity and has vast TK, TCEs and genetic resources. However, it has no direct policy guideline or legal framework in place to regulate utilisation of these resources. The closest connection to TK is the National Health Policy of 2007 which mentions the importance of working together with traditional healers and nurses with due cognisance given to the importance of both traditional and alternative medicines.<sup>26</sup>

### ***3.3.3 Institutions Responsible for IP Administration and Enforcement***

Registration of trademarks can be done either directly with the Africa Regional Intellectual Property Organization (ARIPO) at its headquarters in Harare, Zimbabwe or at the Tanzanian Trademark Office. ARIPO grants the applicant ten years of protection subject to further renewal, whereas the duration of protection granted in Tanzania is seven years with a subsequent renewal of ten year periods. Thus, an applicant who files for registration through ARIPO is at an advantage over another that files locally in Tanzania.

Another administrative office for IP in Tanzania is the Business Registrations and Licensing Agency (BRELA). This is a Government Agency which was established to administer intellectual property laws, among other things. It also plays the role of protecting the development of creativity in artistic, literary works, and expressions of folklore (or TCEs) by protecting such work in conjunction with rights owners.<sup>27</sup>

26 GS Shemdoe & L Mhando, *National Policies and Legal Frameworks Governing Traditional Knowledge and Effective Intellectual Property Systems in Southern and Eastern Africa: The Case of Traditional Healers in Tanzania*; *African Technology Policy Studies Network* at p. 19. Online: <http://www.atpsnet.org/Files/wps64.pdf>.

27 See Samuel Wangwe et al., *Commission on Intellectual Property Rights: Country Case Study for Study 9: Institutional issues for Developing Countries in IP Policy-Making, Administration and Enforcement* (Economic and Social Research Foundation, Dar es Salaam, Tanzania). Online: [www.iprcommission.org/papers/text/study\\_papers/sp9\\_Tanzania\\_case\\_study.txt](http://www.iprcommission.org/papers/text/study_papers/sp9_Tanzania_case_study.txt).

Tanzania is in the lead in the protection of Plant Breeders' Rights (PBRs) in the EAC region. Since the establishment of the Plant Breeders' Rights system in 2005, Tanzania has put in place policies and legislative frameworks to guide the country as it seeks to promote plant breeding and facilitate agricultural advancements.<sup>28</sup> Tanzania's PBR office has also been involved in establishing a regional plant breeders' rights system for the Southern Africa Development Community (SADC). The ultimate objective is for SADC member states to have one PBR office through which an applicant for Plant Breeder protection automatically gets protection in all the member states. The EAC Partner States, which are mainly agro-based economies, should also establish ways in which they too can benefit from such initiatives. However, this also relates back to the challenges associated with Tanzania's divided obligations under both the SADC and EAC regional bodies as already discussed in the previous part of this paper.

### 3.4 Rwanda

#### 3.4.1 Existing Laws and Policies on Intellectual Property

Rwanda is currently the only EAC Partner State that has a National Intellectual Property Policy, which was unveiled in November 2009. Article 29 of Chapter I in the Constitution of the Republic of Rwanda<sup>29</sup> guarantees respect for private property. There is no direct mention of IPRs though their protection is construed as falling within the same article. The 2009 legislation on the protection of intellectual property covers patents, trademarks, industrial designs, unfair competition and copyright. There is also provision for the protection of geographical indications and trade names.<sup>30</sup>

#### 3.4.2 Quasi-Intellectual Property Rights

Protection of TK and Folklore lacks clarity in Rwanda. The country has copyright tariffs for the lucrative use of works of folklore<sup>31</sup> but it is not clear as to how adequate this regulation is in the enforcement of rights to Folklore or TCE. The Law on the Protection of Intellectual Property simply provides

28 Patrick Ngwediagi, *Establishment of Plant Breeders' Rights System in Tanzania: Achievements and Challenges, A Case Study under the Ministry of Agriculture Food Security and Cooperatives, Tanzania – CAS-IP NPI Collaboration Project*. Online: <http://www.wipo.int/edocs/lexdocs/laws/en/tz/tz010en.pdf>.

29 As last amended on 17 June 2010.

30 Law No. 31 of 2009 of 26/10/2009 on the Protection of Intellectual Property.

31 Presidential Decree No. 275/14.

under Article 289 that: “The protection of discovery of plants, genetic resources, traditional knowledge and folklore is granted by a related special law”. Data on the efficacy of the law on placing tariffs on works of copyright or works of folklore was not readily available. Suffice to state, however, that it is not feasible to place a tariff on folklore. This is due to the difficulty in identifying and differentiating pure folklore from works of copyright since most current works of folklore are expressed with a modern adaptation, hence they lean more to works of copyright than folklore. This difficulty is also coupled with the difficulty in placing a value on works of folklore from which a tax base can be ascertained. Tariffs on folklore should therefore not be given priority as an avenue through which economic development can be achieved through works of copyright and folklore.

### ***3.4.3 Institutions Responsible for IP Administration and Enforcement***

The Rwanda Development Board (RDB) took over the administration of IP matters from the Ministry of Trade and Industry (MINICOM) which used to handle all IP policy-making and legislative matters, save for copyright matters which were originally handled by the Ministry of Sports and Culture (MINISPOC). An application for trademark registration is filed at the Rwanda Trade Marks Office. A grant of trademark registration is effective for a period of 10 years from the date of filing and renewable for like periods.

The appreciation of IP in Rwanda has remained relatively low. Available statistics show that since independence, less than 120 patents, less than 7000 trademarks, and less than 50 Industrial Designs have been granted.<sup>32</sup> Rwanda’s limited capacity for handling patent examinations has led it to exploit its membership of ARIPO so as to benefit from examination, registration and protection of its patents across the membership base of ARIPO.<sup>33</sup>

The IP enforcement capacity of various government institutions has been strengthened. These include the police, customs authorities, as well as the judiciary. The High Court of Rwanda, for instance, established the Commercial Court Branch to handle disputes related to IPRs though these have been few due to limited local awareness of IP matters. The number of infringement cases is likely to rise, particularly trademarks cases, associated with cross-border

32 Republic of Rwanda, Ministry of Trade and Industry, *Rwanda Intellectual Property Policy* (Kigali, Rwanda, November 2009) at 5.

33 *Ibid* at 6.

products, since Rwanda joined the EAC.<sup>34</sup> Rwanda's IP policy also takes cognizance of a weak foundation in science, technology and innovation which is tied in to limited resources and capacity to fully engage in developing the area concerned.<sup>35</sup>

Rwanda's IP policy, which is meant to streamline its IP laws, is steered towards encouraging innovation and the creative industries. This is partly through Foreign Direct Investments (FDIs).<sup>36</sup> A key factor in attracting FDIs and technology transfer from Developed Countries to Least Developed Countries is the existence of a favourable IP policy and legislative environment. This is what Rwanda is striving to achieve. Rwanda has no restrictions on foreign investments and foreign investors are given equal treatment with local investors. This approach to attracting FDIs can be followed up by the other EAC Partner States through a uniform approach so as to attract FDIs to the expansive EAC market as well as spread out their investments across the region in line with the objectives of the Common Market Protocol.

## 3.5 Burundi

### 3.5.1 Existing Laws and Policies on Intellectual Property

The pieces of IP legislation in place are the Law relating to Industrial Property in Burundi, which protects Trademarks, Patents and Designs,<sup>37</sup> and the Law relating to the Protection of Copyright and Related Rights in Burundi.<sup>38</sup> These laws are in line with the 2005 Constitution of the Republic of Burundi. Article 58 of the Constitution provides that: "Each one has the right to the protection of moral and material interests deriving from all scientific, literary or artistic production of which they are the author". Trademark protection, in particular, is granted for a 10 year period from the date of filing and can be renewed for like periods of 10 years.

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34 *Ibid* at 6.

35 *Ibid*.

36 *Ibid* at 11.

37 Law no. 1/13 of 2009.

38 Law no. 1/021 of 2005.



### ***3.5.2 Quasi-Intellectual Property Rights***

Traditional Knowledge is protected under the Law relating to Industrial Property. Title V of this law concerns Traditional Knowledge and Crafts objects. Articles 247 to 286 give detailed provisions as to how TK and Crafts objects can be protected. These include provisions on scope of protection, purpose of protection, registration of TK, customary practices, rights conferred upon registration, involvement of government agencies and so on. This is by far the most detailed legislation on the protection of TK within the EAC which other Partner States can draw on.

One of the outstanding provisions in the law that should be of particular interest to the EAC is Article 260 which states:

A local community which occupies both part of the territory of Burundi and part of the territory of a neighbouring country may acquire rights in its traditional knowledge and enforce them in the territory of Burundi, in accordance with this Law.

If the community's traditional knowledge is also protected in the neighbouring country, the registration and protection of such knowledge in the territory of Burundi shall not prevent this same community from acquiring rights in the same traditional knowledge and enforcing them in the neighbouring country in question.

This provision has been carefully crafted because of the factual issues it has to deal with. As aforementioned, a number of communities within the EAC region live across national borders which raises challenges for protection and enforcement of their TK and Expressions of Folklore.

The law provides flexibilities in enabling the affected communities to choose in which country they would prefer to have their TK and TCEs enforced instead of imposing specific legislation upon them.

This type of provision allows for a harmonious relationship within and outside border communities and thus fosters socio-economic development.

### ***3.5.3 Institutions Responsible for IP Administration and Enforcement***

The Burundian government assigned responsibility over Intellectual Property management to the Ministries of Culture, Youth and Sports for the management of copyright and related rights, and the Ministry of Trade and Industry for the management of Industrial Property. However, in January 2002, an Industrial

Property and documentation Directorate was established to deal with all matters related to Industrial Property.<sup>39</sup> Trademark and Patent Applications are filed with the office of the Director of Industrial Property.<sup>40</sup>

#### 4. THE EAC POLICY FRAMEWORK AND NATIONAL FRAMEWORKS ON IPRS PROTECTION

The previous part of the paper has brought out the strengths and weaknesses in the IP policies and legislative frameworks in the respective Partner States of the EAC. The strengths should form the bench marks which other Partner States can follow in addressing their weaknesses so as to build up a healthy and uniform IP protection and enforcement mechanism within the EAC. However, this direction should also be guided by the EAC principles and agenda as derived from the EAC Treaty, the Common Market Protocol and policies meant to foster socio-economic development in the region. Science and technology is one specific area that has been given significant attention by the EAC Partner States. This is evident from specific provisions in this area within the EAC Treaty as well as the Common Market Protocol.

Article 103(1)(i) of the EAC Treaty provides that:

Recognising the fundamental importance of science and technology in economic development, the Partner States undertake to promote co-operation in the development of science and technology within the community through:

- (i) the harmonisation of policies on commercialisation of technologies and promotion and protection of intellectual property rights.

Public health is closely related to the protection of intellectual property. As such, in the same realm of science and technology, issues pertaining to public health have also been addressed under the Common Market Protocol. Article 36(1) (a) of the Protocol provides for the promotion of the interests of consumers within the community through establishing appropriate measures to ensure the protection of life, health and safety of consumers.

The subsequent amendments to the Treaty for the establishment of the East African Community, on 14 December 2006 and thereafter on 20 August

39 Saana Consulting, Factual Overview on Technical and Financial Cooperation for LDCs Related to TRIPS (2013) at 23. Online: [https://www.wto.org/english/tratop\\_e/trips\\_e/ldc\\_overview\\_08.05.2013\\_ch3.pdf](https://www.wto.org/english/tratop_e/trips_e/ldc_overview_08.05.2013_ch3.pdf).

40 See Adams & Adams eds., *Adams and Adams Practical Guide to Intellectual Property in Africa* (Pretoria: Pretoria University Law Press, 2012) at 75 and 79.

2007, did not affect Article 103 which was left intact. By that time, a few of the Partner States of the EAC had started reforming their national laws on IP in line with that Article.

The EAC bloc has given significant importance to issues concerning public health and its intersection with IP. In line with Article 103 of the EAC Treaty and Article 36(1)(a) of the Protocol, the establishment of a policy framework in this realm served the purpose of guiding Partner States towards coming up with uniform frameworks hinged on the provisions of that policy.

It should however be noted that the EAC embarked on a project of harmonising the IP policies and legal frameworks for the Partner States even prior to the passing of the Common Market Protocol in 2005. The key focus was not simply to do with the creation of harmony in all the IP laws, but also focused on the narrower facilitation of regional manufacturing, importation and trade in essential medicines. This culminated in the establishment of the EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities. In this part of the paper, I thus highlight the extent to which the EAC Partner States have fulfilled their obligations as mandated by the EAC Policy on Intellectual Property and Public Health.

The EAC policy on IP and public health contains a number of policy statements that are meant to be adhered to by the Partner States through amending their respective national legislations, particularly on patent law, in line with the EAC policy. These policy statements also constitute part of the drawing board that this paper relies upon in assessing the extent of prioritisation given to development and harmonisation of IP legislation within the EAC bloc. They are adapted and summarised as follows, after which a tabular format is applied to show how far they have been adhered to by the Partner States:<sup>41</sup>

1. Transition periods: All EAC Partner States that are considered as LDCs should utilise the 2016 transition period by providing for such extension within their national legislations<sup>42</sup>. As already discussed in the previous part of this paper, Kenya is the only Partner State that cannot take advantage of this extension since it is not an LDC. This complicates the move towards harmonisation of the EAC laws in this regard.

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41 Adapted from the EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation, February 2013.

42 The transition period has since been extended to 2033 for the world's poorest nations.

2. Patentability criteria: This has to be defined and adhered to within the domestic patent laws.
3. Materials excluded from patentability: These include natural substances (including micro-organisms), as well as derivatives of medical products.
4. Research exception: EAC Partner States are to amend their patent provisions with a view towards authorising research for scientific, non-commercial and commercial purposes, as well as providing for non-exclusive licences for the use of patented research tools against payment of compensation.
5. Marketing approval ('Bolar' Exception<sup>43</sup>): National patent laws in the EAC Partner States should be amended to provide for research exemptions by generic producers of patented drugs.
6. Clinical test data protection: EAC partner States should put systems in place to protect test and other data against unfair commercial use and disclosure. The local Medicines Regulatory Authorities should also be free to rely on the results of original test data from domestic or foreign approvals when assessing the safety and efficacy of generic competing products (misappropriation approach).
7. Disclosure requirements: Patent applicants in the EAC Partner States should be required to disclose all modes and indicate the best mode for carrying out an invention by local experts skilled in the art.
8. Administrative opposition procedures: EAC national patent laws should provide for pre- and post-grant administrative patent opposition procedures.
9. Parallel importation: National Patent, Copyright and Trademark laws should provide for international IP rights exhaustion.
10. Compulsory licensing: Grounds for the granting of compulsory licences should be determined and stipulated within national patent laws; national provisions on compulsory licences should include an authorisation on the export of up to 100% of pharmaceutical products to countries in need; and patent laws should provide the United Nations Development Programme (UNDP) recommended remuneration figure of 4% and take anti-competitive behaviour into account when determining the amount of remuneration;

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43 The term 'Bolar Exception' is in reference to a US law enacted to overturn a prior court ruling which held that the US did not provide for a research exemption – *Roche Products, Inc. v Bolar Pharmaceutical Co., Inc.*, 733 F.2d 858 (1984). The research exemptions are to avoid infringement of certain acts relating to the development and submission of testing data to a regulatory agency over generic versions of a patent drug that is about to expire or is about to be declared invalid. See Anthony Tridico et al., 'Facilitating Generic Drug Manufacturing: Bolar Exemptions Worldwide' (WIPO MAGAZINE, June 2014). Online: [http://www.wipo.int/wipo\\_magazine/en/2014/03/article\\_0004.html](http://www.wipo.int/wipo_magazine/en/2014/03/article_0004.html).

provide for a maximum prior-negotiating period of 90 days in their national laws as well as spell out conditions in which prior negotiation can be waived.

11. Anti-competitive behaviour and patent abuse: EAC Partner States are required to provide remedies for anti-competitive behaviour and patent right abuse, such as compulsory licences.

The table below provides an analysis of the level of compliance from the EAC Partner States in terms of incorporating the above outlined policy statements within their respective domestic legislations. This table presents an analysis of the key provisions of various laws within each EAC Partner State that address the EAC public health policy statements as aforementioned. This is premised on the EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities. The sections and articles mentioned in the table are drawn from the under listed domestic legislations:

- Uganda: The Industrial Property Act of 2014. A mention is also made of the Trade Secrets Protection Act of 2009 under 'Test data protection'.
- Tanzania: The Patents (Registration) Act of 1995.
- Kenya: The Industrial Property Act of 2001. Mention is also made of the Pharmacy and Poisons (Registration of drugs) Rules, which are a subsidiary legislation to the Pharmacy and Poisons Act.
- Rwanda: Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property.
- Burundi: Law no. 1/13 of 2009 relating to Industrial Property in Burundi.

<b>EAC Public Health Policy Statement</b>	<b>Uganda</b>	<b>Tanzania</b>	<b>Kenya</b>	<b>Rwanda</b>	<b>Burundi</b>
Transition periods	s 8 (3)(f)	No provision in the law	None -LDC	art 18.1 (8)	arts 17 and Art. 382
Patentability criteria	s 10, 11 and 12	ss 8, 9, 10 and 11	ss 23, 24 and 25	arts 15, 16 and 17	art 4, 6 and 7
Exclusion of certain materials from patentability	s 8(3)	ss 7(2) and 13	s 21(3)	art 18	art 17

Research exemptions	s 44(a)	s 38 (1)	s 58 (1)	art 41 (2)	art 57 (3)
'Bolar' exception	s. 44 (c)	s 38(2)	s 58 (2)	art 41 (3)	art 57 (5)
Test data protection	s 11(2) of Trade Secrets Protection Act	Legislation is silent on this issue	Rule 9 of the Pharmacy & Poisons (Registration of Drugs) Rules. No information on patent linkage	Legislation is silent on the issue.	arts 375, 376, 377
Disclosure requirements	s 21	s. 18(6)	ss 34(5 & 6), sec. 53(2)	art 25	art 20 & 22
Administrative opposition procedures	s 28 (7-12)	s 64 – Only post-grant procedures	s 103 – Only post-grant procedures	art 36 – Only post-grant procedures	art 48
Parallel importation	s 43(2). However, this provision is somewhat unclear on parallel importation.	s 38(2) – Also somewhat unclear on parallel importation	s 58(2)	art 40(1)	art 57(1)
Compulsory licensing	s 58 – 63	ss 53 – 59	ss 72 – 77	arts 47 – 55	arts 78 – 86
Anti-competitive behaviour & patent abuse	ss 55 and 66 (1)(b)	s 49	s 69 & sec. 80(1)(b)	art 45, 47(2) and 49	arts 74 and 76

**Table 1: Analysis of EAC Partner State compliance with the EAC Policy on Intellectual Property and Public Health**

It is worth noting from the table above that the EAC Partner States have made significant strides in incorporating IP policies, particularly on public health, within their domestic laws. On the down side, the table highlights disharmony in the laws particularly under three policy statements. These are: test data protection, administrative opposition procedures and parallel importation. This disharmony can negatively affect EAC cross-border trade in goods and services in the IP environment and the resolution of any disputes that may arise that are related to the aforementioned policy statements.

