

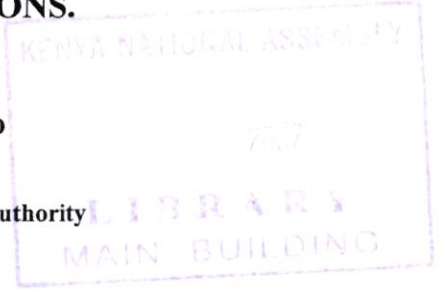


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THE EAST AFRICAN COMMUNITY CUSTOMS UNION ACT 2004, APPLICATION AND IMPLICATIONS.

BY

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A. INTRODUCTION.

Following the signing of the Treaty for the East African Community on 30 November, 1999, it took four years to negotiate the customs Union protocol which incorporates a 5-year transitional implementation period.

The Customs Protocol was ratified in November 2004 following the passing by the East African Legislative Assembly of the East African Community Customs Management Act¹ of 2004. The Protocol came into force on 1st January 2005 and is expected to be implemented over a five year period.

This paper reviews the application and implications of the East African Community Customs Management Act, 2004. In so doing it is Intended to broadly review the policy behind the East African Community Customs Management Act (herein after referred to as EACCMA), its scope, content and finally the implications of its application.

B. Policy underlying EACCMA

The EACCMA arises out of the resolve by the Partner states of the East African Community to establish an East African Customs Union and a common market in order to strengthen their economic, social, cultural, political, technological and other ties for their fast, balanced and sustainable development². The EACCMA also falls within the *East African Community Development Strategy (2001-2005)* to enhance trade liberalisation and development among other sectors. In that vein, pursuant to Article 75(7) of the Treaty for East African Community, the Partner States negotiated and concluded a *Protocol on the Establishment of an East African Community Customs Union*.

The Protocol stipulates the policy on aspects of trade liberalisation and development as follows:

1. Customs administration (including harmonised commodity description and coding system; harmonised trade information and documentation; and trade facilitations);
2. Trade liberalisation (including the establishment of a common external tariff; elimination of internal tariffs and elimination of non-tariff barriers);
3. Trade-related aspects (including Rules of origin; national treatment; anti-dumping measures; subsidies and countervailing measures; safeguard measures; competition; re-exportation of goods and restrictions and prohibitions to trade);

¹ Paper delivered at the 2nd Seminar for the Foreign Affairs & Trade Committees of National Assemblies of Partners States of EAC and the East African Legislative Assembly, Entebbe, 27-28 January, 2005.

4. Export promotion schemes (including duty drawback schemes; manufacturing under bond schemes; duty and value added tax remission schemes; and export processing zones);
5. Special economic zones such as free ports; and
6. Exemption regimes.

The Protocol also provides for steps to address imbalances arising out of the establishment of the Customs Union, for mechanisms for handling trade arrangements with countries and organisations outside the Customs Union and for a common Customs Law of the Community. With respect to revenue collection, the partner states agreed that in line with the principle of subsidiary (a principle underlying the East African Community), revenue collection can be best be handled at the level of partner states for the time being.

Consequently collection of revenue at the centre would require an agreement between the partner states on how to manage the finance, appropriation and distribution of revenue and costs.

The decision on whether to establish a single Common Customs Administration centrally would be the subject of negotiation during the transition period between 2005 and 2010. In the meantime the community is expected to play the general role, among others, of initiating policies on customs and trade matters and co-ordinate such policies in the partner states. Those responsibilities which can be co-ordinated by the communities are those which can best be performed at the regional level in line with the principle of subsidiary. These include:-

1. Administration of the common external Tariff including the common Tariff Nomenclature;
2. Enforcement of the common customs law;
3. Liberalisation of Internal trade;
4. Rules of Origin;
5. Computation of Trade statistics;
6. Information technology;
7. Finance and Accounts;
8. Training;
9. Trade Remedies/Dispute settlement;
10. Compliance and control , and
11. Negotiations

Other functions such as the compilation of trade statistics and information technology would continue to be handled by the Partners States 'Revenue Authorities'. This is in line with Article 75(2) of the Treaty of the East African Community which envisages a progressive establishment of the Customs Union in the course of a transitional period determined by the Council of Ministers of the Partners States.

