

EFFECT OF COVID-19 CONTAINMENT MEASURES ON THE RIGHT TO FREE MOVEMENT UNDER EAST AFRICAN COMMUNITY COMMON MARKET LAW

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Abstract

The right of establishment is provided for under the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol). It entitles nationals of an East African Community (EAC) Partner State to move into another Partner State, establish themselves and carry out economic activities. The attainment of the right of establishment is one of the key drivers towards the achievement of the accelerated economic growth and development of the Partner States. Due to the Covid-19 pandemic, the EAC Partner States have invoked protection of public health as a ground to restrict the movement of citizens of other Partner States into their territories. Through content analysis method, this paper analyses the provisions of the Common Market Protocol in facilitating the realisation of the right of establishment in the wake of pandemics such as Covid-19, with a focus on free movement of persons. It finds that there are no parameters on the invocation of threat to public health as a ground for limiting free movement under the Common Market Protocol. It concludes that this lack of guiding provisions contributes to the violation of the right of establishment.

Keywords: right of establishment, Covid-19 pandemic, EAC, public health restrictions

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1.0 Introduction

The Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) provides for a number of rights, including the right of establishment. This right entitles nationals of Partner States to move into another Partner State, establish themselves and carry out economic activities,¹ as a self-employed person, or to set up and manage economic undertakings on a stable, continuous, and long-term basis. Attaining the right of establishment is one of the key drivers towards Partner States achieving accelerated economic growth and development,² and must therefore, be realised if the accelerated economic growth and development of the Partner States is to be fully attained.

Taking cue from the Economic Community of West African States (ECOWAS), its states recognised that economic development can be achieved by opening up their borders to international specialisation, and that to achieve this, focus must shift to citizens of the other Partner States and their role in assisting the Member States to achieve their desired economic development.³ In the EAC, juridical persons are placed in the same footing with natural persons to enable them move freely and do business in the Partner States. The beneficiaries of the right of establishment are business people and organisations, who are motivated to contribute to the economy of the Partner State, and by extension, the region's economic development. This right aims to create for them a conducive and expanded business environment within which to thrive.⁴

The right of establishment involves complete integration into the economy of the host Partner State by being able to join social security schemes, and to move with their spouses, children or dependants who are entitled to be employed or to engage in economic activities as self-employed persons provided that the child meets the age limits under the national law of the host Partner

¹ Protocol on the Establishment of the East African Community Common Market, Article 13.

² Common Market Protocol, Article 4(2)(a).

³ Michael P Okom and Rose Ohiama Ugbe, 'The right of establishment under the ECOWAS common market protocol', 2(5) *International Journal of Law* (2016) 42.

⁴ Okom and Ugbe, 'The right of establishment under the ECOWAS Common Market Protocol', 40.

State.⁵ Just like natural persons, juridical persons, that is, companies or firms, are also entitled to establish themselves in a Partner State by setting up and managing undertakings through incorporation of companies or firms in the Partner State, or through setting up of agencies, branches or subsidiaries,⁶ so long as they meet the nationality criteria.⁷ They must have been established according to the national laws of a Partner State, have their registered office, central administration or principal place of business and must be carrying out substantial business activities in a Partner State.⁸

For nationals of EAC Partner States to realise their right of establishment, they must be able to enter, stay and move freely within the host Partner State. Thus, the freedom of movement is a key enabler of the realisation of the right of establishment.⁹ The Covid-19 pandemic has negatively affected the freedom of movement, and therefore, the right of establishment, because Partner States have invoked protection of public health as a ground to restrict the movement of citizens of other Partner States into their territories.¹⁰

Through the content analysis method, this paper analyses the provisions of the Common Market Protocol in facilitating the realisation of the right of establishment in the wake of pandemics such as Covid-19, with a focus on the free movement of persons. The paper concludes that lack of guiding provisions on the implementation of public health limitations contributes to the violation of the right of establishment. It proposes some interventions that can be put in place in order to assist Partner States to protect and promote the health of their own citizens while still allowing nationals of other Partner States to realise their right of establishment.

⁵ Common Market Protocol, Article 10(5), 13(3)(b) and 13(4).

⁶ Common Market Protocol, Article 13(11)(b)(i).

⁷ Common Market Protocol, Article 13(6).

⁸ Common Market Protocol, Article 13(6).

⁹ East African Community, Common Market (Right of Establishment Regulations) (Annex III), Regulation 5.

¹⁰ Common Market Protocol, Articles 7(5) and 13(8).

2.0 Background

The Common Market Protocol was signed by EAC Heads of States and Government on 20 November 2009 and entered into force on 1 July 2010.¹¹ One of the objectives of the Common Market Protocol is to facilitate the realisation of faster economic development through attainment of the free movement of goods, persons, labour, services and capital and the rights of establishment and residence.¹² The right of establishment is one of the two rights provided for under the Common Market Protocol.¹³ As such, it deserves due attention, promotion and protection as it has a role to play in the realisation of the potential of all persons in the EAC in the pursuit of their economic progress. It is the duty of Partner States to promote and protect it. Partner States made commitments under Articles 13(1) and 54(2) of the Common Market Protocol to ensure that all these rights and freedoms are enforceable under their constitutions, national laws, or administrative structures; and that anyone who feels that their rights have been violated or there is a threat of violation has access to legal redress even when the violation or threat is by persons acting in their official capacity.¹⁴

Freedom of movement is one of the pre-conditions for the realisation of the right of establishment. It has also been identified as a crucial prerequisite for the development of the human person.¹⁵ In other words, for a person to be able to achieve their economic development goals, they must be able to move from one point to another, and if countries want to achieve economic development, they must allow people to move freely across borders. However, the right of establishment is not absolute. It is subject to restrictions based on public health, public policy and public security considerations.¹⁶ The same

¹¹ Common Market Protocol, 53; East African Community, history of the EAC, eac.int on 8 May 2022.

