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Harmonization of Company Laws in the EAC Region: Linking the Implementation of the EAC Common Market Protocol (CMP) with Cross-border Business Enhancement

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Abstract

Economic integration within the EAC cannot be achieved without the support of company law. Not only because companies are the beneficiaries of integration, but also because they are indispensable vehicles for economic development which is the main goal of economic integration. Our research shows, however, that the company laws of the Partner States differ from one another quite substantially. This is problematic for two reasons: First, from the perspective of a common market, legal differences should be an exception rather than the rule. Second, high disparities among the Partner States produce a need for legal advice which leads to higher transaction costs. As a result, expanding a business from one EAC Partner State into another seems unattractive. We argue that in order to smoothly achieve the goals of integration, the existing differences in the company laws require harmonization. Further, we name certain factors which are the drivers of harmonization of company laws. We also identify the steps taken so far by the EAC Partner States towards harmonization and approximation of company laws, as well as the drivers of harmonization of company law as a component of implementation of the EAC Common Market Protocol (CMP). The political and economic interests of the EAC Partner States in respect of the harmonization of company law are also examined. In addition, we attempt to identify challenges and opportunities experienced in the process of harmonization of company laws. Finally. we recommend an active role be played by the EAC institutions, modernization of company laws, adoption of a common form of limited liability company, preferential treatment of companies registered in EAC Partner States, and removal of restrictions on the formation of branches in respect of companies registered in EAC Partner States, among others.

Key words:

East African Community, Common Market Protocol, Cross-border Business, Harmonization of Law

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1 Introduction

This study is part of an inter-disciplinary research project in the field of legal studies. We followed a three-stage research methodology: library research, field research and data analysis.

Library research involved the collection and analysis of relevant literature available in the Partner States. The main focus was on the analysis of existing company laws and regulations in the three jurisdictions studied, Kenya, Rwanda and Tanzania, with emphasis on provisions which have a direct bearing on cross-border businesses. In addition, various books, journal articles, theses, dissertations and papers, including those available at various online platforms, were carefully studied.

The second stage involved field research. Various representatives and stakeholders from three Partner States were interviewed, either face-to-face or by telephone. To limit biases as far as possible and to gain valuable practical insights, open-ended interview questions were set and administered to various key stakeholders from the EAC headquarters, the ministries responsible for EAC affairs, Law Reform Com-missions, Registrars of Companies, the Chambers of Commerce and Industry, as well as law practitioners from the three examined jurisdictions . The method of using open-ended interview questions offered the advantage of soliciting factual information while allowing multiple interactions with these experts and professionals, ensuring accuracy through clarifications. It also avoided possible misinterpretations of questions and answers. Above all, it was effective in applying the same standard assumptions across the examined Partner States.

Finally, the data obtained from the field research was analyzed, alongside the library research results. Since we did not conduct representative surveys, we did not take the answers as facts, of course. We considered them as valuable insights and opinions for our conclusions and recommendations – nothing more and nothing less.

In order to limit the scope of the study, we focused our research on the company laws of Kenya, Rwanda and Tanzania. While Kenya was chosen because of its thriving economy and very comprehensive company legislation, Rwanda was picked because of its modern and dynamic company law regime. Tanzania was included in order to show another extreme, as it represents the oldest company legislation in the EAC region, which is less dynamic. Divided in nine subparts, this study aims at answering the following questions:

a. What are the divergences and convergences between company laws in the EAC region?

b. What are the important areas for harmonization of company law in the EAC region?

c. What are the available instruments issued by the EAC Council so far for harmonization of EAC company law?

d. What steps have been taken by the Partner States so far in relation to harmonization of EAC company law based on the instruments issued by the Council?

e. What are the challenges encountered by the Council and Partner States in the harmonization of company law in EAC?

f. Where do the political and economic interests lie in terms of pushing for harmonized company law?

2 Situating Company Law in the Regional Integration Process

2.1 Company Law and Business

Companies are important players in furthering modern commerce and business. Naturally, the law governing those companies – company law – plays a key role in this process. The incorporation of companies involves the acquisition of corporate personality, perpetual succession, and limited liability. All of these attributes are highly appreciated by investors, but limited liability is usually what investors seek the most. *Limited* means liability for the share capital only; unlike in a partnership, the shareholders are not personally liable for the debts of the company. Thus, the majority of businesses worldwide prefer to form limited companies rather than partnerships and use them as vehicles towards the realization of their economic goals.[1] On the downside, however, it cannot be denied that the benefits of limited liability can incentivize investors to set up high-risk businesses, in particular regarding the environment.[2]

In the EAC region, the legal form of a company is a conventional vehicle for furthering both national and international business activities. Although a limited liability company can either be formed as a public or private company, our research reveals that the private limited liability company is the most popular legal form in the examined countries.[3] The reason for this is not far-fetched. Generally, a public company is more demanding compared to a private company when it comes to procedures for formation and costs, capital requirement, disclosures, management and capital requirement, among others. It is cheaper and more convenient, especially given the economic conditions in the EAC region, to establish private companies.

2.2 Company Law and Regional Integration

2.2.1 Company law and regional integration

Globalization of the world economy has been made possible by Multi-National Corporations (MNCs) through their investments in various parts of the world. This has led to concepts such as "regional economy", "continental economy" and "world economy." Scholars have pointed out that economies have been, and in fact still are, converging. Stein, for instance, argues that the convergence of economies brings about continental economies, which, in turn, paves the way for a new political order.[4] Furthermore, the

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[1] See the data collected by the Worldbank Doing-Business-Project, http://www.doingbusiness.org/data/exploretopics/~/media/GIAWB/Doing%20Business/Documents/Miscellaneous/DB-Yearly-Number-of-Limited-Liability-Companies.xlsx and Schirmer, "Why not Have a Go with an East African Limited Company? What Company Law Can Contribute to the Integration Process in East Africa," Recht in Afrika – Law in Africa – Droit en Afrique 2016, Vol.19, 162, 163 et seq.

[2] Dangerman/Schellnhuber. PNAS 2013, 110: E549-E58.

[3] Field research findings, see also the corresponding results of the World Bank, Doing-Business-Project (n 1).

[4] In the 1970s, for instance, Stein, referring to the forces behind the creation of the United States, argued that, once the economy became national, it meant that a continental economic system was

term "economic integration" has become popular in many parts of the globe. In Africa this terminology has been known since the 1960s. In the 1970s it matured, giving birth to many of the current "regional economic communities" (commonly referred to as RECs).[5] Since the main goal of RECs is to promote economic development in their respective regions, limited liability companies stand out in the process in two different capacities: on the one hand, as beneficiaries of a specific REC; and on the other hand, as a vehicle for further economic development in a particular REC. As a beneficiary of a REC, a company stands to benefit from the advantages which come with economic integration, including removal of trade barriers, anti-discrimination laws and policies, low consultation costs and realization of the right of establishment.[6] All these benefits are normally provided for in the respective treaties establishing Regional Economic Communities. Furthermore, given its role as a vehicle of business investment, a limited liability company may be regarded as a catalyst of economic integration.[7] Moreover, studies show that cross-border expansion of companies has positive effects on economic growth, and harmonization of company law can lead to even more growth.[8]

In this way, the adoption of the Common Market Protocol ought to change the situation for the companies formed within the EAC region by nationals of the EAC Partner States. For instance, it is important to differentiate between a foreign company in the sense of a company formed in a country outside the EAC region, and a foreign company formed in another EAC Partner State.[9] If this is done in a way that offers more favourable conditions to companies formed within the EAC Partner States, the EAC Common Market Protocol (CMP) will accelerate investments in the EAC region.

2.2.2 Company, business and the EAC instruments

The EAC Treaty defines neither the term "company" nor the term "business." However, the Protocol on the Establishment of a Common Market (hereinafter: EAC-CMP) contains a definition of the term company. Art. 1 CMP states that "Company" means a business entity incorporated as a company under the laws of the Partner State. This definition identifies a company with two important aspects: business entity and incorporation under the law of a Partner State. In other words, a company is, first, an entity aimed at carrying on a business. Second, a company must be incorporated under the laws of the Partner State. In this way, it is a precondition for recognition of a company under EAC law that it must have been incorporated under the company laws of a par-

superimposed on what was then a decentralized political order and that this released powerful impulses toward centralization in the federal political system; see Stein, E. "Harmonization of European Company Laws – National Reform and Transnational Coordination," Law and Contemporary Problems, 318 et seq.

[5] Examples of RECs in Africa are ECOWAS, SADC, COMESA and the EAC.

[6] On the situation in the EU, see *Stefan Grundmann,* European Company Law, Antwerpen and Oxford 2007, 518 et seq; see also *Gregor Bachmann et al.* (eds.), Regulating the Closed Company, Berlin and Boston 2013.

[7] Stein described a corporation as an institution that plays a role in the process of integration of states. For details, see Stein, (n 4) 318 et seq.

[8] For Europe, see the data collected by the *Gallup Organisation Hungary*, Europe Survey of the Observatory of European SMEs, 55 et seq., http://ec.europa.eu/public_opinion/flash/fl196_en.pdf.

[9] Schirmer, (n 1) 162, 168 et seq.

ticular Partner State.[10] It cannot be overemphasized that it is the process of incorporation, which gives a company its corporate personality. As mentioned above, the corporate personality comes with the attributes of a juristic person. As a legal person, therefore, a company can engage in business in its own name. This is not true for "firms". Although firms are also business vehicles, the law does not grant them a legal personality. Consequently, the EAC-CMP distinguishes firms from companies by defining them as a business entity other than a company, registered in accordance with the laws governing the registration of such business entity in a Partner State.[11]

3 The Status Quo of Company Laws in the EAC Partner States

The company laws of the EAC Partner States have similarities and differences. While the similarities are a useful tool for the facilitation of regional economic integration, the differences have a negative impact on the same.[12] It is argued here, therefore, that the success of EAC economic integration demands the harmonization of company laws in order to remove the differences. In this section, some basic similarities and differences are discussed, with a view to portraying the current situation. This should help in the process of determining the extent of the efforts needed in respect of the harmonization of company laws for the success of regional economic integration in the EAC. Although some general similarities and differences, which apply to all types of companies, will be briefly explained, the main emphasis lies on the provisions of the company laws which concern the company forms which are relevant for cross-border business activities.

3.1 Similarities

3.1.1 Similarities common to all forms of companies

3.1.1.1 Existence of company law statutes

Our research findings reveal that all Partner States have a specific company law that regulates companies. While companies in Kenya are regulated by the Companies Act 2015 [13] (hereinafter: KCA), those in Rwanda are regulated by Law 17/2018 of 13/04/2018 Governing Companies (hereinafter: LGC), and those in Tanzania are regulated by the Companies Act 2002[14] (hereinafter: TCA).

3.1.1.2 Types of companies and incorporation procedures

The types and classification of companies found in the three jurisdictions are similar. The companies formed under the laws of these jurisdictions may be classified in many ways. Typically, classifications are based on the nature of ownership and on the extent of liability. On the basis of the nature of ownership, one can distinguish between two types of companies, namely the public limited company and the private limited company. In the case of Rwanda, these companies are the only form of business association

[10] In this configuration the question of applicable company law depends on the laws of the particular Partner State under which the company is incorporated.
[11] EAC-CMP, Art. 1.
[12] For the EU, see supra (n 7).
[13] Companies Act 2015, Act No. 17 of 2015.
[14] Companies Act 2002, Act No. 12 of 2002.

which can be established by entrepreneurs because there is no law providing the formation of partnerships in Rwanda. This state of affairs began with the enactment of Law No. 7/2009 of 27/04/2009 Relating to Companies which repealed and replaced Law No. 6/1988 of 12/02/1988 Relating to Organization of Commercial Establishments. While the repealed law contained provisions governing partnerships, the new law dropped the part on partnerships. The two subsequent repeals and replacements of company legislation in Rwanda have not closed this gap.[15] Our research reveals, however, that there are ongoing reforms in Rwanda to enact a law to regulate partnerships. But even with the enactment of a law to provide for the establishment of partnerships in Rwanda, it is unlikely that this will affect the popularity of private companies in this jurisdiction, because a partnership, as mentioned above, does not offer all the benefits of a corporate body.[16]

Regarding the extent of liability, two types of companies exist, the limited liability company (limited either by shares or by guarantee) and the unlimited company. As mentioned above, private companies limited by shares are the most common form in all three jurisdictions. However, in the three jurisdictions, all types of companies come into existence through the process of incorporation. The process of incorporation basically requires the drafting of relevant documents (Memorandum of Association and Articles of Association), the filling of registration forms, and the submission of the same to the registration authorities. To ease the process of registration of foreign companies, all jurisdictions have established a centre for one-stop registration. For Kenya this is the Kenya Investment Protection Authority (KIPA), while for Rwanda it is the Rwanda Development Board (RDB) and for Tanzania it is the Tanzania Investment Centre (TIC). Also an online name search and registration of a company is available in all three jurisdictions.

3.1.1.3 Management and administration

All company laws provide for a unitary board structure. In all the three jurisdictions the boards of directors are bound by certain duties, such as the duty to act in good faith for the interest of the company, duty of skill, care and diligence, duty to exercise power for proper purposes, and many others. They also provide for the other officers of the company, such as a company secretary and auditors.