C. Scope and Context of EACCMA

1. Scope

The customs protocol provides that the customs law of the community shall consist of:

- (a) Relevant provisions of the Treaty;
- (b) The Protocol and its annexes;
- (c) Regulations and directives made by the council;
- (d) Applied decisions made by the court;
- (e) Acts of the Community enacted by the Legislative Assembly ; and
- (f) Relevant principles of international law.

It is further provided that the Customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided in the Protocol.

The EACCMA, therefore, aims at translating the East African Customs Management Policy into law.

2. Content of EACCMA

(a) Purpose

The main objective of the EACCMA is to provide for the management and administration of customs and for related matters in the East African Community Customs Union ³.

(b) Preliminary Matters

Part 1 of EACCMA contains the short title of the Act, its applicability to the Partner States and the commencement date as well the interpretation of significant terms and expressions used in the Act ⁴.

(c) Administration

Part 2 of the Act⁵ deals with the general administration of the Customs Union covering the duties and staffing of the East African Community Directorate of Customs and Trade as established under the Treaty for the East African Community. It further provides for the method of disclosure of duties at border controls, ports, customs areas and other areas of operation. It also caters for the powers of designated staff of the Directorate and describe goods subject to Customs control.

(d) Importation

Part 3 of the Act⁶ regulates the importation of goods into the partners states from a foreign country. Provision is specifically made for prohibited and restricted imports, arrival and report of aircraft and vessels, arrivals overland, clearance by pipeline, unloading and removal of cargo, entry, examination and delivery of cargo, the utility of customs warehouses and management of goods deposited in them and passenger clearance.

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¹1. Long Title to the Act ;3.East African Community Customs Management Act, 2004, Ss 1-2;
4. Ibid Ss 3-17; 5.Ibid Ss 18-46; 6.Ibid Ss 47-69;

(e) Warehousing of Goods

Part 4 of the Act⁷ deals with the warehousing of goods. It defines dutiable goods liable to be warehoused, the procedure for warehousing, re-gauging and re-valuation delivery and removal from warehouses, management, licensing and control of warehouses and warehoused goods and transfer of goods from one warehouse to another.

(f) Exportation

Part 5 of the Act⁸ regulates the exportation of goods from the Partners States to a foreign country. The part in particular deals with the handling of prohibited and restricted goods, entries of cargo for export, loading of exportable goods on aircraft and vessels, departure overland and the handling of goods in transit or transshipment.

(g) Departure and clearance of aircraft and Vessels

Part 6 of the Act⁹ regulates the departure and clearance of aircraft and vessels used in the delivery of cargo from any port or place in a Partner State to any foreign port.

(h) Importation and Exportation by post

Part 7 of the Act¹⁰ applies the Act to postal articles by providing for their method of carriage through the post office or registered courier services.

(i) Carriage Coastwise and Transfers of goods

Part 8 of the Act¹¹ empowers the council to gazette goods which are prohibited or restricted from carriage Coastwise and transport thereof (by land, sea and air) from any part of a partner state to another part. The handling of such goods is regulated by the Commissioners through issue of relevant permits, examination and variation of procedure and conditions for their handling.

(j) Securities

Part 9 of the Act¹² deals with instances when the Commissioners may require security from a person in order to protect revenue. The part includes the use of approved and enforceable bonds and securities and the status of sureties.

(k) Duties

Part 10 of the Act¹³ provides for liability for import duty. This includes imposition of import duty on goods; exemption of certain goods such as re-imports and temporary imports from duty computation of duty, mode of payment of duty. There is also provision for exemption regimes, anti-dumping and countervailing duties, drawbacks, remission, rebate and refund of duty. The part also provides for the application of the preferential treatment to goods imported under COMESA and SADC arrangements pursuant to Partners State legislation¹⁴.