The EAC Partner States therefore need to undertake further measures in forging a regional IP legal and policy framework. The next part of the paper offers recommendations for creating such a framework.

## **5. RECOMMENDATIONS AND CONCLUSION**

The EAC Treaty, particularly Article 103, as well as Articles 43 and 47 of the Common Market Protocol, obliges Partner States to harmonise their IP legislation so as to foster trade and development in the region. The previous part of the paper shows that they are on track with this obligation. The following steps are recommended towards the improvement of efficiency in the harmonisation process. First is the establishment of grass roots innovation and institutional IP policies. The Partner States need to support local innovation and technological development in their respective countries. Universities, vocational institutions and other institutions of learning should be encouraged to set up their own IP policies which can then feed into the creation of national IP policies and eventually an EAC regional IP policy. Rwanda has already made great strides in this direction which other Partner States could replicate. These same stakeholders should work closely with the governments in the Partner States to periodically review the policy and legislative frameworks for IP within the EAC. Such periodic reviews can contribute to the ongoing process of identifying similarities and differences which can make harmonisation or approximation a smoother process.

Approximation of laws would work as an alternative to harmonisation where the local factors and settings do not make harmonisation a favourable approach. This includes political and socio-economic settings. In such situations, approximation of laws works towards securing a unified objective in the laws without the laws themselves being necessarily reflective of the same provisions.

Second, there is need to establish a regional policy and legal framework for protecting Traditional Knowledge and Cultural Expressions. Burundi has a well laid out legal framework for the protection of TK and TCEs from which other Partner States can seek guidance in establishing their own frameworks. The EAC Partner States are members of ARIPO and can thus borrow a leaf from the 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore<sup>44</sup> which is meant to guide the Member States in structuring their own legislation on TK and TCEs. As has been emphasised previously, a significant feature of the EAC region is that a number of communities share cultural expressions and TK across borders. The regulation of TK and TCEs, therefore, has to take cognizance of this fact in harmonising the law for effective protection and utilisation of the cultural heritage at a regional level.

Third, there is need to build IP administrative partnerships across the region and create one-stop IP registration centres. The EAC Partner States should encourage partnerships and healthy working relationships between IP collecting societies within each country through reciprocal agreements on overseeing the IPRs of their members across the borders. This can also be simplified through harmonised laws, the objective being that it makes monitoring and enforcement of IPRs easier within the EAC region.

The EAC Partner States should also jointly establish and fund a one-stop administrative centre that can handle registration of IPRs. In this way, there would be an easier guarantee that once an applicant's IPRs have been registered in the EAC office, there is automatic protection and enforcement across the region. In the same way, an application for patent or trademark rights within such an office would entail undertaking due diligence research across the EAC region to ensure that there are no conflicting interests. Avoiding such conflicts at the onset will spur up business confidence and consumer satisfaction, and eventually create a balanced regional economic development. Inevitably, it is also a cost-saving initiative by registering once and for all in a wider regional market as opposed to a State environment. IP applicants should thus not be limited to registering within specific Partner States or registering at the level of regional organisations such as ARIPO. IP registration within the Community should however be optional or at the discretion of the applicant based on the applicant's market target.

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44 For a copy of the Swakopmund Protocol, see <https://www.cbd.int/doc/measures/abs/msr-abs-aripo-en.pdf>.



Fourth, is the need for joint training of IP enforcement officers. A joint training of IP enforcement officers is necessary so as to build up capacity and cooperation across the EAC borders. This would contribute to strengthening expertise, enforcing standards of protection and ensuring easier identification of counterfeit products crossing borders. The current standards for the protection and enforcement of IPRs across the Partner States are hampered by the fact that most enforcement officers have an inadequate understanding of IPRs. This incapacity creates challenges in the gathering of evidence and following up of IPR claims by aggrieved parties. The Partner States can thus draw on the expertise which is available within other African regional organisations, as well as experience such as that of the European Union, in providing such training to enforcement officers.

Finally, I recommend initiating joint research and innovation projects. The EAC Partner States should also encourage establishment of joint research and innovation projects as well as transfer of technology and licensing across borders in the region. This can ultimately act as an impetus for Foreign Direct Investments (FDI) which could fast track socio-economic development in the region. Rwanda, again, has opened up to FDI through a non-discriminatory business system in which foreigners are treated no different from locals in the establishment and operation of businesses. A scheme of this nature in the utilisation of IPRs across the region can be of great benefit to the EAC.

This paper has pointed out how commonalities in the enjoyment of IPRs in the EAC region can facilitate socio-economic development through trade. It is only through eradication of the conflicts in the IP legislative frameworks as well as the establishment of a regional IP policy – not just one that covers access to medicine – that IP will make the significant contribution of which it is capable to the socio-economic development of the EAC region. Issues of inadequate awareness of IPRs, capacity development as well as administration and enforcement challenges are all best handled jointly within the region. There should not, however, simply be a case of pushing for adoption through harmonisation. There should also be a focus on adaptation, in the sense of drawing on the experiences of regional IP policies within the wider international community, as well as a healthy local input from neighbouring States within the EAC.



# COMMERCIAL LAW AND LEGAL HARMONISATION



# ANALYSIS OF THE APPROXIMATION OF COMMERCIAL LAWS IN KENYA UNDER THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL

NAOMI GICHUKI\*

## 1. INTRODUCTION

The East African Community (EAC) has a long history that dates back to the colonial era, when the British and German governments took initiatives to integrate their colonial territories in East Africa from 1885 to 1891, particularly in the area of infrastructure.<sup>1</sup> The three states of Kenya, Uganda and Tanzania attempted to create a political federation, which did not materialise. The East African Community (EAC), created in place of the East African Common Services Organisation (EACSO) in 1967, was short-lived and was disbanded ten years later in 1977. Apart from political differences, other factors to which the collapse of the old EAC can be attributed include lack of strong participation of the private sector and civil society, the continued disproportionate sharing of benefits of the Community among the Partner States, due to the differences in their levels of development, and lack of adequate policies to address the situation.<sup>2</sup>

Efforts to revive the EAC culminated with the signing of the Treaty Establishing the East African Community (The Treaty) on 30 November 1999 by the Presidents of Kenya, Uganda and Tanzania. It came into force on 7 July 2000. Rwanda and Burundi joined the Community on 1 July 2007. Balanced and sustainable development was prioritised as a key agenda of the EAC, with the objectives of the Community being to develop policies and programmes aimed at widening cooperation among Partner States in the fields of politics and economics, as well as legal and judicial affairs.<sup>3</sup>

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1 MV Mangachi, *Regional Integration in Africa - East African Experience* (Ibadan, Safari Books Limited, 2011) at 15.

2 Preamble to the Treaty Establishing the East African Community [EAC Treaty].

3 EAC Treaty, art 5(1).

Besides the commitment to establish a Monetary Union, and ultimately a Political Federation, the Partner States of the EAC also undertook to establish a Customs Union and a Common Market among themselves, in accordance with the Treaty.<sup>4</sup> The latter two are especially relevant within the context of commerce and trade, being a vehicle facilitating economic growth and fuelling development. More particularly, the Treaty provides that the operational principles that are to govern the practical achievement of the objectives of the community shall include, among others, people-centred and market-driven cooperation and the establishment of an export-oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology.<sup>5</sup>

## 2. COMMERCE, INTEGRATION AND OBSTACLES TO TRADE

Cross-border trade is one of the driving forces behind the five-member East African Community integration efforts<sup>6</sup> and has been a key uniting factor of the EAC. Partner States have thus taken active steps to consolidate economic empowerment through economic integration. For this to be achieved, the Partner States came together in an arrangement whose aim is the reduction or complete removal of trade barriers. This has in turn helped to reduce the costs of production for the benefit of both the producers and the consumers. The arrangement has further served to increase trade in goods between the Partner States of the Community.<sup>7</sup>

The EAC Customs Union is one of two such trading arrangements in Africa, the other being the Southern African Customs Unions comprised of South Africa, Botswana, Namibia, Swaziland and Lesotho. The EAC Customs Union came into force in 2005 after the Protocol on the Establishment of the East African Customs Union was signed in December 2004. Due to the variance in their level of development and success in establishing effective institutions, the Partner States face unique challenges in improving individual trade environments. The Partner States have also had varying levels of success

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4 *Ibid* art 5(2).

5 *Ibid* art 7(1)(a)(b).

6 The World Bank and the International Finance Corporation. *Doing Business in the East African Community* (Washington, The World Bank and the International Finance Corporation, 2012) at 59.

7 Naomi Gichuki, *Dispute Resolution in the East African Community Customs Union: The Role of the Council and the Court of Justice* (LLM Dissertation, University of Dar es Salaam, Tanzania, 2013) at 3.

in adopting global best practices to facilitate trade, especially in terms of border procedures and transportation infrastructure.<sup>8</sup>

The Customs Union is primarily about trade, investment and business, and to enable this, the Protocol establishing the Customs Union aims at liberalising trade by providing for the elimination of all internal tariffs and other charges of equivalent effect on trade upon the coming into force of the Protocol;<sup>9</sup> transitional provisions on the elimination of internal tariffs over a period of 5 years from the date of commencement of the Protocol;<sup>10</sup> the application of a Common External Tariff (CET);<sup>11</sup> a commitment to fully eliminate all Non-Tariff Barriers (NTBs)<sup>12</sup> to the importation of goods or services into their respective territories except to the extent provided or permitted by the Protocol;<sup>13</sup> the adoption of common trade documentation standards, procedures and processes;<sup>14</sup> and a harmonised system of customs information-sharing among EAC members.

Intra-EAC trade has not been a smooth venture, with the primary challenges arising from various legal barriers to trade. Trade barriers are defined as measures that governments or public authorities introduce in order to make imported goods or services less competitive than locally produced goods or services. In this regard, barriers can take one of several forms, including technical barriers, administrative barriers, tariff barriers, and Non-Tariff Barriers, commonly referred to as NTBs.<sup>15</sup> In 2010, all internal tariffs, surcharges and excise taxes were removed for intra-regional trade, establishing a single market for goods and services.<sup>16</sup> However, despite deliberate efforts being taken to address barriers to

8 US International Trade Commission, *Trade Facilitation in the East African Community: Recent Developments and Potential Benefits* (Investigation No 332-530 Publication No. 4335 Washington, 2012) at 21.

9 Protocol Establishing the East African Customs Union, 2004 art 10 [Customs Union Protocol].

10 *Ibid* art 11.

11 E Mugisa et al., *An Evaluation of the Implementation and Impact of the East African Community Customs Union* (Arusha, The Directorate of Customs and Trade, East African Community Secretariat, 2009) at 8. A CET refers to an agreed set of duties levied on imported goods entering any EAC Partner States from non-EAC member countries. It is a tariff charged on trade with non-members by all countries in the EAC Customs Union. See also Article 12 of the Protocol Establishing the East Africa Customs Union.

12 *Ibid* at 23.

13 Customs Union Protocol, art 13.

14 *Ibid* art 6.

15 See <http://um.dk/en/tradecouncil/barriers/what-is/>.

16 Anton Dobronogov & Thomas Farole, *An Economic Integration Zone for the Eastern African Community* (The World Bank, Africa Region Poverty Reduction and Economic Management Unit, 2012).

trade, the EAC Customs Union still suffers from numerous barriers to trade, especially NTBs, which are reported as being present across all the Partner States. During the 14th Regional Forum on NTBs held in February 2014, for example, new NTBs were still being reported by the Partner States.

Obstacles to intra-regional trade within the EAC take various forms, with NTBs being the most common. Technical and institutional barriers have been noted as barriers to trade, particularly where there is setting of product standards, since technical regulations and conformity assessment procedures vary across the region. Customs clearance has also been noted as being complex, with multiple government agencies being involved, often resulting in wastage of business hours and duplication of efforts. The requirement for multiple permits and licences has also considerably hampered intra-regional trade, with the Partner States having different licensing requirements according to local legislation.<sup>17</sup>

Lack of reliable infrastructure, especially with regard to transport and communication, difficulty in accessing serviced industrial land, coupled with slow, cumbersome processes to secure it, red tape and slow decision-making with regard to licences, permits and other aspects of starting and operating a business and information failures that hinder the private sector from coordinating investment activity have been identified as some of the prevailing barriers that serve to hamper, reduce or slow down the volume of trade in the EAC region.<sup>18</sup>

Another challenge that affects economic integration, not just in the EAC but in African regional economic communities as a whole, is membership of multiple economic blocs. Even though such memberships are ordinarily entered into for strategic and political reasons, it has been argued that another reason is in order to reduce trade barriers. The complexities of multiple membership have created considerable problems for policy and programme coordination across the board, especially with respect to harmonisation. Other effects arising from multiple membership include variance created by divergent approaches to integration, fragmented economic space, increased costs associated with membership, duplication of efforts, unhealthy competition for donor funding, conflicting mandates, and inconsistent objectives.<sup>19</sup>

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17 See Augustus Muluvi et al., *Kenya's Trade within the East African Community: Institutional and Regulatory Barriers* (Kenya Institute for Public Policy Research and Analysis).

18 Dobronogov, *supra* note 16 at 5.

19 Colin McCarthy et al., *Supporting Regional Integration in East and Southern Africa* (Trade Law Centre for southern Africa, 2010) at 50.



The EAC has the objective of accelerating harmonious and sustained expansion of economic activities.<sup>20</sup> This can only be achieved by creating a suitable environment for commercial enterprise. Trade and investment can only prosper within a legal framework that is suited to the needs of modern day business practice.<sup>21</sup> Apart from this, it is also necessary to have in place an effective dispute resolution mechanism, since trade relations often lead to conflicts of interests that call for an independent arbiter.<sup>22</sup> Nowhere is the speedy resolution of disputes more appreciated than in business circles.

It is widely acknowledged that the more people integrate, the more the conflicts that will arise due to the increased avenues of relations. The same applies to business, which by its very nature demands speedy settlement. As far as the EAC is concerned, the need to have trade disputes resolved speedily may have strongly influenced the perceived evasion of the judiciary in favour of alternative approaches. The idea is that business transactions and related disputes should play out as much as possible among business people and in business circles, without transactions being unnecessarily hampered by lengthy dispute resolution procedures. It was a deep concern that if courts were allowed to come in at every level, then litigation would become an obstacle to the free flow of trade in the region. There has been a shift in the world of business thinking that has tended to favour alternative methods of dispute resolution instead of the conventional judicial system.<sup>23</sup>

Benefits that make Alternative Dispute Resolution (ADR)<sup>24</sup> attractive include the fact that through ADR parties are able, through a single procedure,

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- 20 James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (Cambridge: Cambridge University Press, 2010) at 181.
- 21 Polina Dlagnekova, 'The Need to Harmonise Trade-Related Laws within Countries of the African Union: An Introduction to the Problems Posed by Legal Divergence' (2009) 15 *Fundamia: A Journal of Legal History* 1 See also Joseph RA Ayee in his work, *Review of African Development*, which points out that economic development involves the ability of a country to mobilise domestic resources, agriculture and industrialisation, generate employment for citizens and create a good environment for the private sector. 'Review of African Development' (A background paper presented at the African Training and Research Centre in Administration and Development Forum of Directors of Regional Development Institutions in Morocco in 1999).
- 22 Jeroen Denkers, *The World trade Organisation and Import Bans in Response to Violations of Fundamental Labour Rights* (Antwerp, Intersentia Publishers, 2008).
- 23 Key informant from the East African Court of Justice who spoke on the condition of anonymity, during a research study on the resolution of trade disputes within the EAC, carried out by the author at the EAC Secretariat in 2013. Findings were published in Gichuki, *supra* note 7.
- 24 Alternative Dispute Resolution is a procedure for settling a dispute by means other than litigation. ADR ordinarily uses arbitration and mediation. Arbitration is a determination of legal rights whereas mediation results in a binding determination only if the parties agree to settle their dispute on mutually satisfactory terms. In the last 30 years, ADR has become standard in commercial

to agree on how to resolve a matter that may, for instance, be governed by laws from a number of different countries. Parties are given the opportunity to exercise greater autonomy over the manner in which their disputes are resolved, contrary to resolution through court procedures where control lies with the court. The autonomy of ADR allows parties to choose the decision-makers that are most appropriate to the circumstances under investigation. Parties also get to choose the language, venue and even the law to be applied to their situation. In addition, complicated rules of procedure and evidence can be modified or excluded in arbitration, but not so with court proceedings. This ability to fashion procedural and substantive flexibility adds a great boost to ADR as a form of dispute resolution.<sup>25</sup>

ADR takes away the perceived advantages that a party may have in litigating before their home courts, which in turn helps to bolster the neutrality of the process. This is especially beneficial where familiarity with the applicable law and local processes can offer significant strategic advantages. The privacy offered by ADR is perhaps one of the biggest advantages. Proceedings, negotiations and decisions of ADR proceedings remain confidential, which is especially important where commercial reputations and trade secrets are at stake. Arbitral awards are usually final, unlike court decisions which are subject to appeal. This brings an air of finality with it, making the process significantly more predictable in terms of time, compared to litigation which ordinarily drags on for years on end.

### 3. HARMONISATION OF COMMERCIAL LAWS IN THE EAC

Over the past five years, all five economies of the EAC have benefited from regulatory reforms to improve the business environment for local businesses in order to encourage entrepreneurship in the region. This was based on the recognition that entrepreneurs have a key role to play in creating economic opportunities for themselves and for others. The decision to create a regulatory framework that promoted competition was seen as a move that encouraged entrepreneurship in the region. It was in this spirit that the Partner States embarked on a programme to harmonise commercial law, in order develop

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dispute resolution. See Randy Aliment, 'Alternative Dispute Resolution in International Business Transactions' (2009) 38:4 *The Brief* 12.

