



PRIVATE SECTOR POSITION PAPER ON SERVICES LIBERALIZATION IN THE EAST AFRICAN COMMUNITY

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Summary

Progress towards the formation of a Common Market in services is currently stymied by the inability of EAC Partner States to implement the commitments made on trade in services in the first round of liberalization. The key stumbling block is the linkage that has been made with regard to commitments on the temporary movement of service suppliers who are nationals of Partner States (“natural persons”) with the provisions on the free movement of workers.

The East African Business Council (EABC) and the East African Professional Services Platform (EAPSP) believes that the linkage has been wrongly created, will result in practical difficulties and costs for business to exploit the opportunities intended from the free movement of services guaranteed in the EAC Common Market Protocol, and will ultimately frustrate the effectiveness of this freedom, which we do not believe is the aim of Partner States. This paper includes some specific examples that illustrate the problem.

Recommendations:

The EABC, EAPSP and its members make the following recommendations aimed at solving the existing deadlock regarding implementation of trade in services commitments by Partner States.

1. Delink the two schedules (Annex V and Annex II) and specify clearly each country’s Mode 4 commitments.

Ideally, in the services activities in which they have made market access commitments, each Partner State should schedule no restrictions (“None”) for Mode 4 in Annex V instead of the current notation, “*In accordance with the Schedule on the Free Movement of Workers.*” Such an indication would mean that they are opening their markets to the short term presence of natural persons from other EAC Partner States without reservations or restrictions. Mode 4 is an important means of supplying services and a Common Market for services in the EAC cannot be built without this means of supply, especially since the approach to services integration is a progressive one. It will take a long time for labour markets to become integrated as a single market in the region.

2. The categories of services suppliers under Mode 4 be defined Contractual Service Suppliers (i.e. persons working for services companies) and Independent Professionals and Intra-Corporate Transferees. EAC Partner States should consider adding a definition of a service supplier and clarifying Mode 4 movement under the CMP as follows:

"Service supplier" means a natural person or juridical person of a Partner State that seeks to supply or supplies a service.

For the purposes of Article 16.2(d) of the Protocol on the Establishment of the East African Common Market, free movement of service suppliers includes the following categories of persons:

(i) "Contractual services suppliers" which means natural persons of a Partner State employed by a juridical person of that Partner State has concluded a bona fide contract to supply services with a final consumer in the latter Partner State requiring the presence on a temporary basis of its employees in that Partner State in order to fulfill the contract to provide services.

The temporary entry and stay of natural persons considered as contractual service suppliers within any Partner State shall be for a cumulative period of not more than six months in any twelve-month period or the length of the contract.

(ii) "Independent service suppliers" which means natural persons of a Partner State engaged in the supply of a service and established as self-employed in the territory of that Partner State who have concluded a bona fide contract to supply services with a final consumer in another Partner State requiring their presence on a temporary basis in that Partner State in order to fulfill the contract to provide services.

The temporary entry and stay of natural persons considered as independent services suppliers within any Partner State shall be for a cumulative period of not more than six months in any twelve-month period or the length of the contract.

(iii) "Intra-corporate Transferees" which means natural persons who are employees or partners of a juridical person and who are temporarily transferred to a commercial presence of the juridical person in the territory of another Partner State. These consist of (i) key personnel such as managers, executives and specialists; and (ii) trainees.

Steps to resolving the linkage

1. In Annex V, under the Mode 4 entries the words "In accordance with the Schedule on the Free Movement of Workers" should be replaced by "In accordance with the horizontal section of this Annex" or similar wording. This is because most countries have the same rules for Mode 4 categories of natural person regardless of sector. In GATS Schedules, the words used are "Unbound except as indicated in the horizontal section". Any sector differences from the horizontal section should be specified in the sectors concerned, but these are likely to be only a few exceptions, if any
2. A new horizontal section should be created at the beginning of the Annex V Schedule, listing the specific commitments for Mode 4 under both "market access" and "national treatment".
3. In the new horizontal section, it should include a commitment in the market access column which begins: "Entry and temporary stay: Unbound except for measures concerning temporary entry and stay of natural persons of another Partner State who fall into the categories listed below:" It should then list the following categories as recommended by the private sector, with appropriate definitions: intra-corporate transferees (executives, managers and specialists), contractual service suppliers and independent service suppliers.
4. In the national treatment column, the entry should read: "Unbound except for measures concerning temporary entry and stay of natural persons of another Partner State referred to in the market access column".

