



The Tripartite FTA and the Services Sector

Matthew Stern¹

RECOMMENDATIONS

- The draft text on the movement of business persons should be amended to include a definition of 'temporary', which should not be less than three years.
- A concrete work programme which seeks to achieve the mutual recognition of all equivalent professional qualifications across the continent should be initiated, and this should somehow be incorporated into Annex 12.
- An independent review process should be established to monitor the implementation of Annex 12 and report on any non-compliance.

EXECUTIVE SUMMARY

The 26 member states of the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) plan to begin negotiations soon on the creation of a single 'Tripartite' free trade area. These discussions, which will include trade in services, have the potential to transform the continent's economic profile. With regards to trade in goods, the intention is to free all regional trade within a three-year period. In services, however, early indications are that the 'no risk, no benefit' stance of SADC and COMESA has prevailed over the more ambitious approach of the EAC. Although the draft text on trade in services is laced with loopholes, it is encouraging that a separate annex on the movement of business persons has been crafted and negotiations on this will be front-loaded. Meaningful progress in this area would bring real economic benefits to the participants, and may also signal a shift in the region's attitude to services trade.

INTRODUCTION

The COMESA–EAC–SADC Tripartite Summit (hereafter referred to as 'the Tripartite') agreed in October 2008 to accelerate the programme to harmonise the trade arrangements among the three regional economic communities (RECs), with a view to establishing a single free trade area (FTA) encompassing all of the member states of the three RECs. The resulting FTA would bring together 26 countries, a combined population of over 560 million people and a total gross domestic product of around \$1 trillion.

There has been a fair amount of discussion about the practicality and potential costs and benefits of a continent-wide trade agreement, focusing on the likely impact it will have on goods trade between member countries. But this agreement is expected to extend beyond the goods sector, to include trade in services. The purpose of this policy briefing is to describe what is

planned, what is likely to happen and what this might mean for providers and buyers of services in Africa.

WHAT DO WE KNOW?

The 'Guidelines for Negotiating the Tripartite Free Trade Area among the Member/Partner States of COMESA, EAC and SADC',² published in June 2011, briefly describe the scope and principles of the FTA negotiations. The negotiations will take place in two phases: with the usual goods' issues occupying most of the first phase; and discussions on competition policy, intellectual property rights and trade in services carried over to the second phase. At first glance, this seems all too familiar – the possibility of getting down to business in services, anytime soon, would seem remote.

That said, a substantive opportunity does seem to be in the offing, with discussions on the movement of business persons to be front-loaded and to commence as a 'parallel and separate track' during the first phase of negotiations.

In terms of the accompanying 'roadmap', negotiations are expected to commence by January 2012, with the first phase to be completed within a three-year period. Negotiations on trade in services will only commence once agreement on trade in goods, and the movement of business persons, has been concluded. Importantly, agreements concluded in the first phase will enter into force as soon as they are approved by the Tripartite and signed by member states – in other words, they will not be held hostage by second-phase negotiations.

The secretariats from the three RECs have submitted a complete draft agreement for the establishment of the Tripartite FTA, and ministers have agreed that this draft be considered as an input. As such, it is likely to provide a starting point for the negotiations. In the absence of any other text or information, it is worth assessing how far this draft proposes to go on services.

In the area of trade in services, the draft agreement is extremely vague. It commits countries to liberalise trade in priority sectors, subject to whatever flexibilities may be approved by the Tripartite Council, and aims to achieve a

'credible' level of services liberalisation in these sectors. For non-priority sectors, liberalisation will be 'progressive'. No further guidance is provided on the approach to be adopted during these negotiations; except to indicate that schedules of commitments will be annexed to the final agreement.