25 *Ibid* at 13.

a predictable and facilitative legal environment for businesses at the regional level.<sup>26</sup>

Various developments in the political and economic spheres have led to the onset of globalisation, which has resulted in foreign companies expanding their scope of operations to new territories. Naturally, this calls for the development of a well structured legal framework with uniform rules and regulations to guide the operations of transnational companies. With the onset of regional economic integration, it has become imperative for different economic blocs to identify modalities of legal harmonisation that are most appropriate for the fulfilment of their overall objectives. The elimination of barriers to trade and investment begins where effective legal systems with uniform rules are developed. This can only be achieved where there is harmonisation of national laws for a transnational approach to trade and business activities.<sup>27</sup>

Apart from being a means of reducing barriers to trade, other arguments in favour of harmonisation of law advance that the practice is necessary in order to create a comprehensive legal basis for free movement of trade and investment across territorial boundaries of nations and to deal with all sorts of possible disputes that could arise. Harmonisation thereby entails making regulatory, substantive requirements for government policies of an identical or similar nature, and adopting common principles of law, thereby reducing the differences between national laws. Domestic laws are modified to enhance predictability in cross-border commercial transactions.<sup>28</sup> In the context of international trade law, harmonisation can be achieved using tools such as model laws, conventions and legislative guides. Model laws are basically suggested patterns recommended for adoption as part of national law. Legislative guides on the other hand, contain guidance for legislators and include substantial commentary discussing and analysing outlines of the core issues.<sup>29</sup>

Corporate law in East Africa is governed by Acts of Parliament of the respective Partner States. Unfortunately, most of these laws are not consolidated into a single body of legislation, but cut across different statutes which were enacted at different times, and which are rarely, if ever, updated simultaneously.

26 The World Bank & the International Finance Corporation, *supra* note 6 at 59.

27 D Sridhar Patnaik & Fabrizio Lala, 'Issues of Harmonization of Laws on International Trade from the Perspective of UNCITRAL: The Past and the Current Work' in Stefano D'Orilia ed., *Participants Review of International Trade Law Post-Graduate Course* (University Institute of European Studies and ITC ILO, Turin: 2006) at 1.

28 *Ibid* at 11.

29 *Ibid*.

The Treaty mandates Partner States to harmonise all their national laws pertaining to the Community.<sup>30</sup> The specific institution of the EAC tasked with Harmonisation is the Secretariat, which is responsible for co-ordination and harmonisation of policies and strategies relating to the development of the Community. This is done through the Co-ordination Committee.<sup>31</sup> The Committee is made up of the Permanent Secretaries responsible for regional co-operation in each Partner State and such other Permanent Secretaries of the Partner States as each Partner State may determine.<sup>32</sup>

In order to fulfil the Treaty requirements and honour commitments made by Partner States, a Sub-Committee headed by the chairpersons of the Law Reform Commissions of the Partner States was established with the role of harmonising national laws in line with EAC law. The Sub-Committee works by studying and analysing laws of the Partner States in order to establish gaps, inconsistencies, similarities and shortcomings in the Partner States' national laws. After comparing the national laws with international best practices, the Sub-Committee then makes recommendations on amendments which should be effected. In the area of commercial law, the Sub-Committee has so far reviewed laws governing Companies, Insolvency, Partnerships and Registration of Business Names.<sup>33</sup>

The EAC Secretariat commissioned a study to harmonise the commercial laws of the Partner States. The first phase involved an overall review and identification of commercial laws in the Partner States within the nine broad clusters of commercial laws having a direct impact on the EAC Common Market and the EAC Monetary Union. This phase was completed in June 2010 and identified convergences, gaps and differences in the laws of the Partner States. The second phase of the project involves drafting EAC legislation in the identified and agreed priority areas with a view to having the same enacted by the East African Legislative Assembly.<sup>34</sup> The implication of this is that the members of the EAC would in effect have similar laws, since EAC legislation, once published in the Gazette, supersedes any similar national laws in the Partner States.<sup>35</sup>

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30 EAC Treaty, art 126(2)(b).

31 *Ibid* art 71(1)(e).

32 *Ibid* art 17.

33 Steven Agaba, 'Regional Harmonisation of Commercial Laws: Opportunities and Implementation Challenges' (Conference Paper, Arusha, 2011).

34 *Ibid* at 5.

35 EAC Treaty, art 8(4).

The following commercial laws were specifically earmarked for harmonisation by the Secretariat: banking law, business transactions law, finance and fiscal legislation, insurance and re-insurance legislation, investments, procurement and disposal of assets law, monetary legislation, standardisation, quality assurance and trading law (contract, external trade, import and export transactions and sale of goods).<sup>36</sup> Other areas requiring harmonisation and with pending Bills being developed are intellectual property law, contract law, public private partnerships, the law on recognition of judgments, and business registration law.

Other references to harmonisation of laws that touch on private and economic law generally are in the areas of trade documentation and procedures;<sup>37</sup> rationalisation of investment incentives with a view to promoting the Community as a single investment area;<sup>38</sup> monetary and fiscal matters;<sup>39</sup> tax policies;<sup>40</sup> banking;<sup>41</sup> and harmonisation of capital market policies on cross-border listing, foreign portfolio investors, accounting, audit and financial reporting standards and regulatory frameworks.<sup>42</sup>

#### 4. APPROXIMATION OF COMMERCIAL LAWS IN KENYA

As stated in the preceding section, the Partner States have made considerable efforts in harmonising their national laws to conform to the objectives, requirements and commitments of the Treaty. Unfortunately, the process has encountered many pitfalls including the sheer magnitude and scope of work, financial constraints, conflicting commitments caused by subscription of some Partner States to multiple regional economic communities, differences in legal systems, and language constraints.<sup>43</sup> However, due to the complexities of harmonisation, the strategy was abandoned in favour of approximation.

Approximation of laws is defined as the process by which Partner States align their national laws, rules and procedures in order to give effect to the entire

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36 *Ibid.*

37 *Ibid* art 75(1)(m).

38 *Ibid* art 80(1)(f).

39 *Ibid* art 82.

40 *Ibid* art 83(2)(e).

41 *Ibid* art 85(b).

42 *Ibid* art 86(c).

43 Agaba, *supra* not 33 at 8.

body of EAC laws.<sup>44</sup> It involves three main phases. The first is transposition, which entails adopting or changing national laws, rules and procedures so that the requirements of the relevant EAC laws are fully incorporated into the national legal order. The second phase is practical application, which involves the Partner States allocating sufficient budgets to the necessary institutions to implement laws and regulations. The final phase, enforcement, calls upon States to provide the necessary controls and penalties to ensure compliance with the laws.<sup>45</sup>

## 4.1 Sources of Law

The laws regulating Kenya's commercial practice are scattered across a series of statutes. The Constitution is Kenya's supreme law. General rules of international law also form part of the law of Kenya. The same applies to any treaties or conventions ratified by Kenya.<sup>46</sup> Being a common law jurisdiction, the courts also play a role in the interpretation and application of law. Decisions of higher courts are generally binding on lower courts, with decisions of other Commonwealth jurisdictions being used persuasively in deciding matters. The Judicature Act mandates all courts to exercise their jurisdiction in conformity with the Constitution and all other written laws, including Acts of Parliament of the United Kingdom, as specified in the Judicature Act. And, so far as written laws do not apply, in conformity with common law, doctrines of equity and statutes of general application, which shall apply only so far as the circumstances of Kenya permit, and subject to such qualifications as the circumstances may render necessary.<sup>47</sup>

Kenya's laws provide for three main types of corporate entities. These are companies, sole proprietorships and partnerships. The corporate law arena is largely governed by the Companies Act of 2015. Other statutes relevant to corporate law in Kenya are the Registration of Business Names Act, the Partnerships Act of 2012 and the Limited Liability Partnerships Act of 2012. The Companies Act provides for five types of companies. There are companies

44 Johnson Okello, *Approximation/Harmonisation of Laws - Kenyan Context* (Arusha, 2012) at 1.

45 *Ibid.*

46 Constitution of the Republic of Kenya, 2010 art 2(5)(6).

47 *Ibid* art 3(a)(b)(c).

limited by shares,<sup>48</sup> companies limited by guarantee,<sup>49</sup> unlimited companies,<sup>50</sup> private companies,<sup>51</sup> and public companies.<sup>52</sup> It also sets out the requirements for incorporation of companies. The Registration of Business Names Act makes provision for the registration of firms, individuals or corporations carrying on business under a business name. It defines a business to include every trade, occupation or profession. Under the Act, a firm means an unincorporated body of two or more individuals or of one or more individuals and one or more corporations, or of two or more corporations, who or which have entered into partnership with one another with a view to carrying on business.<sup>53</sup> The financial costs of registering a business under this Act are significantly lower than those called for when registering an incorporated company under the Companies Act.

## 4.2 Progress Made in Approximation

The investment climate of a country is the primary determinant for attracting foreign direct investment. Kenya enjoys a liberalised economy, with no foreign exchange and price controls. Apart from Kenya being the economic centre in the East African Community, other reasons identified for making it a viable investment destination are the diversified and established economy with a strong business sector; opportunity in different sectors, including tourism, agriculture, mining, ICT and manufacturing; strong reform gains to encourage investment; regular stakeholder engagement between government and private sector investors; as well as political stability gained through a new constitution with greater separation of powers.<sup>54</sup>

New business opportunities have arisen with the onset of the EAC Common Market. For these opportunities to bear tangible results, a number of legal and regulatory changes need to be effected at EAC level and individual state level. As of 2010 Kenya was leading in this reform process in the region. Working closely with the private sector, it identified several laws and regulations

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48 The Companies Act, No 17 of 2015, s 6.

49 *Ibid* s 7.

50 *Ibid* s 8.

51 *Ibid* s 9.

52 *Ibid* s 10.

53 The Registration of Business Names Act, Cap 499 s 2(1).

54 United Nations Conference on Trade and Development. *An Investment Guide to Kenya, Opportunities and Conditions* (UNCTAD, New York, 2012).

that needed amendment so as to conform to the requirements of the Common Market Protocol.

The Business Regulatory Reform Unit (BRRU) was established by the Ministry of Finance on the realisation that growth and competitiveness in the private sector was being hampered by inefficient, costly and ineffective licences, permits and certifications. The unnecessary bureaucracy increased the cost of doing business and made the private sector uncompetitive globally and in the region. The BRRU mandate includes keeping track of all regulatory regimes, reviewing the quality of new licences, liaising with regulators to conduct regulatory impact assessments and ensure that new regulations, licences, fees and charges do not create unnecessary burdens on businesses. The enactment of the Licensing Laws (Repeals and Amendments) Act of 2006 eliminated 110 licences and simplified procedures for 8. A further 205 licences have been eliminated and 317 others simplified.<sup>55</sup>

A Task Force was established to consider all laws and align them with the Common Market Protocol. The Task Force presented its final report in 2010 and prepared a Bill which was presented to the Attorney General's office for drafting and publication. Kenya's approach to the approximation exercise was to have all legal reforms effected through a single Miscellaneous Amendment Bill. The objective of the Bill is to amend various laws in order to give effect to the Common Market Protocol, thus ensuring that the benefits and opportunities available to Kenyans, as conferred by various statutes, are also extended to citizens of other Partner States,<sup>56</sup> in the spirit of the EAC.

## **5. IMPLEMENTATION STATUS OF APPROXIMATED LAWS AND CHALLENGES**

Considerable efforts have been put into identifying and amending legislation so as to make it conform to the standards set out in the Common Market Protocol. However, in most cases amendment has not translated into implementation. Below is an analysis of the implementation status of the Miscellaneous Amendment Bill, 2011. It is worth noting that the style of amendment chosen is at best basic, and at worst simplistic, since in most cases the amendment simply involves substitution of the word 'Kenya' by 'East Africa.'

55 The Ministry of Finance. Establishment of the Business Regulatory Reform Unit (BRRU) [www.businessadvocacy.org/downloads/briefBRRU0808.pdf](http://www.businessadvocacy.org/downloads/briefBRRU0808.pdf).

56 The Draft Statute Law (Miscellaneous Amendments) Bill, 2011; Memorandum of Objectives.



The statutes affected by the proposed amendments are as follows: The Investment Promotion Act of 2004 in which amendments were made to the definition of the terms ‘foreign investor’ and ‘local investor’, so that the term foreign investor no longer refers to citizens from the EAC Partner States. The scope of the term ‘local investor’ was modified to refer to persons, trusts, body corporate and partnerships from the EAC Partner States. The Bill also extends the definition of ‘Partner State’ to include Burundi, Rwanda and any other state granted membership of the EAC under Article 3 of the Treaty.

The proposed amendments to the Investment Promotion Act have not yet been implemented, even though the proposal has received the support of the Central Bank of Kenya and the Kenya Private Sector Alliance (KEPSA), which will facilitate investment by treating both local and foreign investors in the same manner. A further impediment to the implementation of the proposed amendments is the fact that due to the reorganisation of parastatals, stakeholders agreed to hold the proposed amendment in abeyance until the restructuring was finalised. It is expected that the restructuring will also result in an overhaul of laws, as new institutions may be formed, or existing ones merged.<sup>57</sup> The same challenge has affected the proposed amendments to the Foreign Investment Promotion Act, which had proposed to amend the definition of “foreign national” to mean a person who is not a citizen of a Partner State, or a body corporate which is not incorporated in any of the Partner States.<sup>58</sup>

The Insurance Act proposes amendment by replacing the word ‘Kenya’ wherever it appears by the words ‘East Africa.’<sup>59</sup> Currently, amendments to Section 23(4) of the Insurance Act have not been implemented. The proposals seek to enable companies incorporated in East Africa and having East African directors to be registered in Kenya. Registration requirements are that one third of the share capital should be owned by Kenyans. Stakeholders agreed that there was need for reciprocity from other Partner States with regard to the insurance sector. However, Section 153 has been implemented and East Africans can now be registered as insurance agents.<sup>60</sup>

The Registration of Business Names Act proposes amendment by deleting the definition of the term ‘foreign concern’ and substituting it as follows:

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57 Department of East African Affairs–Legal Unit, *Status of Implementation of Amendments Proposed in the Miscellaneous Amendment Bill to Comply with The EAC Common Market Protocol* at [5].

58 *Ibid* at [9].

59 Insurance Act, s 23(4), 27 and 153.

60 *Supra* note 60 at [6].

“Foreign Concern means any firm, individual or corporation whose principal place of business is not situated within East Africa. The proposal to exclude businesses located within East Africa from the definition of ‘foreign concern’ as established in the Registration of Business Names Act has not been implemented. Stakeholders were informed that the Attorney General’s office is in the process of amending commercial laws, and so proposed amendments should be sent to them for consideration when enacting new legislation.”<sup>61</sup>

The Export Processing Zone Act proposes to make an amendment by deleting the definition of the term ‘company’ and substituting it with the following new definition:

“company” means a company within the meaning of the Companies Act; or a company registered in any of the Partner States; or in any other case, a company incorporated outside Kenya but registered in Kenya under the Companies Act. The proposal to have the definition of ‘company’ within the Export Processing Zones Act altered to mean a company within the meaning of the Companies Act or a company incorporated outside Kenya but registered in Kenya under the Companies Act has been opposed by the Export Processing Zones Act (EPZA). It is preferred that the Companies Act be amended to include companies incorporated within the EAC.<sup>62</sup>

The Income Tax Act is to be amended so that ‘resident’ includes the nationals of other EAC Partner States. The Capital Markets Authority Act is to be amended by expanding the definition of ‘investment company’ to include investment companies incorporated within any of the EAC Partner States. Further, the definition is to be amended to reflect that an investment company means a collective investment scheme organised as a limited liability company under the company law of a Partner State of the East African Community in which the rights of participants are represented by shares of that company. Section 20(2) (a) is to be amended to reflect the fact that the Authority may approve a person as a securities exchange if it is satisfied that the applicant is a limited liability company incorporated under the company law of a Partner State.

The Immigration Act has been heavily amended to respond to the Common Market Protocol. Kenyan laws did not previously provide for a residence permit. However, with the new changes, residence permits are to be issued in place of

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61 *Ibid* at [7].

62 *Ibid* at [8].

Alien Identification Cards for members of the EAC Partner States in Kenya, in addition to work permits. Generally, the existing laws on immigration, citizenship and nationality have been amended to take into account the principle of non-discrimination for East African citizens, particularly because the rights of establishment and residence are dependent on the laws related to free movement of persons and labour.<sup>63</sup>

Amendments to the Capital Market Authority Act and the Immigration Act have been fully implemented and no further reaction is required. In relation to visitors' passes in the Immigration Act, it is proposed that there is need to specify that for East Africans, the pass should apply for a period of up to six months as opposed to the current 90 days.<sup>64</sup> With regard to the acquisition of work permits, the proposed amendment of section 40 has not been implemented. Some stakeholders are of the view that there is need for reciprocity from other Partner States with regard to Kenyans acquiring work permits within the stipulated time in the other Partner States. Other stakeholders are of the view that work permits go against the spirit of regional integration which aims at opening up borders to allow EAC citizens to work freely in all Partner States.<sup>65</sup>

A proposal seeking to amend the Merchant Shipping Act of 2009 to allow East African ships to trade and be registered in Kenya has not been implemented and is in fact strongly opposed by the Kenyan Maritime Authority. Security stakeholders have raised security concerns with regard to access of the Kenyan ports by ships from the region particularly at a time when security is a major concern in Kenya. A concern was also raised about protecting local businesses in the maritime industry until absolute reciprocity is achieved. Further, the amendment contradicts Kenya's obligations under the United Nations Convention on the Law of the Sea regarding the identification of ships and should thus not be passed.<sup>66</sup>

The approximation process has not been without challenges. A recurring challenge is that of reciprocity, or non-reciprocity, depending on how one looks at it. This has arisen where Kenya has amended a law allowing access to citizens from East Africa to the same rights and benefits as Kenyans, but the same has not been accorded in return. A good example of this is the Advocates Act, where

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63 The Draft Statute Law (Miscellaneous Amendments) Bill, 2011; Memorandum of Objectives, at [9]-[10].

64 *Ibid* at [13]-[14].

65 *Ibid* at [14].

66 *Ibid* at [12].

Kenya has allowed advocates from the region to practise in Kenya but the same has not been reciprocated. The same is evident in relation to the Merchant Shipping Act, where non-reciprocity has also been raised as an impediment to the implementation process.

Another challenge that has affected the approximation process is the poor level of coordination at the national level. Commercial law cuts across a multitude of Acts of Parliament and regulatory institutions. Implementation will not be effective if all stakeholders affected by an amendment are not involved in the negotiation process. The massive restructuring of ministries and government regulatory bodies after the 2013 election has also complicated the process and it is expected that implementation is likely to be slowed down. Lack of prioritisation of approximation may also contribute significantly to slowing down the implementation process. The Ministry of Labour for example, has not given its views in relation to amendments to the Employment Act.