Introduction

The free movement of services is a freedom conferred primarily on businesses to enable freer trade in services between the EAC Partner States. The CMP recognizes the different ways in which services can be provided, one of which involves moving skilled or managerial staff temporarily to other Partner States to perform the actual provision of services. This is particularly necessary in service sectors where the service relies on the knowledge or expertise of individuals. These individuals remain employed by their company and are not seeking to enter the labour market of the EAC Partner State where the service is to be provided. However, confusion in the CMP has arisen over this because some see it as movement of labour.

Movement of labour is one of the four fundamental economic freedoms, together with free movement of goods, services and capital. However, of the four, it has met with the lowest acceptance by countries in the international economy, whether developed or developing. The Treaty for the Establishment of the East African Community (EAC Treaty) and its subsidiary legal instruments provide for the full mobility of all factors of production. Article 2(4) of the Protocol on the Establishment of the East African Community Common Market (the CMP) provides for:

- a) the free movement of goods;
- b) the free movement of persons;
- c) the free movement of labour;
- d) the right of establishment;
- e) the right of residence;
- f) the free movement of services; and
- g) the free movement of capital.

The creation of a common market is a gradual process. There has been significant progress towards the free movement of goods. However, progress towards the formation of a common market in services is currently stymied by the inability of EAC Partner States to implement the commitments made on services in the first round of liberalization.

Under the EAC Common Market Protocol, which entered into force on July 1st 2010, EAC Partner States made liberalization commitments on the free movement of services and workers. Art. 16(6) of the CMP allows persons from EAC Partner States to 'temporarily' engage in activities related to the supply of services in other Partner States but not to seek access to the labour market or permanent employment. The CMP also contains provisions for the movement of workers through the integration of labour markets. This covers the broader right of access to employment opportunities in Partner States, and includes the right for the spouse and children of the employee to also move and work in the host country.

While the movement of services and movement of workers are distinct and separate freedoms, during the common market negotiations EAC Partner States tied the movement of services suppliers (i.e., Mode 4) to their commitments on the freedom of movement of workers. Mode 4 inscriptions in the services schedules of all Partner States stipulate "In accordance with the Schedule on the Free Movement of Workers". This means that the temporary movement of services providers under Mode 4 has been made conditional on the commitments on long-term or permanent movement of workers made by EAC countries. (The latter is regulated under Annex II on free movement of workers.)

After the entry into force of the CMP, representatives of Burundi, Kenya, Rwanda and Uganda expressed the view that the decision to link movement of services suppliers to the movement of workers was a wrong decision and called for a council directive to delink the two schedules. Specifically, they indicated that the free movement of workers under the CMP has a limited scope and therefore nullifies the freedoms under the CMP on services. However, Tanzania opposed this proposal and has argued that the issue of delinking the schedules would be contrary to the process of progressive liberalization and that it would imply a renegotiation of the provisions in the Protocol and Annexes.

The deadlock also frustrated timely implementation of services commitments under the CMP and prevented successive rounds of negotiations from taking place. As a result, the private sector stakeholders who expected the common market to yield commitments that are commercially meaningful for their businesses have expressed frustration with the time that it is taking to address this issue. Several private sector representatives have expressed the need to resolve the issue of linking versus delinking of the schedules on services and on movement of workers without further delay and they call upon governments to address all barriers to trade in services and to the different modes of supply that are beneficial to the private sector and citizens in East Africa.

When this issue was presented to the Council of Ministers, they referred it back to the Experts Group under the Technical Committee on Trade and directed the experts to make recommendations on the way forward. In an effort to support the technical experts, the EAC Secretariat commissioned a study to look at the issue of linking versus delinking of the schedules and to identify the best way forward. The experts considered the technical report in June 2012, but did not make a recommendation on whether to continue to link or to de-link the schedules. Instead, they saw a need to look at the errors and inconsistencies in the CMP and the respective schedules as identified by the report.