¹² Common Market Protocol, preamble para 6.

¹³ Common Market Protocol, Article 2(4). The right of residence is the second right.

¹⁴ Common market protocol, Article 54.

¹⁵ UN Human Rights committee, CCPR General Comment No 27 Article 12 (freedom of movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 1.

¹⁶ Common Market Protocol, Article 13(8).

restrictions are applicable to the freedom of movement of persons.¹⁷ The decision as to whether to introduce restrictions to the right of establishment is the responsibility of the Partner States, which have to act in compliance with the Common Market Protocol.¹⁸ A well-coordinated, predictable and transparent approach to the adoption of restrictions on freedom of movement is indispensable to prevent the spread of Covid-19, to protect and promote the health of citizens, and to maintain free movement within the Community under safe conditions. This is very important for nationals of the EAC who intend to, or are in the process of establishing themselves in other Partner States in light of the unpredictable nature of the Covid-19 pandemic.

On 11 March 2020, the World Health Organisation (WHO) declared Covid-19 a pandemic due to factors such as its alarming levels of spread, severity and major negative social and economic consequences.¹⁹ WHO defines a pandemic as a worldwide spread of an illness which makes many people sick.²⁰ The designation of a new disease as a pandemic is important because it informs the possible measures that can be taken to contain the spread of the disease, including measures restricting movement of persons across national borders. As noted by the World Trade Organisation (WTO), due to Covid-19, governments around the world imposed and continue to impose travel or immigration restrictions, which have severely restricted cross-border movement of individuals and negatively affected trade and investment.²¹ The EAC Secretary-General has noted that the Covid-19 pandemic has disrupted livelihoods and negatively impacted economic growth in the region.²²

The EAC has correctly stated that free movement of persons has the effect of spreading diseases such as the Covid-19,²³ and to contain its spread,

¹⁷ Common Market Protocol, Article 7(5).

¹⁸ EAC Treaty, Article 13(7).

¹⁹ World Health Organisation, 'WHO Director General's opening remarks at the media briefing on Covid-19', 11 March 2020.

²⁰ World Health Organisation, *Community case management during an influenza outbreak: Trainer's guide*, World Health Organisation, 2011, 30.

²¹ World Trade Organisation, 'Cross-border mobility, Covid-19 and global trade: Information note', 25 August 2020.

²² Luke Anami, 'East Africa: Secretary-General Mathuki to rid EAC of hurdles stifling business', *The East African*, 27 April 2021.

²³ East African Community Covid-19 response plan, April 2020, 3 and 8.

Partner States have adopted various measures, some of which have had an adverse impact on free movement of persons.²⁴ These measures include: mandatory quarantine for all travellers entering the Partner States; reporting of cases and sharing information with other Partner States; strict screening procedures at border posts; and minimised cross-border movement of people.²⁵ While the measures are intended to safeguard the health and wellbeing of citizens, they have had serious consequences for the freedom of movement of persons within the EAC. Restoring freedom of movement, while protecting public health, is a major concern, especially for businesspeople.

While it is known that Covid-19 is a pandemic as defined by WHO,²⁶ Partner States do not seem to be in agreement on the nature of the disease, the magnitude, and approaches to its containment.²⁷ Consequently, there is no uniformity in the introduction and application of restrictions based on public health across the EAC Partner States and the people who suffer the consequences of this confused situation are the citizens of the EAC who intend to, or are exercising their right of establishment.

For instance, Tanzania was reported as one of the countries which initially refused to report cases and publish data on Covid-19, refused to take public health measures to counter transmission of the disease, and failed to roll out vaccination.²⁸ The restrictions being put in place appear unilateral and have resulted in significant disruptions in the business environment. Nationals are still confronted with a wide array of diverging measures, which are often adopted on short notice, are based on very different criteria, or not sufficiently coordinated with other Partner States. This has resulted in a high level of uncertainty for both citizens and businesses.

²⁴ EAC Covid-19 response plan, 6.

²⁵ EAC Covid-19 response plan, 6 and 7.

²⁶ WHO, 'WHO director general's opening remarks at the media briefing on Covid-19' also, WTO, 'Cross-border mobility, Covid-19 and global trade: Information note'.

²⁷ Tabitha Kiriti Nganga, Daniel Abala, Kennedy Osoro, Benedicto Onger, Socrates Majeune Kraido, Justine Onger Mogendi and Gastone Otieno, 'Impact of Covid-19 on international trade and post-recovery strategies in Kenya', *WTO Chairs Programme*, 2022, 21.

²⁸ World Health Organisation, 'Director-General's statement on Tanzania and COVID-19', 20 February 2021.

The EAC has made some steps towards training of staff serving at border entry points on the Covid-19 Response Plan.²⁹ However, no efforts have been made to train public officers who make policies on the manner of imposing restrictions on the basis of public health in light of the fundamental rights under the Common Market Protocol. None of the Partner States has taken up this initiative individually. Consequently, there is no common approach on balancing public interest in curbing the spread of the virus on the one hand, and promoting and protecting the right of establishment on the other hand. Political statements have been made, for example, by President Samia Suluhu of Tanzania,³⁰ that there will be better cooperation in promoting cross-border investments. The nature and extent of such cooperation remains to be seen.