3.1.1.4 Role of company law in cross-border business

In the interviews, the role of limited liability companies in cross-border business was uniformly acknowledged. A limited liability company is considered to be a medium of both investment and business. In the three jurisdictions, most foreign investments are owned by companies. Based on the experience of the chambers of commerce and the legal practitioners, a company is commonly considered to have the goal of doing business for profit. However, only the LGC contains an express provision which states that the goal of a company is to do business for profit. The KCA and TCA are silent on this

[15] The Law No. 7/2009 of 27/04/2009 Relating to Companies was repealed and replaced by Law No. 27/2017 of 31/05/2017 Governing Companies. This was later repealed and replaced by Law No. 17/2018 of 13/04/2018 Governing Companies.

[16] Some practitioners in Rwanda have argued that the partnership form is not necessary because the company form offers more advantages. They therefore consider the re-introduction of partnership law as being superfluous. See interviews by the researcher in Rwanda.

aspect; these laws only speak of a business association for a lawful purpose. This does not necessarily require every company to perform commercial activities.[17]

3.1.1.5 Recognition of companies formed in other jurisdictions

Companies formed in other jurisdictions, including those formed in EAC Partner States, are recognized in all three jurisdictions. However, to be able to do business in these jurisdictions, foreign companies are required to register.[18]

3.1.2 Similarities relevant to cross-border business activities

What are the options if an existing enterprise, say a company localized in Dar es Salaam and incorporated under Tanzanian law, wants to expand to Kenya in order to reach new markets? Basically, it can take two routes: (1) found a new subsidiary company at the desired location; or (2) form a branch and register as a foreign company.[19]

3.1.2.1 Subsidiaries

There is a common reasoning in the jurisdictions examined that a foreign company would prefer to establish a subsidiary because a subsidiary offers the benefits of local tax treatment and a separate legal entity.[20] The notion of a subsidiary company is associated with group companies and holding companies.[21] Thus, in all these jurisdictions, the definitions of subsidiary, holding company and group of companies are similar, and they revolve around control and ownership of the subsidiary company.[22] They also provide for the possibility of forming a wholly owned subsidiary company. This is defined as a company which has no members other than the holding company.[23] These regulations are useful for cross-border expansion. This is because a company from another jurisdiction will not need to have another shareholder to partner with to be able to form a subsidiary company. It can be the sole member and owner of the subsidiary company and, thus, exercise complete control. However, it should be noted that all jurisdictions prohibit the ownership of shares in the parent company by the subsidiary company.[24] Any allotment or transfer of shares in a company to its subsidiary is void.

Being a separate legal entity from the parent company, the procedures for forming a subsidiary are the same as those for forming a local company at the desired destination. This feature is common to all examined jurisdictions. Thus, as far as private companies are concerned, the provisions governing the formation of local private companies apply.

3.1.2.2 Single Shareholder Company

We have pointed out above that parent companies are eager to exercise complete control over their foreign subsidiaries and are therefore not keen to bring in other shareholders. Thus, it is crucial that the desired location provides the legal framework to

[17] See discussion on the conceptual differences at part 3.2.1 infra.
[18] See discussion on 3.1.2.3 infra.
[19] See Schirmer, (n 1), 162, 164 et seq.
[20] The same is true for companies in the EU; see *Grundmann,* (n 6) 519 et seq.
[21] See s. 3 KCA; compare Art. 2 (21) LGC, Art. 13 LGC and Art. 2 (25); compare also section 487(1) TCA.
[22] See Art. 10, 11 and 13 LGC .
[23] See Art. 15 LGC; compare s. 2 TCA and s. 3 KCA.
[24] See s. 25(1) TCA, s. 108 KCA, compare Art. 174 LGC.

found a single-shareholder company. Luckily, in all three examined jurisdictions this is the case.[25] This provides a fertile ground for transnational business activity.

These companies require the presence of one shareholder.[26] In all jurisdictions there are no special procedures for registration of a single shareholder company, except the registration forms[27] and citation of the name.[28] Thus, in all jurisdictions the process of formation begins with name clearance followed by the process of registration of the company, all of which can now be done online.[29] In particular, after the name clearance, a memorandum of association[30] must be filed to the registrar of companies together with the requisite forms for registration of a company.[31] In addition, the articles of association (if different from those in the regulations) shall also be filed.[32] Art. 21 LGC provides that if a company does not have articles of association, the rights, powers, duties and obligations of the company, the board of directors, and each director and of each shareholder of the company shall be those set out in the LGC. This is comparable to the optional registration of articles of association for companies limited by shares under the TCA.[33] Thus, in situations where the articles of such companies are not registered, or where the articles are registered, so long as they do not exclude or modify the regulations found in Table A, Table A shall constitute the articles of the company in the same manner and extent as if articles in the form of Table A were duly registered.[34]

3.1.2.3 Branches

Foreign companies may establish branches in any other country if the laws of the other country allow it. The idea of establishing a branch of a company is basically to continue

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[25] However, those provisions are not fully operational in all jurisdictions; see below 2.2.2.3.

[26] For Kenya see s. 11(1) Companies Act 2015; for Rwanda see Art. 3 Law No. 17/2018 of 13/04/2018 Governing Companies; and for Tanzania see s. 3(1) Companies Act 2002 as amended by ss. 18 and 23 of the Business Laws (Miscellaneous Amendments) Act, 2012.

[27] In Tanzania, for example, the formation of a Single Shareholder Company requires filling in the application form No. LLSSC 14a and LLSSC 14b; see regulation 3 (2) (a) of the Companies (Limited Liability Single Shareholder Company) Regulations, GN No. 129, 2014 (draft). It should be noted that, at the time of this research, these regulations were yet to be published. They were still a draft.

[28] Regulation 4 of the Companies (Limited Liability Single Shareholder Company) Regulations (draft) requires the Memorandum of a Single Shareholder Company to state the name of the company with "Limited Liability Single Shareholder Company" as the last words of the name.

[29] The online option follows the adoption of laws which recognize and allow government institutions to use electronic information. For Kenya, see s. 31 The Kenya Communications (Amendment) Act, Act no. 1 of 2009; which introduced s. 83S (1) Kenya Information and Communications Act, Cap. 411A Rev. 2011; for Tanzania see s. 13(1) Electronic Transactions Act no. 13 of 2015; and for Rwanda see Art.76 Law No. 18/2010 of 12/05/2010 Relating to Electronic Messages, Electronic Signatures and Electronic Transactions.

[30] See s. 11(1) KCA; s. 3(1) TCA; Art. 5(5) and Art. 7(6) LGC read together with Art. 2(18) LGC.

[31] The relevant forms in Kenya are form CR-1 (application to register a company), form no. CR 2/CR2/CR3/CR4 (model memoranda for different companies) and form no. CR 8 (notification of directors' residential address), while in Rwanda they are forms no. RF-001 (registration of local companies), forms no. RF-003 (registration of foreign companies) and no. RF-005 (registration of a branch).

[32] According to Art. 21 LGC a company may or may not have articles of association.

[33] Under the TCA the memorandum of association must be registered for all types of companies, but registration of articles of association is only mandatory for companies limited by guarantee and unlimited companies.

[34] See s. 11(1) TCA. Compare the situation under s. 21 KCA where if a company has not registered its articles of association, or where its articles are registered but have not modified the relevant model articles, the model articles will apply to it; see s. 21(1) KCA.

the operation of a company in a different location.[35] It is synonymous with the opening of another office, a branch office, of the same company or the establishment of smaller divisions of a company. A branch office is regarded as an extension of a particular company. A branch office is not a separate legal entity and therefore its liabilities are the liabilities of the company which formed it. Consequently, the assets of the parent company are not protected from the creditors of the branch, and the branch office must conduct the same business activities as the parent. For these reasons, it is argued that operating a branch office in a foreign country does not constitute "doing business" in that country.[36]

Our findings show that branch offices in the EAC are preferred by banks and insurance companies.[37] The reasons for this preference lie in the advantages that come with the use of the brand name and finances of the parent company to secure licences and business contracts. It is also important to note that such companies are mandatorily required to register in accordance with the provisions of the company statutes.[38] A foreign company is prohibited by virtue of such laws from operating in such jurisdictions without being registered. Section 974(1) KCA for instance, states, *inter alia,* that a foreign company shall not carry on business in Kenya unless it is registered. Subsection (3) of the same section provides, in effect, that the act of a foreign company carrying on business in Kenya without registration amounts to the commission of an offence, which attracts several liability of the company and the officers who are in default.[39] The procedures for registering a branch in Kenya include submission of the filled forms,[40] the certificate of incorporation from the original country, a certified copy of the memorandum and articles of association of the original country, particulars of foreign directors and of local representative(s) including their passport size photos.[41]

In Tanzania a foreign company is also required to deliver certain documents[42] to the Registrar of Companies under s. 434 (1) TCA. The registrar issues the certificate of

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[35] As a result, a branch name normally contains the name of the place where the branch is located or an abbreviation of the name of the location. For example Kenya Commercial Bank has branches in Tanzania and Rwanda. These branches are called Kenya Commercial Bank (T) and Kenya Commercial Bank (R) respectively. For more details on opening a branch, see Grundmann (n 6), 487 et seq., 519 et seq.

[36] For a comprehensive account of these arguments in the case of the U.S., see Setting up a U.S. Branch Office available in the internet at http://www.usbranchoffice.com/the-difference-between-a-branch-and-a-subsidiary.html. Accessed on 25th March 2018.

[37] This fact was established by observation during field research and it is documented in the literature. For instance, Binda names some banks, such as Kenya Commercial Bank (KCB), Equity Bank, Guaranty Trust Bank (GTBank), Union des Assureurs de Paris (UAP), as having established branches in Rwanda, and Bank of Kigali (BK) having opened a branch in Kenya; for details, see Elvis Binda, Good Governance and Foreign Direct Investment: A Legal Contribution to a Balanced Economic Development in the East African Community (EAC), a PhD. Dissertation Submitted to the University of Utrecht, 2015, 156.

[38] See Part XXXVII of the KCA, see also Part XII of TCA and Chapter X LGC.

[39] Conviction for such an offence leads to a fine not exceeding five million shillings to be paid by each of the officers and the company; see s. 194(3) KCA.

[40] These include application for registration form (Form FC2), notice of place of business (Form FC4).

[41] The detailed procedures and requirements for registration of a branch of a foreign company are found in section 975 KCA.

[42] Such documents include, *inter alia,* the documents of incorporation, such as a copy of the charter, statutes or memorandum or articles of association, list of directors and secretary, names and addresses of one or more persons resident in Tanzania, full address of the registered principal office of the company, and a copy of the most recent accounts. For details, see s. 434 TCA.

compliance under s. 435 TCA to the applicant foreign company. This certificate allows such a company to operate in Tanzania and failure to comply with such requirements attracts a fine to be paid by the company and every officer or agent of such a company under s. 442 TCA.

Likewise, Art. 232 LGC requires a foreign company which wishes to operate in Rwanda to register with the Registrar General. The application for registration is to be made within ten (10) working days of establishing a place of business in Rwanda. If a foreign company fails to register in accordance with this provision, the company and its director(s) commit an offence which attracts joint and several liability under Art. 284 LGC.[43] The details of the application format and the documents to be attached are provided for in Art. 283 LGC.[44] Art. 234 LGC provides that upon registration the Registrar General allocates to the foreign company a foreign company's registered code. However, paragraph 2 of the same provision states that companies from the EAC Member States enjoy national treatment.

In conclusion, it may be argued that the registration of a branch is an important administrative requirement for all foreign companies, since there should be some form of documentation and registration of companies not formed in the jurisdictions in which they operate.

3.2 Differences

So far we have looked at similarities within the company laws of the Partner States. Now it is time to examine the differences. To do this, we will distinguish between conceptual and material aspects.

3.2.1 Conceptual variations

The company laws of the EAC Partner States recognize the use of the company form as an agent of the incorporators to realize their business plans. Thus, nationals as well as non-nationals of these countries may enjoy the benefits of doing business through limited liability companies. This aspect is either expressly stated or implied in the company statutes. The company laws of some EAC Partner States create an express link between the formation of a company and business or commercial activities.

Of the three countries examined by us, Rwanda stands out with clear provisions on the connection between the concept of a company and business activities. Article 3 of the Rwandan Law No. 17/2018 of 13/04/2018 Governing Companies (hereinafter: LGC) provides that:

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[43] Art. 284 LGC is a general clause providing for penalties for failure to comply with the obligations of the LGC. Accordingly, a company will, in the event of such a failure, be liable to a fine of five (5) times the annual filing fee, and every director of the company will be liable to a fine of between five hundred thousand Rwandan francs (FRW 500,000) and five million Rwandan Francs (FRW 5,000,000)

[44] According to Art. 233 LGC, the application shall state the name of the foreign company, the full names and residential addresses of the directors of the foreign company, the principal place of business and address of the company and the accounting reference date. Accompanying the application are the copies of evidence of registration certificate of the foreign company, certified copy of its constitutional documents, a declaration indicating the authorized representatives of the company in Rwanda, and the memorandum of understanding or power of attorney to represent the company in Rwanda.