(l) Customs Agents

Part 11 of the Act¹⁵ regulates the licensing and authority of customs agents, their role, powers and liability for the payment of customs duties.

7. *Ibid* Ss 70-87; 8 *bid* Ss 88-92; 9. *Ibid* Ss 93-95; 10. *Ibid* Ss 96-105; 11. *Ibid* Ss 106-109
12. *Ibid* Ss 110-144; 13. *Ibid* S.112; 14. *Ibid* Ss 145-8; 15. *Ibid* Ss 149-59;

(m) Control of Smuggling

Part 12 of the Act¹⁶ stipulates measures to prevent smuggling including powers of arrest, search and impound offending vessels, persons and search of premises and production of books, documents and electronic data.

(n) Manufacturing under Bond

Part 13 of the Act¹⁷ empowers the Commissioner, upon request, to license persons to manufacture under bond on specified premises subject to stipulated conditions relating to provision of facilities importation of equipment, machinery and materials and entry of the manufactured goods or home consumption.

(o) Export Processing Zones & Free Ports

Part 14 of the Act¹⁸ regulates the handling of goods in export processing zones and free ports and the management of the zones and ports.

(p) Inward and outward Processing

Part 19 provides for inward processing by which goods can be brought into a partner state conditionally exempted from duty where such goods are intended for Manufacturing, processing or repair and subsequent exportation. Provision is also made for outward processing by which goods which are in free circulation in a partner state may be temporarily exported for manufacturing, processing or repair outside the partner state and thereafter be re-imported.

(q) Application of information Technology

Part 16 of the Act²⁰ provides for the application of information appropriate situations when handling technology in customs formalities.

(r) Offenses, Penalties, Forfeitures and seizures

Part 17 of the Act²¹ creates specific offences in customs matters and also provides for the respective penalties for such offences including sentences of imprisonment, forfeitures, seizures and fines in appropriate cases. It also regulates the procedure and powers of seizure as well as restoration of seized goods.

(s) Settlement of cases by the Commissioner

Part 18 of the Act²² empowers the Commissioners of Customs in each partner state to settle certain cases without recourse to court.

(t) Legal Proceedings

Part 19 of the Act²³ provides for the institution and conduct of legal proceedings including the courts with appropriate jurisdiction the evidential requirements and power to prosecute customs offenders as well as the period of limitation for such proceedings to be brought.

16. Ibid., Ss 160-7; 17. Ibid., Ss 167-169 19 .Ibid.,ss 171-86; 20 .Ibid.,ss 187-92; 21. Ibid.,ss 193-218; 22. Ibid.,s 219; 23. Ibid., ss 220-28

(u) Appeals

Part 20 of the Act ²⁴ provides for the judicial review of administrative actions made by customs officers and appeal before tax tribunals established in the Partner States.

(v) Miscellaneous Provisions

Part 21 of the Act ²⁵ regulates several general matters including the making of regulations, savings and transitional matters, precedence of the Act over Partner States corresponding legislation and applications of special law such as air legislation.

(w) Schedules

The schedules to the Act provide for a declaration of a customize officer (Schd. 1) prohibited and restricted imports (sched.2) prohibited and restricted goods (sched .3) valuation of imported goods liable to import duty (Sched. 4) exemption regime (sched. 5), form of warrant of distress (shced. 6)

D Implications of the Application of EACCMA

The EACCMA is basically a reproduction of the East African Customs Management and Transfer Act 1970 (EACMA) of the defunct East African Community a part from significant difference to cater for new circumstances. These include reference to the COMESA and SADC and the use of information technology to facilitate customs administration. The EACMTA has hitherto been the applicable customs law in the three partner states of Kenya, Uganda and Tanzania. Its provisions in a resurrected EACCMA would not, therefore, technically be difficult to implement by trained customs staff in the Revenue Authorities of the three partner states.