3.0 The right of establishment

In 1986, the United Nations General Assembly (UNGA) adopted the Declaration on the Right to Development.³¹ The Declaration was adopted pursuant to the principles of the Charter of the United Nations, on international cooperation for development and promotion of higher standards of employment, living, and social and economic development and progress.³² The UN General Assembly viewed development as a comprehensive economic, social, cultural and political process aimed at the constant improvement of the well-being of all individuals and peoples, on the basis of their participation in development and in the fair distribution of its benefits.³³ The UN General Assembly, therefore, declared the right to development a human right.³⁴ This means that states have the responsibility to create national and international conditions favoura-

²⁹ EAC Covid-19 response plan, 10; EAC, 'EAC secretariat strengthens outbreak response capacities of one stop border posts', Press release, 2 October 2020.

³⁰ Presidential Strategic Communications Unit, 'Kenya and Tanzania agree to eliminate barriers to trade and free movement of people', 4 May 2021.

³¹ United Nations Declaration on the Right to Development, 4 December 1986, A/RES/41/128 UNTS.

³² United Nations Declaration on the Right to Development, preamble para 1; Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 55.

³³ UN Declaration on the Right to Development, preamble paras 1 and 2.

³⁴ UN Declaration on the Right to Development, Article 1.

ble to the realisation of the right to development.³⁵ To achieve this, the General Assembly called upon states to put in place appropriate policy, legislative and institutional measures at national and international levels.³⁶

The right to development is a right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic and social development.³⁷ It applies to all people, in all countries, without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³⁸ The right's core elements include: people-centred development, participation, equity, non-discrimination, and self-determination.³⁹ States have taken up the responsibility and this is evident in the regional integration efforts where economic development is one of the main objectives, and nationals of the Partner States have been identified as key drivers of the objectives. Their participation has been recognised and protected in regional treaties, through provisions such as those allowing free movement of goods, people, services and rights of residence and establishment.

In the EAC, one of the operational principles for the practical achievement of accelerated, harmonious and balanced development and sustained expansion of economic activities is people-centred and market-driven cooperation,⁴⁰ hence the creation of the Common Market.⁴¹ One of the specific objectives of the Common Market is to accelerate economic growth and development of the Partner States through the attainment of the right of establishment.⁴² Therefore, the right of establishment is one of the ways in which EAC Partner States protect and promote the right to development as the right of establishment enables nationals to participate in, contribute to and enjoy

³⁵ UN Declaration on the Right to Development, Article 4.

³⁶ UN Declaration on the Right to Development, Article 10.

³⁷ United Nations, 'Frequently asked questions on the right to development', 2016, Question 1, ohchr.org on 2 August 2021.

³⁸ United Nations, 'Frequently asked questions on the right to development, question 1.'

³⁹ United Nations, 'Frequently asked questions on the right to development, question 1.'

⁴⁰ Treaty for the Establishment of the East African Community (EAC Treaty), 2144 UNTS 255, Article 7(1)(a).

⁴¹ EAC Treaty, Articles 5 and 76; Common Market Protocol, preamble para 2 and Article 4.

⁴² Common Market Protocol, Article 4(2).

economic and social development in the territories of host Partner States. They do this by moving into the territories of host Partner States and carrying on economic activities as self-employed persons or through juristic persons, such as, companies, firms and sole proprietorships.

The right of establishment is one of the key drivers in the achievement of the goal of the EAC Common Market, namely, to achieve accelerated economic development in the Partner States.⁴³ The other drivers are freedom of movement of persons, goods, capital, labour, and services and the right of residence.⁴⁴ Recognising this right is not sufficient in itself. There must be legal provisions to guide its realisation. Max Weber, a proponent of law and development theory of law, observes that the law provides certainty in commercial dealings and protects civil liberties for economic well-being.⁴⁵ Yong-Shik Lee states that law safeguards and maintains internal stability and guides countries' paths of development.⁴⁶ Back in the 18th Century, Adam Smith had argued that imperfect law and the unpredictability in its enforcement is a factor that retards commerce.⁴⁷ Consequently, there must be legal provisions that guide how the right of establishment is to be realised, and specifically, guide invocation of public health as a ground for restricting free movement of persons in pursuit of their right of establishment.

Neither the EAC Treaty nor the Common Market Protocol expressly define the right of establishment. ECOWAS defines it as 'the right granted to a citizen, who is a national of the Member State, to settle or establish in another Member State, other than the State of origin, and to have access to economic activities, to carry out these activities, as well as to set up and manage enterprises and, in particular, companies, under the same conditions as defined by the legislation of the host Member State for its own national'.⁴⁸ The European

⁴³ Common Market Protocol, preamble, para 6.

⁴⁴ Common Market Protocol, preamble, para 6.

⁴⁵ Max Weber, *Law in economy and society*, Touchstone Publishers, 1967, 30.

⁴⁶ Yong-Shik Lee, 'General theory of law and development', 50(3) *Cornell International Law Journal* (2017) 471.

⁴⁷ Adam Smith, *Lectures on jurisprudence*, Oxford University Press, 1978, 528.

⁴⁸ ECOWAS, Supplementary Protocol on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment (29 May 1990) A/SP 2/5/90), Article 1.

Union (EU) defines the right to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the country where such an establishment is sited.⁴⁹

In the context of the right of establishment, an ‘economic undertaking’ means an entity that carries on economic activities.⁵⁰ This means that the income generating activities could include activities such as provision of services, where one earns remuneration or income. Non-profit making activities, such as charitable groups, religious organisations, and trusts do not qualify as economic activities and are therefore, excluded.⁵¹ The right signifies integration in the economy of the host Partner State, excludes persons employed under any contract of employment, and involves long term stays in the territory of the host State.⁵²

4.0 Scope of the right of establishment

The EAC Partner States guaranteed the right of establishment to nationals of other Partner States within their territories.⁵³ The Common Market Protocol defines a national of a Partner State as ‘a natural or legal person who is a national in accordance with the laws of the Partner State.’⁵⁴ A national of any other country not a Partner State in the EAC cannot benefit from this right even if they legally reside in a Partner State, even on long term basis. The right of establishment enables an individual to move to another state and establish a new company or firm, or to start branches of an existing company or firm.