> One or more persons may form a company by pooling together resources or services **for business purposes** and filling out an appropriate form or by complying with the provisions of this law. (emphasis supplied)

This provision directly connects the formation of a company with business purposes. The statute does not, however, define the phrase "business purposes". Thus, one is left with a common sense interpretation. Hence, although disputable, business purposes may be defined as the realization of profits. This is in line with scholars who have ascribed the making of profits to be the goal of a company or corporation.[45] So if this interpretation is correct, one would not be able to establish a non-profit company such as a charity company.

However, the language used in the cited provision is permissive: "may form a company" The issue is whether this refers to the decision to form a company, and ends there, or whether it extends to the business purpose, so that one would be justified in arguing that they may form a company for other purposes. Although both propositions are possible, it is inferred here that the word "may" refers to the act of forming a company, and does not extend to the purposes. In other words, the company formed must be for business purposes.[46] To substantiate this conclusion systematically, one needs to read Art. 18 LGC. This provision, with the heading: Company's objective, provides that, 'Every company shall be considered to be established for commercial purposes.'

The word "shall" shows that this purpose is mandatory. The issue is, perhaps, whether there is any significant difference between "commercial purposes" and "business purposes". Since the same law uses both terms, and they both refer to the purposes of the company, it may be concluded that they mean the same thing. A contrary interpretation would bring about confusion and uncertainty.

It should be noted that, at the time of this research, the LGC is the most recent company legislation in the EAC region.[47] This notwithstanding, the provisions of Art. 18 LGC have evolved from the provisions of the former laws: Law No. 7/2009 of 27/04/2009 Relating to Companies (repealed) and Law No. 27/2017 of 31/05/2017 Governing Companies (repealed). These previous laws were also clear in linking the company form with business.[48] Art. 2(12) of Law No. 7/2009 of 27/04/2009 (repealed) associated the company form with the goal of profimaking, as it defined a company as: "A corporate body composed of one or more persons for making profit". Furthermore, Art. 12 of Law No. 7/2009 of 27/04/2009 (repealed), with the sub-title "Company's objective" provided that "Every Company shall be considered to be a commercial company." This leads us to the conclusion that the pursuit of profit as the goal of a

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[45] It is argued that a company as a business entity is aimed at the making of profits; see Tieves, Der Unternehmensgegenstand der Kapitalgesellschaft, Köln 1998, 39. In particular it is submitted that the purpose of a public company or stock corporation is to make profits; see Körber, in: Bürger/Körber (Ed(s).) AktG, 3. Auflage, Heidelberg/München/Landsberg/Berlin 2008, § 179 Rn. 13.

[46] This tallies with the argument given above on the purpose of a company.

[47] It came into force on 31.05.2017; see Art. 314 LGC

[48] According to Art. 3 of Law No. 7/2009 of 27/04/2009 Relating to Companies (repealed) a company is a legal entity which is made up of one physical person or corporate person for "*commercial purposes*", and Art. 3 of Law No. 27/2017 of 31/05/2017 Governing Companies (repealed) provides that "one or more persons may form a company by pooling together resources or services "*for business purposes*". It should be noted that these old provisions maintained the same purpose of a company.

company, and the commercial nature of the Rwandan company, are not new in the current company legislation in Rwanda.

The Kenyan Company Act (KCA), however, tells a different story. Although the KCA links the company form with business, doing business is not the only goal of a company. This can be seen in section 2 of the Kenyan Companies Act 2015 (KCA), which is rather broad in its interpretation. It provides that:

> The objects of this Act are to facilitate commerce, industry and other socio-economic activities by enabling one or more natural persons to incorporate as entities with a perpetual succession, with or without limited liability, and to provide for the regulation of those entities in the public interest, and in particular, in the interests of their members and creditors.

It is quite clear that the purpose of companies incorporated under the KCA is broader than the purpose defined by LGC. A quick examination of the provision leads to the conclusion that the first two items (commerce and industry) are economic activities. The addition of the word "socio" in the third item widens the interpretation of the objectives of the KCA. Hence, it seems indisputable that the object of this law is not limited to facilitation and regulation of economic activities. The facilitation and regulation of *socio-economic* activities is also targeted – and this includes pretty much everything, as long as the activity is linked to some kind of economic or social purpose. Furthermore, companies are not only regulated with regard to the interest of members and creditors but also with regard to the interest of the public[49]. Thus, facilitation of social activities falls in line with the overall purpose of the KCA, which is not limited to private or economic interests.

This provision leads to the interpretation that individuals may form companies for commercial, industrial or other social *or* economic activities. While commercial or industrial activities are usually done to gain profits, the fact that social activities are also covered, leads to the conclusion that the goal of a company may not be limited to the pursuit of profits. However, the task of determining the objects of the company rests on the shareholders. Interestingly, despite such provisions, most companies formed in Kenya have business goals – either as sole aim or as one of the aims.[50]

The Tanzanian Companies Act, 2002 (TCA) contains neither a provision similar to Art. 3 and Art. 18 LRC nor a provision similar to s. 2 KCA. The issue of the purposes of a company is answered in section 3 TCA. This provision states, *inter alia*, that two or more persons may associate for "any lawful purpose". Thus, the precondition here is only the lawfulness of a particular purpose. This means a company may be formed for commercial, business or social purposes, provided that such purposes are not unlawful. This is a very broad provision. It presupposes that one can form a company for any purpose, including political purposes.[51] Despite such a wide provision, our research shows that many companies have the goal of carrying out business activities.[52] Notwithstanding this provision, s. 7 TCA supplies an explanation of the powers of a com-

[49] This fact may be deduced, first and foremost, from the duty of the directors to promote the success of the company as provided for under s. 143 KCA, and, secondly, from the requirement under s. 655 KCA of including a business review in the directors' report.

[50] Research findings from interviews conducted.

[51] This broad interpretation will be defeated by the principle of "*lex specialis derogat lex generalis*" when it comes into conflict with the provisions of specific laws such as the NGOs Act 2002, the Societies Act (Cap. 337 RE 2002), the Trade Unions Act 1998 and the Political Parties Act 1992.

[52] This fact was revealed by the interviews.

pany by saying that where the memorandum of the company states that the object of the company is to carry on business as a general commercial company, the object of such a company shall be to carry on any trade or business whatsoever. In this way, such a company has a direct connection to business, and it must be used for business. The power to do other activities is limited to those things which are incidental or conducive to the carrying on of a trade or business of the said company.[53]

The foregoing discussion establishes differences in the conceptualization of a company in the examined EAC Partner States. Thus, although the EAC-CMP gives a definition which links a company with business,[54] the company laws of the EAC Partner States do not have a uniform definition of a company. Consequently, it is argued here that even with the guarantee of freedom of establishment under the EAC-CMP, there are practical issues associated with these variations.

If a company registered in Rwanda must only be for the purposes of carrying on business or for commercial purposes, then there is no room for non-profit companies. In Kenya, and more specifically in Tanzania, a company may be established for any purpose. Thus, a business or commercial purpose is just one of many possible purposes. This leads to the question: What will be the fate of a non-profit company registered in Kenya or Tanzania that expands to Rwanda? As shown above, the Rwandan law considers only commercial companies as companies under the law, so establishing a non-profit subsidiary is off the table. The only remaining option is to open a branch and register as a foreign company. This option, however, is quite promising: because the branch is not a separate legal entity, the non-profit company will be still governed by the company law of the Partner State under which it was incorporated originally. And since Rwanda, like all Partner States, recognizes legally incorporated companies from other EAC countries,[55] the Rwandan authorities would be obliged to register the branch despite the fact that the LCA does include non-profit companies.

But what are the options for a Rwandan national who wants to establish a non-profit company in Rwanda? Following the above argument, the answer is quite clear: he or she will have to incorporate that company under Kenyan or Tanzanian company law and then register in Rwanda as a foreign company. In essence, this is just another kind of so-called *forum shopping*, a typical side-effect of a common market and the freedom of establishment that comes with it. This, of course, might lead to the so-called *Delaware syndrome* or *race to the bottom effect*, meaning that the most liberal company law will prevail over the company laws of other Partner States.[56] To avoid this potentially negative effect, there is, as we will point out below, a need to harmonize the company laws of the Partner States to establish a common concept of a company.[57]

[53] See s. 7(b) TCA.

[54] See the discussion in. 2.2.2 supra.

[55] See above 3.1.1.3.

[56] By analogy, this is a situation where the founders would choose to incorporate their companies in a jurisdiction with less demanding regulations and then later open branches in the jurisdictions whose regulations are more demanding. In the long run, such a practice leads to negative impacts on various stakeholders of companies, since it ends up compromising the quality of company law. Such a practice has been experienced in the EU; see the leading cases of *Centros* (1999), *Übeseering (*2001) and Inspire Art (2003) explained in footnote 143-144, infra and Gregor Bachmann et al. (ed.), Regulating the Closed Company, Berlin and Boston 2013, 221 et seq.

[57] See the discussion in 3.2.1 infra.

3.2.2 Other substantive variations

3.2.2.1 The size and comprehensiveness of company statutes

Despite these conceptual differences, the Partner States' company laws differ from one another in many other aspects. In terms of size, for instance, Kenya has the biggest company statute with 1026 provisions. The Tanzanian Company Act, which follows in second place with 490 provisions, is not even half this size, and the Rwandan Company Law has 'only' 314 provisions. Thus, it can be clearly seen that these laws differ from each other quite substantially in terms of comprehensiveness.

It could be easily argued that the comprehensiveness of these laws has something to do with their age. The assumption would be that company law in general has become more detailed in recent times, and, therefore, that the latest company statutes are more comprehensive when compared to the older ones because they embrace newer concepts based on social, economic and political developments. Yet, this argument does not capture the reality within the EAC completely. While the size of the KCA, which was established in 2015, seems to justify the argument, the Rwandan Company law, which was passed in 2018 and has only 314 provisions, points in the opposite direction. Moreover, the old Rwandan company law,[58] which had 388 articles, outnumbered the new one.

At the same time, the argument that the new company laws embrace new concepts based on social, economic and political developments also fails to portray reality. One might expect that a new company law passed after the establishment of the EAC Treaty and, more importantly, after the enforcement of the EAC-CMP, should have some provisions which favour cross-border business transactions among the EAC Partner States. However, it is surprising to see that the recent Kenyan Companies Act 2015, which was passed about five (5) years after the EAC-CMP came into force, does not have a single provision which expressly offers preferential treatment to companies registered in the EAC Partner States. On the other hand, the Rwandan Law No. 17/2018 of 13/04/2018 has provisions requiring companies formed in any EAC Partner State to be treated as domestic companies if they operate in Rwanda.[59]

But size is not the only difference. If we take a closer look at the specific provisions in the areas of formation, registration and management, we will see even more substantial differences.

3.2.2.2 Formation of Subsidiaries

While the maximum number of persons who can form a subsidiary private company in Kenya and Tanzania is 50 persons,[60] in Rwanda the maximum for subsidiary private companies is 100 persons.[61]

According to s. 9 (1) (b) KCA, it is impossible to form a private company limited by guarantee. Thus, a subsidiary private company limited by guarantee cannot be formed in Kenya, while there are no such restrictions in Rwanda[62] and Tanzania.[63]

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[58] Law No. 7/2009 of 27/04/2009 Relating to Companies was repealed by Law No. 27/2017 of 31/05/2017, which was in turn repealed by Law No. 17/2018 of 13/04/2018. See Art. 312 of the Law No. 27/2017 of 31/05/2017 and Art.312 of the Law No. 17/2018 of 13/04/2018.

[59] These are not new provisions in Rwandan company law because they existed also in Law No. 27/2017 of 31/05/2017 (repealed).

[60] See s. 9(1)(a)(iii) KCA; see also s. 27(1)(b) TCA.

[61] See Art. 6 LGC.

Art. 5 (4) LGC requires one or more directors of a private company to be ordinarily resident in Rwanda. This condition is likely to be a limiting factor for foreign companies which wish to establish subsidiaries in Rwanda. There is no such requirement in Kenya and Tanzania.

Furthermore, Art. 16 LGC provides that a company shall be considered to be a virtually wholly owned subsidiary of another company where the latter owns ninety (90) per cent or more of the voting power in that company. By virtue of Art. 15 LGC a wholly owned subsidiary has only one shareholder. Therefore, through the concept of a virtually wholly owned subsidiary, the owners with 10 percent or less voting power in that company are treated as being non-existent. This is a blow to the protection of minority shareholders. There are no similar provisions under the TCA or under the KCA.

3.2.2.3 Formation of single shareholder companies

In the EAC region, the option to establish a single shareholder company came as a result of amendments or fresh enactments.[64] As explained above, in the three examined jurisdictions, the process of formation of a company begins with a name search, followed by registration. There are differences, however, concerning how the online name search and registration process are carried out. In Kenya, for instance, the online name search is done using the so-called E-Citizen platform,[65] at any of the countrywide available Huduma Centres[66] and on Safaricom mobile phone by dialing *271#.[67] In Tanzania the online name search and company registration is done at the BRELA website,[68]

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[62] See Art. 5 LGC.

[63] See s. 27 TCA.

