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EAST AFRICAN COMMUNITY COMMON MARKET
IMPLEMENTATION UPDATE – KENYA

JUNE 2016

Tracking Kenya's Compliance to the EAC Common Market Protocol.

USAID EAST AFRICA TRADE AND INVESTMENT HUB

COMMON MARKET IMPLEMENTATION UPDATE - KENYA

JUNE 2016

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I. SUMMARY

“... This House adopts the Report of the Departmental Committee on Agriculture, Livestock and Cooperatives on the Ratification of the East Africa Community (EAC) Protocol on Sanitary and Phytosanitary (SPS) Measures, laid on the Table of the House on Wednesday, 22nd June, 2016 and pursuant to Section 8 of the Treaty Making and Ratification Act, 2012, approves the ratification of the East African Community Protocol on Sanitary and Phytosanitary (SPS) Measures...” – Kenya National Assembly, 29th June, 2016.

On 29th June, 2016 the Republic of Kenya ratified the EAC Protocol on Sanitary and Phytosanitary Measures, a key instrument that proposes a common and improved framework in EAC to promote trade in food and agricultural commodities and strengthen the application of a harmonized approach for implementation of SPS measures and activities. Kenya now joins Uganda and Rwanda as the EAC Partner States that have complied with a ratification deadline of 30th June, 2016.

Ratification of the SPS Protocol is an important achievement for Kenya. It provides the legal basis for further reforms that are expected to guarantee better food safety measures, plant protection and animal health. When fully implemented in the region’s regulatory environment and institutions, the SPS Protocol is expected to: improve mitigation of risks arising from pests, diseases and food safety concerns; improve competitiveness of produce originating from the EAC in external markets; and help the region effectively contain major threats, such as larger grain borer in the recent past.

By ratifying the protocol, Kenya has made significant progress towards complying with Article 5(2)(a) of the EAC Common Market Protocol which requires Partner States to “harmonize and mutually recognize sanitary and phytosanitary standards and technical barriers to trade”. This action also contributes towards Kenya’s commitments to the WTO Agreement on the Application of SPS measures (concerning the application of food safety and animal and plant health regulations) and the Treaty for the Establishment of the East African Community (concerning cooperation in agriculture and food security).

The USAID East Africa Trade & Investment Hub worked closely with the Kenya Plant Health Inspectorate Service (KEPHIS) and other key public and private sector actors towards the ratification of this important protocol. The next steps for Hub support include working with the EAC to develop the regulatory framework to support the implementation of the protocol in the region.

Read more about the SPS Protocol in this month’s [Spotlight](#) on page 8.



June, 2016 – Kenya’s Cabinet Secretary in charge of agriculture, Mr. Willy Bett speaks at the Hub's EAC Sanitary and Phyto-Sanitary (SPS) Protocol Awareness Forum for legislators. The Republic of Kenya has approved the EAC SPS Protocol for ratification, beating the June 30 deadline.

Kenya has also embarked on reforms within its financial services sector. In the months leading to June 2016, Kenya published three draft Bills with potential for significant impact on capital market operations in the country. These are the Draft Financial Services Authority Bill (2016), The Draft Nairobi International Financial Centre Bill (2016) and the Draft Movable Property Security Bill (2016). These draft bills are proposed to deepen the delivery of financial services in the country. The draft Nairobi International Financial Centre Bill for example seeks to enhance trade by facilitating the development of an efficient and globally competitive financial services sector in Kenya. The Draft Movable Property Security Bill proposes a framework to facilitate the use of movable assets as collateral for credit facilities, a move that has potential to increase access to credit. A legal review shows that the proposals do not contain any measures that are inconsistent to Kenya’s obligations under Article 24 of the EAC Common Market Protocol, connected to the free movement of capital.

To incentivize domestic production of sugarcane, Kenya also published the Value Added Tax (Amendment) Bill 2016 that, inter alia, seeks to amend the Value Added Tax Act (2013) by removing Value Added Tax from transportation of sugarcane from the farms to the milling factories. This move is also neutral to Kenya’s obligations under the common market protocol. Similarly, the Civil Aviation (Amendment) Bill (2016) that imposes additional requirements for persons flying the Kenyan Airspace under clause 46A is common market implementation neutral given that it also does not contain discriminatory elements that affect other EAC Partner States. It however imposes further compliance burdens for persons flying the Kenyan airspace.

