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Convergence of Information and Communication Technology (ICT) sectors in the East African Community (EAC): Challenges for the current legislative and regulatory frameworks and lessons from the European Union experience

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TITLE:
CONVERGENCE OF INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) SECTORS IN THE EAST AFRICAN COMMUNITY (EAC): CHALLENGES FOR THE CURRENT LEGISLATIVE AND REGULATORY FRAMEWORKS AND LESSONS FROM THE EUROPEAN UNION EXPERIENCE.

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CONVERGENCE OF INFORMATION AND COMMUNICATION TECHNOLOGY (ICT) SECTORS IN THE EAST AFRICAN COMMUNITY (EAC): CHALLENGES FOR THE CURRENT LEGISLATIVE AND REGULATORY FRAMEWORKS AND LESSONS FROM THE EUROPEAN UNION EXPERIENCE.

Abstract: The East African Community (EAC)'s Information and Communication Technology (ICT) sector has been confronted with the convergence phenomenon. This is a concept that describes the trend of blurring boundaries between the traditionally distinct ICT sectors, namely: Information Technology (IT), broadcasting and telecommunications. This is significant for the EAC since the driving force behind this convergence phenomenon is that of efficiency. It necessitates the need to rethink the current legislative and regulatory frameworks in the ICT sector in order to cope with this phenomenon. The need to address this is pertinent since adapting to legislative and regulatory frameworks that are fully converged will expand access to ICT, stimulate economic growth, technological advancement, and also faster integration process of the EAC. Therefore this paper aims to demonstrate the following: Implications and challenges of this trend for the EAC legislative and regulatory frameworks; the need for a common legislative and regulatory framework that is fully converged. It therefore focuses on the inadequacies of the existing legislative and regulatory frameworks and reveals the lacunae in the present frameworks and how they fail to adequately address convergence phenomenon. The paper recommends effective, workable and consistent proposals on how to address the inadequacies. This brings awareness and deepens the understanding of the regulatory convergence issues to the ICT stakeholders in the region and the challenges of convergence on the existing frameworks. This will contribute to better legislative and regulatory frameworks in the EAC ICT market. It will therefore enable the region to enjoy the benefits of convergence and minimise instances of inefficiency in regulation of these converged ICT markets.
Keywords: East African Community (EAC), Legislative and Regulatory Harmonization, Convergence, Information and Communication Technology (ICT), Regulation.

1. Introduction.

In the East African Community (hereinafter EAC), regulatory intervention has always been based on the theories of natural monopoly and market failure. It has been necessary to ensure the sector's optimal performance. However, careful adjustments are now emerging as necessary when considering the specificities of the information and communication technology (hereinafter ICT) sector. It has been characterised by a dramatic technological change. The core issue that is emerging as a major challenge for the EAC is how effectively develop legislative and regulatory frameworks (herein after framework) in order to fully leverage the opportunities created by rapid technological changes.

1.1. Objectives
The objectives of this research are to demonstrate the following:
Firstly, that there is a need for a common EAC framework for the ICT sector that is fully converged to reflect the rapid technological changes. This EAC framework should be built on new concepts and principles such as technology neutrality, the shift from vertical to horizontal regulation, the expansion of the definition of telecommunications networks and services to cover all electronic communications networks and services (ECNS) and graduated regulation (as a possible answer to differentiated regulatory needs). Further more, that the reform should focus on regulatory principles such as transparency, flexibility, regional harmonisation, proportionality and legal certainty. These are the basic concepts and principles underpinning legislative and regulatory frameworks in other similar integrated Communities such as current European Union (EU) legislation. The

EU is very advanced in translating the convergence phenomenon into its regulatory frameworks and therefore - as it has gained considerable experience with the opportunities and drawbacks of particular regulatory scenarios - it constitutes an interesting case study for the EAC to learn lessons from.

Secondly, that Member states should reform their national ICT frameworks to reflect this common EAC framework.

In demonstrating the foregoing issues, the paper aims to charter technological trends and their implications. It documents the consequences and repercussions on key legislative and regulatory issues. This gives the reader an understanding of the extent and range of issues at stake by investigating the implications of technological changes on ICT regulations in the EAC.