The requirement that juridical persons must have their registered office, central administration or principal place of business and must be carrying out

⁴⁹ Treaty Establishing the European Economic Community – TEC, Article 43 (Article 49 of the renamed Treaty on the Functioning of the European Union - TFEU).

⁵⁰ *Klaus Höfner and Fritz Elser v Macrotron GmbH* (1991) I-01979, para 21.

⁵¹ Cesare Maestriperi, ‘Freedom of establishment and freedom to supply services’, 10 *Common Market Law Review* (1973) 151.

⁵² Maestriperi, ‘Freedom of establishment and freedom to supply services’, 150.

⁵³ Common Market Protocol, Article 13(1).

⁵⁴ Common Market Protocol, Article 1.

substantial business activities in a Partner State,⁵⁵ prevents ‘briefcase companies’⁵⁶ from benefiting from this right. It also means that it is not possible to form a company in one Partner State for the sole purpose of establishing itself in another Partner State, through opening of branches. Such a company must demonstrate that it actually carries on business activities in the home Partner State.

For a person to invoke the right of establishment, there must be a cross-border element or activity,⁵⁷ which means that the right is not available to nationals of a Partner State against their own governments or fellow nationals. For a natural person to benefit under this right, they must be a national of a Partner State seeking to do business in the territory of another Partner State.⁵⁸ A person who pursues an economic activity is regarded as self-employed if they are not under any contract of employment or supervision and earn a living through this activity.⁵⁹ A dependant of a self-employed person is only entitled to admission to a host Partner State and, it is the duty of the host Partner State to facilitate their entry and ability to take up the economic activity.⁶⁰

There are a number of obligations which Partner States must fulfil in order to facilitate the right of establishment. These include non-discrimination on the ground of nationality,⁶¹ removal of restrictions and non-creation of new ones,⁶² free movement of persons with regard to entry, stay and exit,⁶³ and mutual recognition and acceptance of certifications granted and requirements met in other Partner States.⁶⁴ Everyone lawfully within the territory of a State enjoys the right to move freely from one place to another within that territory and to choose their place of residence.⁶⁵

⁵⁵ Common Market Protocol, Article 13(6).

⁵⁶ A company that only exists on paper and does not have a known actual place of business and the nature and size of their business activities are not well known.

⁵⁷ Common Market Protocol, Article 13(3).

⁵⁸ Common Market Protocol, Article 13(1) and (3).

⁵⁹ Common Market Protocol, Article 1.

⁶⁰ Common Market Protocol, Article 10(6), 13(4), 14(2).

⁶¹ Common Market Protocol, Articles 3(2)(a) and 13(2).

⁶² Common Market Protocol, Articles 13(5) and 16(5).

⁶³ Right of Establishment Regulations, Regulation 5.

⁶⁴ Right of Establishment Regulations, Regulation 13.

⁶⁵ Common Market Protocol, Article 4(2)(a), 5(d) and 7(1).

According to Regulation 5 of EAC Common Market (Right of Establishment) Regulations (Annex III), an individual, their spouse and child may freely enter, stay or exit the territory of a host Partner State upon compliance with immigration procedures and laws of the host Partner State.⁶⁶ However, a host Partner State can limit free movement on the basis of public health, provided that they notify the other Partner States when they are placed.⁶⁷

5.0 Restrictions under the Common Market Protocol

As already highlighted, Articles 7(5) and 13(8) of the Common Market Protocol, subject the right of establishment and the freedom of movement of people to restrictions on the basis of public policy, health and security.⁶⁸ However, Partner States undertake to remove all restrictions or obstacles on the right of establishment based on the nationality of companies, firms and self-employed persons of the Partner States and, not to introduce any new restrictions in their territories, save as otherwise provided in the Protocol.⁶⁹ Partner States are further required to remove administrative procedures and practices that form obstacles to the right of establishment, and those that restrict entry of personnel of the companies or firms registered in another Partner State into that Partner State.⁷⁰ This means that any restriction must be in accordance with the provisions of the Common Market Protocol.

Since the onset of the Covid-19 pandemic, EAC Partner States have been imposing measures they deem appropriate to contain the spread of the coronavirus, such as closure of borders, mandatory quarantine, mandatory testing upon entry into the country, and Covid-19 negative certificates issued within certain hours before traveling into the country. But the application of such measures has been inconsistent. For instance, in May 2020, for travellers going into Tanzania, borders were not closed and there was no mandatory

⁶⁶ Right of Establishment Regulations, Regulation 5.

⁶⁷ Common Market Protocol, Article 7(5) and (6).

⁶⁸ Common Market Protocol, Article 7(5), on freedom of movement of people; and Article 13(8) on right of establishment.

⁶⁹ Common Market Protocol, Articles 5(2)(d) and 13(5).

⁷⁰ Common Market Protocol, Article 13(11).

quarantine⁷¹ whilst quarantine was mandatory for travellers going into Kenya, Uganda, Rwanda at the time. In March 2020, South Sudan closed all her borders.⁷² The measures were not uniform across the Partner States especially with respect to movement of people exercising their right of establishment. There was an apparent lack of co-ordination and protectionist approaches seemed to be given higher priority than protection and promotion of the right of establishment. Some legal issues are emerging on how Partner States can fulfil their duty to their own nationals and also to nationals of other Partner States in light of the pandemic.