Practical Implications of the Linkage of Mode 4 and Workers Schedules

EAC Partner States decided to address seven priority sectors in the first phase of the regional services negotiations: **business, communication, distribution, education, finance, tourism and transport services**. Negotiations followed the positive list approach with Partner States only scheduling those sub-sectors they were willing to commit. EAC services negotiations followed the sectoral breakdown as identified in the W120 classification list (used in the World Trade Organization) which identifies 136 sub-sectors in the selected seven priority sectors. Of the 136 sub-sectors Burundi scheduled 73, Kenya 61, Rwanda 104, Tanzania 61 and Uganda made commitments in 99 sub-sectors.

Schedules of services commitments typically include a horizontal section where governments address issues of a cross-cutting nature that apply to all scheduled sectors, particularly relating to the movement of persons under Mode 4. However, EAC Partner States omitted the horizontal section and apparently decided to deal with these issues in separate annexes. Mode 4 inscriptions in the EAC services schedule therefore refer back to Annex II which separately regulates the free movement of workers. Furthermore, **the designation 'Unbound' is never used in any of the Mode 4 inscriptions, and one has to wonder how countries were supposed to indicate instances where they did not intend to liberalise the movement of natural persons.**

In the case of market access commitments for “workers”, the Schedule on the Free Movement of Workers (Annex II) includes a section in which the categories of workers for which the Partner States made commitments are set out. It appears that these job categories are loosely based on the International Labour Organisation's International Standard Classification of Occupations (ISCO), but they do not strictly follow the structure. An updated classification was adopted in December 2007 and is known as the ISCO-08.¹ The classification is based upon ten broad groupings of occupations (Managers, Professionals, Technicians and associate professionals, Clerical support workers, Service and sales workers, Skilled agricultural, forestry and fishery workers, Craft and related trades workers, Plant and machine operators, and assemblers, Elementary occupations, and Armed forces occupations) sub-divided in major, sub-major and minor categories. The Annex II schedules of the EAC Partner States only include four of these categories. **These definitions are neither services sector-specific nor based on the W120 classification list used in the scheduling of Annex V.** In other words, the commitments are inconsistent. Therefore the reference to Annex II for interpreting a country's Mode 4 commitments in Annex V does not make practical sense.

The linkage poses significant challenges in terms of implementation of the current services liberalization commitments by EAC governments. Practically speaking, the linkage means that in order to understand any commitment on temporary entry of natural persons (Mode 4) in the services schedule (Annex V) it is necessary to consult the country's commitments in the schedule on the movement of workers in Annex II. However, this is an artificial link and should

¹ See - <http://www.ilo.org/public/english/bureau/stat/isco/isco08/index.htm>

not be accepted. Since two of the objectives of the Common Market are to “accelerate economic growth and development of the Partner States ...” and to “sustain the expansion and integration of economic activities within the Community,” the current impasse over the linking of commitments on Mode 4 in the services schedules and Annex II on the movement of workers is directly denying economic agents from benefiting from the services liberalization provisions of the CMP.

Furthermore, Annex V on Services was negotiated and prepared in accordance with the positive list of the GATS and based on the W120 classification list that is derived from the United Nations Central Product Classification (CPC) nomenclature. Although EAC Partner States did not schedule the same sub-sectors there was a consistent and ordered approach to the negotiation of and listing of commitments. Partner States were familiar with the process of scheduling services liberalisation commitments and knew how to open or protect certain areas. (For instance, the meanings of terms like “None”, “Unbound”, etc, are well known). However, the same familiarity is not evident in the scheduling in Annex II on the Movement of Workers. It seems as if the categories of workers stem from the ISCO-08 but this is not always clear. An introductory paragraph on the references could put the context of Annex II in clearer perspective, but at the moment certain assumptions have to be made.

In order to demonstrate the impracticality of the linkage between the two annexes we will consider some examples.