It will further provide deeper insight in how legislation and regulation in the EAC should adapt to the convergence phenomenon. This is aimed at stimulating the ongoing discussion on the reform of ICT frameworks in the EAC. As such, it will contribute to better frameworks in the EAC's ICT market. This will enable the region to enjoy the benefits of convergence and minimise instances of inefficiency in legislation and regulation of the converged ICT markets.

1.2. Justification of the study

The research improves on existing studies and other available literature by providing an insider's scholarly perspective of the legal issues relating to impact of the lack of an EAC common framework and the convergence phenomenon to the EAC's ICT sector. It demonstrates the dynamic nature of technological developments in the ECNS. Further that ICT is of great importance to regional integration and the development of the common market, which warrants a suitable framework.

1.3. Research Methodology

The research has applied the problem-solving methodology limitedly: it describes the difficulty addressed, goes further to define whose and what behaviours constitute the difficulty, an finally specifies the causes of the problematic behaviours before identifying proposed solutions.[1] The research also employs the qualitative research method. There is a critical analysis of the status quo that brings forward the challenges. A lot of emphasis is on secondary resources. The research involved:

Literature reviews (desk and online), EAC legislative texts, ICT sector regulation reports and policy papers, some of which appear in the Bibliography. Research also includes reports from various workshops e.g. Euro-Africa ICT meetings in Brussels and other relevant institutions and programs both within the EAC and the EU. The researchers' experience and knowledge of the subject is also vital.

The research also includes the SWOT analysis (analysis of strengths, weaknesses, opportunities and threats of current frameworks). This involves assessing the merits and drawbacks of the current frameworks on the basis of a number of criteria that are

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[1] A. Seidman, R. Seidman and N. Abeysekere; *Legislative Drafting for Democratic Social Change-A Manual for Drafters,* Kluwer Law International, Boston, 2001 p.176.

generally accepted as underpinning the need for a more technology-neutral approach towards regulation in the converging ICT-sectors.[2]

1.4. Hypothesis
Firstly, that the lack of a common EAC framework for the ICT sector that is fully converged will continue to affect the development of the EAC common market and ICT sector performance in light of challenges such as regional integration, globalisation and the need to attract investment.
Secondly, that the process of convergence is a major driver for the development of the Information Society. It gives rise to a wealth of opportunities in the economic and social growth. Like other integrated regions such as the EU, EAC ought to strive to establish the best possible framework for the development of dynamic ICT industries. This research therefore contributes to this general hypothesis that the development of an effective EAC framework for ICTs will generally accelerate the integration process in the EAC.

1.5. Synopsis
This paper begins with a brief presentation of the legal and institutional framework of the EAC infrastructure. It then analyses the issues including the lack of a common EAC framework and the emergence of the convergence phenomenon as a result of the technological trends. It proceeds to analyse the major impact of these issues to the current regulatory frameworks in the EAC. A proposal for a case study follows thereafter.

2. Legal and institutional framework of the EAC.

The EAC is the regional intergovernmental organisation of the Republics of Kenya, Uganda, the United Republic of Tanzania, Republic of Burundi and Republic of Rwanda with its headquarters in Arusha, Tanzania.
The Treaty for Establishment of the East African Community was signed on 30th November 1999 and entered into force on 7th July 2000 following its ratification by the original three Partner States – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from 1st July 2007. The aims and objectives of the EAC include widening and deepening co-operation among the Partner States in, among others, political, economic and social fields for their mutual benefit.[3] To this extent, the EAC countries established a customs union in 2005. A protocol on a common market became effective on the 1st of July 2010. Subsequently a monetary union is set to take effect by 2012 and ultimately a Political Federation of the East African States.[4]
The EAC has therefore institutional frameworks at the Community level that includes the Summit, The Council of the ministers responsible for regional co-operation, The East African Court of Justice, The East African Legislative Assembly, and finally the Secretariat headed by an appointed Secretary General.[5]

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[2] We in particular rely on the criteria identified in the recent PhD of I. van der Haar and which are drawn from economic and sociological theory: Ilse Marthe van der Haar (2008): The Principle of Network Technology Neutrality within the Framework of EC Network Regulation, Part I; Chapter 2.
[3] Article 5 of the EAC Treaty. Available at: http://www.eac.int/home.html
[4] See: http://www.eac.int/about-eac.html
[5] Article 9 of the Treaty establishing the East African Community(hereinafter the EAC Treaty)

3. Statement of the problem.

Firstly, the EAC has attained its 2006-2010 Development Strategy's primary objective by the attainment of an EAC common market. Consequently, policies and regulatory frameworks of most sectors have been aligned to this objective. Those that have harmonised frameworks include fisheries, transport, higher education and finance.[6] However, the ICT sector has yet to have harmonised frameworks at the EAC level. This is despite the fact that the sector is deemed to have great input in accelerating economic and social integration and growth. It is further expected to do so even more dramatically in the near future.[7]

ICT is currently a regional industry in the EAC; it thus needs a harmonised framework to ensure that competition is not distorted as the market opens up to foreign and cross-border investment.