Further, information on cross-border movement restrictions is not readily available on online platforms for health ministries and ministries concerned with EAC affairs in some of the Partner States as expected.⁷³ The EAC Secretariat website does not have any information or a centralised database on the individual Partner States' restrictions on cross-border movements.⁷⁴ Burundi's Ministry of Public Health website and information on Covid-19 therein are in French language, which is not a common language in the EAC.⁷⁵ Some of the ministries with some information on travel restrictions do not have up to date information. For instance, as at August 2021, the latest information on travel restrictions available on the website of Tanzania's health ministry was of 18 May 2020,⁷⁶ while that of South Sudan was in its April 2020 Standard Operating Procedure for Points of Entry.⁷⁷ As of the same August 2021, Kenya's Ministry of EAC Affairs website had no information on Covid-19 and cross-border movement.⁷⁸ Failure to provide up to date information online

⁷¹ United Republic of Tanzania, Travel Advisory No 3 of 18 May 2020, tzeembassy.go.tz, on 6 August 2021.

⁷² South Sudan ministry of health, Coronavirus Disease (COVID 19) outbreak: standard operating procedure for points of entry (POE) April 2020, 8.

⁷³ See Uganda Health Ministry website, health.go.ug on 6 August 2021; Rwanda Ministry of Health website, moh.gov.rw on 6 August 2021.

⁷⁴ EAC secretariat website, eac.intl on 6 August 2021.

⁷⁵ Republic of Burundi Ministry of Public Health and the fight against AIDS website, minisante.bi on 6 August 2021.

⁷⁶ Tanzania Ministry of Health website, moh.go.tz on 6 August 2021.

⁷⁷ South Sudan Ministry of Health, Coronavirus disease (COVID 19) outbreak: Standard Operating Procedure for points of entry (POE).

⁷⁸ Kenya Ministry of East African Community and Regional Development website, meac.go.ke on 6 August 2021.

means someone who wishes to travel will have to find their way to a border entry point or contact civil aviation authorities to find out with certainty what travel restrictions are in place. In such circumstances, decision making for purposes of travel is made difficult and one may end up not moving into the territory of a Partner State at the time they need to. Furthermore, the restrictions keep changing from time to time depending on a specific country's situation. Lack of timely, accurate and readily available information negatively affects the freedom of movement. This kind of scenario may lead to loss of investment or business opportunities or increased costs.

In determining whether a restriction violates the provisions of Common Market Protocol, the test is whether the objective or effect of the restriction is to impair the realisation of the rights and freedoms, whether it is proportionate to the interest protected, whether it is discriminatory on the basis of nationality, and whether it is justifiable and necessary in a democratic society in view of public policy, health and security.⁷⁹ While restrictions on the grounds of public health are aimed at preventing threats to the health of the population, they must be specifically aimed at preventing diseases or injury or providing care for the sick or injured.⁸⁰

The Common Market Protocol does not define what public health means or what it entails. The meaning of pandemic or epidemic have also not been provided. Lack of definitions has a potential effect of hindering the realisation of rights under the Common Market Protocol because decision making is not based on clearly defined parameters, as noted by the EAC in its Covid-19 Response Plan.⁸¹ Lack of definition may make it easy for public officials charged with the responsibility of facilitating free movement to exercise their discretion/powers in a manner that does not promote free movement and therefore, it makes it harder for nationals of other Partner States to exercise their right of establishment.

⁷⁹ Ilke Gocman, 'The freedom of establishment and to provide services: A comparison of the freedoms in European Union law and Turkey-EU association law', 8(1) *Ankara Law Review* (2011) 101; Common Market Protocol, Article 13(10).

⁸⁰ United Nations Commission on Human Rights, *The Siracusa principles on the limitation and derogation provisions in the international covenant on civil and political rights*, 28 September 1984, E/CN.4/1985/4, para 25.

⁸¹ EAC Covid-19 Response Plan, 3.

In Tanzania, a disease becomes an epidemic, endemic or pandemic once it is so declared by notice in the Gazette by the Minister in charge of health in accordance with Section 25 of the Public Health Act. In Kenya, a declaration of a disease as a pandemic, epidemic or endemic is by order of the Minister of Health as per Section 35 of the Public Health Act. Uganda has a provision similar to Kenya's under Section 35 of Public Health Act. Rwanda, Burundi and South Sudan do not have any legal provisions to this effect. None of these countries attempt to define these terms in their laws. The measures that can be taken to contain the spread of the disease also differ immensely. In Uganda and Kenya, the measures are specified in their public health laws with discretion given to the Ministers for Health to take any measures they consider fit to achieve the intended goal.⁸² In Tanzania, the measures are not specified. This facilitates the lack of uniformity in the mode of approach taken by the Partner States in dealing with the Covid-19 pandemic. For instance, if one Partner State does not declare the disease a pandemic, the rest of the Partner States will have difficulties dealing with the nationals of that Partner States. The Common Market Protocol and national laws of Partner States fail the transparency and accountability test.

In the EU, restrictions based on public health are in respect of diseases with epidemic potential, communicable ailments or transmittable parasitic diseases as defined by the WHO, provided that the diseases are the focus of protective rules and regulations applicable to citizens of the host state.⁸³ EU's definition of what a restriction on the basis of public health means is a useful guide to EU Member States in the wake of pandemics, such as the Covid-19 pandemic, since there is certainty in the application of the law. However, neither the EAC Treaty nor the Common Market Protocol houses such provisions.

Measures such as those requiring persons to go on quarantine upon entry or to carry out medical tests are reasonable restrictions. However, they must

⁸² Public Health Act (Uganda), Section 36; and Public Health Act (Kenya), Section 71.