Example 1 - Tanzania fully liberalised Mode 4 in the national treatment column of Franchising services (CPC 8929) by inscribing “None” in its services schedule. Despite this, Tanzania does not list any professions in the area of franchising in its schedule on the movement of workers. This begs the question what is Tanzania’s market access commitment on Mode 4, given the reference in Annex V to the provisions in Annex II.

Example 2 - Under professional services, Burundi scheduled the sectors of Architectural services (CPC 8671), Engineering services (CPC 8672), Integrating Engineering services (CPC 863), Medical and Dental Services (CPC 9313), Veterinary Services (CPC 932) and Services provided by Midwives, Nurses, Physiotherapists and Para-medical personnel (CPC 93191). It can be argued that these services are all covered by the broad professional categories also scheduled by Burundi in Annex II on free movement of workers. But it is not clear whether the Mode 4 commitments made by Burundi in Annex V means that professional service suppliers from the rest of the EAC states will be allowed to supply all of these services on a temporary basis in Burundi, or only “workers” from the rest of the EAC will be allowed to find employment in these areas in the local market. In the best of cases, this is the problem of ambiguity that the linking of the two schedules with the generic Mode 4 reference to Annex II creates.

Example 3 – Rwanda made full commitments (“None” or no restrictions) for Modes 1, 2 and 3 in Management Consulting services (CPC 865). And for Mode 4 its schedule refers to the Free Movement of Workers schedule (Annex II). But when one checks that schedule, “management consultant” is not listed as a permitted occupation. Does this mean that there is no commitment on Mode 4 for management consulting services? Or was this an oversight since management consulting is not a traditionally regulated or restricted sector?

Example 4 – Of the EAC Partner states, Kenya scheduled the most extensive categories of workers under Annex II, even though it made the fewest new commitments under Annex V. One can see that far more categories of workers are listed than the number of services sub-sectors scheduled by Kenya. This appears somewhat strange since most governments are more conservative about opening their permanent labour market. Is it logical to conclude that Kenya is more prepared to liberalize the long term or permanent movement of workers rather than the temporary movement of service suppliers?

As different approaches were followed in the scheduling of commitments in the two mentioned Annexes, it is impossible to infer any rational linkages between the two. Any convergence or relationship between the Annex II and V may be purely coincidental. The two Annexes are so far removed from each other, the only realistic conclusion that can be reached is that different government departments/officials negotiated and prepared the different schedules. Based on the divergent commitments in the two Annexes, it can be argued that the relationship between categories of workers and the services commitments were never considered; neither were they really intended during the negotiations.

Difference Between Mode 4 and Movement of Workers

The temporary presence of natural persons (or Mode 4 in trade jargon) is an important means of supplying a wide range of services and facilitating investment. It consists of the temporary movement across national jurisdictions of various categories of persons such as intra-corporate transfers (managers, specialists, etc.), business visitors, contractual service suppliers and independent services suppliers or professionals. It is important to distinguish this type of movement to supply services or to establish and manage companies from permanent movement or the movement of workers who settle in a new territory.

The temporary movement of service suppliers (who reside in and are paid in their country of origin) is separate and different from the (permanent or temporary) movement of workers who are paid in the country to which they move or emigrate. Indeed, in the EAC context, the two freedoms (free movement of workers and free movement of services) are distinct in the CMP in achieving their individual objectives and the linking of the two Annexes is not legally provided for anywhere in the CMP or the EAC Treaty.

The CMP contains an implicit definition of free movement of services in Article 16.2 by requiring that, “the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner states, by nationals of other Partner States except as provided in this Protocol.” There is no definition of a “service supplier” although Article 16.1 of the CMP on Free Movement of Services stipulates:

The Partner States hereby guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner States within the Community.

