



What is the status of services negotiations under the AfCFTA?

The Services Protocol to the African Continental Free Trade Area (AfCFTA) Agreement entered into force on 30 May 2019, along with the other parts of the [consolidated text](#). However, the Protocol is incomplete, and it will be some time before any services sector commitments are made under the AfCFTA, and thus before any actual services trade can occur under this Agreement. Furthermore, it is not guaranteed that actual services sector liberalisation will be achieved. This is because countries typically only make commitments that bind existing practices when positive listing services commitments. The indications we saw at an African Union Services Signalling Conference were that this would be the approach.

At the July 2017 Summit the Assembly of the African Union adopted modalities for trade in services negotiations for the African Continental Free Trade Area Agreement. A [Services Protocol](#) was signed as part of the consolidated text of the Agreement Establishing the AfCFTA at the March 2018 Kigali Summit.

While the Protocol sets out principles for enhanced continental market access and services sector liberalisation, services trade liberalisation will only occur in practice when individual countries (State Parties) schedule specific commitments on specific sectors. Under Article 22 of the Protocol, each State Party must provide a schedule of specific commitments. At the [July 2018 Summit](#), the [Assembly adopted](#) five priority sectors on which initial commitments should be made:

- Business services
- Communication services
- Financial services
- Tourism and travel
- Transport

At the February 2019 Summit, the [Assembly adopted](#) the Guidelines for Development of Specific Commitments and Regulatory Cooperation Framework for Trade in Services and the new [Roadmap](#) for Finalization of the AfCFTA negotiations.

The Roadmap provides for the adoption of Schedules of Commitments in January 2022. To meet this deadline, Member States were expected to submit initial offers and requests in May and June 2019, with negotiations taking place from October to December 2019, and again between May and June 2020. Negotiations were expected to be finalised between December 2020 and February 2021. This timeline builds in time for regional and national consultations before technical validation in March-May 2021 and legal scrubbing between June and September 2021. It is not clear whether any services offers have been made to date.

Although in the earlier plan, Schedules of Specific Commitments on Trade in Services for the 5 priority sectors were to be submitted to the February 2020 Assembly, and the additional 7 sectors that are part of the WTO Services Sector Classification List – construction, education, health and social, recreational and cultural, distribution, environment and other services – were to be submitted to the January 2021 Session, it seems that the 2022 deadline is now for the first round of negotiations, which will only cover the 5 priority sectors (unless, under the principle of variable geometry, State Parties wish to make commitments in some of the additional sectors, although this will only likely occur if other parties are demanding such commitments) However, this is not entirely clear from the Guidelines and decisions. Nevertheless, as far as we are aware no schedules were submitted to the February 2020 assembly.

What will services commitments look like?

According to the Guidelines and Modalities, the services scheduling will take a positive listing, GATS-plus approach. This means each State Party lists each sector that they are committing under the AfCFTA. For each sector or subsector, State Parties list any derogations from market access for foreign providers (Article 19 of the Protocol) and national treatment (Article 20) – for each individual mode of supply. For example, the Financial Services sector may be listed, and under that, the subsector of banking and other financial services. This subsector is further divided into various sub subsectors. Against each mode – cross-border supply, consumption abroad, commercial presence and the presence of natural persons, the scheduling country will make a separate commitment for market access, national treatment and additional commitments. This can range from ‘unbound’ to ‘none’. For market access, ‘unbound’ means not committed and foreign suppliers or services can be excluded from the market, while ‘none’ means the sector is committed and there are no further restrictions for foreign suppliers. For national treatment, ‘unbound’ means there is no commitment to treat the

supplier or service the same as a national supplier or service, while ‘none’ means the sector is committed and there are no further restrictions for foreign suppliers. If only the sector or subsector is listed, the commitments and listed limitations apply to all subsectors or sub subsectors.