Secondly, the ICT sector has also been confronted with major challenges resulting from the convergence phenomenon. The present situation in the ICT sector is that the strict borders between sectors are disappearing. It is in turn demanding a fundamental re-thinking of the traditional sectoral frameworks. The following examines the first problem: that of lack of a harmonized framework at the EAC level.

4. The difficulties brought about by the lack of a common EAC framework.

One of the corner stones of the EAC's integration process has been to create a single market, where the trade is free across the EAC and based on the theory of comparative advantages. Harmonization of national ICT laws in the EAC Member States to reflect the common EAC framework should be linked to this free trade thought. The harmonization of laws can be seen as a main mechanism to eliminate unfair differences in legal regimes, because its purpose is to reduce the differences in law and politics of two jurisdictions. However, EAC Member States have not made any attempt to harmonize their current national ICT laws. The following is the status quo:

4.1. Divergences in National ICT Policies.
Presently, each of the EAC Member States has its own distinct and dissimilar policy. Perhaps the point of convergence stops only at the fact that today all the Member States have approved National ICT Policies in place. However, there are glaring areas of divergence in those policies. Apart from the comprehensive National ICT Policies, Member States also have subsidiary policies, the most common being telecommunications policies. Others include stand-alone e-Government strategies (e.g. Kenya), and universal service and/or access strategies (for instance Uganda). In regard to National ICT policies, none of the EAC Member States has developed a corresponding comprehensive implementation plan apart from Rwanda.

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[6] For instance, Lake Victoria Fisheries Organization, East African Community Civil Aviation Safety and Security Oversight Agency (CASSOA), The Inter-University Council for East Africa (IUCEA) and The East African Development Bank.

[7] See report by market analyst Frost & Sullivan: Available on APA - Dar es Salaam (Tanzania) Earnings in the ICT sector in East Africa will rise from $164 million in 2007 to a $788 million by 2014

4.2. Divergences in the legislative and regulatory frameworks.

Apart from the policies, legislation and regulation is equally non-uniform. Save for the fact that all the Member States now have functional, autonomous regulators, there is little beyond that which is uniform. The focus for individual regulators also seems to differ, in the absence of a concerted effort to harmonize the legislations and regulations. For example, in the case of licensing, Tanzania pioneered the converged licensing, supporting triple-play, i.e. telecommunication, IT and broadcasting.[8] In Uganda, the emphasis is on infrastructure licensing[9], the objective is to open infrastructure to full competition. Kenya, on the other hand, is in the process of shifting its licensing regime to a unified licensing framework and market structure.[10] However, the focus has been at the service level, with some of the segments being: international gateway, mobile communication, data operator's license, ISP, etc.[11] Rwanda's regulator issues individual and standard telecommunication while Burundi issues only one type of licence, the commercial services licence which corresponds to a basic telecommunication licence. From the above, it is clear therefore that the award criteria for licences differ in each of EAC Member States. Further, there visible differences concerning ultimate responsibility for awarding licences in the Member States, with the relevant ministries and regulators having different levels of responsibility for this.

As regards regulation of tariffs, various national tariffs regulatory frameworks have various competing issues. Some Member States' regulatory frameworks lean towards self-regulation while others provide for strict regulation by the national regulators in the five countries. Tanzania, Uganda and Rwanda to some extent seem to lean toward self-regulation whereas Kenya and Burundi take the opposite approach of strict regulation.

From the foregoing therefore, it is evident that just as there are discrepancies in policies, so are they in legislation and regulation. Currently, there does not seem to be any major effort to harmonize the respective legislative and regulatory frameworks. Perhaps the two areas where there is most uniformity is firstly with interconnection and sharing of facilities where most national legislations refer to the principle of non discrimination. Secondly, the fact that Member States have provisions for universal service access (except for Burundi).