[64] In Kenya, the provisions on single shareholder companies were incorporated in the Companies Act 2015 from the beginning, and in Rwanda such provisions were also incorporated in the LGC from the beginning and carried forward from the repealed Law No. 7/2009 of 27/04/2009 and Law No. 27/2017 of 31/05/2017. In Tanzania they appeared in the 2012 amendments to the Companies Act; see Part III of the Business Laws (Miscellaneous Amendments) Act, 2012, Act No. 3 of 2012.

[65] E-citizen is a system which has been adopted by some governments in which a one-stop website is created at which the government and various public bodies interact within its area of administration to enhance information exchange, public service provision and even interactive participation. In Kenya the people are able to obtain various public services through E-citizen, including registration of companies, business name search and reservation, application for tax identification number, etc; see E-citizen, Services & Information, available in the internet at https://www.ecitizen.go.ke/ecitizen-services.html. Accessed on 28th March 2018.

[66] Huduma Centres are "One Stop Shop" citizen service centres with integrated technology platforms established as part and parcel of the Kenyan Government Programme: Huduma Kenya, launched in 2013, the implementation of which is coordinated by the Ministry of Public Service, Youth and Gender Affairs, which aims at the transformation of Public Service Delivery by providing various public services and information. The idea of Huduma Kenya "One Stop Shop" involves amalgamation of related services within one building, with the aim of easy access to such services. With these centres in place it is hoped that the citizens will be able to get services such as issuance of national identity cards, issuance of birth certificates, registration of business names, and applications for business licences, drivers' licences, etc. For details, see Huduma Kenya, Huduma Kenya Programme, available in the internet at https://www.hudumakenya.go.ke/about-us.html. Accessed on 28th March 2018.

[67] For a quick explanation of the process, see Capita Registrars, You Can now Register Sole Shareholder and Director Company in Kenya, available at https://capitaregistrars.co.ke/you-can-now-register-a-sole-shareholder-and-director-company-in-kenya/. Accessed on 11th April 2018.

[68] The online registration platform (Online Business Registration (OBRS) became operational on 1st February 2018. Before this date there was another platform, namely Online Business Names Registration System (OBRS), where business names could be searched, reserved and registered for further

while in Rwanda they are done at the RDB website.[69] While these websites are comparable to the E-Citizen platform in many ways, there are no registration centres in Tanzania and Rwanda comparable to Kenya's Huduma Centres and SafariCom mobile platforms.

Furthermore, online registration is the only form of registration available in Tanzania from 1st February 2018, while in Kenya and Rwanda online registration is one of two options.[70]

In Kenya a statement of nominal share capital must be filed, and registration fees paid.[71] In Tanzania, there is no such form but, the nominal share capital is stated in the memorandum of association and fees are required to be paid. In Rwanda, however, there are no registration fees required.

As mentioned above, Art. 5 (4) LGC states that one or more directors of a private company should ordinarily reside in Rwanda. This means, if the single shareholder wants to be the sole director of the company he must be resident in Rwanda. This may be an impediment to a foreigner who would want to establish a single shareholder company in Rwanda. There is no such requirement under the TCA or KCA.

It is important to note that the provisions regarding single-shareholder companies are not fully operational in all three jurisdictions. In Tanzania the operationalization of this form is awaiting regulation. We came across certain regulations purported to have been published on 25th April 2014,[72] but there was no single shareholder company which had been registered. The fact that the interviewed respondents, including the Registrar of Companies, the Law Reform Commission and the AG Chambers, were not aware of the existence of the regulations leads to the conclusion that they are a draft. This is concretized by the fact that they are not signed. However, the availability of the draft regulations leads to the conclusion that it will soon be possible to establish single shareholder companies in Tanzania.

3.2.2.4 Formation of branches

The differences in this area begin with the definition of a foreign company. Section 3 KCA defines a foreign company as a company incorporated outside Kenya.[73] The TCA

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steps in the registration process, with physical presentation of the memorandum and articles of association and the filled registration forms 14a and 14b. With the new system everything is done online and the physical presentation of documents to BRELA is no longer acceptable.

[69] In Rwanda there is a fully functioning portal for registration, information on tax obligations, etc. See World Bank and International Finance Corporation, *Doing Business in 2017: Equal Opportunity for All*, 14th Edition, World Bank Group, 31. The relevant online platform is http://org.rdb.rw/busregonline#.

[70] Thus, in Rwanda the registration process can either be by physically presenting the documents to the Registrar General (physical registration takes place at the Rwanda Development Board (RDB) offices located in Kigali) or through an online platform. The relevant online platform is http://org.rdb.rw/busregonline#. Explanations and details are also available at http://rwanda.eregulations.org.

[71] For a company limited by shares, registration fees range from 4,000 to 62,200 Kshs. depending on the value of the nominal share capital. See the Ninth Schedule – Fees Payable under the Act, Part 1: Companies limited by Shares and Part 2: Companies limited by guarantee, made under Regulations 68-72 of The Companies (General) Regulations, 2015.

[72] See Companies (Limited Liability Single Shareholder Company) Regulations 2014, made under section 26A (5), 275(4) and 479 TCA, Government Notice No. 129, published on 25/04/2014.

[73] See also s. 3 Foreign Investment Protection Act (KIPA) which defines a foreign national as a person who is not a citizen of Kenya and includes a body corporate not being incorporated in Kenya.

does not contain a definition of a foreign company in its definition section, but s. 433(1) TCA states that a foreign company is a company incorporated outside Tanzania.[74] Since these definitions do not exclude companies incorporated in an EAC Partner State, it goes without saying that such companies are also foreign companies for all intents and purposes.

Rwanda follows a different path. Art. 2 (22) LGC defines a foreign company as a company incorporated outside Rwanda that carries out business in Rwanda. Unlike the KCA and the TCA, however, the provision explicitly excludes companies which are incorporated in Partner States from the category of foreign companies.[75] The inclusion of a definition placing a company incorporated in one of the EAC Partner States in the category of local companies is a useful provision in the implementation of the Common Market Protocol.[76] Furthermore, this law also accords national treatment to companies formed in EAC Partner States, something which is not available to foreign companies. Paragraph 2 of Art. 234 LGC states that:

> Companies from EAC Member States and other companies from countries with relevant agreements with Rwanda shall enjoy national treatment.

It goes without saying that similar provisions in the company laws of the EAC Partner States would have many positive impacts regarding freedom of establishment in the EAC, since there are many legal benefits that come with being treated as a local company.[77] However, the KCA and TCA lack provisions similar to Art. 2 (22) and Art. 234 (2) LGA.

[74] It is important to note that the term foreign company may be implied from the definition of a "foreign investor" provided for under s. 3 of the Tanzania Investment Act 1997. This provision defines a foreign investor in reference to his citizenship. Accordingly, a foreign investor in case of a company, is a company which is incorporated under the laws of any country other than Tanzania in which more than fifty percent (50%) of the shares are held by a person who is not a citizen of Tanzania. This definition appears to be wider than that of TCA, in that it not only looks at the place of incorporation for the purpose of determining whether a company is foreign or local, but also considers ownership issues. Thus, it is possible to have a company incorporated in another jurisdiction and yet to consider it as a local investor, if more than fifty percent of the shares are owned by citizens of Tanzania.

[75] See also Law No. 06/2015 of 28/03/2015 Relating to Investment Promotion and Facilitation which provides for a definition of "foreign investor" under two circumstances: (1) Art. 2 (24) (b) of this law defines a foreign investor*, inter alia,* as a business company registered in Rwanda, a member state of the EAC or COMESA, and (2) Art. 2 (24)(c) defines a foreign investor as a business company, *inter alia,* registered in Rwanda, whose capital from countries other than EAC or COMESA Member States is at least fifty-one (51%) of the invested capital. Thus, while the definition in the LGC looks only at the place of incorporation, the definition in Law No. 06/2015 considers not only the place of registration but also the percentage of ownership of a company registered in Rwanda. Hence, a company registered in Rwanda may be regarded as foreign because of its ownership structure.

[76] According to the interviews conducted during our field research, the provisions aimed at removing companies formed in the EAC Partner States from the category of foreign companies started with the 2010 amendments to Law No. 7 of 27/04/2009 Relating to Companies and its spirit was adopted in Law No. 27 of 31/05/2017 Governing Companies (repealed) and in Law No. 17/2018 of 13/04/2018 Governing Companies.

[77] For example, in terms of taxation, land ownership, etc.; see *Aspen Network of Development Entrepreneurs*, East African Legal Guide, https://www.aspeninstitute.org/publications/ande-east-africa-working-group-toolkit/, 17 et seq.; for Kenya in particular, see Kleis, Legal aspects of doing business in Kenya, in: Law in Africa 18 (2015), 250 et seq.

Regarding Tanzania, the silence of the law can easily be explained by the fact that the EAC-CMP came into force after the enactment of the TCA.[78] The TCA was enacted in 2002, when the EAC Treaty was still fresh. Nevertheless, the developments in the adoption of the EAC instruments, in particular, the EAC-CMP, have created a need to amend or review the TCA. Surprisingly, even the fairly recent amendments of 2012[79] did not contain a single provision on the treatment of EAC companies.

In relation to Kenya, it can be argued that the absence of provisions giving preferential treatment to companies formed in the EAC Partner States is notable, since the KCA is quite new and, therefore, should take into account new developments in the EAC instruments. However, it has been argued that since the KCA gives powers to the Cabinet Secretary to make regulations for foreign companies, there is a possibility of incorporating a provision in the said regulations, which, in effect, will offer such preferential treatment compared to other foreign companies.[80] The relevant provision for such powers is s. 995 KCA which empowers the Cabinet Secretary to make regulations called Foreign Companies Regulations. Section 995(3) KCA provides that such regulations may be generally or specifically limited in application or may differ according to variations in time, locality, place or circumstances. Nevertheless, the absence of such regulations at the time of our research, despite developments in the adoption of the EAC instruments, makes a negative impression.

It was further argued by the respondents that there are ongoing company law reforms which are beneficial to foreign companies generally, and which will also favour companies registered in the EAC Partner States.[81]

In the meantime, however, companies from other Partner States are still treated as foreign companies under Kenyan law. As one of us has pointed out before,[82] there are severe disadvantages that come with this. Most prominent is s. 975(2)(b) KCA, which states that at least 30 per cent of the foreign company's shares – regardless of the company's specific business – must be held by a Kenyan citizen by birth in order to register a branch in Kenya. One doesn't have to be a rocket scientist to conclude that no major company would be willing to transfer almost one third of its shares – a blocking minority – to Kenyan investors.[83] This is an impediment to all kind of foreign companies which would be interested in establishing branches in Kenya. Yet, since the KCA does not distinguish between 'real' outsiders and companies from the EAC, it affects the EAC Partner States squarely. However, it looks as if Kenya has responded to the problem. A bill has been published that purports, *inter alia,* to abolish the 30% requirement in s. 975(2)(b) KCA.[84] There are no similar requirements under the LGC and TCA.

[78] These recent amendments are contained in Part III of the Business Laws (Miscellaneous Amendments) Act, 2012, Act no. 3 of 2012.

[79] See Part III of the Business Laws (Miscellaneous Amendments) Act, 2012, Act No. 3 of 2012.

[80] Interview with various institutions conducted in March 2018.

[81] Ibid.

[82] See Schirmer, (n 1) 165-165.

[83] No wonder Kenyan lawyers are rather shocked. According to Hamilton Harrison & Matthews Attorneys, Registration of a foreign company in Kenya, http://hhm.co.ke/wp-content/uploads/2015/09/HHM-NEWS-ALERT-02-SEPT-2015.pdf , the 30 per cent requirement is "of great concern as it is likely to discourage, and in fact prevent, foreign companies wishing to invest in Kenya".

[84] During this study it was established that this Bill was not yet in force at the time of the research.

3.2.2.5 Management of companies

Common to all three examined jurisdictions is a unitary board structure. Nevertheless, the company laws of these jurisdictions contain various provisions on management of companies which differ in many respects. The peculiarities of each jurisdiction are discussed in this part under separate common subheadings: the number of directors, qualifications of directors for appointment and duties of directors.

Composition of the board of directors

The Rwandan LGC provides that the essentials of a private company include the requirement that the company shall have one or more directors of whom at least one must be an ordinary resident in Rwanda. In Tanzania, the TCA requires every company to have two or more directors, except for a single shareholder company which shall have one director. In Kenya, the KCA requires a private company to have at least one director and this one director has to be a natural person, s. 129 KCA. The TCA does not have a similar requirement on the nature of persons who may become directors. This is supported by s. 129 (d) (ii) TCA which requires the annual returns to have particulars of a corporate director. Whether a company registered under TCA may only have corporate directors is left open. In Rwanda, Art. 154 LGC requires that a director must be a natural person. The options of having a board of directors composed of both natural persons and corporate directors under this law are, therefore, ruled out.