Sector or subsector	Limitations on Market Access	Limitations on national treatment	Additional Commitments
Modes of supply 1) Cross border 2) Consumption Abroad 3) Commercial presence 4) Presence of natural persons			
X. Financial services			
a. Banking and other financial services			
c. Financial leasing	1) Unbound meaning no commitment 2) None meaning no limitations 3) Financial leasing companies must be incorporated in [State Party] 4) None except as listed in horizontal section.	1) Unbound 2) None 3) None 4) Only natural persons who are nationals of [State Party] may conduct financial leasing as a sole proprietor.	
d. All payment and money transmission services	1) Authorisation is required from the Central Bank for a foreign provider to offer cross-border money transfer services. 2) None 3) Unbound 4) Unbound	1) None 2) None 3) Unbound 4) Unbound	

Limitations on market access that may be listed include limitations on the number of suppliers, value of transactions or assets, number of people employed, number of operations or output as well as any requirement for a specific type of legal entity, or a limit on the participation of foreign capital.

Listing a sector also requires making a commitment on national treatment – this means that foreign services and foreign service providers should be functionally treated, and subject to the same conditions of competition, as local services and services providers.

State Parties will also schedule horizontal commitments – limitations on market access and national treatment that apply across all services sectors committed in the schedule. In other trade agreements, members often have horizontal commitments on the movement of natural persons.

GATS-plus means that State Parties that are members of the WTO must make commitments building on the commitments already made under the General Agreement on Trade in Services (‘GATS’) – that is, they must offer more access in their AfCFTA schedule to AfCFTA member countries than they offer

under the GATS to all WTO countries. For non-WTO members, the starting point is to bind current national practice. In practice, this is likely to result in higher levels of liberalisation commitment from State Parties that are not members of the WTO, because many WTO members' services sectors are more open than is reflected in their GATS services commitments.¹

The guidelines prioritise reciprocity and envisage the possibility of bilateral negotiations under the AfCFTA. This means it is possible any one State Party may have two or more services schedules applying to different State Party partners.

Overall, State Parties are expected to achieve 'substantial liberalisation', although this is not defined and nor is a timeframe articulated for reaching this – only 'successive rounds of negotiation'. No decision has yet been made on any minimum threshold of sub-sectors or sub subsectors required to be committed to constitute 'substantial liberalisation, and nor has any guidance been released for those non-GATS members.

How are negotiations being conducted?

Negotiations will be undertaken on a request-offer basis. Each state will make an initial offer to all other members. Other members may request improvements in the sectoral coverage of commitments or level of liberalisation – that is, by the reduction or elimination of restrictions. State Parties may make requests to all other parties, to a single party or to a group of parties. Offers will be conditional and may be changed any time prior to the conclusion of negotiations.

Negotiations are expected to be reciprocal, but even after making a common offer, a state could not expect to have a collective response from all partners. This means that members may negotiate bilaterally or under the auspices of a Regional Economic Community (REC), negotiations are to be transparent, so all negotiated outcomes must be transmitted to the Secretariat for dissemination among the members.

How does it enter into force?

According to Article 28 of the Protocol, upon adoption by the Assembly any schedules or other annexes (including a framework document on Regulatory Cooperation) will form an integral part of the Protocol. As such, it seems that these annexes will be in force as soon as they are adopted by the Assembly. Of course, in most cases, any liberalisation in fact (rather than binding of existing practice) would need to be legislated domestically.

¹ Although of African countries, only South Africa is included in this analysis, the authors find that in the 40 countries surveyed, services trade policies are much more open than what countries have committed in the GATS. This is also likely to be the case for other WTO members https://www.oecd-ilibrary.org/trade/water-in-the-gats_5jrs6k35nnf1-en

How will it be enforced?

The Council of Ministers will establish a Committee on Trade in Services and this Committee must make annual reports on implementation, monitoring and evaluation. The Protocol and its schedules will be justiciable under the dispute settlement Protocol.