⁸³ European Union directive 2004/38/EC of the European parliament and the council [29 April 2004], Article 29, on the right of citizens of the union and their family members to move and reside freely within the territory of the member states amending regulation (EEC) No 1612/68 and repealing directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 29 April 2004, 2004/38/EC (EU free movement and residence directive).

meet the criteria of ensuring that the effect of the restriction is not to impair the realisation of the right of establishment, be proportionate to the interest protected, not discriminatory on the basis of nationality, and must be justifiable within the imperatives of the common good or general interest, must be suited to achieving their intended goal and must not go beyond what is necessary to attain such legitimate objectives.⁸⁴ In addition, the requirement must be grounded in law.

Comparatively, in the EU, quarantines and taking of tests are acceptable restrictions and must be provided free of charge, as part of the medical examination required for persons entitled to the right of residence, so as not to impose a further burden on the citizens of the other Member States.⁸⁵ The Common Market Protocol does not provide any guidance to this effect. The measures being taken by the EAC Partner States do not seem to have any legal basis at the Community level.

5.1.0 Non discrimination

Discrimination of nationals of other Partner States on the basis of nationality would definitely constitute a barrier to the realisation of the right of establishment and freedom of movement. A discriminatory measure is one that prohibits or otherwise impedes economic activities,⁸⁶ or renders less attractive the exercise of a right or freedom.⁸⁷ As a matter of principle, and for efficient implementation of the Common Market, discrimination of nationals of other Partner States, whether direct or indirect, on the ground of nationality is prohibited.⁸⁸ Respecting and promoting this principle of non-discrimination is the starting point towards ensuring that any restriction imposed on the basis of public health does not impede the freedom of movement. The treatment

⁸⁴ *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, judgment of 30 November 1995 — case C-55/94, para. 37.

⁸⁵ Article 29, EU directive 2004/38/EC.

⁸⁶ Sjoerd Douma, 'Non-discriminatory tax obstacles', 21 *European Community Tax Review* (2012) 67.

⁸⁷ *Columbus Container Services BVBA & co. v Finanzamt Bielefeld-Innenstadt* (judgment on merits) EU-ECJ C-298/05(2007), para 34.

⁸⁸ Common Market Protocol, Articles 3(2) and 29(2)(b).

they get should be the same as that given to nationals of the host Partner State.⁸⁹ This means that where taking up of a certain activity requires fulfilment of certain conditions that also apply to nationals of the Partner State, then a national of another Partner State must comply with these conditions, and if there are no conditions, then they are free to establish themselves.⁹⁰

It is discriminatory for a host Partner State to close its borders for nationals of other Partner States seeking to exercise their right of establishment whereas it has not locked down movement of its own citizens within the territory or in some parts of the territory as that would amount to according nationals of other Partner States treatment that is less favourable to that given to own nationals, and therefore discriminatory. This is because, in principle, established nationals of other Partner States attain the status of legal residents upon issuance with work and residence permits as per Regulation 6(2) of the EAC Common Market (Right of Residence) Regulations,⁹¹ and should not be treated as visitors or tourists. Their stay is on long term basis as opposed to short term.

5.2.0 Proportionality

The measures taken in response to public health emergencies must be proportionate to the interest protected. In applying public health restrictions, the interest is to prevent the spread of diseases, and not any other interest. For instance, in the EU, invoking public health restrictions in order to serve economic ends is expressly prohibited under the law.⁹² The Common Market Protocol does not contain any provision guiding the implementation of the principle of proportionality. Without guiding provisions, the restriction based on public health is likely to be abused to achieve goals other than safeguarding public health. For instance, in August 2020, Kenya excluded Tanzania from the list of countries whose citizens would be allowed entry under the revised

⁸⁹ Common Market Protocol, Article 3(2)(b).

⁹⁰ *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (1995) I-04165, 23 and 33.

⁹¹ Right of Residence Regulations, Regulations 6.

⁹² EU Directive 2004/38/EC, Article 27(1).

restrictions.⁹³ Kenya unilaterally considered Tanzania as an unsafe area after what Kenya considered as an unreasonably relaxed approach to the pandemic by Tanzania, and excluded it from the list of countries exempt from mandatory quarantine after entering Kenya.⁹⁴ In a move that was seen as retaliatory, Tanzania banned flights from Kenya and this move was seen as not being about public health considerations.⁹⁵ Tanzania's action against Kenya does not seem proportionate to the public health interest being protected by limiting movement of people to reduce spread of Covid-19, considering that her former Head of State, John Magufuli, had reportedly, declared Tanzania to be 'Covid-free', open for business, and called upon her citizens to go about their business as usual.⁹⁶ If there were rules under the Common Market Protocol governing imposition of restrictions based on public health, such rules would have offered clearer remedies for this kind of scenario.

5.3.0 Mutual recognition of health travel certificates

Article 13(7) of the Common Market Protocol requires Partner States to mutually recognise certificates granted to a self-employed person, a company or firm in the other Partner States. Such certificates may be construed to include health travel certificates such as yellow fever vaccination certificate and Covid-19 Polymerase Chain Reaction (PCR) test certificates, which are required by countries for purposes of allowing entry to or departure from their territories. These certificates have an impact on the freedom of movement, and consequently, the right of establishment.

The objective of Article 13(7) of the Common Market Protocol's mutual recognition is to prevent a host Partner State from applying its rules to granting of certifications, or meeting certain requirements that have already

⁹³ Gerald Adae, 'Why Tanzania banned three Kenyan airlines', *Business daily*, 26 August 2020.

⁹⁴ Ministry of transport, infrastructure, housing, urban development and public works, 'Communique on the resumption of international air travel on 1 August 2020', transport.go.ke on 2 November 2020.