Annex 12 of the draft text spells out the ambitions of the three RECs relating to the movement of business persons. The intention of this annex is unquestionably good – to allow legitimate business visitors; traders and investors; intra-company transferees; and professionals to move freely between member states, without the need for any form of prior approval and without any form of numerical limit. This would be a giant leap forward for the region – outside of the EU, it is unlikely that any other regional integration initiative enables business people to move with such freedom. One potential catch is that the draft text focuses largely on the *temporary* movement of business people, but fails to define what may be considered as temporary. If this text sticks, then member states could continue to impose severe restrictions beyond whatever time frame they consider to be temporary.

The only exception to this limitation is with reference to intra-company transferees; where no mention is made of any time frame. As it stands, this particular clause could be interpreted to prohibit any limitations on intra-corporate transferees from entering a country, so long as the individual occupies a senior or technical position and is a resident of another member state. Interestingly, there is no requirement for the business itself to be registered elsewhere in the region; so this freedom would seem to apply equally to both African and foreign-based companies. If this text sticks, then it could prove to be a major concession to all multinationals – regional and international – operating across the continent.

WHAT DOES THIS REALLY MEAN?

On the basis of what is already on the table, it would seem that the prospect for meaningful discussions on trade in services (beyond the

movement of business people) in the Tripartite arena is extremely unlikely. This is not surprising. Both SADC and COMESA have made little progress in their own services negotiations, and have proved reluctant participants in external negotiations in this sector. The EAC, on the other hand, has made significant strides towards the achievement of a common market, including a commitment to the free movement of services across all countries and sectors by 2015.³ Unfortunately, within the Tripartite, it would seem that the lowest common denominator has prevailed.

It is worth comparing the proposed commitments in the area of services with those related to trade in goods. On tariffs, the draft text proposes that: 'Member States agree to eliminate all import duties and charges of equivalent effect'⁴ on intra-regional trade; with all export taxes, non-tariff barriers, and quantitative barriers also to be eliminated (unless specifically permitted in terms of the final agreement). Clearly, those drafting this text have assumed a strong mandate to pursue the removal of all remaining barriers to trade in goods, but they are much more careful or conservative when it comes to the liberalisation of the services sector.

The text on the movement of people holds promise, but in practice it is unlikely to take countries much beyond the status quo. Already, many African countries allow for the movement of traders, investors and professionals across their borders, and with increasingly few exceptions, visas are not required in advance for short-term stays. On the other hand, it can be extremely difficult to obtain permission for these same people to stay and work in a foreign (African) country for an extended period of time. With the exception of intra-corporate transferees, the draft text focuses on temporary movement, and certainly does not touch on longer-term work permits.

It is also important to note that enabling professionals to move between countries does not, in itself, enable them to work as professionals. Obtaining recognition of foreign qualifications and meeting the membership requirements of professional associations can be extremely difficult. In South Africa, for example, little or no recognition is given for past training and

experience in the engineering and accounting professions, and in law, most foreigners are required to retrain from undergraduate level in order to practise.⁵ Moreover, the government explicitly prohibits the recruitment and accreditation of African medical professionals in South Africa.⁶ The draft agreement does not touch on accreditation or the mutual recognition of qualifications.

With regards to intra-corporate transferees, allowing companies to shift their senior staff between African countries without any form of numerical or time-bound restriction, and without the need for prior approval or labour certification tests, would be a major gain to businesses in the region. South African companies regularly complain about their ability to place and retain expatriate staff in other African countries, and these complaints are borne out by the laws in place, as reflected by some countries' commitments in the General Agreement on Trade in Services (GATS).

In Botswana, for example, 'investors are required to conform to the requirements of the localization policy', which includes training locals to replace any expatriate hires in senior management positions. Zambia and Lesotho also require foreign enterprises to train local staff 'to enable them to assume specialized roles'. In Egypt, 'the number of foreign personnel necessary to the supply of services in any entity, regardless of the number of its branches, shall not exceed 10 per cent of the total number of personnel employed therein, unless otherwise specified in a sectoral entry of this schedule'. In Kenya, Malawi and Zambia, foreign investors are required to obtain prior approval from government on the specific number of expatriate staff that can be employed, and in Zimbabwe, permits are granted 'subject to the lack of availability in the local labour market'.⁷ Most other African countries have made no GATS commitments in this area.