II. LEGAL AND REGULATORY ACTIVITY (APRIL TO JUNE 2016)

In months of April to June 2016, the Republic of Kenya published the following bills and motions, selected in view of their potential impact on implementation of the EAC Common Market Protocol:

- East Africa Community (EAC) Protocol on Sanitary and Phytosanitary (SPS) Measures (ratification)
- Draft Finance Services Authority Bill, 2016
- The Draft Nairobi International Financial Centre Bill, 2016
- The Draft Movable Property Security Bill, 2016
- The Value Added Tax (Amendment) Bill, 2016
- Civil Aviation (Amendment) Bill 2016
- Kenya Revenue Authority Directive on New Valuation Requirements for importation of motor vehicles
- Kenya Bureau of Standards revised PVoC manual

The published bills are neutral to Kenya's legal obligations to the protocol, while the recently-ratified EAC Protocol on SPS will improve Kenya's compliance with the protocol once the instruments of ratification have been deposited with the EAC Secretary General. The bills however contain reform measures that can potentially contribute towards deepening the trade and investment environment in Kenya and in the EAC.

Bill, Draft Regulation or Directive	Date of Publication	Areas of Potential Relevance to the EAC Common Market Protocol	Key Impacts If Implemented	Potential Effect on EAC CMP Compliance
1. The draft Financial Services Authority Bill 2016	<p>26.05.2016</p> <p>Key Stakeholders:</p> <p>Treasury;</p> <p>Capital Markets Authority;</p> <p>Retirements Benefits Authority;</p> <p>Insurance Regulatory Authority</p>	Article 24 of the CMP, Movement of Capital (Securities, Direct Investment, Credit Operations and Personal Capital Operations)	<p>This Bill proposes to impose a financial levy on financial institutions under clause 153 (1) of the Draft Bill by creating a financial sector levy.</p> <p>Clause 153(2) sets out the formula for calculating the levy for the first five years after the commencement of the Act, which is proposed not to exceed the amount of current levy.</p>	Neutral

	<p>Next Step: National Assembly debate</p> <p>Person Responsible for next step: The Cabinet Secretary for Finance</p>		<p>The Bill however does not provide the formula for calculating the levy after the first five years. The Draft Bill only states that this is to be completed later. This unpredictability is not good for business planning.</p> <p>Clause 156(2) provides that the levy is payable after 30 days of assessment. Under clause 158(1) prescribed penalty levy is payable for failure to pay the levy in time.</p> <p>It is noteworthy that there are already various levies under different financial laws. Under the Insurance Act, for example, there are the Insurance Premium levy and the Insurance Training Levy under sections 197A and 197B respectively. The Draft Bill does not indicate that the levies under other laws will be repealed once the financial sector levy comes into force. The part of the Bill on repealed and amended laws is still incomplete.</p> <p>Although its impact in so far as the legal EAC CMP commitments is neutral, if provisions on levy in other financial laws are not repealed, the financial sector levy will increase the cost of doing business.</p>	
2. The draft Nairobi International Financial Centre Bill 2016	<p>26.05.2016</p> <p>Key Stakeholders: Treasury; Capital Markets Authority; Retirements Benefits Authority; Insurance Regulatory Authority</p> <p>Next Step: National Assembly Debate</p>	Article 24 of the CMP, Movement of Capital (Securities, Direct Investment, Credit Operations and Personal Capital Operations)	The Bill proposes amendments to enhance trade in financial services by providing for a framework to facilitate and support the development of an efficient and globally competitive financial services sector. It does not contain measures inconsistent to Kenya's obligations under the CMP.	Neutral

	Person Responsible for next step: The Cabinet Secretary for Finance			
The draft Movable Property Security Bill, 2016	26.05.2016 Key Stakeholders: Treasury; Capital Markets Authority; Retirements Benefits Authority; Insurance Regulatory Authority Next Step: National Assembly Debate Person Responsible for next step: The Cabinet Secretary for Finance	Article 24 of the CMP, Movement of Capital, Credit Operations (external borrowing by residents and lending abroad by residents)	The Bill proposes to boost credit operations by facilitating the use of movable assets as collateral for credit facilities. The bill does not contain measures inconsistent to Kenya's obligations under the CMP.	Neutral
The Civil Aviation (Amendment) Bill, 2016	18.04.2016. Key Stakeholders: Kenya Civil Aviation Authority; Ministry of Transport; Kenya Airports Authority Next Step: First Reading	Transport services	The Bill inserts a clause 46A which imposes additional requirements for persons flying within the Kenyan airspace. Such persons are required to carry on board documents including:- i) Certificate of registration ii) Certificate of air-worthiness iii) Aviation personnel certificate of each crew member iv) Aircraft radio licences etc	Neutral, but increases the burden for regulatory compliance