The EAC's ultimate objective has always been to establish an export-oriented economy allowing free movement of goods, capital and services such as ICT. EAC's aim is to harmonise of ICT services.[12] This involves the Member States adopting common EAC policies and frameworks. The EAC established a common market in 2010.[13] This therefore requires a corresponding adoption common ICT framework as provided for under the Treaty.[14]

Various forums have advocated for a common EAC ICT framework. They include the East African Regulatory, Postal and Telecommunications Organisation (EARPTO) which seeks to harmonize and enhance development in the sector.

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[8] Key Legal and Regulatory Findings: Available at: http://www.eac.int/infrastructure/index.php?option=com_docman&Itemid=146
[9] As opposed to "service licensing," An applicant can be granted both or either license.
[10] See 'Implementation of a Unified Licensing Framework and New Market Structure' published by the CCK in May 2008
[11] See footnote 8 above.
[12] Articles 89-101 and Chapter 15 EAC Treaty.
[13] http://www.eac.int/commonmarket/
[14] Article 99 EAC Treaty.

Other include the Preliminary study on Harmonisation of Regional Communications Strategy, commissioned by the EAC Secretariat, made a number of findings outstanding of which was that one of the persisting problems in the sector is the regulatory divergence. It creates a problem to investors and hinders co-ordinated development of the sector in East Africa. This study provides justification for the harmonisation of the regulatory framework.[15]

These past studies are very relevant because they provide sound basis for examining the possibility of a common ICT regime at EAC level. The following examines the second problem; the emergence of the convergence phenomenon.

5. Emergence of the convergence phenomenon to the ICT sector in the EAC.

EAC's ICT industry, as a whole, is undergoing a potentially disruptive phase of development. This is because there have been extensive technological changes in its structure in recent years. These changes are the driving force behind the emergence of convergence. Generally, the term convergence has been used to describe almost any trend representing the ever closer contact between the telecommunications, IT and broadcasting industry. The term is most commonly expressed as:

· The ability of different network platforms to carry essentially similar kinds of services, or

· The coming together of consumer devices such as the telephone, television and personal computer. [16]

It occurs when multiple products come together to form one product with the advantages of all of them – e.g. your computer as purveyor of voice as well as text and graphics; cell phones that provide text and graphics as well as voice. This is otherwise referred to as technological convergence.[17] Digitization is the major driving force towards technological convergence.

5.1. Changes in the market structure

Convergence has seen major changes in the market structure including the following:

> *Entrance of new market services providers especially in the mobile market.*

They include Zain, a service provider in three Member States: Kenya, Tanzania and Uganda). Safaricom,[18] it provides a host of products and services for telephony, broadband internet and fax in the EAC and MTN (currently a service provider in Uganda and Rwanda).

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[15] See study at: *www.uneca.org/.../ICT%20Policy%20Paper%20Kigali%20-Final%20%2031%20August%202004.doc*

[16] The European Commission's Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation, COM (97) 623, Brussels, December 1997.

[17]European Commission, Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Towards an Information Society Approach. COM (97) 623, Brussels: European Commission, 1997, (www document) URL http://www.ictregulationtoolkit.org/en/Publication.1500.html]

[18] Substantial stake is held by Vodafone, which is also the parent company for Vodacom.

> *New services can now be transmitted over various networks.*

Companies have set up new activities in other sectors in order to complement their core business. For instance, telecommunication companies are doing content provision (including broadcast) in order to ensure content for their networks. As a result, traditional telecommunication companies are directly competing with broadcasting companies and the newly emerging IT providers. Telkom Kenya limited is currently providing new services such as internet hosting, mobile services, VoIP and other multimedia services.[19] Others are Uganda Telecom,[20] Tanzania Telecommunication Company Limited[21] and Rwanda Tel.[22] Some IT companies such as Swift Global Kenya Limited,[23] UUNet Kenya,[24] Access Kenya,[25] Africa Online Uganda Limited,[26] and Africa Online Tanzania[27] e.t.c are not only providing internet services but are also providing telecommunication services. They have further shown their interest in broadcasting.