The approximation process has been affected by inadequate resources to fully operationalise and implement the amendments as well the emergence of conflicting interests (for example, between the need to honour obligations to open up the Kenyan market versus the need to protect certain industries, such as the maritime industry). All in all, efforts made at approximation are commendable and reflect commitment to the integration process.

## 6. Conclusion

Full implementation of the Common Market Protocol implies that other laws would also have to be amended to bring them up to par with the Protocol. With commerce and cross-border investments comes the aspect of different rights and freedoms, and the Common Market Protocol brings into operation the free movement of labour, services, goods and capital. This necessarily means that the legal reform process will have to include other laws that may not be purely commerce-related if citizens from other Partner States are to fully enjoy the benefits of the Protocol.

Reciprocity is not a principle in the EAC Treaty, neither are states compelled to reciprocate measures extended to their nationals by other states. This can complicate issues, and more so when regarded in the light of the principle of variable geometry,<sup>67</sup> a principle of the EAC Treaty which the East African

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<sup>67</sup> This is defined as a principle of flexibility which allows for progression in co-operation among the sub-group of members in a larger integration scheme in a variety of areas and at different speeds.

Court of Justice opined was in harmony with the treaty, and is a strategy of implementation of community decisions as opposed to being a decision-making instrument itself.<sup>68</sup> Variable geometry might of itself be a reason contributing to non-reciprocity. The fact that the Common Market Protocol was a negotiated process cannot be ignored, and so the demand for reciprocity does not auger well, since it can be argued that by signing the Protocol, Kenya had already committed herself to opening up her market in specific areas and is thus bound by that commitment without obliging other Partner States, that did not make similar commitments, to reciprocate Kenya's gesture.

Generally, each country is making its own reforms to suit its prevailing national interests, which at the end of the day may affect the integration process negatively or slow it down significantly. A good example was the emergence of the 'Coalition of the Willing' arrangement which entailed Kenya, Uganda and Rwanda fast tracking certain elements of Treaty implementation to the exclusion of Tanzania and Burundi. This approach needs to be thought afresh if integration is going to become a reality in the region.

To conclude, the role that stable, predictable and conducive national policies and legal frameworks play in the realisation of the integration process, particularly regarding cross-border business, cannot be underestimated. It is important that equal and urgent priority be granted to the approximation process by all Partner States. It is also preferable that the process be undertaken systematically and in response to prevailing and emergent dynamics in the industries that stand to be affected by the proposed approximation process.

In agreement with Ambassador Mwapachu, former Secretary General of the EAC, the realisation of a large African market crucially hinges on the role of businesses exploiting open borders. How businesses collaborate to realise such an objective depends on how public policy at the level of regional economic communities creates a supporting environment.

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68 *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, East African Court of Justice at Arusha First Instance Division.



# ASSESSING THE FEASIBILITY OF HARMONISATION OF INSURANCE LAW FOR A MORE RELEVANT INSURANCE INDUSTRY IN EAST AFRICA

EDSON RWECHUNGURA\*

## 1. INTRODUCTION

This article explores the prospects and importance of harmonising insurance law in the East African Community (EAC)<sup>1</sup> as the regional bloc goes into deeper integration in the form of a monetary union. It is developed against the background of the efforts to integrate economically which began with the formation of a customs union, and later a common market.<sup>2</sup> All these efforts are ultimately aimed at creating an integrated economic area among the East African countries which are members of the EAC.

As the East African Community heads into deeper economic integration, the regulation of various economic sectors becomes crucial and one of these sectors is insurance. It is important that laws regulating insurance in the EAC Partner States are harmonised so that a single internal market for insurance is created among the Partner States. In mind here is a situation in which insurance business is accessible throughout the region to all providers (insurers) and services are accessible to all those in need in the region (policyholders) without cross-border differentiation.

Despite the ongoing integration initiatives, complete integration of the insurance industry is still far from sight. Analysis of domestic laws of the EAC Partner States exhibits considerable differences in the laws which cause market compartmentalisation. Geographical borders between the Partner States have a

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1 The East African Community is a regional economic integration of six countries, namely Tanzania, Kenya, Uganda, South Sudan, Rwanda and Burundi. It was created via adoption and eventually ratification of the Treaty for Establishment of the East African Community which was signed in 1999. While appreciating developments in Rwanda and Burundi, this paper explores the law in respect of the three initial members of the EAC, namely Tanzania, Kenya and Uganda, as an attempt to limit the scope, but also under the assumption that the conclusions from an analysis of laws in these three countries are equally applicable to the rest of the EAC. In the case of Tanzania, the insurance framework applies both to the Mainland and Zanzibar since insurance is a union matter.

2 The East African Community became a Customs Union in 2004 and developed into a Common Market in 2010 with signing of protocols for adoption of the respective levels of integration.

lot of influence on how business is conducted and how services are accessed. There is an appreciable level of freedom of establishment of business ventures, but this is not complete as it is associated with a number of conditions which require host-country compliance in addition to home-country compliance for insurers. Freedom of services is not yet developed.

There are additional impediments to the creation of a single internal market in East Africa. It is not clear in the laws as to how policies issued in one Partner State are treated in the others, but there is a heavy inclination towards rejection, as each Partner State's regulatory authority exercises considerable control over the business in its own country. The dispute resolution mechanism is not helpful in this matter. Jurisdictional rules, choice of law rules, and judgment recognition rules vary among the countries. This paper reveals that the East African insurance market is yet to be integrated, despite the importance of doing so. This is because of the absence of harmonised regulations in certain aspects, and the non-implementation of recommendations that have been made in the past.

## **2. RATIONALE**

The insurance sector is one of the most important components of the East African economy, and as the countries integrate economically, it is logical that the sector should also be integrated. The ideal scenario contemplated in an integration setting is that insurance services are not subject to tariff or non-tariff barriers within the EAC, so that finally a single internal market for insurance services is created.

Insurance services should be the subject of a single or common policy, so that finally there is a possibility of having a common supervisor of insurance services, or, alternatively, harmonised regulatory frameworks, integrated treatment of insurance policies and claims, as well as an integrated system of resolution of disputes relating to insurance contracts. It is also a situation where insurance service providers as well as consumers are able to access markets and services respectively from other Partner States as though there were no geographical borders among the EAC Partner States.<sup>3</sup>

Notwithstanding the accompanying challenges, there are significant benefits

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3 K Bhoola et al., 'Insurance Regulation in Africa: Impact on Insurance and Growth Strategies' (Paper presented at the Actuarial Society of South Africa's 2014 Convention 22–23 October 2014, Cape Town International Convention Centre).



to be obtained from cross-border insurance business. Enlargement of markets, reduction of prices due to increased competition, increased opportunities for investments, decrease in costs of production due to use of new technologies, as well as lowering of costs due to economies of scale, are some of the advantages of having an integrated regional insurance market.<sup>4</sup>

### 3. HARMONISATION OF INSURANCE LAWS IN THE EAC

Harmonisation of insurance has been addressed in a number of instruments forming a body of laws of the East African region. A lot has been written with regard to the harmonisation of laws generally, as covered in the EAC Treaty, the Customs Union Protocol, the Common Market Protocol and the Monetary Union Protocol, and how such harmonisation is meant to assist the EAC to achieve its integration objectives. However, the relevant provisions as far as the insurance sector is concerned are contained in the Common Market Protocol and the Monetary Union Protocol.

The Common Market Protocol was adopted in 2009. The Protocol is important because it is directed towards the removal of barriers to movement of services, including insurance. It is meant to complete what was started by the Customs Union Protocol which only covered tariff barriers and mainly dealt with trade in goods. This Protocol gives the right of access to cross-border markets by providers of insurance services. Full implementation of the Protocol will help the EAC achieve a single internal market for services, including insurance services.

The Common Market Protocol provides for the very important freedoms of movement of capital and of provision of services, as well as the right of establishment.<sup>5</sup> The provisions on freedom of movement of capital require elimination of all restrictions on movement of capital, except for purposes of prudential supervision, public policy, prevention of money laundering and implementation of sanctions duly imposed by a Partner State.<sup>6</sup>

The timetable for removal of the envisaged restrictions is contained in the Schedule on the Removal of Restrictions on the Free Movement of Capital.

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4 See the presentation by Israel Kamuzora, Tanzania's Commissioner of Insurance on East African Regional Integration, Challenges, Opportunities and Trade-offs for Tanzania Insurance Industry, made on 12 September 2014 in Dar es Salaam, Tanzania.

5 See paragraph 4 of the Preamble to the Common Market Protocol.

6 Common Market Protocol, art 25.

It is unfortunate that the Schedule does not explicitly mention insurance services and does not therefore have dates for the removal or restrictions on the movement of capital generated from insurance. It seems as if insurance services are not treated as capital-related services.<sup>7</sup> However, if they are to be treated as such, which would be quite logical,<sup>8</sup> then the Protocol is a development towards integration of the insurance market, as it allows insurance service providers to utilise the pools of funds collected from insured persons with far more freedom throughout East Africa.

Another Annex to the Protocol contains a Schedule of Commitments on Progressive Liberalisation of Services (Services Schedule).<sup>9</sup> This is even more relevant to insurance services in East Africa as it records commitments made by Partner States to remove restrictions on the movement of services, and includes insurance services as one of the services to be liberalised, that is, to have insurance services provided and freely accessible across the region.<sup>10</sup> According to the Schedule, Kenya restricts freedom of provision of services by foreigners in Kenya or to nationals of Kenya in respect of life insurance, non-life insurance (except for aviation, marine, and engineering), insurance broking and insurance agency. Freedom for foreigners to have a commercial presence in Kenya is limited to only two-thirds of paid-up share capital for life insurance while no restrictions on such a presence exist for other categories of insurance. However, agency services can only be provided by Kenyan nationals. On the other hand, generally no restrictions exist as regards auxiliary services, assessors, intermediaries, and loss adjusters, as well as re-insurance and retrocession. All existing restrictions were to be removed by 2015.<sup>11</sup>

The Schedule records no restrictions on freedom of provision of insurance services in Uganda and Tanzania.<sup>12</sup> However, as will be shown later in this paper, the Schedule may not have considered certain provisions in the laws of

7 See the Schedule on the Removal of Restrictions on the Free Movement of Capital, Annex IV of the Protocol. It is to be noted that Annexes have binding force in the EAC as they form part and parcel of the EAC Treaty. This is made clear in paragraph 1 of Article 1 of the EAC Treaty which defines the term Treaty to include Annexes.

8 See N Doherty, 'On the Capital Structure of Insurance Firms', in J David Cummins & Richard A Derrig, *Financial Models of Insurance Solvency* (Dordrecht: Kluwer Academic Publishers, 1989) at 267. Doherty writes that although insurance policies are sold in the insurance product markets, they act as a source of capital for insurance firms. The capital nature of insurance moneys is underlined here.

9 Common Market Protocol, Annex V.

10 *Ibid*, Services Schedule at 54, 59–63.

11 *Ibid*, Services Schedule at 59 and 60.

12 *Ibid*, Services Schedule at 61 and 62.

these two countries which impede provision of insurance services across their borders, both inward and outward bound.

All that having been said, Kenya has taken a significant stride towards streamlining its Insurance Act to comply with the rules of the EAC by enacting amending provisions which replace the words “Kenyan citizen” with the words “East African citizen”.<sup>13</sup> This will have the effect of giving rights to service providers and consumers from other parts of East Africa in the same way as those from Kenya. The other countries are still lagging behind in as far as their commitments are concerned.

The Monetary Union Protocol is the pinnacle of economic integration in East Africa. It is the completion of what was started by the Customs Union and the Common Market Protocols. It creates a more complete internal market for services by creating a single currency in which all services will be transacted and requires creation of an integrated monetary policy in the region.<sup>14</sup> This essentially means that conditions for the provision and consumption of financial services in the region, insurance inclusive, are harmonised. This Protocol directly covers both the provision and consumption of services, unlike the Common Market Protocol which only covers provision of services.<sup>15</sup> It is unfortunate, however, that at this point in time the Monetary Union Protocol is yet to be implemented, although ratifications by Partner States have been obtained.

The Protocol provides that the monetary union be established to promote the objectives stated in Article 5 of the EAC Treaty. In this respect, the monetary union is expected to promote monetary and financial stability in East Africa.<sup>16</sup> In order to achieve the desired result, the Partner States are urged to harmonise and co-ordinate their fiscal policies, to formulate and implement a single monetary policy and exchange rate policy, as well as to develop and integrate their financial, payment, and settlement systems. They are also urged to adopt common rules for financial regulation and prudential supervision.<sup>17</sup> These provisions are very important for integration of the insurance sector, as they facilitate payments in terms of premiums, as well as settlement of policies in terms of indemnity or otherwise. They do away with the currency and fiscal

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13 The Draft Statute Law (Miscellaneous Amendments) Bill, 2011; Memorandum of Objectives.

14 Monetary Union Protocol, art 4.

15 The provisions of this Protocol have also taken into account the concerns of consumers of services unlike the Common Market Protocol which concentrated on creating access to service providers into territories of other Partner States.

16 Monetary Union Protocol, art 3.

17 *Ibid* art 4.

differences which currently affect the execution of cross-border payments between insurers and policy-holders.

The Protocol further requires Partner States to develop an integrated financial system which includes the banking sector, capital and money markets, *insurance*, retirement benefits, microfinance and other financial services.<sup>18</sup> It also requires the integration of payment and settlement systems to ensure an efficient flow of financial transactions within the union by adopting an integrated trading and securities depository system; and it requires Partner States to harmonise and integrate the regulation of financial markets with other systems.<sup>19</sup> More relevant to this paper, the Protocol requires Partner States to harmonise policies, laws and systems to make the Protocol viable.<sup>20</sup> It is therefore apparent that the Protocol has taken into account, among other things, that integration of the insurance sector through harmonisation of laws is inevitable if the region is to achieve complete economic integration.

In addition to the above-mentioned instruments, the East African Legislative Assembly legislates on matters of common interest to East Africa, and its legislation takes precedence over individual countries' legislation. However, in the area of insurance, no Act of the Community has been put in place yet, which may mean that despite recognition that the financial sector needs to be integrated, it has not occurred to anyone that implementation of the same requires an instrument of the Community which supersedes national instruments.

#### 4. THE DOMESTIC LAWS OF THE PARTNER STATES

This section looks at the domestic laws of the EAC Partners. It confines itself to the three countries selected for review in this paper, namely Tanzania, Kenya and Uganda. The laws of the three countries are examined in respect of selected issues, namely, access and exit from insurance business, control over insurance business operations, access to insurance business by consumers and dispute resolution.

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18 *Ibid* art 14.

19 *Ibid* art 5.

20 *Ibid* art 22.

## 4.1 Access into and Exit from Insurance Business

In Tanzania, the governing law is the Insurance Act of 2009.<sup>21</sup> This law gives responsibility for insurance matters, and authority to supervise them, to the Tanzania Insurance Regulatory Authority (TIRA). This Authority is charged with responsibility for registering, licensing and approving insurance practitioners in the country in the form of insurance companies, brokers and agents.<sup>22</sup> It is this same Authority which promulgates conditions for an entity to work as an insurance practitioner in the country. It is this Authority which recommends to the Minister the minimum paid-up share capital to be maintained by insurers,<sup>23</sup> and the level of solvency which insurers have to maintain in Tanzania, the calculation of which is done via a formula prescribed by the Minister.<sup>24</sup> The disposal of an insurance undertaking, whether by way of sale, amalgamation or merger, is also under the Minister's control, which means the creation of any regional conglomerate requires the involvement of the Tanzanian local authorities.<sup>25</sup>

The Insurance Act is categorical about who can conduct insurance business in Tanzania. It requires a body corporate to be registered as a company in Tanzania under the Companies Act, or any other law operating in Tanzania. The company should in addition prove to be resident in Tanzania according to the residence rules applicable in Tanzania. Even ownership of such companies is restricted. At least one third of the controlling interest, whether in terms of shares, paid-up capital or voting rights, must be held by citizens of Tanzania. Moreover, the companies must be managed by a majority of Tanzanians, as the law requires at least one third of those composing the board of directors to be citizens of Tanzania.<sup>26</sup>

Section 24 of the Insurance Act which outlines the registration requirements for insurance companies in Tanzania contains five requirements. These are that the company is registered in Tanzania under the Companies Act<sup>27</sup> or any other law; that it has a principal office in Tanzania, that it is a member of the association of insurers; that its director, manager, controller and principal

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21 Insurance Act, Act No. 10 of 2009.

22 *Ibid* s 64.

23 *Ibid* s 19.

24 *Ibid* s 20.

25 *Ibid* s 32 and 77.

26 *Ibid* s 16.

27 Companies Act, Act No 12 of 2002.

officer who handles day-to-day business are all resident in Tanzania; and that all the aforementioned persons have sufficient knowledge and experience in insurance business. The requirements apply similarly to re-insurers.<sup>28</sup> Section 67 lists similar requirements in respect of insurance brokers. This means that as far as these provisions are concerned, the only way a foreign company can access the insurance business in Tanzania is by establishing physical or commercial presence in the country. It is not possible for a company to provide services from its country of origin directly to consumers in Tanzania.

In Kenya, under the Insurance Act, all insurance practitioners must be registered under the Act. Those who wish to practise outside Kenya also need to be registered under the Act except for re-insurance business.<sup>29</sup> Anyone wishing to be registered as an insurer must be registered as a company under the Companies Act and after ascertainment that a majority of the controlling interest is in the hands of Kenyans.<sup>30</sup> Moreover, at least one third of the paid-up capital must be held by Kenyans<sup>31</sup> and one third of the board members must be Kenyans.<sup>32</sup>

Brokers, like insurers, also need to be incorporated under the Kenyan Companies Act and must ensure sufficient Kenyan participation.<sup>33</sup> For agents, individuals working on their own or as a firm must be citizens of East Africa. Companies incorporated to work as agents must be wholly owned by East African citizens.<sup>34</sup> Repatriation of insurance remittances must be approved by the Commissioner.<sup>35</sup>

As noted above, Kenya has taken a significant stride towards streamlining of her insurance laws with those of the EAC by enacting an amending legislation which replaces all parts of the Insurance Act which provide for “Kenyan citizen” with the words “East African citizen”.<sup>36</sup>

Ugandan law requires any person wishing to provide insurance services to be registered as a company under the country’s Companies Act or the Co-

28 Kenya Insurance Act, s 24(2).

29 *Ibid* s 19.