	<p>Person Responsible for next step: Leader of the Majority, National Assembly</p>		The Bill does not contain measures inconsistent to Kenya's obligations under the CMP.	
The Value Added Tax(Amendment) Bill 2016	<p>04.04.2016.</p> <p>Key Stakeholders:</p> <p>Kenya Revenue Authority; Ministry of Finance; Consumers Federation of Kenya</p> <p>Next Step: Second Reading</p> <p>Person Responsible for next step:</p> <p>Wafula Wamunyinyi (MP)</p>	Elimination of tariffs and equivalent measures on intraregional trade	The Bill proposes to reduce the cost of production of sugar in Kenya. It seeks to do this by amending the Value Added Tax Act, 2013 thus exempting sugarcane farmers from paying Value Added Tax on transportation of sugarcane from the farms to the milling factories. The Bill does not contain measures inconsistent to Kenya's obligations under the CMP.	Neutral
Motion to adopt the East African Community (EAC) Protocol on Sanitary and Phytosanitary (SPS) Measures	<p>22.06.2016</p> <p>Key Stakeholders:</p> <p>Ministry of Agriculture, National SPS Committee, Kenya Plant Health Inspectorate Services, Kenya Flower Council, Directorate of Public Health, Directorate of Economic and Internal Trade, Kenya Private Sector Alliance, East Africa Trade & Investment Hub</p>	Article 5(2)(a) of the EAC Common Market Protocol	<ul style="list-style-type: none"> • A guarantee of better food safety measures, plant protection and animal health • Enhanced mitigation of risks arising from pests, diseases and food safety concerns • Improved competitiveness of produce originating from EAC in external markets • Effective containment of major threats, such as larger grain borer in the recent past 	Positive Reform

III. SPOTLIGHT: EAST AFRICAN COMMUNITY PROTOCOL ON SANITARY AND PHYTOSANITARY MEASURES

Entry into Force:	12 th July 2013
What is the Legal Basis for the EAC SPS Protocol?	<p>The legal basis for the East Africa Community (EAC) Protocol on Sanitary and Phytosanitary (SPS) Measures is derived from the EAC Common Market Protocol, the WTO Agreement on the Application of SPS Measures (“The WTO SPS Agreement”) and the Treaty for the Establishment of the East African Community (“the EAC Treaty”).</p> <p><u>The EAC Common Market Protocol</u> requires EAC Partner States to harmonize and mutually recognize sanitary and phytosanitary standards and technical barriers to trade.</p> <p><u>The WTO SPS Agreement</u> entered into force on 1st January 1995. It concerns the application of food safety and animal and plant health regulations.</p> <p><u>The EAC Treaty</u> provides the institutional and legal framework for domestication of the WTO SPS Agreement. Articles 105 to 110 of the EAC Treaty provides for cooperation in agriculture and food security. In addition, it provides a basis for the creation of an improved and common legal standard for key agricultural trade issues:</p> <ul style="list-style-type: none"> • Adoption of internationally accepted quality standards for food processing – Article 105 (2)(e) • Harmonization of quarantine policies, legislation and regulations to ease trade in seeds – Article 106 (e) • Development of a common regulatory framework in livestock multiplication, trade in semen, embryos, breeding stock, drugs and vaccines, and a series of quarantine regulations – Article 107 (d), (e) • Harmonization of policies, legislation and regulations for enforcement of pests and disease control – Article 108 (a) • Harmonization of quality standards of inputs and products including food additives.
Objective	<p>The East African Community Protocol on SPS measures (“the EAC SPS Protocol”) provides an implementation framework for the WTO SPS Agreement and the EAC Treaty provisions on SPS through:</p> <ul style="list-style-type: none"> • Promoting trade in food and agricultural commodities within the EAC and between EAC and other trading partners • Implementing the principles of harmonization, equivalence, regionalization, transparency and risk assessment. • Strengthening the application of a common and improved standard for implementation of SPS measures and activities.

What are Kenya's Reform Obligations Related to the EAC SPS Protocol?	<p>Kenya is required to ratify the EAC SPS Protocol vide an Act of Parliament and thereafter deposit the protocol and instruments of ratification with the EAC Secretary General.</p> <p>Article 17 of the EAC SPS Protocol provides that "...the protocol and all instruments of ratification shall be deposited with the Secretary General who shall transmit certified true copies of the Protocol and instruments of ratification to all Partner States."</p>
What Impact After Ratification and Implementation?	<ul style="list-style-type: none"> • A guarantee of better food safety measures, plant protection and animal health • Enhanced mitigation of risks arising from pests, diseases and food safety concerns • Improved competitiveness of produce originating from EAC in external markets • Effective containment of major threats, such as larger grain borer in the recent past
Who Are The Key Stakeholders?	<p>Ministry of Agriculture, National SPS Committee, Kenya Plant Health Inspectorate Services, Kenya Flower Council, Directorate of Public Health, Department of Veterinary Services, Directorate of Economic and Internal Trade, private sector, East Africa Trade & Investment Hub</p>
What Progress Has Been Recorded?	<p>Signature of the EAC SPS Protocol by Kenya: 12th July, 2013 (Minister for Agriculture)</p> <p>Cabinet Memorandum on Ratification: 11th July, 2014 (Secretary to the Cabinet)</p> <p>Cabinet Resolution to Ratify</p> <p>Forum in Support of Ratification: 10th June, 2016 (Ministry of Agriculture, KEPHIS, EATIH)</p> <p>Presentation of the SPS Protocol and memorandum on Protocol to Speaker, National Assembly</p> <p>Departmental Committee on Agriculture Hearings - Week of June 13th 2016</p> <p>Report of the Departmental Committee laid on the Table of the House on 22nd June, 2016</p> <p>National Assembly Debates and Ratifies the Protocol on 29th June, 2016</p>
What Are The Next Steps?	<p>Preparation of instruments of ratification</p> <p>Sign, seal and deposit Instruments of Ratification with the EAC Secretary General</p> <p>Development of EAC SPS Bill</p> <p>Gazettement of EAC SPS Bill</p> <p>Domestication at Country Level</p>
Parties Responsible for Next Stages?	<p>Ministry of Industry, Trade & Cooperatives, Ministry of EAC, Labour and Social Protection, Attorney General, EAC Secretariat, EALA</p>
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Resources	<p>Treaty Establishing the East African Community</p> <p>The WTO Agreement on the Application of Sanitary and Phyto-sanitary Measures</p> <p>The East African Community Protocol on Sanitary and Phyto-sanitary Measures</p>