New promising applications have emerged such as mobile-banking. In a region where a significant part of its inhabitants have a mobile telephone but do not have a bank account, there has been a huge opportunity to bring financial services to a largely untapped consumer base. Mobile operators have therefore launched several m-banking services. For instance, there is M-PESA system by the Kenyan mobile operator Safaricom.[28] As of 2010, M-PESA had around 13.5 million subscribers and earned over 7.5 billion in the same year.[29] Zap Mobile Banking was launched in February 2009 by Zain.[30]

Some international initiatives to support ICT for development projects have been launched, such as the Mobile Money for the Unbanked (MMU) programme.[31]

> *Mergers and acquisitions in the ICT sector in the EAC.*

For instance, South African's MTN recently acquired a 60% stake of UUNet; it was therefore re-branded from UUNet to MTN Business Kenya. Internet service providers (hereinafter ISP) Access Kenya and Kenya Data Networks have absorbed much of UUNet's corporate business since 2008.[32] Uganda's InfoMail (IMUL) merged with the country's second ISP, Starcom, to form Infocom.[33] Libya's Lap Green Networks

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[19] See: http://www.telkom.co.ke/index.php?option=com_content&view=article&id=60&Itemid=95
[20] See: http://www.utl.co.ug/
[21] See: http://www.ttcl.co.tz/
[22] See: http://www.rwandatel.rw/
[23] http://www.swiftglobal.co.ke/#
[24] http://www.ics.uunet.co.ke/index.php?option=com_frontpage&Itemid=1
[25] http://www.accesskenya.com/inner.asp?cat=prods
[26] http://www.africaonline.com/countries/ug/
[27] http://www.africaonline.com/countries/tz/
[28] See http://www.safaricom.co.ke/
[29] See http://wirelessfederation.com/news/15801-m-pesa-still-not-profitable-despite-high-growthrate-safaricom-ceo/ for a recent update on M-PESA figures.
[30] See: http://www.ke.zain.com/opco/#?lang=en
[31] The Mobile Money for the Unbanked (MMU) programme is an initiative of the Bill & Melinda Gates Foundation and the GSM Association. The MMU programme will support approximately 20 projects in developing countries, focusing on Africa, Asia and Latin America, with the goal of reaching 20 million previously unbanked people with mobile financial services by 2012.
32 See report available at: http://www.standardmedia.co.ke/InsidePage.php?id=2000025563&cid=4&ttl=Mergers,%20acquisitions%20drive%20mega%20deals

[33] See: An African Pioneer Comes of Age: Evolution of Information and Communication Technologies (ICTs) in Uganda

acquired Rwanda's Rwandatel. It also owns a majority stake in Uganda Telecom (UTL).[34] Convergence Wireless Networks (Convergence Wireless) acquired a 35% stake in WIA Company Limited (WIA), of Tanzania in 16 November 2009.[35]

> ➤ *Expansion of the ICT industry to the EAC regional level.*

Most service providers are currently providing services in the EAC regionally as opposed to individual Member States. This is due to the mergers, acquisitions and continuous expansion of new services to other sectors.

Despite this expansion of the ICT industry to the EAC regional level, there is still a lack of a corresponding common EAC framework. This has thrown the current frameworks into question.

From the foregoing, it is clear that the EAC's ICT sector has seen the term convergence become one of the most recurrent words in the region's ICT industry lexicon.

Despite the foregoing, the different ICT sub-sectors are subject to distinct regulatory models. At the Community level, same legislative frameworks are still maintained to date.[36] This scenario has resulted to a series of new challenges in the field of regulation. The following section elaborates the implication of these inconsistencies.

6. Implication of these inconsistencies to regulation of ICT in the EAC.

6.1. Inconsistencies in regulation resulting from traditional separation.

As the European Commission Green paper on convergence (1997)[37] identified, some converging services are facing a regulatory vacuum. Others tend to fall under the jurisdiction of two or more agencies, which leads to jurisdictional conflicts once they start issuing their own rules. New services such as mobile-banking by the M-PESA,[38] or Zap Mobile Banking,[39] have in the past caused major controversy with the bank fraternity.[40] The banking industry's concern has been that the mobile-banking operators are enjoying privileges similar to those extended to banking institutions despite not being covered by the same regulatory regime. Debate has been rife on who should regulate the mobile-banking operators, whether it should be the central banks and therefore regulated

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[34] See: http://www.cellular-news.com/story/26685.php

[35]   http://us-cdn.creamermedia.co.za/assets/articles/attachments/24554_convergence_partners_-_wia_invests_in_tanzania_-_16_nov_09.pdf

[36] Article 99 of the East African Community Treaty provides for adoption of a common telecommunication policy and regulation. This leaves out other ICT sectors. It is therefore clear that even at the level of the East African Community the regulatory framework that addresses convergence is either lacking or not technologically neutral. At the Member States level, a review of the relevant laws in each of the Member States, which include Communications Acts (for the IT sector), Broadcasting and Telecommunications Acts all provide for a distinct regulatory framework of the different ICT sectors. Boundaries for regulation of the distinct sectors do not exist anymore since they have been blurred by the phenomenon of convergence. Yet, there still boundaries in the legal and institutional regulatory frameworks.