1) Dual Membership of Common Market Blocs

There are, nevetheless, challenges which the application of the EACCMA will face. First is what has generally been described ²⁶ as the need for joint trade negotiations and policy formulations in the context of COMESA, SADC, EU, WTO, AGOA, among others. In graphic terms it has been asserted thus ²⁷

*External threats to the customs Union Abound, with Kenya and Uganda's membership of the Common Market for Eastern and Southern Africa (COMESA) and Tanzania's membership of the Southern Africa Development Co-operation (SADC) seem as Potential conduits for dumping of products into the EAC Customs Union..
In that context it is noticeable that the World Trade Union (WTO).*

27 ³³ ³ 24 .Ibid., ss 229-31; 25 .Ibid., ss 232-54; 26) EAC, *Report of the Committee on Fast Tracking East African Federation (2004) pp 73-4, paragraph 340(v), xi; 27. EACCMA S. 112(A)*

(27 *The East Africa*, Newspaper 17-23 January 2005, pp 13) It is notable that the World Trade Union (WTO) prohibits Membership of two Customs Unions but the restriction will only come into force in 2008 a year before the East Africa fully becomes a free market with trade between the partner states being freed from tariff and non-tariff barriers. During the transitional period, Kenyan goods to Uganda and Tanzania will be subject to import duty which will be reduced to Zero between 2006 and 2008. The dual membership of COMESA and SADC effectively means that products such as beer from Egypt (a COMESA Member) and Sugar and dairy products from South Africa (a SADC member) could enter the EAC at preferential rates ^{27a}.

A recent notice ²⁸ issued to ports of entry by the Kenya Revenue Authority (KRA) indicated that sugar should be charged a duty of 100 percent (way above the external tariff of 25 per cent), while milk will attract 35 percent import duty. Both products will also be levied value added tax at 16 percent. This move is justified by KRA on the grounds that the higher duties would mitigate against dumping of goods from outside the EAC and would protect materials facing unfair competition from subsidised or cheaply produced imports. It is argued ²⁹ that the higher duties are covered by the anti-dumping legislation which is not regarded a restrictive trade practice within the WTO and which should be used to protect locally sourced raw materials.

Barley, a key ingredient in the East African Breweries production process would also benefit from anti dumping legislation since it's competes with the zero rated variety obtained from the European Union ³⁰

It is because of the above problems that the 3 Partner states have agreed to examine the distortions arising from the dual membership of other trading blocs in order to resolve the problem by the end of the transitional period (2008) during which goods exported from Kenya to its Partner states will be charged duty while those exported to Kenya will enter duty free. The review will definitely delay the functionality of the new system. It has indeed be reported ³¹ that exports worth US\$750,000 from Mukwano Industries in Uganda had been denied entry into Kenya following a demand by the Company to export the goods duty free. KRA has countered that the affected goods are intermediate or finished goods rather than raw materials qualifying for zero duty ³²

The EAC Council of Ministers has ruled that the competitions goods will only be eligible for export after paying prevailing national tariffs. The council has also given a two months window to Uganda to prove how and which industries are threatened by the 10 percent (Intermediate goods) and 25 percent (final product) common External tariff given suspension that the exemption would be a conduit for the dumping of goods which would suffocate industries in Kenya and Tanzania and lead to the loss of jobs in the cement plants and edible oil factories.

28 *The East African Newspaper* (17-23 January 2005) , p3;

29 *Ibid*; *EAC Report of the Committee on Fast Tracking East African Federation*

30 *Ibid* ; 32. *Ibid*

The above problems point to the enforceability of the customs Union and problems of dumping and unfair competition.