IV. METHODOLOGY

The Common Market Implementation Update (Kenya) tracks key legal, regulatory and administrative developments that impact on the implementation of the EAC Common Market Protocol. It tracks the expected impact that selected reform proposals will have on the movement of capital, services and goods once promulgated. The implementation update works on an *ex-ante* basis (forward looking).

The update flags reform proposals at their development stage, and highlights the key aspects of the reform proposals that will have a bearing on the implementation of the EAC Common Market Protocol if promulgated. The reform proposals tracked by the update can either be positive or negative to the implementation of the protocol. It thus supports the stand-still requirements of the protocol, which require EAC Partner States to refrain from adopting new reform measures that are inconsistent to their obligations to the protocol. It also supports the roll-back requirements of the protocol, where the identified reform proposal is positive.

The objective of the *ex-ante* approach is to accelerate implementation of the EAC Common Market Protocol by enabling the public sector, private sector representatives, consumer groups and other reform agents to anticipate the reform pipeline in Kenya, and to influence the reform process accordingly. This approach further supports implementation of *The Constitution of Kenya (2010)* by facilitating a platform for effective advance consultation and public comment on proposed bills, regulations and administrative measures. This is in line with Article 118 (1) (b) of the Constitution which states:- “*Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees*”

This update focuses on 3 implementation areas that are considered to be foundational to the implementation of the protocol. These are the movement of capital, services and goods.

Movement of Capital	The update tracks legal, regulatory and administrative developments that potentially facilitate or impede Kenya’s compliance with its commitments to liberalize the movement of capital, specifically as relates to the <i>Schedule on the Removal of Restrictions on the Free Movement of Capital</i> . This schedule covers 20 operations connected to securities, credit, direct investment and personal capital transactions.
Movement of Services	The update tracks legal, regulatory and administrative developments that potentially facilitate or impede Kenya’s compliance with its commitments to international norms of fairness and non-discrimination – comprising national treatment and most favored nation treatment – in the trade of services. Specifically the update tracks reform proposals that potentially impact on the <i>Schedule of Commitments on the Progressive Liberalization of Services</i> . All sectors of Kenya’s commitments are covered in the update.
Movement of Goods	The update tracks legal, regulatory and administrative developments that potentially facilitate or impede Kenya’s compliance with its four key obligations towards the movement of goods per the protocol – implementation of the internal tariff, implementation of the external tariff, removal of non-tariff barriers, and implementation of SPS measures. Specifically, it tracks commitments in relation to <i>Article 5(2)(a) of the East African Community Common Market Protocol</i> .

When there is relevant legislative activity, the update also tracks county-level bills and regulatory proposals that have a potential impact on implementation of the protocol. Selected are the county governments that lie along the Northern Corridor or are border counties. These are: Mombasa, Taita Taveta, Kajiado, Nairobi, Busia and Migori, Uasin Gishu, Nakuru, Kisumu, Makueni, Machakos and Nairobi.

Data Sources

The update uses published bills, drafts regulations and directives. The update also scans published notices in the official Kenya Gazette and reviews discussions in the widely circulating dailies in Kenya. The websites of key public and regulatory agencies are also regularly tracked to identify any new proposals. The data collection process is further complemented by visits and telephone calls to key public and regulatory agencies for confirmation of published reform proposals.

Senior trade and investment legal experts in collaboration with the private sector and Hub experts conduct the research and analysis. The legal experts are Advocates of the High Court of Kenya, hold current practicing certificates and are members of the Law Society of Kenya.