[37] European Commission (1997).Green paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation towards an information society approach Brussels: European   Commission.   Accessed   April   7,   2003: http://europa.eu.int/scadplus/leg/en/lvb/l24165.htm.

[38] See http://www.safaricom.co.ke/

[39] See: http://www.ke.zain.com/opco/#?lang=en

[40] This according to a report by the Bankers Association in <u>The East African</u> (Nairobi) 12 October 2008 posted to the web 13 October 2008

under the Banking Acts or the Communication Acts. Fundamentally, the mobile operations are guided by the Communications Commissions.

At the Member States level, most have engaged in regulatory attempts to accommodate most of the new services. The attempts have led to the establishment of regulatory authorities such as the Communication Commission of Kenya (CCK),[41] Uganda Communication Commission (UCC).[42] Tanzania established the Tanzania Communications Regulatory Authority (TCRA),[43] Rwanda Utilities Regulatory Agency was created by law no 39.2001 on the 13th September 2001.[44]

However, there are many examples of services which have a regulatory vacuum. These include video on demand. These are subject to inconsistent and contradictory regulations issued by separate broadcasting and telecommunications authorities. Others include broadcasting over the internet. It is not clear if it should be regulated as broadcasting or not regulated at all because they are computer based. Inconsistencies also arise when pre-convergence classifications, such as cable and common carrier regulation, lead to similar services with differing regulatory treatments.[45]

These fragmentations of the ICT markets are reducing the region's competitive advantage.

6.2 Regulatory arbitrage.

There is a lack of a common EAC framework that is fully converged. The Member States frameworks provide for four different regulatory entities in all the Member States – the Telecommunication Commissions, the Ministry of Information and Communication, the Broadcasting Commissions, and the Ministry of Culture and Tourism. These are competing with each other to take the initiative in convergence.

Since convergence introduces new emerging services, market players have to face more than one regulatory regime in the various Member States. Not only are there multiple regulatory bodies, but also conflicting regulations and licensing authorities. As a result, the regional market players have tended to select the regulatory frameworks in the various Member States that advance their interest the most (otherwise referred to as *forum shopping*). This trend has been made even easier with the EAC Common Market Protocol that paved the way for the free movement of goods, labour and capital. This is not necessarily the best option for the region or the industry as a whole since the interests of companies are not aligned with those of the government. Companies want to maximize profits while governments aim to maximize societal welfare. The rules that companies may wish to have applied to them do not necessarily lead to benefits for society in the region.

6.2 Uncertainty.

A great challenge which regulators currently face is their inability to reliably forecast the future. This is due to rapidly changing technology, which has given rise to unforeseen new products and services. Therefore, regulators can only issue rules for the problems

[41] www.cck.go.ke/
[42] http://www.ucc.co.ug/
[43] http://www.tcra.go.tz/
[44] http://www.rura.gov.rw/
[45] Garcia-Murillo, M. & MacInnes, I. (2001). FCC organizational structure and regulatory convergence. Telecommunications Policy, 25:6, 431452

faced today, these causes problems when new technologies become available. Because of this continuous innovation, regulators need to find regulatory frameworks that allow them to better cope with uncertainty.

7. European Union's experience as a suitable case study.

It has been demonstrated that there are clear divergences in the EAC's ICT sector frameworks due to lack of a common EAC framework that is fully converged. These continue to negatively affect the development of the sector and also delaying the integration process of the EAC.

The EU is a similar integrated Community, just like the EAC. It is therefore a suitable example to offer in the evolution of a single market in ICT. It provides the best pointers to similar developments in EAC. The EU example remains a standard that the EAC can seek to emulate in order to reap the benefits that the EU has gained in developing its single market. With regard to the ICT sector, the following gives motivations as to why the EU constitutes a suitable case study.

