

What opportunities are there for law firms once the AfCFTA is implemented?

Once the African Continental Free Trade Area (AfCFTA) is up and running (which may be by the end of 2022¹) preferential trade in goods and some services² will become possible across the continent. This will create opportunities for the private sector in terms of cross-border commerce, investment opportunities and expanding existing operations. The legal profession will structure new deals, adjust existing ones, assist with negotiations, and interact with governments and regional institutions. Disputes of a commercial nature, as well as those involving States, national authorities and regional administrations will have to be settled.

The legislative and executive actions of a large number of State Parties and measures by several Regional Economic Communities (RECs) will form part of the regime to be implemented under the AfCFTA. These matters will have to be studied and monitored. Economic integration makes sense in and for Africa but is not without its problems. Overlapping REC membership will remain a challenge. The AfCFTA is another FTA, albeit one with continental reach.

The AfCFTA will not bring about one single legal regime to govern all intra-African trade, customs administration, transport, investment etc. The RECs that have already consolidated their own economic integration to the level of Free Trade Areas (FTAs) and beyond,³ and customs unions such as the Southern African Customs Union (SACU), will continue to function in terms of their existing legal instruments.⁴ They will exist alongside the AfCFTA.

¹ The outstanding matters under Phase I are tariff schedules, rules of origin and commitments for the 5 priority services sectors.

² The priority services areas are transport, tourism, business services, financial services, and communication.

³ COMESA, EAC, ECOWAS and the EAC.

⁴ See Art 19(2) AfCFTA Agreement and Art 8(2) ACFTA Protocol on Trade in Goods.

The AfCFTA Agreement provides for preferential trade among State Parties that previously traded with each other, without preferences, either under multilateral rules such as World Trade Organisation (WTO) MFN tariffs or in terms of general rates of duty applied by those African Union member states that are not yet members of the WTO. Once the AfCFTA is implemented, preferential trade under AfCFTA rules will become possible between, for example, the Member States of SACU and of ECOWAS.

It will be necessary to keep track of national laws and practices. The member states of an FTA retain policy space over national trade issues and new trade agreements with third parties. The AfCFTA Agreement allows “*preferential trade Arrangements with third parties*” and for two or more State Parties to extend to one another preferences which aim at achieving the objectives of the AfCFTA.⁵ Some of the AfCFTA’s legal disciplines will be based on obligations providing for **cooperation** among the State Parties⁶, not harmonisation. In these areas there will be specific national laws and procedures.

When it comes to trade in services the AfCFTA will break new ground by including a Protocol on Trade in Services. It liberalises, like the General Agreement on Trade in Services (GATS) of the WTO, trade in services in terms of the same four modes of supply:

- From the territory of one State Party into the territory of any other State Party
- In the territory of one State Party to the service consumer of any other State Party
- By a service supplier of one State Party, through commercial presence in the territory of any other State Party
- By a service supplier of one State Party, through presence of natural persons of a State Party in the territory of any other State Party.⁷

The AfCFTA Protocol on Trade in Services will have Annexes on the State Parties’ Schedules of Specific Commitments, MFN Exemptions, and a framework for Regulatory Cooperation.⁸ There will also be an Annex on Air Transport Services.

Legal services are tradeable and can be provided via the four modes of supply, and in terms of specific market access commitments of State Parties. The recognition of qualifications and issue of work permits might, for example, be required. Cross border supply and the temporary movement of natural persons are

⁵ Art 4 AfCFTA Protocol on Trade in Goods and Art 4 AfCFTA Protocol on Trade in Services.

⁶ Art 4 AfCFTA Agreement.

⁷ Art 1 AfCFTA Protocol on Trade in Goods.

⁸ Art 28 AfCFTA Protocol on Trade in Services.

traditionally the most important modes of supply of legal services. Mode Three (commercial presence) may allow law firms to provide legal services to clients in a particular region and on a more permanent basis. Law firms may also be able to establish a commercial presence in terms of bilateral, regional, or domestic arrangements.

In terms of its basic design, the AfCFTA Protocol on Dispute Settlement replicates the Dispute Settlement Understanding of the WTO. It establishes a Dispute Settlement Body, Panels, and an Appellate Body. Only State Parties will have locus standi. They may file disputes in response to complaints by private firms about violations by other State Parties, as frequently happens in the WTO. Where a dispute arises between or among the AfCFTA State Parties, the Parties to the dispute must first engage in direct consultations with a view to find an amicable resolution.⁹ We will have to wait and see whether there will be inter-State disputes about the interpretation or implementation of the AfCFTA Agreement, which includes several Protocols, Annexes and Appendices.¹⁰ African governments do not litigate against each other over trade-related issues.

The Courts of the EAC, COMESA and ECOWAS can hear cases brought by private parties, including trade-related disputes. A few such cases have been decided.¹¹ Domestic courts often decide disputes about national trade measures, such as import restrictions or the regulation of service providers. Such measures must comply with due process requirements.

There might be disputes about investments too, but the relevant AfCFTA Protocol is still being negotiated. Trade remedies and safeguard measures are likely to generate disputes. The AfCFTA Protocol on Trade in Goods has a detailed Annex on Anti-dumping, Countervailing and Safeguards. The traditional picture (that only Egypt and South Africa have active investigating authorities) is changing; as more African governments are now accepting requests for safeguards investigations.¹²

Non-tariff barriers (NTBs) will remain a major challenge for exporters, providers of logistical services and for the transport sector. The AfCFTA Protocol on Trade in Goods has Annexes on Trade Facilitation, NTBs and customs administration. Hopefully there will be follow-up measures to sort out the delays and blockages at African border posts.

The AfCFTA establishes an FTA for trade in goods, liberalises trade in some services sectors, and provides for Protocols on competition, investment, intellectual property rights, digital trade and women and the

⁹ Art 6 AfCFTA Dispute Settlement Protocol.

¹⁰ Instruments “within the scope of the Agreement deemed necessary” may be added. Art 23 AfCFTA Agreement.

¹¹ The judgment by the First Instance Division of the COMESA Court of Justice in *Polytol Paints & Adhesives Manufacturers Co. Ltd (Applicant) versus The Republic of Mauritius (Respondent) 2012*, is an example.

¹² Madagascar and Zambia have imposed safeguard measures on imported goods.

youth which are being negotiated. This will be a comprehensive legal regime and will include a wide range of new national and regional regulations and procedures. The State Parties will have to undertake domestic reforms, implement new trade-related obligations, and adjust their national and regional tariff books (the latter is a consequence of the fact that customs unions have a Common External Tariff) accordingly.¹³ The AfCFTA is not a self-executing regime.

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¹³ Forty-three ratifications of the AfCFTA Agreement have already been deposited. Eritrea has signed the AfCFTA Agreement but does not participate in the negotiations.