⁹⁵ Gerald Adae, 'Why Tanzania banned three Kenyan airlines.'

⁹⁶ BBC, 'Coronavirus: John Magufuli declares Tanzania free of Covid-19', 8 June 2020.

been granted or met under the laws of another Partner State.⁹⁷ It is aimed at removing the relevant barriers to establishment. It creates an obligation on the part of a Partner State to be open and receptive to laws and rules of another Partner State, and to refrain from imposing rules, procedures, and administrative controls whose effect is to restrict the activities of a national of another Partner State.⁹⁸ It means a national of a Partner State can carry with them advantageous standards of their home Partner State into the host Partner State.⁹⁹ This helps in ensuring that another layer of rules is not added to the home Partner State's rules by the host Partner State. If such a second layer (or double burden) is added, then it may be difficult for someone to realise the right of establishment. In any case, such a measure would violate this rule and amounts to a restriction, which is prohibited unless it is justifiable.

The nature of such obligations means that Partner States must be prepared to lose some regulatory autonomy.¹⁰⁰ However, the Partner States may refuse mutual recognition on the permissible grounds of public health, because states still retain their power and obligation to regulate internal matters.¹⁰¹ No provision prohibits recognition of certificates regarding public health. In fact, yellow fever certificates are acceptable across the Partner States. Further, Regulation 13 (1) of Annex III provides that:

where a Partner State requires the nationals of that Partner State who intend to take up economic activities to fulfil certain requirements as to good repute and proof that the requirements are satisfied, the competent authority of the Partner State shall accept a certificate issued by a competent authority of another Partner State as sufficient evidence in respect of nationals of another Partner State indicating that the requirements have been met.

Although there is no express provision under the Common Market Protocol or Annex III requiring Partner States to accept health certificates issued by

⁹⁷ Matteo Ortino, 'The role and functioning of mutual recognition in the European market of financial services', 56(5) *International and Comparative Law Quarterly* (2007) 312.

⁹⁸ Ortino, 'The role and functioning of mutual recognition in the European market of financial services', 312.

⁹⁹ Markus Mostl, 'Preconditions and limits of mutual recognition', 47 *Common Market Law Review* (2010) 409.

¹⁰⁰ Mostl, 'Preconditions and limits of mutual recognition', 411.

¹⁰¹ Mostl, 'Preconditions and limits of mutual recognition', 411.

another Partner State, Regulation 13(1) of Annex III can be applied. Regulation 13(1) recognises the principle of mutual recognition of certificates where a Partner State requires the national of the Partner State who intends to undertake economic activities to fulfil certain requirements as to good repute and proof that the requirements are satisfied. In this case the competent authority of the Partner State shall accept a certificate issued by a competent authority of that other Partner State as sufficient evidence proving this.¹⁰²

It is not clear why some Partner States do not recognise Covid-19 negative certificates issued in another Partner State by requiring the holders to undergo another test at an extra cost and in some cases like South Sudan, self-isolation at own cost, before being allowed to enter and stay in their territory.¹⁰³ It signifies lack of commitment, co-ordination, good faith and good will on the part of Partner States to facilitate realisation of the right of establishment.

Furthermore, EAC does not have standardised rules/requirements for use of Covid-19 PCR certificates, thereby leaving it to individual Partner States to decide whether to accept certificates issued by other Partner States and under what conditions. This has created a situation which has led to Partner States providing their own standards which are different, and which keep changing from time to time. For instance, in Kenya, the Ministry of Health issued travel requirements which took effect from 11 June 2021, providing that travellers wishing to enter the country, except children aged five years and below, must possess a Covid-19 negative PCR test certificate conducted within 96 hours before travel.¹⁰⁴ The travel requirements also provide conditions for entry of persons from various countries. As per these requirements, persons from certain countries, including EAC Partner States are exempt from mandatory quarantine upon entry into Kenya.¹⁰⁵

In Uganda, with effect from 6 July 2021, and except for children aged below three years, all travellers had to possess a Covid-19 negative certificate

¹⁰² Annex III, Regulation 13(1).

¹⁰³ United Kingdom, 'Foreign travel advice- South Sudan', gov.uk , on 11 August 2021.

¹⁰⁴ Ministry of Health, 'Travel requirements with effect from 11 June 2021', kcaa.or.ke , on 10 August 2021.

¹⁰⁵ Ministry of Health, 'Travel requirements with effect from 11 June 2021.'

issued within 72 hours from the time of sample collection to boarding the plane departing their country of origin, whether one is vaccinated and holds a vaccination certificate or not.¹⁰⁶ Further, travellers from Kenya, Tanzania, and South Sudan must undergo a PCR test upon arrival at a cost of USD (United States Dollars) 65, whether or not they have a certificate issued in their home country, while travellers from Burundi and Rwanda were not subject to this requirement.¹⁰⁷ In Rwanda, all persons entering the country must have a Covid-19 negative PCR test conducted 72 hours before departure, and are required to take a second test upon entry at a cost of USD 60, except for accompanied children below five years.¹⁰⁸ In South Sudan, with effect from June 2021, there is a requirement for travellers to possess a Covid-19 negative certificate issued not more than 72 hours before departure and self-isolation for 10 days without a test or 7 days with a test and release.¹⁰⁹

These country-specific requirements are not published in a central source, such as the EAC website, for ease of access to information by nationals of Partner States.

5.4.0 Clear and timely information

Transparency and sharing of information are some of the principles of the Common Market,¹¹⁰ and mandatory when it comes to restrictions on the right of establishment.¹¹¹ However, timelines and the nature of the information to be shared are not provided for. The result is that a Partner State may decide not to give information in good time. It may also fail to provide comprehensive information to assist travellers make a decision. This creates uncertainty and unpredictability for the nationals of the EAC because it is not possible to

¹⁰⁶ Uganda Civil Aviation Authority, 'Frequently asked questions in relation to Covid-19 standard operating procedures at Entebbe international airport', (6 July 2021) caa.go.ug, on 11 August 2021.