> *The EU is advanced in translating the convergence phenomenon into its regulatory frameworks*

The EU has considerable experience with the opportunities and drawbacks of particular regulatory scenarios. Its current Regulatory Framework on ECNS[46] created a level playing field for network operation in a converging world. Regulation is applied regardless of the technology. It creates a consistent market across Europe; this gives operators the confidence to increase investment for the current 500 million consumers.

The EU framework for the ICT sector is be built on concepts and principles such as technology neutrality, the shift from vertical to horizontal regulation, the expansion of the definition of telecommunications networks and services to cover all ECNS and graduated regulation (as a possible answer to differentiated regulatory needs). Further, it focuses on regulatory principles such as transparency, flexibility, regional harmonisation, proportionality and legal certainty.[47] EAC should consider a focus of these concepts and principles in its reforms.

This paper is conscious to avoid a focus on the EU regulatory tools as it would pose great challenges on how to effectively integrate similar EU regulatory tools to the EAC social – economic conditions.

The motivation for the focus on the regulatory concepts and/or principles is because they are generally recognised as the basic regulatory concepts and principles underpinning reforms of ICT regulatory frameworks worldwide. They are therefore generally accepted as effective and can work in any context irrespective of the geopolitical, social or cultural borders. The essence is to contextualize these basic regulatory concepts and principles into the local cultural, social-economic, and political conditions of the EAC. These make them concise, workable, and effective and fit for the EAC circumstances.

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[46] http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm
[47] Current legislation available at: http://ec.europa.eu/information_society/policy/ecomm/library/legislation/index_en.htm

> *The Institutional frameworks of both the EU and the EAC are similar at first sight, just like their powers under the respective treaties establishing them.*

The EU's institutional framework includes the EU Parliament, the Council, the Commission and the Court of justice and Court of First Instance. [48] The EAC's institutional framework includes the Summit, the Council, Court of Justice, the Legislative Assembly and the Secretariat. [49]

The EAC's Summit is comparable to the EU's European Council, because both are their respective Union's supreme organ. Like the European Council, whose presidency is rotated every six months among its constituent member countries, the EAC's Summit is rotated annually among the Partner States. Key institutions of the EAC and the EU that share similar names are the Commission, the Court of Justice, and the Parliament. The three aforementioned institutions are firmly established in the decision-making structures of the two Communities, respectively as the cabinet/bureaucracy, the judiciary, and the de facto lower legislative chamber.

Another area of similarities is with regard to their goals. Although they arrived at their respective goals from different experiences, the aspirations are similar. Both Communities, for example, hope to use regional integration to promote peace, stimulate economic growth, achieve solidarity for their peoples, and strengthen their international profile/stature. Just as the EU has used regional integration to foster and promote peace via an increasingly interdependent economic structure, the EAC is also using regional integration as a vehicle for promoting peace, in order to enhance the prospects for positive economic results. In short, the EAC is focussed on making the East Africa's economies more mutually interdependent among its constituent members.

The treaties establishing both communities provide for the goals discussed above as their main aims and objectives. Article 2 of the EU treaty provides for these aims and objectives while chapter 2 of the EAC Treaty provides for similar.

> *The principle of direct applicability of community law*

The treaties for both communities provide for direct applicability of community law.[50] The EC Treaty, Article 249 provides that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.' An almost identical provision is contained in Article 8 of the EAC treaty. Both Communities' Regulations are also subject to direct effect and immediate applicability. They are incapable of being conditional. As provided for under Article 249 of the EC Treaty, Communities' Decisions "are binding in their entirety on the party to whom they are addressed". Both Communities' Directives directive could be directly effective insofar as the provisions define rights which individuals are able to assert against the State." [51]

However, Directives at Community level are directly effective only if the prescribed date, by which the Member State should have implemented it, has expired. Therefore, if the time limit given for the implementation of the directive has not expired, it cannot have

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[48] Article 7 of the Treaty establishing the European Union (hereinafter the EC Treaty).
[49] Article 9 of the Treaty establishing the East African Community(hereinafter the EAC Treaty)
[50] See EC Treaty, Article 249, and EAC Treaty, Article 8
[51] See Grad v Finanzamt Traunstein, (Case 9/70) [1970] ECR 825

direct effect. [52] Additionally, in instances where a Member State introduces the required legislation, but has done so defectively, the directive may still be directly effective. [53]

Member states of the EAC have enacted legislation giving 'the force of law' to 'the provisions of any Act of the Community … from the date of the publication of the Act in the Gazette'. [54] The EAC Treaty provides for the principle of supremacy of the laws of the community. [55] This ensures that conflicts between community law and national law are resolved in favour of the former. This defines the place of community law in national legal systems.