30 *Ibid* s 21.

31 *Ibid* s 23.

32 *Ibid* s 27.

33 *Ibid* s 153.

34 *Ibid* s 153(5).

35 *Ibid* s 201.

36 The Draft Statute Law (Miscellaneous Amendments) Bill, 2011; Memorandum of Objectives.

operative Societies Act.<sup>37</sup> Foreign companies can be licensed as insurers but subject to special paid-up capital requirements.<sup>38</sup> These companies are also required to maintain part of their paid-up capital as security with the central bank of Uganda.<sup>39</sup> The companies are furthermore required to have their headquarters in Uganda and open branches elsewhere with the approval of the Commissioner.<sup>40</sup> Application to transact insurance business is made to the Commission.<sup>41</sup> Brokers are to be body corporates under the Companies Act.<sup>42</sup> Intermediaries are not allowed to place business with insurers not licensed under the Insurance Act.<sup>43</sup>

## 4.2 Control over Insurance Business Operations

In Tanzania, the Regulatory Authority has power to suspend or terminate operations of insurance practitioners.<sup>44</sup> There is even a requirement for audit of insurers' or broker's accounts to be conducted by an auditor resident in Tanzania.<sup>45</sup> Host country control is therefore very strong in Tanzania.

To be specific, the Insurance Act is applicable to every kind of insurance business in Tanzania, both Mainland and Zanzibar, unless one is exempted by the Minister responsible for finance either under powers given to the Minister under section 140 of the Act and on advice by the National Insurance Board under section 14(a), or through regulation.<sup>46</sup> This has a lot to say with regard to applicability of the "country of origin" principle. It means all companies registered in other Partner States and wishing to provide services in Tanzania must be prepared to subject themselves to Tanzanian legislation. That is one impediment to implementation of the country of origin principle and also to market integration.

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37 Insurance Act, Cap 213, s 4.

38 *Ibid* s 6(2).

39 *Ibid* s 7(1).

40 *Ibid* s 13.

41 *Ibid* s 29(1).

42 *Ibid* s 73.

43 *Ibid* s 82.

44 *Ibid* s 29.

45 Insurance Act, ss 36 and 73.

46 *Ibid* s 2.

The Act vests power to promulgate, and implement, insurance policy in the minister,<sup>47</sup> and the co-ordination of such policy is undertaken by the TIRA.<sup>48</sup> Specific mandates of the Authority are outlined in section 6 of the Act the totality of which vests power in the Authority to oversee provision of insurance business in the country under the superintendence of the Commissioner of Insurance.<sup>49</sup>

The law also requires insurers to invest the funds accruing from their insurance activities in Tanzania within Tanzania. The only exception is when the Commissioner gives prior consent to invest or lend such funds outside Tanzania. The Commissioner can in fact go as far as to prescribe the kinds of Tanzanian securities in which the insurance funds ought to be invested.<sup>50</sup>

Section 3 of the Kenya Insurance Act establishes the Insurance Regulatory Authority which is charged with the general supervision of insurance business in Kenya.<sup>51</sup> An insurer must maintain a prescribed minimum threshold of assets in Kenya<sup>52</sup> and must deposit security with the Central Bank of Kenya<sup>53</sup> which can be invested at the insurer's request only within Kenya.<sup>54</sup> Solvency margins for insurers are to be maintained and determined by the Kenyan Commissioner.<sup>55</sup> Insurance assets of the insurer are to be invested inside Kenya unless the Commissioner otherwise authorises.<sup>56</sup> Accounts are to be prepared according to standards approved and acceptable in Kenya.<sup>57</sup> Amalgamations and mergers of insurers need to be approved by the Commissioner<sup>58</sup> and every insurer is required to re-insure with the Kenya Re-insurance Corporation.<sup>59</sup>

In Uganda, Uganda Insurance Commission is the overall supervisor of insurance business in Uganda.<sup>60</sup> Solvency margins of an insurer are also determined

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47 *Ibid* s 4.

48 *Ibid* s 5.

49 *Ibid* s 11.

50 *Ibid* s 44.

51 Kenya Insurance Act, ss 3A and 3C.

52 *Ibid* s 28.

53 *Ibid* s 32.

54 *Ibid* s 36.

55 *Ibid* s 41-44.

56 *Ibid* s 48.

57 *Ibid* s 54 (A1).

58 *Ibid* s 113.

59 *Ibid* s 145.

60 Insurance Act, ss 14 and 15.



by the Commission.<sup>61</sup> An auditor of an insurer is also to be approved by the Commission.<sup>62</sup> Amalgamation is done with the approval of the commission.<sup>63</sup> Brokers, agents and other practitioners are also licensed by the Commission.<sup>64</sup>

### 4.3 Access to Insurance Services by Consumers

In Tanzania, restrictions are not only placed on insurers but extend to consumers of insurance services, too. The Act requires all those who desire to receive insurance services in Tanzania to place their applications with Tanzanian insurers. It is only when the class of insurance desired is not available in Tanzania that one can solicit the same from non-resident insurers and only with prior permission from the Commissioner and exemption under section 140.<sup>65</sup> The aforementioned insurance transaction has to be effected through a broker registered in Tanzania.<sup>66</sup> Therefore, it is not only that foreign insurers cannot directly provide services to Tanzanian consumers, but also that Tanzanian consumers cannot directly access insurance services from foreign companies.

It is prohibited for consumers to place business with insurers registered outside Kenya until prior written approval granted by the Commissioner has been produced.<sup>67</sup>

### 4.4 Dispute Resolution

In the event of conflict, the law provides that service of process on insurers is to be done on the insurer's principal office and where the same does not exist, then service is duly completed when done on the Commissioner of insurance.<sup>68</sup> The Act also rules that holders of a policy can enforce their rights under the policy in Tanzanian courts.<sup>69</sup>

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61 *Ibid* s 44(2).

62 *Ibid* s 51.

63 *Ibid* s 65.

64 *Ibid* s 72.

65 Insurance Act s 133.

66 *Ibid* s 134.

67 Kenya Insurance Act, s 20.

68 Insurance Act, s 147.

69 *Ibid* s 148.

Kenyan law contains a choice of law rule which directs the use of the law of Kenya in resolving all matters connected to an insurance contract in cases where a transaction has been effected in Kenya.<sup>70</sup>

## **5. RELEVANT ASPECTS OF HARMONISATION AND ANALYSIS OF THE EAST AFRICAN LAW**

### **5.1 Supervisory Framework**

One of the very important aspects to be considered as far as integration of the East African insurance industry is concerned is supervision. Since the proposition is to have an integrated insurance sector, it would not be logical to have supervisory differentiation. There should be some form of commonality. This can come either as a result of harmonisation of supervisory rules or by institutional integration.

Harmonisation of supervisory rules would require countries to abide by certain agreed standards of supervision to be followed by all supervisors within the individual countries. Institutional integration may require, in addition to abiding by standard rules, the creation of an over-arching supervisor for the entire East African insurance sector, which may retain or do away with national supervisors.

The current supervisory setting is clearly individualistic. Each country has its own supervisory authority.<sup>71</sup> The authorities have complete mandates to supervise the insurance industry in all respects, that is to say admission into the business, operations of providers and their termination. The setting does not allow a foreign supervisory authority any room to influence activities in another country, even if the operators involved come from a particular country of the supervisory authority. The mandates are strictly territorial in nature. This situation can only serve to accentuate differences among East African insurance markets.

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70 Kenya Insurance Act, s 76.

71 These are the Tanzania Insurance Regulatory Authority, Uganda Insurance Commission and Kenya Insurance Regulatory Authority.

## 5.2 Treatment of Insurance Policies and Claims

Basically, for there to be a single internal market for insurance, treatment of both policies and claims should be uniform. A policy entered into in one country should be able to receive similar treatment throughout the Community. For example, if a consumer takes out a life policy in one country, say Tanzania, from a named insurer and subsequently moves to another country, say Kenya, the conditions as set by the insurer should in effect accord similar rights and impose similar obligations to the parties to the insurance contract in both countries. Such similar treatment results in a uniform treatment of insurance claims in both countries.

So far the legislative enactments in the East African countries have not made express provisions on this aspect. It is not apparent whether the rights accorded to an insured person in one country can be recognised in another country. However, there are indications that this may not be the case. The emphasis on using Tanzanian courts to resolve insurance matters arising in Tanzania<sup>72</sup> as well as the provision for the application of Kenyan law for insurance transactions concluded in Kenya<sup>73</sup> show that each of these countries is competing to have the rights of parties determined under their respective regimes. This means that there is no common treatment of rights created under policies in the Partner States.

## 5.3 Insurance Contracts Disputes Resolution

Insurance contracts are a category of contracts likely to breed many conflicts. Dispute resolution mechanisms in the Community must be tailored such that the end result is not only predictable but also uniform in the entire Community as regards a particular insurance contract. Important here are the rules in the Partner States regarding the jurisdiction of courts to entertain disputes relating to insurance contracts, choice of law rules, and enforcement of judgments. These are important because matters of law enforcement are not purely economic in nature and even with economic integration they are likely to remain within the realm of individual Partner States. The available option is to ensure that law enforcement works uniformly despite being monopolised by individual nations.

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72 Insurance Act of 2009 (Tanzania), s 148.

73 Kenya Insurance Act, Cap 487, s 76.

It is important to harmonise jurisdictional rules in order to give wider options for parties to institute proceedings relating to insurance disputes in most or all parts of the Community. Likewise, the choice of law rules must be such that the applicable law is one that the parties must have intended to use when they contracted. In the alternative, substantive law in the region may be harmonised so that regardless of the applicable law, the end result is the same as regards particular contract(s). In addition, the rules should make it possible for the judgments pronounced by courts in the Community to be able to be enforced with effectiveness in any part of the Community.

The present situation, in as far as jurisdictional rules are concerned, does not allow smooth operation of a single insurance market. The jurisdictional rules are not very clear, reading from legislation, except for Tanzania whose legislation clearly stipulates the authority of Tanzanian courts to entertain matters regarding insurance transactions which occur in Tanzania.<sup>74</sup> Again, as regards choice of law, the Kenyan legislation provides for the applicability of Kenyan law in insurance contracts cases arising in Kenya. Legislation in other countries is silent. None of the insurance laws covers enforceability of foreign judgments but this aspect may be inferred from the allowance made by the Judgments Extension Act of Tanzania,<sup>75</sup> for example, which recognises certain judgments from, among other things, East African countries. The shortcoming, however, is that the judgments recognised in this way are only those which are pronounced by superior courts, a fact which may not exactly create desirable conditions for a single market, as many other judgments may be pronounced by subordinate courts and are therefore not among those which can be recognised in Tanzania.

## **5.4 The Question of Access**

The question of access to insurance business, as well as access to insurance services, is also relevant. Aside from Kenya, which has effected amendments of its legislation to allow the establishment of insurance undertakings in Kenya by East Africans, the other two countries under consideration still maintain differentiation in terms of treatment of foreigners and residents. The relevant amendment in Kenya is that which affects the status of investors from other East African territories and investment of their capital in Kenya. The Investment Promotion Act, Act No. 6 of 2004, has been amended to define local investors

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74 Insurance Act, Act No 10 of 2009 s 148.

75 Chapter 8 of the Laws of Tanzania, Revised Edition, 2002.

as including those coming from other East African territories, the effect of which is to give the same rights to investors from other East African countries as those available to Kenyan investors.<sup>76</sup> There are additional requirements for foreigners which impede unlimited access to firms from other Partner States. The same situation applies in respect of consumers who also face restrictions as far as access to foreign service providers is concerned.

## 6. CONCLUSION AND THE WAY FORWARD FOR THE EAC

In conclusion, harmonisation of law is a very important issue for any integration initiative, particularly one that aims to achieve economic ends. The current legal and regulatory set up in East Africa demands that harmonisation of laws be effected for the Partner States to be able to achieve a complete internal insurance market for the benefit of East African citizens. This paper examined how such harmonisation can assist in achieving the goals of East African integration. It recommends three things that must happen to help in achieving these goals.

First, the EAC needs to make a definitive and realistic timetable to achieve not only the proposed single internal market but also a single internal insurance market. Most of the timeframes put forward to date have lapsed or are about to lapse. Almost all events, including those relating to the structuring of legal and regulatory rules, were scheduled to be completed by 2015. Most of these measures have not been implemented.

Second, there are substantive and procedural differences in the laws of EAC countries which would still render creation of a single internal market incomplete even with freedom of establishment. The differences in the choice of law rules, as well as those regarding jurisdiction of courts, are likely to bring contradictions. Coupled with the differences in interpretation of insurance contracts, treatment of policies, and a range of rights granted in different jurisdictions, the situation becomes even worse.

These differences have to be eliminated by adopting a harmonisation of substantive law approach. They could also be dealt with by using the conflicts of law approach, but this approach often leads to advantages for either consumers or service providers and disadvantages for the other. If it were to be adopted, then probably it should be that the law of the consumer's country is applicable, in order to protect the comparatively more vulnerable consumers. In the

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76 The amendment is effected through the Draft Statute Law (Miscellaneous Amendments) Bill, 2011; Memorandum of Objectives.

alternative, the European approach could be adopted, with differential choice of law rules for the large risks usually faced by bigger companies, and for smaller risks and compulsory insurance. The former could readily be subjected to any law, while the latter should be subjected to the law chosen by the parties.

Finally, liberalisation and co-ordination of the laws of East Africa are inevitable. The existing legal and regulatory rules, as seen earlier, do not give any chance for realisation of both freedom of establishment and freedom of services. As the case was in Europe, the EAC needs to build its internal insurance market on the foundation of those two principles. Since differences are not too big, liberalisation of the industry could take place, allowing service providers to access markets in other member countries without discrimination. This would serve to create fair competition throughout East Africa, and from that point other aspects of regulation could be co-ordinated. Precisely, the order should be that those provisions which impede establishment of commercial ventures abroad are removed first and the other aspects, such as treatment of policies and dispute resolution, are co-ordinated later.

# PROSPECTS AND PITFALLS OF AUTONOMOUS DIGITAL MIGRATION IN EAST AFRICA: A CASE FOR HARMONISED BROADCASTING REGULATION

SHEILLAH NYANZI\*

## 1. INTRODUCTION

In 2006, the International Telecommunications Union (ITU) reached the Geneva Agreement (GE06) to transition from analogue to digital broadcasting by 17 June 2015 through a process called “Digital Migration”. The main aim was to use spectrum more efficiently and to release the “digital dividend” for use by other communication services such as broadband and surveillance. Although Articles 89 and 99 of the Treaty for Establishment of the East African Community (“the EAC Treaty”) envision harmonised and coordinated communication programmes by adopting ITU policies, standards, regulations and common frequency management, each East African Community (“EAC”) Partner State signed the GE06, but implemented digital migration autonomously with little regional coordination.

The fragmented approach resulted in disconnected transition roadmaps, dissimilar laws, policies, equipment standards, incoherent licensing and signal distribution models, fees and taxes. Further regional migration has been very polarised, with Tanzania and Rwanda tranquilly completing the process by June 2015, while Kenya and Uganda’s digitalisation was marred by interminable litigation, heavy lobbying, consumer outcry against television blackouts, unfair competition and copyright wrangles between broadcasters. Uganda and Burundi also continue to simulcast with both analogue and digital signals, pending deployment of digital networks countrywide.

Nonetheless, the migration outcomes worldwide are alike, and challenge regions similarly. For instance, all grapple with must-carry rules for FTA channels on subscription television, increasing tariffs, piracy, consumer protection and digital dividend management. As a result, regulators across East Africa are progressively issuing similar directives to standardise the ramifications, despite lacking supportive laws. This raises an issue about whether regulatory

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harmonisation is the antidote for disintegrated digital migration in East Africa. This paper hypothesises that uncoordinated digital migration has hindered the EAC's realisation of a common broadcasting market. It investigates whether the fragmented laws, policies and enforcement have deterred the EAC's effective transition to a harmonised digital television market for the region. The findings will inform proposals towards harmonised broadcasting regulation so as to leverage the prospects of digitalisation and overcome the pitfalls of disintegrated migration.

Digital migration is a transfer from broadcasting by analogue technology and replacing it with digital transmission.<sup>1</sup> It arose from ITU recommendations at a Regional Radio-Communications Conference in 2006 (RRC06) and the ensuing GE06 which resolved that Africa, Europe and the Middle East should switch over from analogue to digital broadcasting by 17 June 2015.<sup>2</sup> It set out to ensure more efficient use of frequency as a scarce resource, reduce transmission costs and environmental degradation, as many broadcasters cease to carry their signals individually and converge their channels for carriage by one or a few signal distributors at the same cost. Digitalisation also enhances consumer experience with better picture quality, sound clarity, wider viewership choices from new channels, and more equitable access to information as digital signals reach even the remotest of areas.<sup>3</sup>

From the onset, it is worth accentuating the legal significance of digital migration. *Prima facie*, the migration is profoundly technical, and assumed to have little significance in the law. However, digital migration engages with various sub-disciplines of law which include the law of contract, sale of goods, consumer protection, competition law, copyrights, administrative law and the law of information and communications technology (ICT). Besides originating from an international treaty, the GE06, digital migration is also a creature of regional laws as well as national policies and statutes, which are reviewed in detail in parts 2 and 3 of this paper.

1 Guy Berger, 'Challenges and Perspectives of Digital Migration for African Media' (Panos Institute of West Africa, Dakar, Senegal, 1st ed. 2010) at 15.

2 This deadline was set to coincide with the target year for achieving the Millennium Development Goals. Balancing Act, "DTT: Analogue to Digital Migration in Africa – Strategic Choices and Current Developments" 2015. See more at: <http://www.balancingact-africa.com/reports/dtt-analogue-to-digi#>.

3 Common Market for East and Southern Africa, "Roadmap for Digital Broadcasting Migration Implementation 25 November 2011" Annex IV from the Association of Regulators for Information and Communications in Eastern and Southern Africa (ARICEA). Online: <http://www.comesa.int/attachments/article/415>.



Further, the execution of digital migration has promoted legally enforceable rights and responsibilities for stakeholders such as Regional Economic Blocs (REB), governments, regulators, signal distributors, public and private broadcasters, equipment manufacturers, courts of law, consumers and the general public. An illustrative example is that digital migration lies at the heart of the universal right to access information and freedom of expression.<sup>4</sup> Thus, in case of any violation, an aggrieved party is entitled to seek redress from the courts. Indeed, the legal implications of the migration are widely revealed across East Africa through regulatory appeals, disconnection of television services and litigation as discussed in parts 4 and 5 of this paper.