¹⁰⁷ Uganda Civil Aviation Authority, 'Frequently asked questions in relation to Covid-19 standard operating procedures at Entebbe international airport.'

¹⁰⁸ Ministry of Health, 'Info note for passengers arriving or departing from Rwanda' (15 June 2021) rbc.gov.rw, on 11 August 2021.

¹⁰⁹ United Kingdom, 'Foreign travel advice- South Sudan'.

¹¹⁰ Common Market Protocol, Article 3(2)(c).

¹¹¹ Common Market Protocol, Article 13(9).

know what restrictions are in place in good time and the information may be so inadequate as to hinder the exercise of the right to free movement. This is the case where the information does not outline the documents one needs to provide before being allowed to enter the territory of another Partner State.

Recent interventions by the EAC fall short of meeting this requirement. For instance, the EAC Covid-19 Response Plan does not address freedom of movement of people or the right of establishment. It only mentions free movement of goods and services. The only guidelines developed by the EAC concerning free movement of goods and services are contained in the EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services during the Covid-19 Pandemic.¹¹² Whereas there is information on the restrictions imposed by EAC Partner States annexed to the Guidelines, these are restrictions, as of April 2020, containing measures such as cessations of movement from Nairobi metropolis in Kenya.¹¹³ While this restriction has since been lifted, the information available to EAC citizens had not been updated as at November 2021. The information available to them is inaccurate. At the time of writing, the Covid-19 portal in the EAC official website contained information only updated until April 2020.¹¹⁴ None of the Departments/ Ministries responsible for EAC affairs and immigration in any of the Partner States had provided information on restrictions based on public health in their official websites. Lack of information is an impediment to the exercise of the right of establishment that fails the test and makes the exercise of the right of establishment unattractive.

The EU Council, for example, has made it clear that EU Member States should provide relevant stakeholders and the general public with clear, comprehensive and timely information about any restrictions to free movement, any accompanying requirements (for example negative tests for Covid-19 infection or passenger locator forms), as well as the measures applied to travellers travelling from higher-risk areas. In particular, Member States should, as quickly as possible, inform the public of any newly introduced or lifted re-

¹¹² EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services during the Covid-19 pandemic (April 2020) eac.int, on 28 March 2022.

¹¹³ EAC Administrative Guidelines to Facilitate Free Movement of Goods and Services, 11.

¹¹⁴ EAC official website, eac.int, on 27 October 2020.

restrictions, communicated to other Member States and the European Commission.¹¹⁵ This information should also be made available on the ‘Re-open EU’ web platform, which should contain a cross-reference to the map published regularly by the European Centre for Disease Prevention and Control, and the substance of the measures, their geographical scope and the categories of persons to whom they apply should be clearly described.¹¹⁶

6.0 Conclusion

The Common Market Protocol does not provide adequate mechanisms to guide the question of restrictions based on public health in light of pandemics such as Covid-19. It does not define what public health and pandemics are and what they entail. There are no provisions guiding the exercise of discretion and powers by Partner States to impose restrictions based on public health considerations. There are no criteria set to assist in ensuring that a restriction strikes a balance between promoting public health by stopping the spread of Covid-19 and ensuring freedom of movement of persons for purposes of establishment, and does not discriminate on the basis of nationality. Lack of guiding provisions has, and will lead to violation of the right of establishment by the Partner States. However, it is possible for Partner States to recognise Covid-19 certificates issued by a competent authority of a Partner State without further conditions for purposes of facilitating movement of persons.

The EU has made progress in providing the much-needed guidance to its Member States. As early as 2004, the EU had recognised and appreciated that restrictions based on public health can inhibit the realisation of the freedom of movement of persons and of establishment and came up with Directive 2004/38/EC¹¹⁷ whose Article 29 provides guidance on how to apply restrictions on public health basis. This is a practice worth adopting to the unique circumstances of the EAC.

¹¹⁵ EU Council Recommendation 2020/ 1475, 13th October 2020, *Official Journal of European Law*, Recommendation 25.

¹¹⁶ EU Council Recommendation 2020/ 1475, Recommendation 25.

¹¹⁷ EU Directive 2004/38/EC, Article 29.

To better fulfil its mandate, the EAC ought to consider the following recommendations to facilitate the realisation of the aims of the Common Market Protocol.

- i. Appropriate amendments be made to the Common Market Protocol to define what restrictions on public health entail.
- ii. The EAC Summit and the East African Legislative Assembly to issue appropriate directives and expressly legislate to expressly provide for the criteria for imposition and application of restrictions based on public health, especially with regard to the right of establishment.
- iii. Provisions to guide availability and dissemination of information on public health restrictions be made in the Common Market Protocol or directives issued under it.
- iv. Partner States be encouraged to apply Regulation 13 (1) of Annex III on mutual recognition of certificates so that they can accept Covid-19 health certificates provided they are issued by competent authorities of other Partner States, without subjecting the holders to additional conditions and costs, in order to promote free movement.
- v. The EU experience has useful lessons that can be borrowed and applied in the EAC with appropriate modifications. The lessons include the test for applying public health restrictions, and availing timely, comprehensive, and accurate information on the restrictions,
- vi. Intensive and extensive training should be conducted targeting public officers who formulate and enforce policies to increase their capacity in the protection and promotion of the rights and fundamental freedoms under the Common Market Protocol even as they seek to protect their own states from threats to national security and public health.