Qualifications of directors

In Rwanda, a director must be older than 16 years and not older than 75 years[85] and must not be an un-discharged bankrupt. He or she should also not have been convicted of a criminal offence under the LGC or under capital markets law in the five years immediately preceding the appointment. Again, he or she should have complied with the qualifications for directors contained in the incorporation documents and should not have any mental disability.[86] In Kenya a director must be a person aged 18 years or above,[87] but there is no maximum age limit for a director in the KCA. Furthermore, a person who is under a disqualification order cannot become a director unless the court grants him leave to do so.[88] In Tanzania a director must be a person aged between 21 and 70 years,[89] who is not an un-discharged bankrupt (except where there is a leave of court).[90] Also if he is faced with a disqualification order made under one of the circumstances mentioned in s. 197(1) TCA he shall not qualify to become a director except where there is a leave of court. Additionally, if the articles require a share qualification, the director shall acquire such shares within two months of his appointment or within a shorter period of time which may be fixed by the articles, in order to qualify.[91]

Duties of Directors

In Rwanda, the directors' duties include the fundamental duty (ie. duty to act in good faith in a manner he or she believes to be in the best interest of the company and to use

[85] The upper limit of 75 years applies only to public companies, see Art. 154 Paragraph 2 No. 3 LGC
[86] Article 154 LGC.
[87] S. 131 KCA.
[88] S. 214 KCA; persons subject to foreign restrictions are also disqualified from being directors of a Kenyan company, see s. 234 KCA.
[89] S. 194(1) TCA.
[90] S. 196(1) TCA.
[91] S. 191(1) TCA.

reasonable diligence in discharging the duties of his office), the duty to existing shareholders (ie. the duty not to act or to agree to the company acting in a manner that unfairly prejudices the company or the shareholders), the duty to comply with the incorporation documents and the law, the duty to avoid risks causing the company to fail the solvency test, the duty to exercise care, skills and diligence and the duty to exercise power for proper purpose.[92]

In Kenya, the duties of directors are the duty to act within powers, the duty to promote the success of the company, the duty to exercise independent judgment, the duty to exercise reasonable care, skill and diligence, the duty to avoid conflict of interest, the duty not to accept benefits from third parties[93] and the duty to declare an interest in proposed or existing transactions or arrangements with the company.[94] Also certain transactions between the directors and the company require the approval of members. These include, *inter alia*, the giving of loans and quasi-loans to directors and to persons connected with directors and the making of credit transactions for the benefit of a director.[95]

In Tanzania, the TCA contains four duties, the duty to act in good faith and in the best interest of the company, the duty to have regard to the interests of employees, the duty to exercise powers for proper purposes, the duty to exercise care, skill and diligence[96] and the duty to disclose the director's interests in contracts.[97] In addition, certain prohibitions and requirements of company approvals are put in place with a view to avoiding the conflict of interests of directors. These include the prohibition of tax-free payments to directors,[98] prohibition of loans to directors and connected persons,[99] company's approval of payments made to a director for loss of office or retirement from office[100] and company's approval of transfer of the whole or part of the undertaking or property of a company to the director of the company as compensation for loss of office or retirement.[101]

A critical examination of these duties leads to a number of conclusions: (1) that some duties such as the duty to exercise care, skill and diligence and the duty to act in the best interest of the company, are common in all jurisdictions; (2) that some duties only differ in the nomenclature but, in effect, are the same in all jurisdictions – like the duty to avoid conflict of interests is expressly provided for only under the KCA but is, of course, not allowed under the TCA or the LGC although these laws do not say so explicitly; and (3) that some duties are unique to a certain jurisdiction, like the duty to promote the success of the company under the KCA.

[92] Ss. 145-150 LGC.
[93] Ss. 142-147 KCA.
[94] S. 151 KCA.
[95] Ss. 164-167 KCA.
[96] Ss. 182-185 TCA.
[97] S. 209 TCA.
[98] S. 199 TCA.
[99] S. 200 TCA.
[100] S. 201 TCA.
[101] S. 202 TCA.

4 Rationale and Extent of Harmonization

4.1 Removal of restrictions, realization of the freedom of establishment and modernization of company laws

It will be hard to achieve the economic goals of EAC integration without harmonizing the company laws in the EAC. Although companies are, of course, governed by many laws and regulations, the importance of company law cannot be underestimated since companies owe their lives and functioning to it.[102] Analysing the role of corporations in European integration in the 1970s, Stein argues that, "the corporation is the principal instrumentality in the Europeanization process and that the Common Market Treaty provides an institutional framework for a new economic system and for a new political order."[103] Moreover, there is a causal relationship between company law, financial markets, investors' confidence and attraction of both domestic and foreign investors.[104] Therefore, the laws regulating companies in the EAC must be shaped in such a way that they promote the proliferation of companies in the region, in order to ensure smooth achievement of the goals of integration.

It is argued here that the differences existing in the company laws of the EAC Partner States are likely to undermine the effectiveness and the functioning of the common market. In other words, the differing company laws are likely to be an impediment to free trade in the EAC region. It is argued further that harmonization will promote the freedom of establishment guaranteed under Art. 13 of the Protocol for the Establishment of the EAC Common Market,[105] which in turn will equip the citizens of EAC with an effective forum to set up businesses anywhere in the EAC and enjoy freedom of movement of their capital. They will also be able to operate smoothly in other Partner States with far less transaction costs.[106]

For these reasons, therefore, harmonization of company laws is premised on four (4) principles: (1.) removal of restrictions which may affect cross-border business activity; (2.) creation of minimum standards to improve the quality of company law in the EAC region; (3.) realization of the freedom of establishment; and (4.) modernization of company laws. It is important to note that the freedom of establishment and the removal of restrictions on cross-border trade within the EAC region occupy a special position in the EAC-CMP.

The freedom of establishment guaranteed under Art. 13 Paragraphs 1 and 3 (a) (ii) of the EAC Common Market Protocol has two important aspects, namely the freedom to incorporate (right of establishment) and the freedom to select a corporate law regime

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[102] A limited liability company is a legal fiction/ legal person/juristic person created under the process of incorporation. Outside the law, there is no company; for the provisions on the process of incorporation, see ss. 15 and 16 Tanzanian Companies Act, 2002; ss. 17-19 Kenyan Companies Act 2015 and Art. 23 of the Rwandan Law No. 27 of 31/05/2017 Governing Companies.

[103] See Stein, (n 4) 318.

[104] Compare Hopt, K. "Chapter 5. Board Structures – The Significance of the Rules on the Board of the European Company," in: Rickford, J. (Ed.) The European Company; Developing a Community Law of Corporations, 55.

[105] See Paragraphs 1, 3, 5, 6, 7 and 11 of Art. 13 of the Protocol for the Establishment of the EAC Common Market, 2009 available at: http://www.eac.int/sites/default-/files/docs/protocol_eac_common-market.pdf Accessed on 15.11.2017.

[106] Scholars have identified transactional costs as being an impediment to companies willing to trade in another jurisdiction; see, for instance, Schirmer, (n 1) 165.

(cross-border incorporation).[107] Freedom of establishment deals with actions which have to do with the company as a whole: formation and structural change (branches, subsidiaries, transfer of seat, mergers, takeovers, etc.)[108] This is the true meaning of the notion of the freedom of movement of capital within the EAC region.

In connection with the furthering of cross-border trade, the freedom of establishment under the EAC-CMP can be exercised by incorporation of parent companies and subsidiary companies, but also by establishment of company branches in the EAC-Partner States without restrictions.[109] This is because the freedom of establishment grants the citizens of EAC Partner States the right of choice of law. Moreover, the freedom to opt for another law as per the interests of the founders is afforded by the act of incorporation unconditionally (as a criterion for nationality of a company under the incorporation theory). Incorporation brings the legal person into life, and it regulates its operations. In the EU, the freedom of choice of law, as per ECJ judgments,[110] cannot be restricted.[111] The three EAC Partner States examined all apply the incorporation theory in conjunction with the shareholders theory in determining the nationality of a company.[112] Therefore, by analogy, the problems which arose in the EU of conflicting criteria for determining the nationality of companies are not likely to occur.[113]

From the foregoing discussion, it is important to note that the adoption of the EAC-CMP accounts for the birth of EAC company law, which is the totality of the national company law models in the EAC Partner States. That is to say, the quality of the EAC company law depends on the quality of the company laws found in the EAC Partner States and *vice versa.* This line of thinking is significant for two reasons: (1.) it accounts for the principles of harmonization of company laws in the EAC, and (2.) it justifies the modernization of the national company laws in the EAC. Thus, while harmonization aims at the creation of common principles, procedures and practices of company law within the EAC region without which cross-border business continues to be restricted, the modernization of company laws aims at the attainment of international standards

[107] Paragraph 1 of Art. 13 states that the Partner States guarantee the right of establishment of nationals of the other Partner States within their territories. Paragraph 3 of the same states, *inter alia,* that: for the purposes of paragraph 1, the right of establishment shall entitle: (a) a national of a Partner State to: (i) take up and pursue economic activities as a self-employed person; and (ii) set up and manage economic undertakings, in the territory of another Partner State. See Protocol for the Establishment of the EAC Common Market, 2009 available at <http://www.eac.int/sites/default/files/docs/-protocol_eac_common-market.pdf >

[108] Compare Grundmann, (n 6) 13.

[109] To make this happen, it is argued that it depends on the commitment of all Partner States to remove administrative procedures and practices that restrict the setting up of agencies, branches or subsidiaries in the territory of a Partner State for companies or firms of another Partner State; see Binda, (n 37) 156.

[110] See Centros case (1999), Überseering case (2001) and Inspire Art case (2003), the summaries of which are briefly explained in footnotes 143 and 144 respectively, infra.

[111] Grundmann, S., and Möslein, F. *European Company Law: Organisation, Finance and Capital Markets*, Intersentia, Antwerpen, Oxford, 2007, 224.

[112] For details, see Binda, (n 37) 157.

[113] Generally, there are three accepted criteria for determining the nationality of companies: either the place where the central administration takes place, the place of registration of the company, or the nationality of the majority shareholders; see Binda, (n 37) 157. The first two criteria were at issue in the *Überseering case* and the *Inspire Art case,* a summary of which is given in footnotes 143 and 144, infra.

and establishment of common minimum standards, which protect the company stakeholders and maintain a healthy business environment.

It is argued that freedom of establishment is narrowly interpreted by referring only to the nationality of companies.[114]As a result, the other provisions of company legislation, such as those on fees and procedures of registration of companies, management and directorship, as well as those on insolvency matters, have continued to vary substantially. All these have impacts on the choice of law under which a company can be registered within the EAC region and consequently, the realization of the freedom of establishment.

4.2 The extent and areas of harmonization

4.2.1 Partial or full harmonization

Harmonization of laws in these circumstances may be full or partial. On the one hand, full harmonization creates one-to-one similarities and eliminates all differences in company laws. On the other hand, partial harmonization aims at creating similarities in some areas, but not in all areas, as it allows some differences to remain in the laws. By doing so, it may be submitted that while full harmonization will eliminate all chances of legislative competition in the region as far as company law is concerned, partial harmonization will limit the chances and areas of legislative competition. However, both full and partial harmonization have pros and cons.[115]

It may be observed that full harmonization is more effective compared to partial harmonization for it creates uniformity. On the other hand, there are arguments in favour of variations in company laws. For instance, it may be argued that differences in company laws will provide a good platform for competition in relation to registration and management of companies in the region. The nationals of EAC Partner States will have options to choose from when considering to incorporate companies, and at the same time the EAC Partner States will modernize their company statutes. However, legislative competition may lead to the so-called "Delaware Syndrome", a situation in which the founders choose to incorporate their companies in a jurisdiction with less demanding regulations and then later open branches in the jurisdictions whose regulations are more demanding.[116] In the long run, such a practice may have negative impacts on various stakeholders of companies, since it ends up compromising the quality of company law in the EAC region. In this constellation, harmonization should aim at introducing minimum standards, rather than at achieving complete uniformity of company laws in the EAC Partner States.

The World Bank recommends deregulation of the business environment in many developing areas as a way of allowing them to grow.[117] In this respect, the said partial harmonization would modernize company laws in the EAC region without leading to

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[114] This fact has also been established by other authors; see Binda, (n 37) 157.

[115] For a similar discussion in the EU, see *Gregor Bachmann et al.* (eds.), Regulating the Closed Company, Berlin and Boston 2013, 217 et seq.

[116] As explained above, such a practice has been experienced in the EU; see the leading cases of Centros (1999), Übeseering (2001) and Inspire Art (2003) explained in footnotes 128-130, infra.

[117] The World Bank argued in its report of 2004 that poor economies regulate their economies the most and heavier regulation brings bad outcomes; see Word Bank and International Finance Corporation, Doing Business in 2004: Understanding Regulation, Washington D.C., World Bank and Oxford University Press, xiii et seq.

over-regulation of the business environment. Partial and selective harmonization is supported by the majority of the respondents who participated in this study.