2) Most Favoured Nation Rules (MFN)

There is need to apply and enforce MFN rules for products meeting standards and rules of origin from the Partner states ³³

3) Harmonization of Additional Standards

A third area of challenge is the need to harmonize additional standards such as the Standardisation, Quality Assurance, Metrology and Testing (SQMT) in addition to the mutual recognition of Partner state certifications, utilisation of existing standard capacities in Partner States to facilitate wider traded products and save on time wasted on double certification at border points ³⁴. In this respect the use of information Technology will be essential ³⁵

4) Small and Medium Enterprises (SMES) Facilitation

Simplified mechanisms should be put in place to facilitate Informal sector and SME's cross border trade which in most cases is dominated by Women ³⁶ This is significant given the elaborate provisions of EACCMA on the handling of goods and imports subject to customs control and duty ³⁷

5) Redressing Developmental Imbalance

The Smooth operation of the Customs Union generally and the EACCMA would benefit from macro and micro-economic strategies to identify industries and infrastructure for support to assist in the development of the disadvantaged areas aimed at addressing existing imbalance ³⁸ This may call for review of the privatisation policies of some of the Partner States.

6) Harmonisation of Tax Policies

In line with Article 83(2) (e) of the Treaty for the East African Community , 1999, the Partner States should work towards harmonising their tax policies and tax incentives affecting both direct and indirect taxes in order to remove predatory tendencies and tax distortions aimed at realising a more effective and efficient allocation of resources within the community. ³⁹ In this regard, Tanzania should suspend the recently introduced US \$50 Business Visa

7) Additional External /Exit Points

To effectively combat smuggling, it is necessary to open and / or strengthen additional East African Exit/ Entry points along Somali/ Sudan / Mozambique / Zambia /Rwanda / Burundi / Ethiopia border points. This is essential in order to forestall undermining of the benefits of the Customs Union ⁴⁰

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³¹ *Ibid* ;EACCMA, s . 187;EAC Report , *Supra n. 33 Paragraph 340 (iv)*

³⁸ *EAC Report, Supra, Para 340 (vii);42 Ibid 39. Ibid . para 340 (viii)*

⁴⁰ *Ibid. para 340 (x)*

8) Other Implications

There are unforeseen or negative implications arising from the implementation of the EACCMA. One of these which has emerged recently arises from the imposition of the Common External Tariff (CEF) of 0 percent for raw materials and capital goods, 10 percent for intermediate goods and 25 percent for finished goods. Before the Customs Union drugs imported into Kenya and Uganda were Zero-rated. Following the Customs Union inception all imported medicines (following the Tanzania model) will attract a 10 percent tax. Effectively this will raise the cost of essential medicines for the treatment of malaria, HIV/AIDS, Tuberculosis and Diabetes by 10 percent. This will raise the cost of healthcare and may require review given the inconsistent treatment of medical items such as surgical stitching threads, cotton wool and gauze which are exempted from taxation in contrast to anaesthesia, Pain Killers and muscle relaxers used in surgical procedures, which are not⁴²

Secondly, there is likely to be a fall in revenue for partner states such as Uganda which had previously relied heavily on indirect taxes which will be lowered and, updating gradually phased out. Thirdly, is the challenge of information technology to capture information on revenue based on the Customs Union Arrangements.

Fourth, is the need to train Revenue staff to operate under the Customs Union both in the transitional period and when the Custom Service is fully implemented during the fiscal year 2007/2008.

Conclusion

An attempt has been made to assess, the application and Implications of the EACCMA by reviewing the Policy underlying the law, its scope, content and the challenge, for its implementation. The challenge revolve basically around the dual membership of the Partner states of similar regional markets, the need to address issues of dumping and unfair competition, the application of MFN rules, harmonisation of certification standards, the protection of SMEs, redressing regional development imbalance, harmonisation of tax policies, introduction and strengthening of External / Exit Points, reviewing the CET for certain goods, dealing with shortfalls in revenue arising from the implementation of the Customs Union, capacity building including the use of information technology and training revenue staff to operate under the new system.

⁵ 41. *East African Newspaper* 24-30 January 2005, pp.3-4