And Article 16.2 (c) and (d) do so as well. Indeed, it is obvious from 16.2 (d) that a service supplier is a natural person who is moving under Mode 4 (as defined in the General Agreement on Trade in Services or GATS):

The free movement of services shall cover the supply of services:

- (a) from the territory of a Partner State into the territory of another Partner State;*
- (b) in the territory of a Partner State to service consumers from another Partner State;*
- (c) by a service supplier of a Partner State, through commercial presence of the service supplier in the territory of another Partner State; and*
- (d) by the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State.*

On the other hand, with regard to the movement of **workers**, Article 10 of the CMP provides:

1. The Partner States hereby guarantee the free movement of workers, who are citizens of the other Partner States, within their territories.
2. For the purposes of paragraph 1, the Partner States shall ensure non discrimination of the workers of the other Partner States, based on their nationalities, in relation to employment, remuneration and other conditions of work and employment.
3. For the purpose of this Article, the free movement of workers shall entitle a worker to:
 - (a) apply for **employment** and accept offers of employment actually made;
 - (b) move freely within the territories of the Partner States for the purpose of **employment**;
 - (c) conclude contracts and take up **employment** in accordance with the contracts, national laws and administrative actions, without any discrimination;
 - (d) stay in the territory of a Partner State for the purpose of **employment** in accordance with the national laws and administrative procedures governing the employment of workers of that Partner State;
 - (e) enjoy the freedom of association and collective bargaining for better working conditions in accordance with the national laws of the host Partner State; and
 - (f) enjoy the rights and benefits of social security as accorded to the workers of the host Partner State.

It is clear from the various privileges listed above that “service suppliers” do not fit into the category of “workers” as defined in the CMP. While there is no provision to indicate length of stay for workers, it is clear from the use of the term “employment” in Article 10.3 (a), (b), (c), (d) and the reference to “enjoy the rights and benefits of social

security,” that the movement of a worker means long-term stay to participate in the local labour market like nationals of the destination country. Furthermore, Article 10.5 provides that “A worker shall have the right to be accompanied by a spouse, and a child” and even the spouse is entitled to employment in the territory in which he/she moves. This is not the case with the presence of natural persons or Mode 4, except for intra-corporate transfers.

Therefore, there should not be any confusion such as the mixing of the two different categories of movement or freedoms regarding on the one hand, “service suppliers” and on the other, “workers.” So, the linkage of the commitments on Mode 4 in the services schedule (Annex V) with the schedule on movement of workers (Annex II) which has prevented the implementation of services liberalization so far, should be removed.

The table below highlights some of the key distinctions between the temporary movement of service suppliers and the permanent migration of workers.

Principle	Free Movement of Workers	Freedom to Provide Services through “Mode 4”
Basis of movement	Permanent	Temporary
Length of stay	Indefinite	Limited (the time limit may vary depending on the category of natural person)
Access to labour market	Yes	No
Access to social security benefits	Yes	No
Right to remain	Yes	No (unless the rules for permanent migration are independently satisfied)
Basic right	Entitled to apply for and accept employment	Right to provide services
Aimed at	Individuals	Companies/self-employed professionals
Visa / work permit requirements	Work permit may be required (e.g. for periods of more than 90 days) Some countries may require contract of employment at immigration	Work permit may be required (e.g. for periods of more than 90 days)
Where employee is paid and pays taxes	Country <u>to</u> where worker moves	Country <u>from</u> where natural person is normally employed by service provider (may have funds paid into local bank)
Spouse and dependants	Right to be accompanied by spouse and dependent children	No

Private Sector Interests in the Liberalization of Services

At a major consultation forum of the private and public sectors from all EAC countries in Arusha in September 2012, Hussein Kamote of the Confederation of Tanzanian Industries, explained that the success of the manufacturing sector is heavily reliant on the efficiency of services both in the production process and in the distribution process. Extensive research by the World Bank on the professional services sector in the EAC revealed that while this sector is very important for development of the region, the high explicit barriers mainly related to the movement of professionals, the lack of adequate regulatory reform affecting entry, and the segmentation of the regional market for professionals. These factors have resulted in the professional services sector remaining largely underdeveloped, with high levels of skills shortages and skills mismatches. Hence, professional services in the EAC have remained inefficient, more costly and less widely available than in many other comparable countries. (Dihel et al, 2010).

