

Ministerial Directive 1/2021 clarifies and expands the legal basis of the AfCFTA

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The African Continental Free Trade Area (AfCFTA) is anchored in a comprehensive set of legal instruments. They have been negotiated, adopted, and ratified to ensure that the founding Agreement, Protocols, Annexes and Appendices provide the required international legal basis for continent-wide preferential trade in goods and services among the State Parties.¹ These legal instruments must be incorporated into domestic legislation to allow national customs officials and regulators to implement them.

The AfCFTA regime is not yet finalised; some rules of origin and tariff reductions remain outstanding. In the meantime, trade in goods under AfCFTA preferences has started among some State Parties, for specific products. This is made possible by the Guided Trade Initiative (GTI).² However, the GTI needs a proper legal basis; the AfCFTA Agreement does not mention the GTI. This legal basis has been provided through Directive 1 of 2021, which was adopted by the Council of Ministers.³ This Blog discusses its main provisions.

The background needs to be mentioned. The 13th Extraordinary Session of the African Union (AU) Assembly of Heads of State and Government held in Johannesburg in December 2020, decided that trade under the AfCFTA shall officially commence on 1 January 2021 on the basis of legally implementable and reciprocal schedules of tariffs concessions. This did not happen; because of outstanding negotiations on tariff reductions and rules of origin.

On 10 October 2021, the Council of Ministers adopted the Ministerial Directive on the Application of **Provisional Schedules of Tariffs Concessions**. It provides a legal basis for the countries that have submitted their tariff schedules in accordance with the agreed modalities to trade preferentially

¹ Arts 22 and 23 AfCFTA founding Agreement explain the relevant procedures.

² See the relevant Blogs [here](#).

³ For the text of the Directive, see <https://www.tralac.org/documents/resources/cfta/4877-afcfta-application-of-provisional-schedules-of-tariff-concessions-ministerial-directive-1-2021.html>

amongst themselves. The Ministerial Directive was adopted by the Assembly of Heads of State and Government in February 2022.⁴

The Council of Ministers of the AfCFTA acted pursuant to Article 11 of the Agreement Establishing the AfCFTA when it adopted this comprehensive Directive, and thereby clarified important issues in respect of the implementation of the AfCFTA regime. This provision provides inter alia that the Council of Ministers “shall within its mandate ensure effective implementation and enforcement of the Agreement and take measures necessary for the promotion of the objectives of this Agreement and other instruments relevant to the AfCFTA.” It may “make regulations, issue directives and make recommendations in accordance with the provisions of this Agreement.”⁵ Decisions of the Council of Ministers are taken by consensus. This Directive adds additional legal principles to the AfCFTA regime.

The essential aspects in this Directive are as follows, with emphases added:

- It confirms that, in terms of Article 8 of the AfCFTA Protocol on Trade in Goods, each State Party shall apply **preferential tariffs** to imports from other State Parties in accordance with its Schedule of Tariff Concession contained in Annex 1 to the AfCFTA Protocol on Trade in goods and in conformity with the adopted tariff Modalities for Tariff Negotiations.
- The Council of Ministers recalls the Decision of the Assembly of Heads of State and Government of the AU at its 13th Extraordinary Session that the State Parties must specify a schedule of tariff cuts that meets the annual tariff reduction schedule in order to achieve a zero-rate of duty on 90% of tariff lines within the time frames set out in the adopted Modalities for Tariff Negotiations.
- The exchange of tariff concessions between State Parties shall be conditioned by the principle of **reciprocity** in terms of product line coverage and tariff reduction schedules that are aligned with the agreed Modalities.
- The Council of Ministers called for the immediate implementation of Provisional Schedules of Tariff Concessions identifying at least 90% of tariff lines and these Schedules, pending final approval by the Assembly of the AU. They shall also be **provisionally** implemented once approved by the Council of Ministers.

⁴ See [The Guided Trade Initiative](#) on the AfCFTA Secretariat website and tralac’s [AfCFTA Resources page](#)

⁵ Art 11(3)(j) AfCFTA founding Agreement.

- Provisional Schedules of Tariff Concessions shall reflect the 2017 Edition of the Harmonised System, which entered into force on 1 January 2017.
- The Modalities on Tariff Negotiations are **an integral part of the AfCFTA Agreement**. Accordingly, the Provisional Schedules of Tariff Concessions shall cover, at a minimum, 90% of products as set out in the Modalities for Tariff Negotiations.
- The base tariff rates set out in each State Party's Provisional Schedules of Tariff Concessions shall reflect the Most-Favoured-Nation (MFN) **applied rates** of customs duties of each State Party in effect on the date of the entry into force of the Agreement Establishing the AfCFTA, which is 30 May 2019.
- The reduction or elimination of customs duties will happen on a **preferential and reciprocal basis** as provided for in all the Schedules in Annex 1 and shall be deemed to have **commenced on 1 January 2021**.
- Provisional Schedules of Tariff Concessions shall apply for all State Parties **until final Schedules of Tariff Concessions are appended to Annex 1** of the AfCFTA Protocol on Trade in Goods.
- The State Parties shall **promptly gazette** Provisional Schedules of Tariff Concessions, in accordance with their internal procedures, including, where possible, through the Internet, and shall notify the AfCFTA Secretariat in writing of the date and place of publication.
- State Parties **shall negotiate and submit final Schedules of Tariff Concessions** in accordance with the approved Modalities for Tariff Negotiations.
- The State Parties shall not be required to refund any customs duties collected on imports from other State Parties between 1 January 2021 and the first day of implementation of their Provisional Schedules of Tariff Concessions.
- Neither shall they be required to implement preferential tariff concessions with respect to products imported from another State Party **before the date of implementation of their own Provisional Schedule of Tariff Concessions**; and with respect to products imported from State Parties that have not yet start the implementation of their Provisional Schedules of Tariff Concessions. (This again confirms the fact that AfCFTA trade in goods is anchored in **reciprocity**.)

- The State Parties shall not be required to implement preferential tariff concessions with respect to products in the Provisional Schedules of Tariff Concessions for which there are no **agreed AfCFTA Rules of Origin**.
- They may apply Rules of Origin of Most-Favoured-Nation (MFN) applied on these products or developed under a Regional Economic Community for intra-REC trade until agreement has been reached on AfCFTA Rules of Origin in accordance with Art 42(3) of Annex 2 of the AfCFTA Protocol on Trade in Goods.
- The State Parties shall take such measures as are necessary to implement this Directive and shall notify the AfCFTA Secretariat of such measures.
- The Committee of Senior Officials is responsible for monitoring the implementation of this Directive and reports on its application to the Council of Ministers.
- The Council of Ministers shall review annually the disciplines of this Directive and shall monitor its implementation. Such review shall include regular updates of the Annex to this Directive.

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