South Africa, in its GATS commitments, allows for the temporary presence of intra-corporate transferees (managers, executives and specialists) and senior persons involved in a new investment for a period of up to three years, so long as they have worked for the home company for at least a

year prior to application. Interestingly, in practice, the Department of Home Affairs will only issue such permits for a two-year period, and requires a written commitment from the company to confirm that 'the maximum duration will not exceed two years'.⁸ Such permits must be applied for in advance and the department provides for a six-month approval process.

Finally, the commitments made in this agreement are worthless, unless they are implemented and can be enforced. A dispute resolution mechanism is established in terms of the draft text, but in terms of this mechanism, disputes can only be initiated by member governments (not individual complainants). Whereas large manufacturers and service providers are capable of lobbying government in the face of a serious legal or political threat in an export market, individuals are usually less effective. Moreover, most member states are unlikely to show great sympathy towards skilled professionals from their own country, seeking work elsewhere on the continent.

CONCLUSION

The Tripartite FTA has the potential to shake up the economic structure and performance of the continent. To do so will require brave undertakings, substantive negotiations and a commitment to full implementation by all 26 member states. This is no mean feat. It is too early to assess the likely success of these negotiations, but early indications are that in services, the Tripartite FTA will not take us very far. The current text shows little ambition and too much flexibility.

By fast-tracking discussions on the movement of business people, the willingness and ability of African member states to open up a core component of their service sectors to regional competition will be tested at an early stage. Meaningful progress in this area will be extremely

difficult. But if successful, this would not only bring real economic benefits to the participants, but may signal a shift in the region's approach to services trade.

ENDNOTES

- 1 Matthew Stern is the Managing Director of DNA Economics. Comments on this paper from Markus Jelitto and Viola Sawere are greatly appreciated.
- 2 SADC, 'Guidelines for negotiating the Tripartite Free Trade Area among the member/partner states of COMESA, EAC and SADC', 12 June 2011, <http://www.trademarksa.org/sites/default/files/publications/Negotiating%20Principles%20%20-%2012.06.2011%20-%20English.pdf>.
- 3 Uganda, Ministry of East African Community Affairs, *Brief on trade in services under the East African Community Common Market*, http://www.tccia.com/tccia/wp-content/uploads/2011/07/trade_services_eac.pdf.
- 4 COMESA, SADC and EAC Secretariats, Draft Agreement Establishing the COMESA, EAC and Tripartite Free Trade Area, Revised December 2010, Part 3 Article 1, <http://www.tralac.org/2011/06/29/sadc-eac-comesa-tripartite-free-trade-area-legal-texts>.
- 5 Condon C, Stern M & S Truen, *Professional Services in South Africa: Accounting, Engineering and Law*, DNA Economics, 25 January 2009, http://www.dnaeconomics.com/assets/Usegarath/SA_Professional_Services.pdf.
- 6 Stern M, *Moving Medics: A Case Study of South Africa*, DNA Economics, 2008, <http://www.dnaeconomics.com/pages/publications>.
- 7 World Trade Organization, Services Database, <http://tsdb.wto.org>, accessed 8 February 2012.
- 8 South Africa, Department of Home Affairs, 'Application for an intra-company transfer work permit', http://www.services.gov.za/services/content/Home/ServicesforForeignNationals/Temporaryresidence/Applicationforanintracompanytransferworkpermit/en_ZA, accessed 9 February 2012.

The Economic Diplomacy Programme is funded by the Swedish International Development Cooperation Agency, the Danish International Development Agency, and the Foreign and Commonwealth Office through the British High Commission in South Africa. SAIIA gratefully acknowledges this support. © SAIIA 2012 All rights reserved. Opinions expressed are the responsibility of the individual authors and not of SAIIA.