4.2.2 The important areas for harmonization

Following from the goal of creating minimum standards, there is a need to identify areas in company law which should be harmonized, and to separate them from other areas which should remain open for competition. In the examined states, the areas which should be harmonized were identified. These include procedures and requirements for registration of companies, specifically, for foreign branches, foreign subsidiaries and single shareholder companies; adoption of a common definition of the concept of a company; preferential uniform treatment of the companies founded in the EAC Partner States; management and administration of companies; accounting, disclosure and reporting standards; mergers and divisions; and insolvency matters. In addition, some practitioners (particularly from Rwanda and Kenya) recommended that there should be uniform adoption of minimum share capital for companies,[118] since such a requirement protects the creditors and the society against damage from failing or untrustworthy businesses.[119]

5 The legal basis for harmonization of company laws in the EAC region

5.1 The EAC primary instruments

5.1.1 The EAC Treaty

The EAC Treaty[120] provides for the harmonization of laws in Art. 126(2)(b). Consequently, the harmonization of company laws is primarily premised on this provision. This is further justified by the other provisions of the EAC Treaty on the establishment of a common market.[121] The first provision for this purpose is Art. 1 EAC Treaty which defines the term "Common Market" as, 'the Partner States' markets integrated into a **single market** in which there is **free movement of capital**, labour, goods and services.'[122] From this definition, it can be concluded that the free movement of capital, labour, goods and services are core components of a common market. This conclusion is concretized by Art. 76(1) EAC Treaty, which provides for the establishment of a common market among the Partner States in which there shall be free movement of

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118 This recommendation is contrary to the recommendation by the World Bank which argued for abolition of minimum capital requirements; see Word Bank and International Finance Corporation, ibid. xvi.

119 See the World Bank, Doing Business Report 2005, 20 et seq.

120 In 1999 the Presidents of the three East African countries Kenya, Uganda and Tanzania met in Arusha and signed the Treaty for the Establishment of the East African Community (herein referred to as the EAC Treaty); see the East African Community, The Treaty for the Establishment of the East African Community 1999, Publication No. 1, signed on the 30th November 1999 and came into force on July 2000. Furthermore, the EAC Treaty was amended in 2006 and 2007 with a view to improving various provisions.

121 Art. 5 (2) EAC Treaty envisages a sequential establishment of four elements of the EAC. Accordingly, the first element should be the Customs Union, followed by a Common Market, followed by the Monetary Union and ultimately followed by a Political Federation.

122 (emphasis supplied).

labour, goods, services, capital and the right of establishment. Simply stated, these provisions aim at trade liberalization and development among the Partner States.

Moreover, Art. 86 EAC Treaty requires the Partner States to permit, *inter alia,* the free movement of capital within the EAC. In particular, the EAC Partner States are required to do three things. First, they should ensure the unimpeded flow of capital within the EAC through the removal of controls on the transfer of capital among the Partner States. Second, they should ensure that all persons (nationals and non-nationals) resident in a Partner State are allowed to acquire stocks, shares and other securities or to invest in enterprises in the other Partner States. Third, they should encourage cross-border trade in financial instruments. For the purposes of this study, the first two requirements are significant because their contents directly or indirectly relate to company law.

5.1.2 The EAC Common Market Protocol

The EAC-CMP requires the Partner States to remove all restrictions on the right of establishment based on nationality of companies, and it calls for non-discrimination of companies established in accordance with the laws of Partner States, as well as mutual recognition of licences and certificates, *inter alia,* granted by Partner States.[123] Furthermore, it requires the Partner States to remove the administrative practices which form obstacles to the right of establishment.[124] Also Art. 24 EAC-CMP guarantees the free movement of capital. Directly connected with companies is the fact that the freedom of capital movement is important for the issue of securities and trade in them.[125] In addition to the removal of the existing restrictions, the Partner States are also barred from introducing new restrictions on the movement of capital.[126]

It is important to note that the implementation of Art. 24 is required to be progressive and in accordance with the Schedule on the Removal of Restriction on the Free Movement of Capital under Annex VI of the CMP.[127] Cutting across all these provisions is paragraph 1 of Art. 47 EAC-CMP which provides for the undertaking of Partner States to approximate their national laws and to harmonize their policies and systems for purposes of implementation of the Protocol. Furthermore, paragraph 2 of the same article requires the Council to issue directives for the purpose of implementing this Article.

5.2 The EAC Secondary Instruments:

5.2.1 The instruments of the Council

In order to ensure implementation of these provisions, the EAC-CMP empowers the EAC Council (hereinafter: the Council) to issue directives, regulations and decisions

[123] EAC-CMP, paragraphs 5, 6 and 7 of Art. 13.
[124] Ibid. paragraph 11 of Art. 13.
[125] Compare Grundmann, (n 6) 13.
[126] See Paragraph 1 (a), (b), (c) and (d) of Art. 24
[127] For the identification of the then existing restrictions on the free movement of capital in the EAC Partner States and the predetermined elimination date, see the East African Community, The East African Community Common Market Schedule on the Removal of Restrictions on the Free Movement of Capital, Annex VI, Arusha, 2009.

aimed at the harmonization of laws in the EAC region.[128] Compared to the EAC Treaty and its Protocols, these are secondary instruments. Some of these instruments may be regarded as forming the basis for harmonization of company laws in the EAC region.

To begin with the powers to issue directives, it can be observed that such powers are provided for under Art. 47 Paragraph 2 and Art. 51 EAC-CMP. While Art. 47 paragraph 2 is specific on the power to issue directives for implementation of the Common Market Protocol, Art. 51 empowers the Council to issue different instruments, including directives as may be necessary for the effective implementation of the provisions of the EAC-CMP. Based on the role of company laws in the promotion of EAC cross-border business, it may be argued that there is a good case for the issuance of directives by the Council, aimed at harmonization of company laws in the EAC region. It is worth noting that a number of directives affecting companies have been issued in the area of public listed companies,[129] while non-listed and private companies have been left out. However, given the prevalence of private companies in the EAC region it may be argued that the reluctance of the Council to issue directives covering harmonization of private companies affects the implementation of the EAC-CMP provisions on the freedom of establishment and ultimately cross-border business.[130]

Art. 51 EAC-CMP grants the Council the power to issue regulations. Regarding the harmonization of company law, the Council issued the East African Community Common Market (Right of Establishment) Regulations (hereinafter: EAC-RoE).[131] The EAC-RoE seeks to achieve three things: (1.) implementation of the provisions of Art. 13 of the EAC-CMP; (2.) assurance of uniformity among Partner States in the implementation of Art.13 of the EAC-CMP; and (3.) assurance of a process that is transparent, accountable, fair, predictable and consistent with the provisions of the EAC-CMP Protocol. Regulation 10(2) of the EAC-RoE requires the identification and removal of administrative restrictions on the right of establishment upon entry into force of the EAC-CMP, while regulation 10(3) of the same requires the Partner States to identify the restrictions on the right of establishment in the national laws and submit a list of restrictions to the Council within one year of the coming into force of the EAC-CMP.[132] Upon receiving this list, the Council shall issue a directive for the removal of

[128] Art. 14 paragraph 3 (d) EAC Treaty designates the Council as the policy organ of the Community and mandates it with the function of making regulations, issuing directives, taking decisions, making recommendations and giving opinions in accordance with the provisions of the EAC Treaty.

[129] The directives in this area include the EAC Council of Ministers Directives on Admission to Trading on Secondary Exchange; EAC Council of Ministers Directives in Public Offers (Equity) in the Security Market; EAC Council of Ministers Directives on Public Offers (Debt) in the Securities Market; EAC Council of Ministers Directives on Regional Listing in the Securities Market; EAC Council of Ministers Directives on Asset-Backed Securities; and EAC Council of Ministers Directives on Corporate Governance of Securities Market inter-mediaries; all these directives are found in Legal Notice No. EAC/24/2015, see The EAC Gazette, Vol. AT 1 No. 7, Arusha, 29th May 2015. The legislative focus on public companies instead of private ones is similar to the development in the EU; see *Gregor Bachmann et al.* (eds.), Regulating the Closed Company, Berlin and Boston 2013, 202 et seq.

[130] See Binda, (n 37) 159.

[131] See the EAC, The East African Common Market (Right of Establishment) Regulations, Annex III, Nov. 2009.

[132] The identification and removal of restrictions under regulation 10(2) RoE as well as the identification and submission of restrictions under regulation 10(3) RoE to the Council, is to be done voluntarily by the Partner States themselves; see Binda, (n 37) 159 et seq.

the restrictions identified.[133] Moreover, if a Partner State becomes aware of a restriction in another Partner State, which has not been declared under regulation 10(2) and (3) or any other restriction, that Partner State shall notify the Council through the Secretary General, and the Partner State in which the restrictions exist. In this case, a Partner State notified of a restriction under regulation 10 (5) is required to remove the restriction within the time directed by the Council.

However, our research reveals that there have been no such steps taken to identify and remove the legal and administrative restrictions in the area of company law.[134] Furthermore, regulation 11 EAC-RoE requires the competent authorities of the Partner States to cooperate in certain areas such as sharing of information on priority economic activities (where the right of establishment makes a valuable contribution to the economic development of the Partner States), simplifying the process and procedures involved in obtaining the relevant licenses, harmonizing the fees to be paid for obtaining and processing necessary documents, and sharing any other relevant information. Also these provisions have not been effected.[135]

Lastly, the powers of the Council to issue decisions which have the effect of harmonizing laws generally are found in Art. 51 EAC-CMP. However, as with the powers to issue directives, we could not find a single decision of the Council in relation to the harmonization of company law.

5.2.2 East African Legislative Assembly's Acts

Another institution which can issue secondary instruments is the East African Legislative Assembly (hereinafter: EALA). The common secondary instruments issued by the EALA are the Acts of the Community, as provided for under Art. 62 EAC Treaty. The EALA is empowered to pass laws applicable to the Partner States. Using these powers, the EALA may come up with a model company law to be adopted by the Partner States. The model law could contain mandatory and optional provisions. Mandatory provisions could be relegated to the most fundamental aspects which would establish minimum standards of company law in the region, while optional provisions could be provisions which are less fundamental and which go beyond the minimum standards. However, at the time of our research, the EALA had not issued any model law for harmonization of company law in the EAC region.

5.2.3 The East African Court of Justice's Decisions

The decisions of the East African Court of Justice (hereinafter: EACJ) also form a secondary instrument for harmonization of company laws in the EAC region. The EACJ has powers to determine disputes related to infringements of the EAC Treaty, or of Protocols or of other secondary instruments. There are various ways of accessing the EACJ, *inter alia*, legal and natural persons may refer matters to the EACJ by virtue of Art. 30 EAC Treaty to challenge the legality of any Act, regulation, directive or actions of a Partner State or an institution of the Community on the grounds of lawfulness or

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[133] See Regulation 4 of the EAC-ROE.

[134] The same has been observed by other authors; see Binda, (n 37) 159 et seq.

[135] Some authors argue that the fact that the initiative to take further steps, such as simplification of the process to obtain licences and to harmonize the fees for obtaining trading licences, permits, etc., is left to the goodwill of the Partner States, throws doubt on the expected co-operation in these areas; see Binda, (n 37) 160.

infringement of the provisions of the EAC Treaty.[136] In this configuration, national company law rules which restrict the free movement of companies may be set aside by the EACJ.[137] However, the EACJ does not have jurisdiction to deal with disputes arising between individuals or legal persons against other individuals or legal persons with respect to infringement of rights and privileges recognized by the Common Market Protocol.

It should be noted, however, that there have been attempts to extend the jurisdiction of the EACJ to cover trade and investment disputes. These attempts can be explained by the Alcon case[138] and the events which followed it. Alcon Ltd. (a Kenyan company) was suing upon wrongful termination by the government of Uganda of a construction project agreed between Alcon Ltd. and the National Social Security Fund (Uganda). Upon the said termination, the machinery and plant belonging to Alcon were confiscated. Alcon won the case in the High Court of Uganda, and instituted proceedings in the EACJ after failure to execute the arbitration award and the decree of the High Court. The proceedings at the EACJ were dismissed in 2013 following the setting aside of the decision of the Ugandan High Court by the Ugandan Supreme Court. Alcon appealed against the decision of the EACJ in the EACJ appellate division.

At the appellate court, one of the pertinent issues was whether the EACJ has jurisdiction to deal with individual cases concerning cross-border investment disputes (claimed to have been extended by Art. 54 CMP). The Appellate division held that to extend the jurisdiction of the EACJ to individual cases, there should be a protocol under Art. 27 EAC Treaty. It argued further that the EAC-CMP is not the kind of protocol envisaged under Art. 27(2) EAC Treaty because it was concluded under Art. 76 and 104 EAC Treaty. Finally, it concluded that Art. 54 EAC-CMP relates to States and not individuals or national institutions and, therefore, it does not overrule the interpretation of Art. 30 EAC Treaty provided in the case of *Prof. Anyang Nyongo and 10 others* (2006).[139]

It is important to note that there have been developments in this area. There is a positive movement towards the realization of the right of access for individual cases. Thus, the decision of the Council of Ministers to extend the jurisdiction of the EACJ in this respect was approved on 30.11.2013 by the Summit of the Head of States. However, the extension requires a Protocol thereon as per Art. 27(2) EAC Treaty which is yet to be concluded.[140]

In relation to decisions directly related to company laws, it is observed that up to the time of this study, there was no decision on implementation of the EAC-CMP in this area. The EACJ has remained adamant, despite the existence of legal provisions, poli-

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[136] On the accessibility of individuals and non-state actors to the EACJ, see Possi, A. "Mapping the Jurisdiction, Accessibility and Nature of Judgements of the East African Court of Justice," Eastern Africa Law Review 2015, Vol. 42 (1), 9 et seq. For case law, see Reference No.1 0f 2006, *Prof. Peter Anyang' Nyongo and 10 Others v. The Attorney General of the Republic of Kenya and 5 Others*; also see Reference No. 1 of 2008, *Modern Holdings (E.A) Limited v. Kenya Ports Authority.*

[137] For case law on the right of establishment in the EU, see Andenas, M. and Wooldridge, F. *European Comparative Company Law*, New York, Cambridge University Press, 2009, 1.

