

2024 tralac Annual Conference



Directive 1/2021 of the AfCFTA Council of Ministers: The legal and operational basis of the Guided Trade Initiative

The Agreement establishing the African Continental Free Trade Area (AfCFTA) entered into force on 30 May 2019, as per the requirements of Article 23 of this Agreement.[1] However, since the Tariff Schedules and Annex on Rules of Origin of the AfCFTA Protocol on Trade in Goods are still to be finalised, trade in goods under AfCFTA preferences is not yet possible. In the meantime, the Guided Trade Initiative (GTI) has been launched to fill the void. It does so through an interim trade arrangement which allows firms in the AfCFTA State Parties that have signed up for the GTI, to export and import goods from each other at the preferential rates contained in the **Provisional Schedules of Tariff Concessions** (PSTCs) of these countries. The PSTCs are those tariff concessions submitted by the State Parties and verified by the AfCFTA Secretariat as compliant with the Modalities on Tariff Negotiations.

This interim regime needs its own legal basis; the AfCFTA Agreement does not mention the GTI. On 10 October 2021, the AfCFTA Council of Ministers responsible for Trade adopted Ministerial Directive 1/2021 to provide a legal basis for trade conducted in terms of the GTI.[2] This Note discusses some of the main features of this Directive, which is a unique solution to the delays caused by an incomplete AfCFTA regime.

Does the Council of Ministers (CoM) have the power to create additional legal regimes for intra-African preferential trade in goods? The Preamble to this Directive invokes *"the powers of the Council of Ministers under Article 11.3 (j) of the Agreement Establishing the AfCFTA to make regulations, issue directives and make recommendations in accordance with the provisions of the Agreement."* Decisions of the Council of Ministers are taken by consensus.

The Directive confirms that, in terms of Article 8 of the AfCFTA Protocol on Trade in Goods, each State Party shall, when the AfCFTA is fully operational, apply **final** preferential tariffs to imports from other State Parties in accordance with their respective Schedules of Tariff Concessions. The State Parties' final schedules of tariff cuts must meet the annual tariff reduction schedule in order to achieve a zero-rate duty on 97% of tariff lines within the timeframes set out in the adopted Modalities for

Tariff Negotiations. The State Parties shall negotiate and submit final Schedules of Tariff Concessions in accordance with the approved Modalities for Tariff Negotiations. The exchange of tariff concessions between them 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 GTI, on the other hand, provides for the application of **Provisional** Schedules of Tariff Concessions. The PSTCs shall reflect the 2017 Edition of the Harmonised System (HS), which entered into force on 1 January 2017. The base tariff rates set out in each State Party's PSTCs 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, namely 30 May 2019. The elimination of customs duties on a preferential and reciprocal basis (as provided for in all the Schedules in Annex 1 to the Protocol on Trade in Goods) shall be deemed to have commenced on 1 January 2021.[3]

This Directive contains an important clarification: The Modalities on Tariff Negotiations are an integral part of the 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 PSTCs shall apply until final Schedules of Tariff Concessions are appended to Annex 1 of the Protocol on Trade in Goods.[4]

This Directive is not self-executing. The State Parties shall take such measures as are necessary to implement the Directive and shall notify the AfCFTA Secretariat accordingly.[5] The State Parties shall promptly gazette their PSTCs in order to make trade in goods under the GTI possible. This must be done in accordance with the relevant internal procedures of the state Parties. Transparency is important; where possible, information about domestic measures must be disseminated through the Internet.

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 PSTCs. 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 that State Party's own PSTCs; nor with respect to products imported from State Parties that have not yet started the implementation of their PSTCs. This again confirms the fact that AfCFTA trade in goods is anchored in **reciprocity**. Reciprocity is part of the GTI regime.

The State Parties shall not be required to implement preferential tariff concessions with respect to products in the PSTCs for which there are no **agreed AfCFTA Rules of Origin**.

The Committee of Senior Officials is responsible for monitoring the implementation of this Directive and must report on its application to the Council of Ministers. The Council of Ministers shall annually review the requirements of this Directive and shall monitor its implementation. Such review shall include regular updates of the Annex to this Directive.

The final paragraph of this Directive reads: *"Nothing in this Ministerial Directive shall be read as a waiver or a derogation from any right or obligation under the Agreement Establishing the AfCFTA."* It means that the rights of the State Parties in respect of, for example, the Annexes on SPS and TBT requirements apply to trade under the GTI, as will their rights to implement Trade Remedies and Safeguards. The GTI regime is designed to be of an interim nature in respect of the applicable tariffs; the other provisions in the AfCFTA Protocol on Trade in Goods are not affected.

[1] The Agreement establishing the AfCFTA and its Protocols on Trade in Goods and Services, and on Dispute Settlement, enter into force 30 days after the deposit (with the Chairperson of the AU Commission) of the 22nd instrument of ratification.

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

[3] As decided by the AU Assembly on 5 December 2020.

[4] Paragraph 12 of the Directive.

[5] Paragraph 18 of the Directive.