## 2. DIGITAL MIGRATION AND REGIONAL HARMONISATION

Regional harmonisation is the process of bringing common matters of interest into proximity by identifying and reducing key discrepancies in the laws to achieve peaceful co-existence and providing an enabling environment for effective operation and development of the community.<sup>5</sup> This definition requires an approximation of divergent laws, setting minimum standards and operational practices to ensure a synchronised state of affairs across the region. However, it does not imply unification of existing sovereign standards in different Partner States in one and the same set of regional rules. The principle of harmonisation is enshrined in Article 5(1) and (2) of the EAC Treaty,<sup>6</sup> which provides for deeper cooperation between the Partner States by establishing policies, programmes and a common market to strengthen and regulate their commercial and infrastructural relations for accelerated, harmonious, balanced and sustainable development of economic activities for the benefit of all.

Generally, the rationale for harmonisation is to minimise legislative divergences and operational uncertainty. Stephan discusses three of its goals which are: to minimise legal risks by reducing unpredictability related to divergent legal regimes, to reform laws through cooperation which curbs territorial discrimination whilst preserving sovereign dignity, and to develop specialised legal expertise in regional law.<sup>7</sup> Mistelis also commends

4 Universal Declaration of Human Rights, 1948, art 19.

5 Edward Kitosa, 'The Status of EAC Legal Harmonization in Uganda: Uganda Law Commission' (Paper presented on creating a predictive and facilitative legal environment for business in the East African Community, 6 -7 August, 2012 in Arusha, Tanzania).

6 As amended on 14 December, 2006 and 20 August, 2007 and which first came into force on 7 July 2000.

7 B Paul Stephan, 'The Futility of Unification and Harmonization in International Commercial Law'

harmonisation as an enabler of commerce because it reduces transaction costs and lifts other barriers related to varying laws, creates neutral or customised law for cross-border transactions by disregarding domestic differences, fills a legal vacuum where there are no national laws, and substitutes a single law for a proliferation of national laws with the collateral of reduced conflict of laws.<sup>8</sup> Finally, harmonisation leads to efficiency improvements in the law between and within common markets.<sup>9</sup> True to those principles, the Treaty and the EAC Common Market Protocol envision it as a vehicle for driving the region towards coordinated service delivery and sustainable investment with only the necessary or minimal national differences. Thus, legal harmonisation manifests through multilateral conventions, bilateral treaties, community laws, a model law or contract, codified customs and standardised practices.<sup>10</sup>

Despite these advantages, critics of harmonisation contend that it is politically implausible, cannot deliver on its promise of *ex ante* predictability and encourages rent seeking.<sup>11</sup> Stephan further cautions that it may produce highly specific rules which increase legal risks beyond optimal levels<sup>12</sup> and fosters the interests of some special groups to the detriment of public welfare. Consequently, such groups may thwart rules unfavourable to them or cause a regulatory capture.<sup>13</sup> Lastly, Mistelis also cautions that ineffective harmonisation increases conflict of laws and the opportunities for forum shopping.<sup>14</sup> Therefore, although harmonisation may have made digital migration in the EAC more efficient, affordable and predictable, this paper does not suggest that it would completely resolve the setbacks of the country-by-country analogue switch-off.

At this juncture, it is worth noting that the EAC has made tremendous efforts to harmonise many economic laws and operational standards. They

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(Social Science Research Network Working Paper No. 99-10, June 1999) at 4-7. Online: [http://papers.ssrn.com/paper.taf?abstract\\_id=169209](http://papers.ssrn.com/paper.taf?abstract_id=169209).

8 Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Ian Fletcher et al., eds., *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001) 3-27 at 21.

9 John Linarelli, 'The Economics of Uniform Laws and Uniform Law Making' (2002) at 2. Online: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=384180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384180).

10 Mistelis, *supra* note 8 at 15.

11 Frederick Tung, 'Skepticism about Universalism: International Bankruptcy and International Relations' (U.C. Berkeley Law and Economics, Working Paper Series, Working Paper 2001). Online: [http://papers.ssrn.com/paper.taf?abstract\\_id=267437](http://papers.ssrn.com/paper.taf?abstract_id=267437).

12 *Ibid* at 6 and 14.

13 *Ibid* at 33.

14 *Ibid* at 21.

include the establishment of the Sectoral Council on Legal and Judicial Affairs, its sub-committee and taskforce for the approximation of laws entrusted with reviewing national laws to ensure their conformance to the regional treaties and proximity to corresponding rules in other Partner States.<sup>15</sup> As a result, different commercial laws applicable to immigration, employment, companies, intellectual property and mining have been approximated or harmonised across EAC to boost business certainty in the common market.

It follows therefore that as signatories to both the GE06 and the EAC Treaty, the EAC Partner States were duty bound to approximate their laws and policies so as to facilitate seamless implementation of the digital migration. Article 27 of the Vienna Convention on the Law of Treaties, 1969 renders every treaty binding upon its state parties, which must perform its obligations in good faith. Similar to other international laws, application of the GE06 depended on its place in each country's legal order. Basically, there are two legal systems, either monism where international law ranks equally with municipal law, or dualism where they are distinct. Thus in monist states, a treaty automatically applies upon its ratification, while dualists require its transformation into municipal law before it takes force. The process is called domestication, and occurs by parliamentary approval of a treaty, or passing of an "Implementation Act" to incorporate its stipulations into the domestic law.<sup>16</sup>

Kenya, Tanzania and Uganda are common law and dualist jurisdictions. Thus, after ratification, they also require an implementation legislation to localise international law. However, upon promulgation of the new Constitution of Kenya, 2010, Article 2(6) renders any treaty ratified by Kenya part of its domestic laws with direct application.<sup>17</sup> This implies that the GE06 became automatically applicable in Kenya, without need to pass an Act to provide for digital migration. Indeed, Kenya did not legislate to domesticate the GE06 provisions on digital migration, but made other policy and regulatory reforms to accommodate digital broadcasting.

15 The Sectoral Council and its Committee were established under Article 14(3)(i)-(j) of the EAC Treaty.

16 Nicholas Wasonga Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective' (2013) 13 *African Human Rights Law Journal* 415-440.

17 Various courts in Kenya have held different international conventions as forming part of domestic law pursuant to Article 2(6) of the Constitution. Some illustrations include *John Kabui Mwai v Kenya National Examination Council and 2 Others*, High Court of Kenya at Nairobi, Petition 15 of 2011 6-7, *Beatrice Wanjiku v The Attorney-General*, High Court of Kenya at Nairobi, Petition 190 of 2011 and *Ibrahim Songor Osman v Attorney General*, High Court Constitutional Petition 2 of 2011 at 8-10.

By contrast, Tanzania as a dualist state transformed its GE06 commitments into the Electronic and Postal Communications Act by amending it in 2010 and passing the Electronic and Postal Communications (Digital and Other Broadcasting Networks) Regulations, 2011 to provide for the analogue switch-off, the simulcast period and ultimately digital terrestrial transmission. Quite differently again, although Uganda is dualist, it did not pass any implementation legislation for digital migration. This gap is particularly glaring because although the Uganda Communications Act was passed in 2013, after Uganda's ratification of the GE06, it is totally silent about digital migration.

Similarly, although the GE06 was concluded way back in 2006 with a definite deadline of mid-2015, the EAC did not prioritise approximation of the broadcasting laws. This regional omission is manifest in the 4th EAC Development Strategy which was designed for 2012-2016 at the peak period for implementation of the digital migration, but is void of a single reflection on television services. Instead, it blanketly addresses ICT development with a solid inclination towards mobile communication services and growth of internet uptake.<sup>18</sup> Such gaps are strongly symptomatic of the danger that digital migration was not regionally prioritised as it deserved.

The above flaws notwithstanding, all EAC Partner States undertook to evolve harmonised and complementary communication policies and expand the communication links to further their physical cohesion.<sup>19</sup> This commitment was a concrete premise upon which the EAC should have mobilised jointly and advanced a harmonised regional policy or strategy to guide the Partner States towards a coordinated digital broadcasting market. Further, Article 89 of the EAC Treaty obliged them to develop harmonised standards, laws, practices, upgrade communication facilities, and jointly use national institutions to train staff and exchange information on technological developments.

In addition to the foregoing, Article 99 of the EAC Treaty tasked the Partner States with: adopting common communication policies in collaboration with relevant international bodies including the ITU; modernising equipment to meet standards for efficient communication; applying non-discriminatory tariffs; harmonising capacity building, exchanging manpower, boosting cooperation in local equipment manufacturing; offering a conducive climate for private ICT investment; and adopting a common frequency management and monitoring

18 EAC, *4th EAC Development Strategy (2011/12 -2015/16): Deepening and Accelerating Integration, One People One Destiny* (August 2011) at 68-69.

19 EAC Treaty, art 89.

scheme which includes assignment of mutually agreed frequencies for cross-border communications and issuing similar operating licenses.

It is clear from the above advantages of harmonisation, and the duties undertaken by the EAC Partner States under the GE06 and the EAC Treaty, that digital migration should have been closely coordinated and its enforcement harmonised.<sup>20</sup> The justification for regional regulatory collaboration derives from a multiplicity of strategic, technical, operational and financial imperatives. They include: the cross-border implications of spectrum use, a need for equipment standardisation to guarantee consumers quality of service, merchantable Set Top Boxes and fair price determination, a quest to harness the benefits of coordinated analogue switch-off roadmaps and public sensitisation. Lastly, coordination is vital for joint capacity building for various stakeholders, and institutional armament since regional bodies are key enablers of the digital migration.

The merits of coordinated digital migration are well illustrated in other RECs. For instance, the COMESA Secretariat has served as a focal point for effective regional mobilisation. It convened ministerial meetings to debate policy concerns which informed the migration strategic plans of its members, steered policy harmonisation, coordinated capacity building and frequency allocation, and continues to periodically monitor and evaluate the migration, as well as benchmark best practices for replication in partially migrated member states.<sup>21</sup> Similarly, SADC enabled its member states to agree upon a regional switch-off date.<sup>22</sup> The Ministers approved the SADC migration roadmap and strategy which provided implementation guidelines for the members and domesticated the ITU Guidelines for the Transition from Analogue to Digital Broadcasting. They also direct policy formulation, stakeholder engagement, and conduct of economic impact and needs assessments.<sup>23</sup>

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20 Nicholas Kalungi, quotes the Secretary General of Africa Telecommunication Union, Abdoulkarim Soumaila at the Digital Migration and Frequency Coordinating Workshop in Kampala, who said the region would speed up migration by harmonising policy and working closely to share spectrum without interference. See 'EAC Urged to Harmonize Digital Migration Policies' (Daily Monitor, April 18 2012).

21 *Ibid* at 12. Likewise, the industry umbrella body of ARICEA contributed by creating a platform for regional coordination, knowledge sharing, policy harmonisation, capacity building and implementing roadmaps.

22 The deadline of 31st December 2013 was agreed to at a Special Session on Digital Terrestrial Television Standards for SADC Senior Officials and Ministers' Conference held in Lusaka, Zambia in November, 2010, where the Ministers also approved the revised SADC Digital Television Migration Roadmap and the SADC Strategy. [http://www.parliament.gov.zm/sites/default/files/documents/committee\\_reports](http://www.parliament.gov.zm/sites/default/files/documents/committee_reports).

23 *Ibid* at 4.

Unfortunately, the EAC did not exhibit similar strength of collaboration as a regional economic bloc. Arguably, its smaller size with fewer members as compared to SADC and COMESA meant less financial, technical and organisational capacity to coordinate the digital migration. However, the fewer Partner States imply less bureaucracy and lower costs of organising the project. Therefore, the failure of EAC to coordinate migration as SADC and COMESA did perhaps relates to insufficient political will, different regional priorities at the time, and varying levels of readiness to implement the digital migration in each Partner State.

It is worth highlighting that the communication regulators and broadcasters under their umbrella body, East African Communications Organisations (EACO), made some efforts towards concerted action and set the deadline for digital migration in the region as 31 December 2012. The agreement to a regional deadline prior to the global cut-off date aimed at giving the region ample time to address any difficulties which arose in the process before the worldwide deadline.<sup>24</sup> The challenge, however, is that EACO decisions have no binding force of law, and are not enforceable. It is therefore not surprising that despite all countries agreeing to switch off analogue signals by 31 December 2012, only Tanzania had commenced migration by then and the other countries were yet to prepare sufficiently for their migration. In the absence of concrete concerted efforts for enforcing digital migration at the regional level, the next section of this article examines the policy and legislative premise for digital migration at country level.

### 3. POLICY AND LEGISLATIVE FRAMEWORK FOR DIGITAL MIGRATION

As indicated earlier, the EAC did not specifically formulate a digital migration policy. However other regional economic blocs to which EAC Partner States are members, namely COMESA and SADC, purposely made arrangements for the transition. For instance, COMESA facilitated its member states to design apt mechanisms to handle key stakeholder concerns, and provided blue prints for national policies to define the transition process, calendar, licensing, spectrum management and Set Top Box affordability. COMESA also offered

24 Rwanda Utilities Regulatory Agency, 'Brief on Digital Migration from Analogue to Digital Television Broadcasting System' (Kigali, Rwanda, 2013). COMESA set June 2014 as the switch-off date while SADC set 31 December 2013, so as to overcome any challenges before the 2015 global deadline. Report of the Committee on Information and Broadcasting Services for the Second Session of the 11th National Assembly appointed 27 September 2012. Online: [http://www.parliament.gov.zm/sites/default/files/documents/committee\\_reports](http://www.parliament.gov.zm/sites/default/files/documents/committee_reports).

strategies for the transition, and equipped regulators with interventions to harness opportunities for industry and overcome the likely challenges.<sup>25</sup> Similarly, SADC advanced a regional digital migration roadmap and strategy from common positions at ITU, which guided the policies and deployments of its member states. However, each country retained discretion to customise the regional schemes within its existing local environs.<sup>26</sup>

As earlier stated, each country had to ratify the GE06 before it could enforce the digital migration. The domestication process varied depending on the hierarchy of laws and legal regime. For instance, it sufficed that the monist and civil law countries of Burundi and Rwanda ratified the GE06, and it automatically became applicable. By contrast, the dualist common law countries of Tanzania and Uganda needed to enact a national law to adopt the GE06 provisions after its ratification. As a result, in 2010 Tanzania amended its Electronic and Postal Communications Act to provide for digital terrestrial television services. However, Uganda did not translate the GE06 provisions into local law. Apparently, Section 5(1)(h) and (i) Uganda Communications Act, 2013 was deemed to be sufficient embodiment of the GE06.<sup>27</sup> Kenya lies between the two distinct legal orders, because prior to 2010 it was dualist. However, Article 2(6) Constitution of Kenya, 2010 ushered in monism and now a treaty ratified by Kenya forms part of its laws. Thus, the GE06 and COMESA policy and strategy documents applied automatically and did not require any further domestication.

### 3.1 Migration Policy Regime in East Africa

Against that background, each country in East Africa set a policy to enable digital migration. For example, in Burundi, the Ministry of ICT framed the National ICT Policy in 2011 and the Communication and Audiovisual Policy in 2013 to guide the migration. Further, a national committee was nominated by presidential decree consisting of a technical committee on DTT broadcasting, and the legal, economic and environmental committee which planned the analogue switch-off roadmap.<sup>28</sup> However, given the on-going post-election

25 *Supra* note 20 at 5.

26 *Supra* note 22 at 7.

27 The section obligates Uganda Communications Commission to coordinate and collaborate with relevant world organisations in relation to communications and to set national standards in compliance with international standards and obligations laid down by international communication agreements and treaties to which Uganda is a party.

28 Apollinaire Bigirimana, 'Status of Digital Migration in Burundi' (ARCT, Annex 7 to the EACO

uprisings, deployment of the DTT network was halted, the migration delayed, and the schedule has never been updated.

The Ministry of ICT in Kenya had earlier envisaged digital migration in the National ICT Policy of January 2006. Clause 4.7 of the Policy categorically empowers the government to promote the introduction and uptake of digital television by managing the migration. To bolster that position, on 1 October 2013, the Cabinet Secretary for ICT revised the policy to set a new switch-off roadmap, and a phased migration scheme adopted in tandem with the DTT network rollout, so as to mitigate service disruption.<sup>29</sup> Equally, Tanzania had a general stance on digital television under the National Information and Broadcasting Policy issued by the Office of the Prime Minister in October 2003. It aimed to build a diversified television sector which promotes freedom of expression under Article 18 of the Constitution. The Policy also committed to aligning the laws and practices in Tanzania with international criteria.

By contrast, Rwanda reviewed its National ICT Policy and framed a fresh policy for the migration through a Ministerial Task Force. It guarantees existing broadcasters a future, accommodates new services and local content, promotes digital service uptake, cordial co-existence of free-to-air and pay services and fair competition.<sup>30</sup> Akin to Rwanda, the Minister of ICT in Uganda released a new Digital Migration Policy for Terrestrial Television Broadcasting in July 2011. Its goals are to segment the television market into signal distributors and content services, ensure equitable access to quality broadcast services, make efficient use of spectrum, protect the public against unfair practices, conserve the environment against degradation, and promote local content development.

Evidently the foregoing narrative testifies to a disintegrated approach to policy formulation in the run to digital migration in East Africa. While Burundi, Rwanda and Uganda specifically designed fresh policies, Kenya and Tanzania relied on existing and general ICT policies which they either deemed sufficient, or reviewed and amplified to suit the local demands of the analogue switch off. This individualist approach resulted in divergent policies, each with its own considerations, comprehensiveness, and migration strategy. This factor

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Congress Report 2014). Online: [http://eaco.int/docs/assemblies/ANNEX\\_7\\_Burundi\\_Digital\\_Migration\\_Status\\_Report.pdf](http://eaco.int/docs/assemblies/ANNEX_7_Burundi_Digital_Migration_Status_Report.pdf).

29 The amendment issued vide Gazette Notice No. 2431 of 2006.

30 Rwanda Utilities Regulatory Agency, *Managing the Change from Analogue to Terrestrial Digital Broadcast in Rwanda* (Kigali, Rwanda, January 2008) at 37–38.



contributes to the prevalent discrepancies in the broadcast market in East Africa, despite digitalisation occurring regionally and worldwide.