[138] *Alcon International Limited VS Standard Chartered Bank of Uganda and 2 Others,* Appeal No. 3 of 2013.

[139] Prof. Anyang Nyongo and 10 others (supra).

[140] For details, see Otieno-Odek, J. "Judicial Enforcement and Implementation of EAC Law", in Ugirashebuja, J., Ruhangisa, J., Ottervanger, T. and Cuyvers, A. (eds.) East African Community Law: Institutional, Substantive and EU Comparative Aspects, Brill, 2017, 451-485, 468.

cies and practices of Partner States which appear to affect the freedom of establishment.[141] Nevertheless, the experience of the EU can be used to explain the circumstances under which a regional court has been used to interpret the provisions of the regional instruments and domestic laws of member states. In fact, the ECJ is the main driver of harmonization of company law in the EU. In its famous decisions *Centros*,[142] *Überseering*[143] and *Inspire Art*,[144] the ECJ made clear that the fundamental freedom of establishment applies to European companies just the same as to any European citizen and, therefore, it is prohibited to discriminate against companies from other Member States in favour of local ones. A company incorporated under Dutch law, for example, is free to open a branch or even transfer its company seat to Germany. Any obstacle deriving from the law of the host country has to be justified by imperative reasons in line with general interests and to be tested against the principle of proportionality.[145] If it was up to the European Court to rule over a national provision such as s. 975 KCA – which requires all foreign companies to have at least 30 per cent local shareholders to open a branch – the Court would most likely declare it illegal because it sets up disproportional hurdles for establishing a business in the EAC. Despite the differences between the legal systems in the EAC and in the EU, the European experience shows that

[141] Binda argues that the absence of such cases is caused by the existence of Art. 13(7) EAC-CMP in which the Partner States are required to mutually recognize the relevant experience obtained, requirements met, licences and certificates granted to a company or firm in the other Partner State; see Binda, (n 37) 159.

[142] In *Centros Ltd. V. Erhvervs–og Selskabsstyrelsen* (1999) ECR I-01459 (hereinafter referred to as *Centros case*) a company had been registered in the UK with the aim of conducting business in Denmark. It was argued by the Danish authorities that this constituted an abuse of the freedom of establishment because the incorporators had avoided the stringent minimum capital requirements under Danish law. Therefore, the Danish authorities refused to register the branch of *Centros Ltd.* The ECJ ruled in favour of *Centros Ltd.* defending the freedom of establishment.

[143] In *Überseering BV v. Nordic Construction Company Baumanagement GMBH (NCC)* (2001) I-09919 (hereinafter referred to as *Überseering*), a company which was registered in the Netherlands moved its central administration to Germany and all its shares were acquired by German citizens. The company purported to sue in a German court following a dispute over non-execution of contract. The German court refused to recognize *Überseering* as a legal person with the ability to sue and be sued, arguing that, although the central administration had been shifted to Germany, the company had not been reincorporated under German law. The controversy was influenced by the fact that Germany applies the principle of central administration while the Netherlands apply the principle of incorporation for company nationality. The ECJ ruled against Germany pointing out that the requirement of reincorporation under German law negates the freedom of establishment. This is because legal personality is acquired under the national laws only. The ECJ clarified further that a Member State does not have power to subject companies' validly incorporated in other Member States and transferred their seat to its territory, to its domestic company law. The ECJ noted however, that the right of establishment may be restricted under private international company law to "enhance legal certainty and creditor protection", to protect the rights of minority shareholders and employees and for taxation purposes. It went on to state that all these circumstances are not enough to deny legal personality to a company (*Überseering* Case Paras. 72, 92) .

[144] In *Kamer van Koophandel en Fabrieken Voor Amsterdam v. Inspire Art Ltd.* (2003) I-10155 (hereinafter referred to as *Inspire Art*), *Inspire Art* had been registered in the UK and was doing business only in the Netherlands. The Chamber of Commerce in the Netherlands decided to register the branch of *Inspire Art* as a "formerly foreign company", which subjected it to the payment of a minimum amount of capital and more drastic directors' liability. *Inspire Art* considered this categorization as contravening the provisions of Community law on the right of establishment. The rationale behind such measures was to avoid abuse of EU law, to protect creditors and to ensure proper tax inspection. The ECJ ruled in favour of Inspire Art.

[145] See *Grundmann*, (n 6) 503 et seq. with further references.

regional courts can play a crucial role in furthering the development of company laws in the region.

6 Drivers of modernization and harmonization of company laws in the EAC Partner States

6.1 Drivers of modernization

Modernization of company laws is a result of multiple drivers. The most common ones include the impact of the World Bank reports, the need to simplify company laws, the need to improve company laws, and implementation of constitutions. Other factors such as political pressure and pressure from the private sector also play a role.

6.1.1 The Effects of the World Bank, Doing Business Reports

In 2002, the World Bank launched the World Bank Reporting Project which aimed at releasing annual reports with the goal of advancing the World Bank Private Sector development agenda by, *inter alia*, motivating reforms through country benchmarking and informing the design of reforms. The reports explain the business environment of more than 130 countries by using certain indicators, namely business entry, employment regulation, contract enforcement, creditor rights, credit information sharing system and bankruptcy. The first report covering the year 2003 was released in 2004.[146]

These reports have continuously identified weaknesses in the regulatory and administrative environment in such jurisdictions and offered recommendations on how to improve the regulatory environment. The reports usually contain a ranking of the business environments, which should act as a guide, especially to foreign investors. Many jurisdictions, including the EAC Partner States, have therefore attempted to improve their regulatory and administrative environment in line with the recommendations of these reports, in order to attract foreign investments. According to our research, most of the reforms in the business environment of Rwanda, for instance, were influenced by the World Bank's Doing Business Reports.[147] This applies also to Kenya and Tanzania. The common areas of company laws which have been influenced by the reports include company registration procedures, registration fees, time required for registration, and the administrative procedures. The idea of having a single point (one-stop shop) where all administrative procedures related to formation and operations of companies are located is a remarkable feature flowing from the World Bank's Doing Business Reports. Each of the examined jurisdictions has a one-stop shop especially for registration of foreign companies.

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[146] World Bank and International Finance Corporation, Doing Business in 2004: Understanding Regulation, Washington D.C., World Bank and Oxford University Press, 2004.

[147] Now ranking second in Africa in the Doing Business Report of 2017, Rwanda is cited as an example of an economy which has used the Doing Business Reports as a guide to improving its business environment. It is said to have implemented a total of 47 reforms emanating from the reports and it has been implementing them since 2006. For details, see World Bank and International Finance Corporation, Doing Business in 2017: Equal Opportunity for All, 14th Edition, World Bank Group, 27.

6.1.2 The need to simplify the company laws

In some jurisdictions, there has been a growing need to simplify company laws with a view to enabling common citizens to be able to register and invest through companies. This has been observed, in particular, in Kenya, where the registration forms and documents have been simplified and the process of registration made easier, to the extent that one can register a company without drafting articles of association, simply by making a name search and reservation online and paying registration fees through mobile money transfer. The same can be said of Rwanda. There are no registration fees in Rwanda, companies can be registered online, and it takes less time to register a company in Rwanda than in any of the other EAC Partner States.[148]

Likewise, Tanzania introduced an online registration and management system in 2018, namely the Online Registration System (ORS), effective from 1st February 2018.[149] This new system replaced the older Online Business Names Registration System (OBRS), which was restricted to "name clearance," "name reservation" and "business names registration." Under the ORS system, other services, in addition to name search and name registration, include the registration of companies, change of particulars of companies and filing of annual returns.[150]

Furthermore, simplification of company laws has aimed at minimizing the hurdles to be overcome by small and medium-sized enterprises while establishing and operating their businesses.[151]

6.1.3 The need to improve company laws

Traditionally, reforms in company law are driven by the need to remove weaknesses that have led to failures or scandals.[152] It is an indisputable fact that social, economic, technological and political developments as well as globalization of the economy have rendered the company laws of many jurisdictions obsolete. Attempts to remedy the weaknesses of company laws have thus gone hand in hand with facilitation of a modern market economy. The recent reforms witnessed in Rwanda, Kenya and Tanzania in this respect have been aimed at improvement of the obsolete company laws in these jurisdictions.

6.1.4 Implementation of a new constitution

This driver applies only to Kenya where a new constitution with many rights, which go beyond the provisions of the previous constitution, was adopted in the year 2010. During this study it was revealed that the new constitution required many reforms in the existing laws regulating the business environment, including company laws. Thus, it became inevitable to adopt new legal principles to regulate companies in the country.

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148 We were told that one can register a company in Rwanda in less than three hours, if all documents are available. This information was obtained from interviews with corporate law practitioners.

149 This information was obtained from the interview with the Registrar of Companies and cemented by the notice which was made available at the BRELA website: http.//ors.brela.go.tz/login.

150 Ibid.

151 The need to simplify company laws has also been identified as a driver behind EU company law reforms; see Andenas, M. and Wooldridge, F. *European Comparative Company Law*, New York, Cambridge University Press, 2009, 1.

152 Ibid.

6.1.5 Other Factors

Other drivers of company law reforms in the EAC Partner States are political influence and pressure from the private sector. In some jurisdictions there has been political pressure from the government to improve the business environment. Thus, policies are put in place for this purpose. It is from these policies that reforms of company law proceed. The material policy in this respect for most of the EAC Partner States is the investment policy. The private sector has also been at the forefront in pushing for reforms. This has been done through the Chambers of Commerce and Private Sector Foundations advising and recommending reforms to the governments.

6.2 Drivers of harmonization of company laws

Several factors may be considered to be the drivers of harmonization of company laws in the EAC Partner States. These include the desire to attract more foreign investors, the economic and political interests of the Partner States, and prospects of regulatory competition.

6.2.1 Economic and political interests of Partner States

The main goal of RECs is the pursuit of economic goals. Thus, the economic interests of Partner States are taken to be the ultimate driver of the implementation of regional instruments. However, a critical analysis of the process of integration shows that the implementation of regional instruments is also partly politically driven. Given the fact that the Treaty and its Protocols are not self-executing, the implementation of these instruments depends on the political interests of the Partner States. This is also concretized by the fact that there are no effective sanctions for non-implementation of the EAC instruments. In the case of company law, this argument is cemented by the absence of directives on the harmonization of company laws, despite many variations in the company laws of the Partner States. The harmonization of company laws depends on the political interests of the governments of the EAC Partner States.

6.2.2 Prospects of regulatory competition

Regulatory competition could be regarded as a driver of harmonization of company laws in the EAC region.[153] Although the prospects of regulatory competition were not identified as a driver of the on-going reforms in the EAC Partner States, it may not be hard to associate it with harmonization of company laws in the EAC region. This is because regulatory competition is normally done by minimizing the requirements for incorporation with a view to encouraging domestic incorporations. Since regulatory competition may emerge at any time, harmonization should aim at creating core minimum standards, below which, even if competition emerges, a Partner State may not go. Such minimum standards will help to protect the basic interests of the stakeholders of the company and limit the so-called race to the bottom effect.[154] In this way, prospects of regulatory competition may be regarded as a driver of the harmonization of company laws in the EAC region.

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[153] Regulatory competition is considered to be one of the drivers of company law reforms in the EU; see Andenas/Wooldridge. (n 151) supra; see also *Gregor Bachmann et al.* (eds.), Regulating the Closed Company, Berlin and Boston 2013, 217 et seq.

[154] See the discussion at 2.2.1 and 3.2.1 supra.

6.2.3 The desire to attract local and foreign investments

The desire to attract more foreign investments in a particular jurisdiction may be said to be a driver of harmonization of company laws in the EAC Partner States. This applies in particular to investments from the EAC Partner States. Our research shows that specific reforms have been introduced, particularly in company laws, which are aimed at attracting more foreign investments. One of the areas advertised on the websites of the investment regulatory authorities is the speedy registration of investment vehicles. This touches squarely on the procedure of registration and management of companies in these jurisdictions. The desire to establish speedy procedures for registration and management of companies has led to the adoption of online procedures.

It may be observed that the modernization of company laws is aimed at attracting foreign investors generally. However, the issue is whether the harmonization of company law also aims at attracting foreign investors. It should be noted that the Partner States have not expressly provided for this objective in their laws. Nonetheless, the provisions concerning the definition and preferential treatment of companies from the EAC Partner States may be associated with the harmonization of company laws with the intention of attracting investors from both outside and inside the EAC. It is argued here that, as a consequence of these provisions, more foreigners who are interested in establishing their business in a certain Partner State, but who at the same time are not comfortable with the company law of that state, will now establish companies in EAC Partner States and let them operate in the whole region.

7 Opportunities and Challenges

There are a number of opportunities in the EAC region which may be used to further harmonization of company laws. At the same time, there are a number of challenges which act as impediments to the harmonization of company laws.

7.1 Opportunities

The available opportunities include the existence of functioning EAC institutions, readiness to modernize company laws, availability of similar institutions, and positive thinking in connection with the introduction of the EAC private limited company.