Therefore, it is not surprising that private sector stakeholders made the following recommendations regarding professional services at the consultation in September 2012:

- a. Remove restrictions on movement of workers and service providers;
- b. Remove restrictions on establishment of professional services firms;
- c. Streamline work permit application procedures and harmonize work permit fees;
- d. Allow for mutual recognition of professional qualifications obtained in all the EAC Partner States.

Various business persons have also noted with dismay that EAC Partner States have taken a very restrictive approach to integration – by retaining visas and work permit requirements - which is not really a common market approach, especially when compared with the Caribbean Community or European Union’s common market rules for free movement of workers and service suppliers. While the East African Legislative Assembly (EALA) has the mandate to pass Community Laws, barriers still exist on market access, national treatment and domestic regulations. The private sector has pointed out that residence and work permit procedures in the EAC Partner States are not harmonized, requirements are unclear, discriminatory and the processing of permits is very lengthy and cumbersome.

Furthermore, despite the fact that Partner States have undertaken to harmonize work permit fees, there is a huge variation in the fees that are applicable in the different Partner States ranging from no fees in Kenya and Rwanda to up to US\$2,000 (B-class) and US\$3,050 (A-class) in Tanzania.

There is clear interest by the private sector in the EAC to enjoy the benefits of services liberalization and market integration among the five economies. It would create a bigger, stronger regional market and provide significant opportunities for growth of firms and individuals services professionals. It will also help in diversifying the services export portfolio of individual countries. Table 1 below shows the concentration of exports in each economy and the relatively large role of government services in some. This is a sign of under-developed services sectors. The current inability of Partner States to implement their services commitments is constraining investment and growth of service industries in the region.

Composition of Service Exports by EAC Partners (% of total service exports)

	Trans- portation	Travel	Communi- cation	Insurance	Finance	Government services	Other
Burundi	0.9	2.2	0	1.3	0.8	90.9	3.9
Kenya	42.5	21.8	9.8	0.9	3.0	20.6	1.4
Rwanda	8.5	65.0	4.4	0.2	0.1	21.3	0.5
Tanzania	21.3	60.0	1.9	1.7	0.5	2.1	12.5
Uganda	3.9	57.0	1.6	0.9	1.5	23.9	11.2

Calculated from Extended Balance of Payments (EBOPS) data from UNSTATS

Recent Developments

At a meeting in February 2013 to review the status of implementation of the CMP, it was interesting that the Sectoral Council of Ministers Responsible for EAC Affairs and Planning (SCMEACP) noted that there is progress in some areas in terms of the implementation of the Common Market. For instance, all governments are either in the process of

changing their laws or have changed domestic laws to allow citizens from other EAC Member States to stay for six months on entry into their territory. There has also been some progress among professionals with the signing of a Mutual Recognition Agreement on engineering by professional bodies from Kenya, Tanzania and Uganda.

The 22nd meeting of the Council of Ministers² had:

referred all unfinished business under the schedule on the free movement of workers to the forum of Ministers Responsible for Labour and Employment (EAC/CM/22/Decision 54);

referred all unfinished business under the schedule on the free movement of services to the Sectoral Council on Trade, Investment, Finance and Industry (EAC/CM/22/Decision 59);

directed the Secretariat to submit all issues on the implementation of the Common Market Protocol to the Sectoral Council for the Ministers Responsible for EAC Affairs and Planning (EAC/CM/22/Directive 77).

Conclusion

The EABC and EAPSP note with appreciation that the Sectoral Council on Trade, Industry, Finance and Investment (SCTIFI) established a Technical Working Group to consider the perceived need to rectify any technical errors, inconsistencies and/or legal discrepancies in the Schedules of Commitments of EAC Partner States on both services and the free movement of workers as well as to develop definitions on some key terms. This is a positive step in the right direction.

However, the EABC would like the Committee to consider adopting the recommendations made in this paper to address the current impasse regarding the two schedules which has prevented the implementation of services commitments. The EABC and EAPSP believes that these recommendations will assist in solving the existing deadlock regarding implementation of trade in services commitments by Partner States and will facilitate further liberalization in future rounds of negotiations.

Dar es Salaam

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² The Council consists of the Ministers responsible for regional co-operation of each Partner State and such other Ministers of the Partner States as each Partner State may determine.