### 3.2 Legislative Framework in East Africa

Turning over to the statutory regime, the EAC witnessed a similar maverick approach to setting up a legislative regime for digital migration. In Burundi, Presidential Decree No. 100/02 of 7 January 2014 was used to legitimise digital broadcasting, license two multiplex signal distributors, mobilise funds for the analogue switch off, and set local content quotas. However, due to the current political unrest in Burundi, the ensuing draft law and regulations tabled by the Minister of ICT in the cabinet are yet to be adopted and passed as a binding and enforceable law.<sup>31</sup>

Again, Kenya took a different approach as they did not enact a new law specific to digital migration because they deemed the existing Kenya Information and Communications Act, 1998 (as amended) adequate.<sup>32</sup> However, in 2009 the Kenya Information and Communications (Broadcasting) Regulations were made to cater extensively for key concerns in digital terrestrial television, such as signal distribution, content services, appropriate licences for different market segments, professional standards of reporting, child safety, media crime and complaint handling.

Yet again in sharp contrast, the government of Rwanda recognised the gaps in the current laws and set out to boost its laws to accommodate digital terrestrial broadcasting. Accordingly, in September 2011 the regulatory agency passed the Regulations Governing Licensing for Digital Terrestrial Television, which create a signal distribution model, new licensing structure and fees, frequency assignment, capacity development and universal access to information. This was a positive step as the regulations established the rights and duties of different players typically involved in the DTT broadcast ecosystem in contradistinction to analogue television.

Similar to Kenya, the legitimising clauses for digital migration in Tanzania were established in 2010 through an amendment of the Electronic and Postal Communications Act to provide for a new converged licensing regime for digital terrestrial television.<sup>33</sup> In addition, the Electronic and Postal Communications

31 Bigirimana, *supra* note 28 at 1.

32 K Leo Boruett, *Digital Migration: The Kenyan Experience* (Communications Authority of Kenya, 2015).

33 Sections 12–14 of the Electronic and Postal Communications Act, 2010 provide for a Network

(Digital and Other Broadcasting Networks) Regulations, 2011 were passed.<sup>34</sup> Regulation 2 thereof delineates the scope of application of the Regulations to include migration from analogue to digital terrestrial broadcasting, management of the simulcast period, spectrum planning and assignment, and technical broadcasting standards.

In contrast to all the other countries in East Africa, Uganda did not make any enabling legislative efforts for its commitment to the GE06 and the enforcement of digital migration. This nonchalance is particularly disconcerting because in 2011 the country had shown goodwill by formulating a meaningful migration policy which unequivocally obliged the government to set up appropriate laws for smooth and timely execution of the migration.<sup>35</sup> Consequently, this blatant neglect of the government's legislative duty has in part hindered a successful migration.

Further, in 2012 Uganda had overhauled the broadcasting regulatory context by repealing the Electronic Media Act. It dissolved the Broadcasting Council and replaced them with the Uganda Communications Act, 2013 and the new Uganda Communications Commission as the principal law and institutional regulator of television services.<sup>36</sup> However, the new Act remained silent about digital migration, yet it was passed less than two years before the global deadline and the legislators were well aware of Uganda's need to domesticate the GE06 and implement the Digital Migration Policy by June 2015. Such omissions triggered the case of *Enoth Mugabi v Uganda Communications Commission* which challenges the legality of digital migration and seeks injunctions against its implementation in Uganda.<sup>37</sup> The suit is still in court at preliminary stages.

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Facilities Licence and Content Service Provision Licences aligned to DTT broadcasting rather than analogue transmission. See also the Electronic and Postal Communications (Licence Procedures) Rules, 2014 subsequently made to ease licensing.

34 Government Notice No. 418 published on 9 December 2011.

35 Policy Item 5.1, Digital Migration Policy for Terrestrial Television Broadcasting in Uganda, July 2011 at 16.

36 It was published in the Uganda Gazette No. 4 Volume CVI dated 18th January, 2013. See also the Long Title to the Uganda Communications Act, No. 1 of 2013, as well as Sections 4, 5 and 96 thereof.

37 Miscellaneous Application No. 465 of 2015, arising out of Miscellaneous Application No. 464 of 2015 arising out of Chief Magistrates Court Civil Suit No. 764 of 2015. Although the initial suit was dismissed on procedural technicalities, the plaintiff filed the case afresh in the High Court and was joined by two media houses seeking injunctions against the migration on substantive merits. See also Betty Amamukirori, 'Digital Migration Complainant Gets Back-up from Broadcasters' (New Vision, 14 July 2015).

### 3.3 DTT Licensing Regime in East Africa

Besides the presence of a law, another core facet of any operative legislative regime is a suitable and comprehensive licensing structure. In East Africa, all countries have liberalised their broadcast sectors and adopted a converged licensing approach as a means to harnessing the benefits of liberalisation. Mfungahema describes a converged licensing structure as a regulatory instrument used to control several variables to achieve different policy objectives such as defining a market structure, the level of competition, infrastructure rollout, availability and affordability of services.<sup>38</sup> With its overall objective of easing market entry and facilitating efficient operations using regulatory flexibility, a converged licensing framework is essentially technology and service neutral. This implies that regulators and licence services generally use standard terms and conditions, regardless of the broad range of technologies used to deploy a service.

For instance, in 2010, Tanzania created four licence categories, including a network services licence and content service licence suited to digital broadcasting.<sup>39</sup> In 2011, the Rwandan Regulations Governing Licensing for Digital Terrestrial Television established a three-pronged signal distribution licence model, alongside content service provision licences. Similarly, the licence regime in Burundi currently accommodates two signal distributors to double as multiplexers and content service providers as either free-to-air or subscription broadcasters.

In Kenya, a converged licence framework is alive in numerous policy positions,<sup>40</sup> which explicitly provide for various licence categories including content service, satellite and terrestrial broadcast services and any other classes determined by the regulations. This open clause gives leeway for the issuance of new licences and has given Kenya a market-structure-led licence regime with a distinctive two-dimensional signal distribution model. First, it has the typical signal distributors, and secondly there are self-provisioning licencees who obtain spectrum to carry their own content. The final licence is for support

38 C Raynold Mfungahema, 'Policy and Regulatory Approach on the Next Generation Networks: The Case of Tanzania' (ITU-Regional Workshop on the Next Generation Networks, Dar es Salaam, 3-5 October 2006).

39 Electronic and Postal Communications Act, 2010, Laws of Tanzania.

40 Clause 4.4 of the National ICT Policy, 2006 categorically requires every person intending to provide broadcasting services to obtain the necessary licence and meet the prescribed local content levels. Clause 4.5 of the National ICT Policy, 2006 further provides for a market-structure-led licensing regime including the national public broadcaster, private broadcasters who obtain licences for 10 years with a possibility of renewal, and community broadcasters.

management services for customer care providers to mainstream broadcasters and is akin to Tanzania's structure. Besides the law and market practice, Kenya's licensing regime has also developed through litigation. For instance, in the case of *Wananchi Group Kenya Limited v The Communications Commission of Kenya, Kenya Broadcasting Corporation (KBC) and MultiChoice Kenya Limited*, the court found that although KBC was statutorily empowered to distribute signals in Kenya, its carriage of GOtv was operating contrary to the law because it had neither applied for, nor been granted a signal distribution licence as required by the Act.<sup>41</sup>

In the absence of an enabling statute for digital migration in Uganda, even the broadcast licence regime is rather basic and restrictive. For instance, the Digital Migration Policy broadly provides for the public signal distributor as the sole signal carrier for the first five years without stating the commencement date of that limitation.<sup>42</sup> Pursuant thereto, the Uganda Communications Commission creates two wide licence classes: namely a signal distribution licence and a content service licence. The difficulty, however, is that this generalisation ignores pre-existing private digital broadcasters which have already rolled out DTT networks countrywide and are carrying their own signals, without need for a national signal carrier. Instead, they need self-provider licences similar to those recently evolved in Kenya in order to give legitimacy to their operations.

In sum, in the wake of economic liberalisation in East Africa, all the countries pragmatically shifted towards converged licensing. Despite this shared element, the dynamics of implementing the licence models differ significantly. Each country devised its own licence categories, leading to significant variations in their television markets. While Uganda theoretically opted for a monopoly signal distribution, Burundi, Rwanda and Tanzania were realistically open to licensing 2–3 signal distributors who double as multiplexers. Nonetheless, they maintain basic and conservative licence traits due to various constraints such as restrictive laws or policies, and limited spectrum available to modify the signal distribution that can accommodate self-provisioning. Kenya's licensing is so far the most progressive and laudable for growing with market forces, promoting fair competition and having a robust signal carriage structure.<sup>43</sup>

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41 High Court Petition No. 98 of 2012.

42 Digital Migration Policy of Uganda, *supra* note 35 at 12, 16.

43 Clause 4.6 of the National ICT Policy of Kenya empowered the Government to license signal distributors to ensure maximised use of infrastructure as signal distributors must operate on a non-discriminatory basis.

Notwithstanding the stark variations in signal distribution, there is more harmonisation in licensing of content services. For instance, all EAC Partner States license national, private and community broadcasting services. Further, they all authorise broadcasting by both free-to-air channels and subscription television. This all-inclusive approach enhances access to information by all citizens regardless of one's financial or social position, thereby closing knowledge gaps in society. It also increases consumer choice by enabling citizens who can afford to pay subscription fees to access a wider range of local and international channels, whilst mitigating the risks of copyright infringement through restricted access to premium content channels.

The last similarity within the EAC arises from the fact that analogue television required each broadcaster to deploy its own infrastructure and also provide content. As a result, spectrum was assigned to every licensee to run their own network. However, digital terrestrial broadcasting rests on infrastructure sharing thereby promoting specialisation and a separation of roles for more efficient use of spectrum. The outcome is a veto against content service providers obtaining frequency, as it is assigned to a few signal distributors who multiplex and jointly carry their channels. This has redefined the traditional broadcasting business models across the region.

As earlier pointed out, Articles 5 and 99 of the EAC Treaty require the development of common technical, infrastructural and operational standards amongst the Partner States. This is particularly relevant for digital migration as the consumers have to procure Set Top Boxes or decoders for the purpose of translating analogue signals into digital mode in order to continue receiving television signals after the switch-off. In this regard, the ITU, EACO, SADC and COMESA recommended the adoption of DVB-T2 as the common standard for digital terrestrial services, and MPG4 for transmitters.<sup>44</sup> Four countries adhered to and incorporated these standards in their type approval rules, to ensure that consumers bought futuristic decoders that were merchantable and fit for purpose.<sup>45</sup> However, Tanzania adopted an earlier and thus older generation of DVB-T1 Technology for the decoders. Whilst in the short term it rendered

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44 EACO, *Progress Report on the Work of the EACO Working Group 6 on Broadcasting Services Development* (Rwanda, 2014).

45 See the Kenya Information and Communications (Importation, Type Approval and Distribution of Communications Equipment) Regulations, 2010, the Electronic and Postal Communications (Electronic Communications Equipment Standards) Regulations, 2014 of Tanzania, and the Communications (Telecommunications and Radio Communications Equipment Type Approval) Regulations, 2005 of Uganda.

them cheaper, the T1 devices have become obsolete at a faster rate than the T2 technology, and required consumers to additionally buy more recent decoders.<sup>46</sup> Another challenge is that although the institution of equipment standards was necessary, it led to a shortage in supply of decoders. Upon the government's imposition of minimum technical standards, some equipment vendors ceased to import huge volumes of sub-standard decoders, while other unscrupulous businessmen invested heavily in counterfeit decoders and sold them to unsuspecting consumers who were ignorant of the law and minimum standards. Eventually the public suffered with either fake and dysfunctional decoders sold at cheap rates, or expensive type approved decoders. These challenges reduced the ease of access to information for all as the supply of digital decoders could not match the number of households with analogue televisions.

An illustrative case in point is Rwanda where the Rwanda Broadcasting Agency planned to start dual illumination in March 2013, meaning that both analogue and digital signals would run parallel to allow viewers with and without decoders to continue receiving television channels until the analogue switch-off was effected progressively; however, this did not happen because there were no decoders in the country.<sup>47</sup> Consequently, the analogue switch-off was postponed. Similar challenges of decoder availability, quality and affordability were evident across the region, leading to similar deferments and a progressive switch-off of the analogue transmitters over many months.

Besides the availability of a sufficient stock of decoders for purchase, they needed to be affordable. The digital migration required every television viewer to purchase either the more recent integrated high definition television or a digital decoder to translate the analogue signal into digital mode. Decoders were expensive, with the low-cost ones priced between US\$ 20-30 and high-end ones close to US\$ 100, varying by country.<sup>48</sup>

A key determinant of product price is taxes as a cost of doing business. Since all countries in the region are free market economies, the decoder prices are set by operators rather than regulators. The difficulty in self-regulation of

46 The Guardian Reporter, 'Government Stakeholders Refute Claims on TV Decoders' (The Guardian, Tuesday 7 July 2015, Tanzania).

47 Pablo Divinoltd, 'Lessons and Opportunities in Rwanda's Digital Migration Fairy Tale' (30 January 2015). Online: <http://www.digitaltvafrika.com/?p=218>.

48 Yudaya Nangonzi, 'Digital Migration Changes Remote Control Dynamics in Homes' (The Observer, 1 July 2015, Kampala, Uganda). See also Njeri Kiereine, 'What the Digital Migration Means to TV Audiences' (The Star, 2 February 2015, Nairobi, Kenya).

tariffs with minimal control by regulators is that the service providers easily fix high prices in order to recoup a high margin of return on investment. The second element of tax is that it is a creature of statute.<sup>49</sup> In this regard, in Article 32 EAC Common Market Protocol the Partner States undertook to progressively harmonise their tax policies and laws in order to reduce tariff barriers to the free movement of goods, services and capital in the region. However, the Partner States did not harmonise taxes on decoders but each country imposed its own rate, leading to divergent prices across the region with tax waivers in some cases. For instance, in a bid to increase affordability of the decoders, Kenya waived import duty and vendor registration fees, and reduced the type approval fees.<sup>50</sup> By contrast, Uganda still charges vendor registration and type approval fees in dollars which deters decoder imports.

Other laws which require regional harmonisation so as to facilitate digital migration are fair competition and consumer protection laws. Currently, the region is subject to the East African Community Competition Act, 2006, the COMESA Competition Regulations, 2004 and the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, 2009 which foster cooperation and dialogue in East Africa, aimed at encouraging convergence of laws and practices on consumer rights and duties. Save for Uganda, all EAC Partner States have laws and regulatory institutions responsible for consumer welfare and fair competition.<sup>51</sup>

With the digital migration overhauling a long-standing broadcasting system, consumer welfare required early, effective and extensive public sensitisation. As a result, each country strategically, incorporated a consumer sensitisation campaign in its digital migration roadmap. For instance, the President of Burundi launched the public awareness campaign in 2013, followed by provincial seminars conducted by the national committee for public and local

49 See Income Tax Act of Kenya, 2012 s 3; Income Tax Act of Uganda, Cap. 340 s 5; Income Tax Act of Tanzania, 2006 s 4.

50 Daniel Obam, *Migrating from Analogue to Digital Television Broadcasting – Case Study from Kenya* (National Communications Secretariat of Kenya, Nairobi, 2015).

51 Tanzania promotes consumer welfare and fair competition pursuant to the Fair Competition Act, 2003 through the Fair Competition Commission and several other industry-specific regulatory structures. Kenya recently enshrined consumer rights in Article 46 of the Constitution, 2010 followed by the enactment of the Competition Act, No.12 of 2012 and the Consumer Protection Act, No.46 of 2012. Likewise, Rwanda passed the Competition and Consumer Protection Act which also established a Competition and Consumer Protection Regulatory Body (CCRB) in 2012, as did Burundi which passed the Consumer Protection Act, 2012. Evidently, 2012 was a turning point for the majority of countries in the region in so far as they committed to protecting consumers and enhancing competitive markets. This begs the question why Uganda was left behind.

administrators.<sup>52</sup> Besides training, Kenya, Tanzania and Rwanda sensitised the masses through advertisements in print and broadcast media, with artistic logos and songs explaining the migration process.

The last cross-cutting legislative issue pertains to environmental conservation in the face of digital migration. The switch-off of analogue transmitters demands proper disposal of obsolete equipment with minimal pollution. Again, there was no regional position agreed upon on the management of infrastructural waste arising from the migration. However, some countries were environmentally alert and provided for conservation of a clean and healthy environment. For instance, Clause 4.9 of the National ICT Policy of Kenya requires sensitive development of modern broadcasting facilities to minimise their environmental impact, and every licence applicant must demonstrate readiness to minimise the effects of their infrastructure on the environment, which should include provision of appropriate recycling/disposal facilities for toxic waste. Similarly, the Digital Migration Policy of Uganda provides for environmental protection during the transition and beyond by reducing the negative impacts of broadcast infrastructure.<sup>53</sup>

In sum, the digital migration in East Africa has had wide-ranging policy and legislative significance in the region. The EAC did not enact a law for the process, but left it to the Partner States to set up. Consequently, each country formulated laws and policies fit for itself with minimal collaboration with the neighbouring states. The resulting divergences either enabled or restricted the success and timeliness of the analogue switch-off across the region. They also provide future opportunities for collaboration in a bid to redress the prevailing weakness of the migrations.

#### 4. IMPLEMENTATION STATUS

With a mutually agreed upon global deadline, successful execution of digital migration required each country to design strategies to guide the course. All countries in East Africa drew roadmaps covering all stages from analogue switch off, through dual illumination and the complete digital migration. They also stimulated participation of relevant stakeholders as the roadmaps entailed key targets, resources and persons answerable for a timely realisation of the

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52 Bigirimana, *supra* note 28 at 1.

53 *Ibid* at iii, 11 and 14.



milestones. As a result, all countries migrated by a phased approach but there were minimal efforts to harmonise the migration timetables so as to meet the switch-off deadlines agreed to globally and regionally.