What about regulatory cooperation?

The Modalities and Guidelines adopted are unlikely to lead to the free movement of services across the continent. The positive listing approach means that State Parties must explicitly list any sectors to be liberalised and within these sectors limitations must be noted. Practically, it means there are multiple ways to narrow overall commitments – by listing only some subsectors, by limiting sectors and subsectors and by including horizontal limitations. This means it is not likely to lead to sector opening beyond existing autonomous liberalisation. Because the Schedules are an integral part of the agreement once approved, this also means that any changes must be approved by the total membership. This method does not lend itself to further (bound) liberalisation.

There are also components of the Guidelines that have the potential to further limit any commitments. For example, the Guidelines provide:

- It is understood that market access, national treatment and additional commitments apply only to the sectors or sub-sectors inscribed in the schedule. They do not imply a right for the supplier of a committed service to supply uncommitted services which are inputs to the committed service.

Given how integrated services are in the digital economy, this has the potential to be a significant barrier to services trade. For example, any kind of digitally delivered service would rely on communication services as an input. This issue also came up in a [WTO dispute](#), where China claimed that a lack of commitments in the disaggregated parts of a payment service meant no obligation for that service. Although in that dispute the Panel found that the disaggregated service components were committed under the committed service, this guideline suggests that it would not be the case in the AfCFTA.

Similarly, the guidelines provide that coverage of a transaction is only guaranteed if all relevant modes of supply are committed. This may create restrictions where the mode of supply is unclear (for example, is a financial service supplied cross-border or by consumption abroad if it is first instigated when the purchaser is abroad, but actually supplied/processed when the purchaser returns home?) or when modes are mixed, as is increasingly the case in a more digitally connected and geographically mobile society.

There are also repeated references to preserving the right for Member States to introduce new regulations on services, in so far as the regulations do not impair any rights or obligations under the Protocol. While of course Member States should retain the right to regulate, the role of regulation in

the movement of services is so critical that without some disciplines on regulation, any liberalisation scheduled can be effectively negated. For example, if a country commits to no restrictions on foreign payments providers entering their market but does not give these providers access to the payments system, this effectively negates the commitment. This means that the regulatory cooperation component of the Agreement be an important complement to the services schedule and will also potentially have more impact on increasing trade in services across the continent. According to the text of the Protocol on Services, members will engage in regulatory cooperation and develop sectoral disciplines, based on best practice in the RECs.

According to the Roadmap, regulatory assessment and situational analysis was to be undertaken until June 2019 and national consultations should have taken place between July and September. Technical discussions will take place throughout 2020 in sectoral working groups and the regulatory frameworks (for all sectors) will be adopted between April and June 2021.

The sectoral disciplines and regulatory cooperation will help to create an environment that is more conducive to trade and, importantly, will help to create an environment more conducive to liberalisation. The regulatory frameworks are scheduled to be in place before the finalisation of services negotiations, which means there is potential for the regulatory disciplines and cooperation to give comfort to State Parties to liberalise certain services sectors. This means that regulatory disciplines should not just focus on those aspects of regulation that could inhibit trade in a direct sense (such as a slow or opaque licensing process), but also those aspects that improve the regulatory environment, such as ensuring adequate consumer data protection is enforced, or that sectoral regulators are required to cooperate with one another across borders.

Internal regulations – that are not usually addressed by scheduling commitments – mostly affect modes 3 (commercial presence) and 4 (presence of natural persons) of financial services trade, although mode 2 (cross-border supply) can also be affected. For example, if foreign securities are allowed to be sold cross-border, but a completely different offer document is required, this will place an additional burden on this trade. For mode 4, requirements on an individual, such as registration, education and licensing can inhibit trade. In mode 3, all of the requirements for operation have potential to create a barrier for entry because they are typically different or additional to those of the home country, requiring doubling up of capital, duplication of regulatory compliance documents and new systems among other things.