This principle of direct applicability allows both communities' laws to become part of national legal systems without intervening national measures which aim at transforming the community law into a national one i.e. both Communities' laws do not need measures such as parliamentary resolution, an act of parliament, or an executive act such as cabinet approval.

The European Court of Justice defines the principle to mean that the entry into force of community law is 'independent of any measure of reception into national law'. [56]

This enables individuals to invoke community law before national courts. [57] It allows national courts to use community law as an independent, direct and autonomous basis of decisions. It turns national courts and persons who litigate before them into private enforcers of community law. It brings 'home' to persons rights created by the community.

8. Recommendations.

In order to chart a way forward, it is important to adopt a common EAC ICT framework that has same conditions, procedures, charges, fees, timeframes and categorizations at the Community level. This embraces the one-stop-shopping procedure.

To ensure certainty and consistency, the reforms should be built on concepts and principles such as those underpinning the EU framework. There is therefore a need for regulatory convergence for a common EAC ICT market. Regulatory convergence describes a process whereby legislators adopt more or less similar legislation and regulation in order to respond to the challenges of a changing technological environment.[58]

The framework should avoid the divergences so that there is a level playing ground for all operators across EAC.

Competent expertise is crucial for the sectoral development and EAC needs to invest in human capital development.

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[52] See Pubblico Ministero v. Ratti, (Case 148/78) [1979] ECR 1629

[53] Verbond van Nederlandse Ondernemingen (VNO), Case C-72/95.

[54] See for instance Kenya: Treaty for the Establishment of East African Community Act 2000, Article 8(1); Uganda: East African Community Act 2002; and Tanzania: Treaty for the Establishment of East African Community Act 2001.

[55] See EAC Treaty, Article 8(4).

[56] See Case 26/62, *NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

[57] See Craig, P.P. 1992. Once upon a Time in the West: Direct Effect and the Federalization of EEC Law. Oxford Journal of Legal Studies Volume 12. 453.

[58] C. Stephanou; 'Regulatory Convergence in the Wider Europe Region: Goals and Means', Associazione Universitaria di Studi Europei, ECSA, Italy, January 2003.

Participation of all the ICT sector stakeholders including the operators, users, consumers, manufacturers, private sector is important as part of a people-driven initiative. These are necessary to boost investor confidence.

The EAC's treaty provides for the principle of subsidiarity and this should be respected with to ensure that country-relevant approaches are proportionately developed but this should not be at the expense of developing a common framework if the EAC is to build on the single market.

9. Conclusion.

It has been demonstrated that in the EAC, the traditional distinct sectors of telecommunications, IT and broadcasting have been confronted with the convergence phenomenon. This is dissolving the once-clear lines that distinguished the mode of delivery and allowed for the distinct regulation of these different sectors. Technological developments of the ICT sector have undoubtedly been having a crucial impact on the emergence of this convergence phenomenon. The ICT sector landscape in the region is undergoing crucial fundamental changes. These changes are in turn demanding a new perspective on legislation and regulation of the ICT sector. However, regulation is still mostly sector-specific, and at Member States level. Therefore, competing companies providing these new services in the whole of the EAC find themselves under different regulatory regimes.

These discriminatory treatments have the potential of increasing disinvestments and withheld provision of new services. This is seriously conflicting with the general policy objectives of the EAC in this area. Measures need to be taken in order to support the development of the ICT sector. Legislative and regulatory changes are therefore needed in order to support the sector's environment. This will promote competition in the ICT sector market.

It is necessary to understand how, in a fast moving technological environment, effective frameworks may be developed at the EAC level to fully leverage the opportunities created by rapid technological changes. There is therefore an urgent need for a new EAC legislative and regulatory paradigm. It is even more meaningful in the EAC as a developing region due to the opportunities to leapfrog technology and short-cut regulatory change. This new legislative and regulatory framework would ideally aim at facilitating the deployment of different technology options based on the establishment of an open, level playing field for all the ICT industry operators.