For instance, Tanzania was the pioneer in switching off analogue signals on 31 December 2012, and duly adhered to the date agreed upon under EACO. Rwanda followed in 2013 and both countries successfully completed their migrations before the global deadline with manageable inhibitions. It was conceivably worthwhile that Tanzania and Rwanda's experiences could inform the rest of EAC about the opportunities, implications and challenges of the migration. Surprisingly, although Kenya planned to migrate in 2012, 2013 and 2014, its first analogue switch-off did not occur until 31 December 2014. Alongside the general impediments discussed above, that first phase of the switch-off was fettered by an injunction which prohibited the regulator from enforcing migration against the three top free-to-air channels.<sup>54</sup> The result of such judicial intervention in the regulatory enforcement was a partial switch-off which led to unfair competition as leading broadcasters continued with the status quo whilst the smaller players terminated their analogue services and lost viewership and advertising revenue.<sup>55</sup>

Kenya was entangled in endless litigation by broadcasters protesting against execution of the migration on various grounds, but mainly fuelled by the ownership of leading broadcast and print media by the same persons.<sup>56</sup> A case in point is *Media Owners Association v The Communications Commission of Kenya*<sup>57</sup> which challenged the decision of the state to switch from analogue to digital broadcasting by December 2012. Justice Lenaola issued conservatory injunctions which restrained the regulator from cancelling, stopping, suspending, restricting

54 Supreme Court Petition No.14 of 2014 as consolidated with petitions No. 14A, 14B and 14C of 2014

55 Olive Burrows, 'Stations to Remain Analogue as Court Considers Appeal' (30 January 2015, Nairobi, Kenya); L Mutegei, 'Kenya Supreme Court Allows 3 Media Houses to Continue with Analogue Broadcast' (8 January 2015). See also Edwin Okoth, 'Digital Switch Row Takes Another Turn' (5 February 2015); Salaton Njau, 'CA to Repossess All Analogue Broadcast Licences' (The Daily Nation, 13 February 2015); Jeff Angote, 'Top 4 TV Stations Back on Air' (3 March 2015, The Daily Nation, Nairobi, Kenya); Eunice Kilonzo, 'Digital Switch War Back to Court' (The Daily Nation, 22 December 2014).

56 It is important to note that Clause 4.11 of the National ICT Policy of Kenya discourages concentration of ownership of print and electronic media in a few hands. Some of the cases include *Magic Radio Limited v The Communications Commission of Kenya*, where the Court issued temporary injunctive orders prohibiting the regulator from issuing broadcasting licences under the new converged licensing and regulatory framework of the amended Kenya and Information Communications Act, Miscellaneous Civil Application No. JR 284 of 2011.

57 High Court Petition No. 244 of 2011.

or interfering in any way with the existing licences, frequencies, spectrums and broadcasting services pending the hearing and determination of the petition.

Similarly, in *Royal Media Services Limited v The Attorney General, Ministry of ICT, Communications Commission of Kenya*,<sup>58</sup> the appellants sought an order to compel the government to issue them with signal distribution licences and frequencies, and to prohibit switching off of their analogue frequencies until the regulator had granted them licences. The Court of Appeal declared the regulatory preparations made by the regulator for the digital migration illegal. This caused confusion in the market, and compromised Kenya's ability to migrate in good time as agreed with ITU. Such judicial interventions delayed seamless enforcement of the digital migration process by the regulators and broadcasters.

Another outstanding instance was when the three leading free-to-air channels resisted the digital migration through blocking the carriage of their content by subscription televisions without receipt of payment for it or the grant of their consent. Akin to rising grievances in Tanzania and Uganda, the free-to-air television owners argued that forceful carriage of their information without payment violates their copyrights and threatens their advertising revenue while they invest heavily in content development. They demanded clear rules which determine free but commercially viable inclusion of their content in pay television bouquets. This protest painfully gave birth to the "must carry" regime in Kenya and culminated in the landmark case of *Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited v The Attorney General, Ministry of ICT, Communications Commission of Kenya*, in which the applicants sought injunctions against the regulator switching off analogue television services on 13 December 2013 or ever.<sup>59</sup>

Indeed, even though phase 1 of the digital migration had already occurred and thus the status quo had changed from analogue transmission to simulcast, the court still granted the applicants an injunction against switching off their analogue signals. As a result, the applicants refused to migrate their services while the regulator continued to switch off signals of all other free-to-air broadcasters. The stalemate created an unfavourably unequal playing field within the free-to-air television market segment, and threw the country into a state of partial migration where the three leading broadcasters who enjoy the largest market share continued with analogue transmission while their smaller competitors

58 Court of Appeal Civil Appeal No.4 of 2014, Judgment was delivered on 28 March, 2014.

59 High Court Constitutional and Human Rights Division, Petition No. 557 of 2013.

were switched off. This unprecedented injunction also led to a turning point in judicial practice, as the Supreme Court exempted itself from the *functus officio* rule by invoking residual jurisdiction, yet it had already delivered its substantive and final judgment.

The legal battles were intensified by media reports which repeatedly informed the public only about digital migration developments which were in their favour. Uganda faced challenges similar to Kenya, but at a smaller scale. For instance, the public protested and private broadcasters extensively lobbied the Parliament, Minister of ICT and President to defer the migration until the country was fairly prepared. They stated that by 2015 Uganda was ill-prepared because simulcast only began in August 2014, and the national signal distributor was not yet registered, licensed, funded or equipped to carry their signals.<sup>60</sup> In addition, the country had an insufficient stock of digital decoders, which were priced expensively and limited in distribution. They also used print media to criticise the migration process as non-consultative, illegal, under-prioritised and mismanaged.<sup>61</sup> Uganda now also faces its first landmark case which disputes the lawfulness of digital migration.<sup>62</sup>

Apart from sufficient time, capacity building and consumer awareness, sufficient financing is a key indicator of a successful exercise. Unfortunately, East Africa faced limited funds as another cross-cutting challenge to the migration. As shown above, digitalisation brings a wealth of benefits to the broadcast industry and consumer viewing experience. However, those benefits come at a huge cost. Digital migration requires major capital investments in upgrading the transmission systems and studio equipment, and for consumers in buying decoders. Additionally, dual illumination and routine maintenance of digital

60 Dickson Nshabohurira & Sharon Kyatusimire, 'Ugandans Panic as June 17 Nears' (East African Business Week 15–21 June, 2015) at 1; Chris Kiwawulo, 'Auditor General Queried Digital Migration Readiness' (New Vision, 8 July 2015); Ruth Namatovu, 'Why is UCC Forcing the Digital Migration?' (New Vision, 6 July 2015) at 23; Pablo Kimuli, 'Bans Don't Ever Seem to Work in Uganda' (The Observer, 10 July 2015).

61 Paul Tentena, 'Uganda Nears Digital Switch' (East African Business Week 2–8 March 2015) at 27; Paul Kwesiga, 'Digital Migration: UCC–Broadcasters Disagree' (17 June 2015) at 3; Frederic Musisi, 'Broadcasters Government Disagree on Digital Migration' (The Daily Monitor, 17 June 2015) at 5; Anthony Wesaka 'Switch Back to Analogue: Court Tells the Commission' (The Daily Monitor, 3 July 2015) at 3; Frederic Musisi, 'The Confusion that is Digital Migration' (The Daily Monitor, 7 July 2015) at 3; Anthony Wesaka, 'Court Okays Digital Migration' (The Daily Monitor, 8 July 2015); C Natukunda, 'Digital Migration Drama Continues' (Sunday Vision, 12 July 2015); Solomon Stacy, 'Who Cares for the Interests of Free-to-Air Consumers?' (22 July 2015).

62 Betty Amamukirori, 'Digital Migration Complainant Gets Back-up from Broadcasters' (New Vision, 14 July 2015).

infrastructure involve enormous operational expenses for grid power, labour costs, site rentals and security.

Each country funded the migration using different approaches. For instance, Burundi's national broadcaster entered into a joint venture with the Chinese broadcaster Star Times Limited and obtained a finance facility worth US\$40 million from China's Export-Import (Exim) Bank.<sup>63</sup> Similarly, Tanzania Broadcasting Corporation entered into a joint venture with China's Star Times (called Star Media) where China financed the rollout of the digital infrastructure.<sup>64</sup> Kenya mirrored the same model as Kenya Broadcasting Corporation partnered with MultiChoice.<sup>65</sup> Uganda, which relied on public funds, is lagging behind in its network rollout with only one digital site in operation as at 17 June 2015, and commenced the switch-off without installing transmitters countrywide.

A comparison of the above models indicates that so far the most successful approach to financing digital migration is through Public Private Partnerships.<sup>66</sup> However, gaps remain region wide in fund-raising for further digitalisation. The EAC Partner States need to benchmark the costs of decoders, antennas, infrastructure rollout, and signal carriage from studios to the transmission sites and the end-users, so as to determine fair pricing on a professional, equitable and non-discriminatory basis for all stakeholders.

In sum, implementation of digital migration in East Africa has faced several constraints. They have included shortage of funds, public protests, wavering political will by governments, resistance from private broadcasters, counterfeit equipment and the sudden or rushed switch-off by late adopters like Kenya and Uganda, which gave consumers and broadcasters little time to make adequate preparations. The consequence was a restriction of the right to access information for many consumers, as well as limited freedom of expression for content producers.

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63 Bigirimana, *supra* note 28. See also The European Times, 'Invest in Burundi'. Online: <http://www.european-times.com/publications/burundi.pdf>.

64 Robert Schumann, 'Case Study of Digital TV Switchover in Tanzania' (29 July 2013). Online: <http://www.analysismason.com/About-Us/News/Insight/Case-study-of-digital-TV-switchover-in-Tanzania/>.

65 Telecom Paper, 'MultiChoice unit DStv launches GoTV in Kenya' (New, Telecom Paper, 14 September 2011). Online: <http://www.telecompaper.com/news/multichoice-unit-dstv-launches-gotv-in-kenya--826724>.

66 See also David Ssempijja, 'Public Private Partnerships Key in Achieving Successful Digital Migration' (New Vision, 25 June 2014).

## 5. PROSPECTS FOR HARMONISATION

In the light of the foregoing discussion, there are several opportunities for the EAC Partner States to cooperate in ensuring that the region achieves a harmonised digital broadcasting market with fewer divergences in the regulatory framework. Such prospects are summarised below:

The EAC should consider adopting the more efficient policy-led approach to digitalisation so as to serve public interests, rather than a market-led style. The Partner States need to jointly mobilise and formulate a regional policy on digital broadcasting rather than entrusting it to private sector investors whose commercial interests do not necessarily serve the common good. Ideally the digital migration should benefit the citizens of East Africa. The EAC should further develop a regional action plan for completing the transition, based on updated roadmaps, and resolve the obstacles in past migration phases.<sup>67</sup> This requires revised regulations, licensing, effective use of digital dividend and spectrum coordination, especially at the borders, and facilitation of fair competition and infrastructure sharing.

There is also a need to establish a regional must-carry regime as a balancing act between protection of the intellectual property rights of free-to-air channels and the consumers' right to continued access to information. From the discussions above, it is clear that free-to-air broadcasters are aggrieved with the present must-carry rules. Their criticisms underscore the urgency for the EAC Partner States to collaborate and agree upon a common mutually rewarding position on must-offer obligations for free-to-air broadcasters and must-carry duties of pay television providers that is copyright sensitive.

Further, the laws and institutional practices on consumer protection in the EAC ought to be approximated to evenly protect the public against exploitative market practices and the dangers of knowledge gaps concerning digital migration. As shown above, successful transition depends heavily on consumer awareness of the key issues and capacity to buy decoders or integrated digital televisions. Thus, it is advisable that the EAC Partner States cooperate in continuously sensitising the public about their rights and responsibilities during

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<sup>67</sup> Southwood Russell, recounts that in Europe the period between the launch of the first digital broadcast signal and the shutting down of the analogue TV signal has generally taken between 3–14 years. See Southwood Russell, 'Digital Broadcast Migration in West Africa: An Overview and Strategies to Accelerate the Transition' (Association for Progressive Communications (APC) and Balancing Act, June 2011) at 6. Online: <https://www.apc.org/en/system/files/APCPublicationDigitalMigrationOverviewEN.pdf>.

and after the migration, in order to empower them to make informed decisions. It is also important to ensure that decoders are affordable, or subsidised, so as to realise universal access to information.

Besides consumer protection, environmental conservation should be prioritised during and after the digital migration. The generation of new electronic waste is an inevitable outcome of the analogue switch-off, and can potentially increase climatic change and environmental pollution, if not managed well. Thus, the EAC needs to agree upon a waste management strategy related to digitalisation. A good case study is the COMESA which recommends that its Member States adopt the Switzerland model of e-waste disposal where all actors such as transmitter manufacturers, assemblers and decoder vendors charge a nominal advance recycling fee for their electronic equipment. In addition, disassembling centres should be established to collect and safely dispose of waste from digitisation which includes analogue devices, DVB-T1 gear which will soon be obsolete, and Standard Definition gadgets which are being superseded by High Definition devices.

Further, since digital migration increases the proliferation of international content into the region over multimedia devices, the EAC needs to protect its unique cultural values by boosting the production, preservation and regulation of local content in the digital broadcasting era. Some approaches to explore include setting and stern enforcement of local content quotas in digital television programmes which accommodate region-wide languages, artists and productions in the definition of local content. Further, governments should incentivise local production through financing, establishment of well-equipped studios and training in talent development. Capacity building should extend to regulators, the judiciary and other stakeholders to equip them to patriotically promote homegrown productions and safeguard their copyrights. The EAC should boost the curriculum for arts to ensure holistic skills acquisition, as well as setting and enforcing professional standards across the region.

Further, East Africa requires more efforts to boost the availability and affordability of digital decoders and their spare parts for repairs in case of breakage. The Partner States can mutually give tax holidays over the same period or lower rates on digital television services and equipment to avoid device dumping from one country to another. In addition, some revenue raised from the reassignment of digital dividend can subsidise costs of decoders.<sup>68</sup>

68 Russel, *ibid.* "The first of these obstacles needs to be assessed by looking at both the costs and benefits of the transition process. As has been shown in the accompanying case studies on Ghana,

Another opportunity for regional collaboration is jointly overcoming the challenges of DTT by exploiting the capabilities of satellite television services. As with any other service made available by deployment of physical infrastructure, the availability of DTT services is dependent upon quality network and coverage. However, it is impossible to achieve a state of perfection in this regard due to insurmountable terrains, grid instability, obstructive weather, political instability and commercially non-viable places, *inter alia*. Therefore, the EAC Partner States need to agree upon rules by which satellite television services which are broadcast indiscriminately can complement DTT services and fill the gaps, without blurring the distinction in the two television business models and technologies.

Another potential area for regional collaboration is the management of the digital dividend, spectrum re-planning and re-allocation to new services. To optimise digital dividend, the EAC Partner States should cooperate in revisiting their frequency assignments in line with the GE-06, jointly develop frequency planning tools, update their national frequency plans, coordinate spectrum use to reduce harmful interference, and cooperate in the regulation of transmitters located at the borders so as to minimise cross-border signal interference. Regional coordination is necessary to harmonise frequency management by all states.

Given the varying models of signal distribution, licensing of content broadcasters and their subscriber management service providers across the region, there is an opportunity for the EAC to collectively examine the best approach to promoting free and fair competition in the digital broadcasting era, and replicate its strengths in all countries. For instance, it is advisable that Uganda should open up the signal distribution market by reviewing the Digital Migration Policy to end the monopoly currently enjoyed by the public signal carrier. Further, countries which had pre-existing digital network investors prior to the migration ought to fairly take explicit cognisance of their operations and absorb them in their policy and legislative frameworks, perhaps similar to Kenya's model of self-provider licences. Such removal of barriers to

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Nigeria and Senegal, it is possible through a process of tax reduction to get a pricing on set-top boxes that will make it comparable to acquiring a low-end phone. Furthermore, the spectrum freed up by transferring broadcast signals out of their existing spectrum band and efficiencies of digital transmission will give either the Government or the regulator a financial bonus. This funding can be applied to ensuring that there is a wider coverage area for television and if need be (at the end of the transition) applying some subsidy to those unable to afford the set-top box".

entry will encourage increased investment by more efficient players to compete favourably in meeting consumer needs and efficiencies of competition.

Finally, the EAC Partner States need to benchmark recommended standard terms and conditions for Service Level Agreements executed between the signal carriers and the content service providers on one hand, as well as those between the content broadcasters or their support management service providers and their consumers. Some of the key considerations include fair tariff determination, quality of service, honest advertising or misrepresentation and fair compensation for any aggrieved party.

## **6. PITFALLS FOR HARMONISATION**

It is worth cautioning that the implementation of regional harmonisation proposed above for digital television services in East Africa may not run as smoothly as the academic proposals made. Some of the likely drawbacks in the coordination process are highlighted below as follows:

The divergent laws and policies require thorough benchmarking and amendments prior to realisation of meaningful harmonisation. Countries such as Uganda which has not formulated comprehensive laws and regulations to govern the migration will require more time and a persuasive strategy to garner public support and political good will of the legislators so as to expedite the necessary approvals and enactments.

Variations in the signal distribution model and infrastructure deployment are a potential impediment to meaningful harmonisation. For instance, the countries which embraced restrictive signal carriage structures based on monopoly or duopoly by public service providers will need to demonstrate more liberalisation by accommodating the self-provider model of signal distribution, particularly for pre-existing service providers.

It may also be difficult to coordinate the licensing approaches since some countries have already adopted a market-led broadcasting approach rather than the policy approach. The reason is that unlike policy, market forces are difficult to steer in a single and specific direction.

Further, a determination of the regime of free-to-air carriage is potentially controversial as it requires a selection of minimum channels or specific television stations for mandatory carriage in pay television bouquets. It will be necessary to establish transparent selection criteria for preferring specific channels over



others, since they are all competitors. It will also be necessary to determine whether the must-carry rules apply only for the simulcast period or stand in perpetuity in the interest of universal access to information.

The cooperation initiatives may encounter increasing rates of copyright infringement across the region. This is potentially a hindrance to tearing down the barriers comprised of territorial restrictions on broadcasting of specific content in the EAC. Thus the Partner States ought to intensify their crackdown on piracy in order to boost confidence amongst content producers, rights owners, licensees and broadcasters in the region.

## **7. CONCLUSION**

This paper has examined the policies, laws and implementation of digital migration in East Africa. It has established that Tanzania and Rwanda were early adopters of the migration and have had considerable success due to early preparations and execution. Their accomplishments provide good lessons for Kenya, Uganda and Burundi which have lagged behind the international deadline for analogue switch-off. The key models include prioritisation by devoting ample time, finances, human resources and extensive public sensitisation to the process. Similarly, the achievements and flaws of the laggards also demonstrate that effective migration demands comprehensive mobilisation, strict enforcement of global equipment standards and meaningful engagement of relevant stakeholders. Nonetheless all countries have encountered imperfections with the migration which call for regional dialogue and collaboration in finding useful solutions. Such imperfections include gaps in digital signal coverage, increasing demands for clear must-carry rules which strike a healthy balance between the public right to access information and upholding copyrights of free-to-air channels, competent resolution of customer inquiries or complaints and subsidised decoder prices. These, alongside other emerging issues, such as management of digital dividend and quality of service standards, offer many opportunities for the EAC to regionally harmonise the regulation of the digital television market.



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