7.1.1 The availability of institutions

The process of harmonizing company laws requires the availability of institutional frameworks for facilitation. The existence of the EALA, the Council and the EACJ are of great significance in the harmonization of company laws. As discussed above, the EALA has powers to issue model company laws, which may be adopted by the EAC Partner States.

Furthermore, the Council has powers to issue directives for the implementation of the EAC-CMP. Through the exercise of these powers, the Council may, for instance, issue directives with a view to harmonizing company laws in the EAC region. It may be observed here that this mode has been used extensively in the harmonization of EU company laws.[155]

In addition, the EACJ is an institution which is instrumental in the process of harmonization of laws in the EAC. Through dispute settlement and interpretation of the EAC instruments, the EACJ becomes an indispensable player in the harmonization process.

7.1.2 The willingness of the EAC Partner States to modernize their company laws

During this study, we have observed that most of the Partner States are willing to modernize their company laws. This has been done through repeals and amendments of their company laws. Some Partner States, such as Rwanda, have repealed their company law statutes several times within this short period of time. This means that the Partner States are ready to improve their company law regimes. This readiness to change can be used in the harmonization process. Important is that harmonization should be seen as part of the modernization of company laws with the goal of improving cross-border business by guaranteeing the freedom of establishment.

7.1.3 The availability of similar investment institutions

It has been observed in this study that the examined jurisdictions have investment law regimes which have led to the establishment of regulatory institutions. Such institutions include the Rwanda Development Board (RDB), the Tanzania Investment Centre (TIC) and the Kenyan Investment Promotion Authority (KIPA). Each of these institutions has managed to establish a so-called one-stop centre in their respective jurisdiction.[156] These regulatory authorities can be used to manage cross-border incorporations more easily, cheaply and effectively in order to make the harmonized provisions a reality.

7.1.4 Positive thinking about the introduction of the East African Limited Liability Company

The idea of introducing a new corporate form that would be available in every Partner State with identical legal conditions – the so-called East African Limited Liability Company – is premised upon the need to foster cross-border business.[157] The justification for this kind of legal form is based on the fact that the majority of companies existing in the EAC region are private companies in the nature of small and medium enterprises (SMEs). At the same time, it can be observed that only a few of them engage in cross-border business. That being the case, there is a need to enable SMEs to access the EAC Common Market. The same argument was made in Europe in 2008 for the introduction of the *Societas Privata Europaea* (SPE), but this new form was rejected because of the existing fundamental differences in company laws, such as board structures.[158]

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[155] See Stefan Grundmann, The Structure of European Company Law: From Crisis to Boom. European Business Organization Law Review 2004, Vol. 5, No. 4, 601-633.

[156] The idea of establishing a one-stop centre originated from the World Bank Doing Business reports as one of the measures to improve the business environment at the level of entry; see World Bank and International Finance Corporation, Doing Business in 2004: Understanding Regulation, xviii, 18, 25.

[157] Schirmer, (n 1) 169 et seq.

[158] Ibid. 170-171.

However, it may be argued that the environment in the EAC is different, and such an idea is likely to materialize.[159] Private companies are more prominent in the EAC region than public companies. For this reason, the introduction of a private limited liability form of EAC company is more promising when it comes to exploring the potentiality of company law in furthering regional economic integration in the EAC. Furthermore, our field research revealed that this legal form is supported by the majority of academics and practitioners from all the three examined jurisdictions. Some practitioners, nonetheless, remain sceptical of the idea. They argue that the introduction of a new legal form is not going to act as a wonder medicine in furthering cross-border business, but may face the same problems that are facing existing private companies in the Partner States as a result of weak company law regimes. To them, therefore, it is more important to concentrate on modernization of the existing company laws, rather than introducing a new legal form. On the one hand, this argument makes a lot of sense, bearing in mind that the companies will be registered under the existing laws in a particular Partner State. These must therefore be modernized. On the other hand, a regional company form could operate more flexibly in the region than the existing forms, and could serve as a role model for the modernization of national company forms. Therefore, we think the idea should not be regarded as being untenable.

7.1.5 Other factors: Prevalence of common law

The prevalence of common law legal system in the EAC Partner States also provides an opportunity for harmonization of company laws. Originally, Rwanda and Burundi had a civil law orientation, while the rest of the Partner States were common law countries. Our research shows, however, that Rwanda's company legislation, which was originally based on Belgian/French civil law, began to move in the direction of UK company law in 2004. This gradual shift from civil law to common law reached its peak in 2009 with the passing of Law No. 27/2009 of 27/04/2009. The subsequent amendments and repeals have further intensified the move towards common law. Although it was not officially acknowledged, some respondents from various institutions in Rwanda pointed out that Rwanda is moving in the direction of common law. Different legal systems become a problem if they are associated with rigid company law principles, which the Partner States are not ready to compromise on. A good example here would be the German two-tier board system and the British one-tier board system.[160] With the existence of one-tier board systems in all the examined jurisdictions, it may be concluded that the process of harmonization should be easier to achieve in the EAC region than in the EU region.

7.2 Challenges facing the harmonization of company laws in the EAC

But where there is light, there is shadow. Despite the many opportunities there are also quite substantial challenges to the harmonization of company laws in the EAC.

7.2.1 Different requirements for formation of company branches

The laws governing the formation of company branches make the freedom of establishment meaningful. This is because companies formed in different jurisdictions gain

[159] Ibid. 171-172.
[160] Ibid. 170-171.

access to the other jurisdictions by using the option of establishing branches. If conditions for the formation of branches are tightened, the freedom of establishment is negatively affected. The three examined jurisdictions show different conditions for the formation of branches. Tanzania requires the presence of a local representative, among other conditions such as the incorporation documents of the foreign company, while Rwanda requires at least one of the directors to reside in Rwanda on top of incorporation and other documents of the foreign company.[161] Kenya requires, in addition to the other conditions, 30 percent ownership by a Kenyan citizen by birth in the mother company. These differences are a challenge to harmonization.

Furthermore, the requirements for foreign companies in Rwanda do not apply to companies formed in any of the EAC Partner States. Although this is the case, practice shows that companies formed in other EAC Partner States also need to establish branches in Rwanda for them to operate in Rwanda. We argue that local treatment should start with dispensation of the need to form and register branches in Rwanda. Instead, it should be possible for those companies to operate directly as local companies, as long as such companies have been legally incorporated in one of the EAC Partner States.

7.2.2 Differences in the speed of coping with new developments

The speed of adoption of new provisions to cope with recent developments is different. For instance, Tanzania started to modernize its company laws earlier than the other countries. The Companies Ordinance of 1932 was repealed in 2002, while Kenya remained with its Companies Act of 1948 until 2015, and Rwanda started major company law reforms in 2009. However, the speed of Tanzania then became slower compared to the other two jurisdictions. Thus, since the company law reforms of 2002, in which Tanzania adopted the UK Companies Act of 1985, there have been no major company law reforms to date. The Kenyan Companies Act 2015 adopted the UK Companies Act of 2006, which is quite modern in its contents. Furthermore, since 2009 Rwandan company law has been the most dynamic company law regime in the region, with two main repeals, one in 2017 and the other in 2018.

The Rwandan company law is the first to incorporate specific provisions relating to the EAC Treaty and the EAC-CMP. By contrast, the Kenyan Companies Act is silent on this aspect, in spite of the fact that it was enacted six years after the EAC-CMP. Likewise, the 2012 Tanzanian company law amendments do not contain any provision relating to the EAC Treaty, although they came three years after the entering into force of the EAC-CMP. Given these differences in speed of coping with new developments, it is hard to see how the minimum standards can be achieved.

[161] See above 2.2.2.4. The other documents required for establishment of a branch in Rwanda include a notarized power of attorney, notarized copies of memorandum and articles of association, a certificate of registration issued in the country of incorporation by the registration authority, a notarized resolution to open a branch, and passport copies of shareholders or directors; for details, see Rwandan Development Board, Registration of Foreign Companies, available in the Internet at http://businessprocedures.rdb.rw/procedure/11/7/step/17?l=en. Accesses on 22nd March 2018.

7.3 Differences in the coverage of company laws

The EAC Partner States have company laws which differ in terms of comprehensiveness. It has already been mentioned that Kenya has the most comprehensive company law in the EAC region, with very modern company law principles. For instance, the provisions on the concept and treatment of stakeholders and ESG reporting in the Kenyan Companies Act 2015 are missing in the company laws of the other Partner States. Rwanda company legislation, on the other hand, contains provisions on corporate governance, which is normally subject to corporate governance codes. This makes this law more demanding than others in the region, because such principles can be enforced just like other provisions of the law, while under normal practices, they are a subject of soft-law. Tanzanian company law is the least demanding in all respects. Given the extent of the differences, it is not easy to set minimum standards.

7.4 Differences in economic development

The levels and tempo of economic development in the EAC Partner States are different. Of the three examined Partner States, Kenya is the leading economic power in the EAC region, while Rwanda is the fastest-growing economy in the region. Tanzania takes the third position. These differences may be partly attributed to the historical development of the said countries, which applies well to Kenya and Tanzania[162] than for Rwanda.

7.5 Competition to attract FDI

It has been observed that every EAC Partner State is struggling to modernize its regulatory environment, including an overhaul of their investment and company laws with a view to attracting more investors, especially foreign direct investments (FDIs). This individualism, and absence of regionalism, in attracting FDIs is a threat to the harmonization of company laws. This factor has been observed in previous studies, especially on investment.[163] The Joint Export and Investment Promotion Strategies (JIPS) of 2006, which identified solutions to the problem of attracting FDI, never became fruitful. The EAC Development Strategy, which advocated the enactment of a common EAC investment strategy, and called for the development of a mechanism for equitable sharing of benefits and costs of EAC integration by 2016, also failed. The EAC industrialization policy also failed to address the issue.[164]

8 Recommendations

On the basis of our research findings we recommend the following:

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[162] It is argued that Kenya has had preferential treatment since colonial times, a fact which has enabled Kenya to become more advanced than the other EAC founding Partner States, Tanzania and Uganda. See Elvis Binda, "Free Movement of Capital and the EAC Monetary Union," in Ugirashebuja, J., Ruhangisa, J., Ottervanger, T. and Cuyvers, A. (Eds.) East African Community Law: Institutional, Substantive and EU Comparative Aspects, Brill, 2017, 399.

[163] Binda, for instance, argues that it is likely that a Partner State may vehemently oppose anything that could deter or divert the flow of FDI into its territory, even if it is a regional integration requirement; see Binda, ibid. 401.

[164] For details of these failed attempts, see Binda, ibid. 402.

a) Higher priority for company law through more activism, both on the EAC and the Partner States level. In particular, at the EAC level, the EACJ, EALA and the Council should play a more active role in the process. The Partner States should promptly and actively participate in the harmonization process by implementing the EAC primary and secondary instruments aimed at harmonization of company laws.

b) Multi-track approach to harmonization of company law

Based on the circumstances obtaining in the EAC region, it is recommended that the harmonization of company laws should take a multi-track (hybrid) approach. This will involve harmonization of national company laws by the Partner States *suo moto*. It will also involve the adoption of a new EAC-wide corporate entity (the East African private limited company), coupled with uniform regulations which should be available in all Partner States. There should also be harmonization of company laws through EALA Acts in the form of a model company law statute.

c) Enhancing cooperation among Partner States in harmonization of company law

To hasten the modernization and harmonization of company laws in the EAC region, it is recommended that the Partner States should cooperate in certain aspects. These include the sharing of information by administrative authorities (registration offices). The sharing of information could be achieved by the actualization of Regulation 11 of the EAC-RoE Regulations which requires the Partner States to cooperate by sharing information,among competent authorities.[165] However, these regulations apply to public companies only. Furthermore, to ease the registration process, we recommend to establish an EAC companies register in each company registry for branches and cross-border groups of companies registered in the EAC Partner States by EAC citizens.

d) Selected focus areas of harmonization

Finally, we recommend that harmonization should focus on certain important areas which have an immediate effect on cross-border business. These areas include the common concept of a limited liability company, the equal treatment of companies registered in the EAC Partner States, the removal of restrictions on formation of branches and subsidiaries, common procedures in the formation of single-shareholder companies, and common management and corporate governance principles.

[165] The term Competent Authority is defined under the Directive of the EAC on Competent Authorities (Directive 2014/19/EAC of the Council) to mean the agency that primarily regulates securities markets in the Partner State; see Art. 1 of the Directive 2014/19/EAC.

9 Areas for Further Research

Due to time and resource constraints, it has not been possible to explore the harmonization of company laws in all the EAC Partner States. Thus, there is a need to conduct further research on the harmonization of company laws in the remaining EAC Partner States, namely Uganda, Burundi and South Sudan. For the same reason, the company laws of the examined EAC Partner States could not be explored in all of their aspects. In particular, a deeper empirical study is required to get an idea of the actual number of limited liability companies that are currently operating across borders, and their share in the process of facilitation of business in the region compared to other forms of business associations. Besides this, the areas of mergers and acquisitions, insolvency and reconstruction, as well as winding up procedures, demand separate comprehensive research because of their vastness, technicality and significance in cross-border trade within the EAC region.