



Jackson, Etti & Edu

*A Full Service Law Firm With Sector Focus*

# INTELLECT FIRST

**A NEWSLETTER BY JACKSON, ETTI & EDU**



# JEE IN THE HEADLINES

## Our milestones this year are as follows:

- We were voted firm of the year in Nigeria at the Managing IP Awards 2020.
- For 15 straight years, we have been rated Tier 1 Law firm for contentious and non-contentious trademark and Patent work in Nigeria by World Trademark Review ("WTR").
- Highest ranking firm in for IP stars by Managing intellectual Property ("MIP")
- Voted the "Best IP Advisor, Africa" at the innovation & IP Forum & Awards 2019.
- Our partner, Uwa Ohiku is one of the 2 Nigerians recognized amongst the Top 250 Women in Intellectual Property 2019 & 2020, globally, by Managing Intellectual Property.
- Our partner, Chinyere Okorochoa was recognized as Outstanding Woman in Business Law, in a report promoted by leading business newspaper, "Business Day".
- Our partner, Obafemi Agaba was elected president of Intellectual Property Law Association of Nigeria (IPLAN)
- Another partner, Yusuf Asamah Kadiri was elevated to the rank of Senior Advocate of Nigeria ("SAN"), which is one of the most prestigious honours to be bestowed to a litigation lawyer in Nigeria.
- Uwa Ohiku, Chinyere Okorochoa, Obafemi Agaba, Ngozi Aderibigbe and Chinwe Ogban were ranked IP Stars in the 2020/21 edition of Managing Intellectual Property's IP Stars. The highest number of Lawyers ranked from a Nigerian firm.



A FULL SERVICE LAW FIRM WITH A SECTOR FOCUS

**JEE Silver Jubilee;** This year, we celebrate Jackson, Etti and Edu 25 years of excellent client service, innovation, and achievements.

### 11 June 2020 - JEE IP Awareness Webinar

Jackson, Etti & Edu in collaboration with the Delegation of German Industry and Commerce in Nigeria (AHK) recently hosted a webinar themed Fostering Innovation in a Time of Crisis: The Critical Role of IP Protection.

The webinar was held on **11th June 2020** and featured senior associates from Jackson, Etti & Edu; **Chinwe Ogban** and **Busola Bakinson**.

Anchored by **Yolanda Oghumah** of AHK, the webinar was aimed at educating emerging innovators on the need for IP protection to ensure substantial economic exploitation of their innovations.

The webinar commenced with a robust exposition by Busola Bakinson on the forms of IP protection available under Nigerian laws to innovators in respect of their novel creations. Chinwe Ogban then followed up with an insightful session on the legal framework for collaboration between innovators and investors. Following their presentations, the two IP lawyers took questions from the participants, drawing on their practical, Africa wide experience in the exciting field of IP law.

In view of the wave of innovation that is currently sweeping through the globe in the wake of the COVID-19 pandemic, the webinar could not have come at a better time.

## **JEE Congratulates the new DG of ARIPO!**

**The Director General's Office  
African Regional Intellectual Property Organisation  
11 Natal Road, Belgravia  
Harare, Zimbabwe**

08 December 2020

RE: Congratulatory Message

Dear Mr Bemanya Twebaze,

On behalf of the management and staff of Jackson, Etti & Edu ("JEE"), I would like to extend my heartfelt congratulations for your recent election to the office of Director General of the African Regional Intellectual Property Organisation ("ARIPO"). We trust that you are in good health with your family during this trying time.

We have witnessed tremendous strides of the organisation under Mr Dos Santos' leadership since January 2013 such as greater cooperation between our two African regional bodies, ARIPO and OAPI, as well skills transfer and inclusion through the Working Group of African IP Practitioners. We are confident that the continent will continue to rise in creativity and innovation, as indeed we have seen positive trends with African start-ups receiving a record US\$1.3 billion in foreign investment in 2019.

Sir, we are excited at the prospect of working under your keen leadership, at a time when the continent has just united to form the largest single free market in mankind's history; the African Continental Free Trade Area ("AfCFTA"). Notably, amongst the six operational protocols of the Treaty, is the Protocol on Intellectual Property Rights. JEE sees this as an opportunity for ARIPO to further regional cooperation in IP enforcement and other important issues relevant to the continent's socio-economic development.

Thank you, Sir, and welcome to your new role. As an African practice, we remain committed to supporting ARIPO's efforts. We wish you and your team, many future successes during your term of office.

Warm Regards,

**Uwa Ohiku**

**Partner & Head, Intellectual Property**

Feature Article: **"Commercial Success and Co-Existence in Other Territories are Not Special Circumstances to allow registration of confusingly similar marks"** – Marshal Mapondera.

When reviewing a new application for registration, the examining attorney (the Registrar) will compare the mark that you are seeking to register against the registry's trademark database to determine if the proposed mark potentially conflicts with any existing trademark within the same class.

To determine whether a conflict exists, the trademark examiner must consider whether there is a “likelihood of confusion” or “confusing similarity” between the application mark and any existing marks. Likelihood of confusion is determined by looking at several factors regarding the similarity of the marks, the similarity of the goods and services associated with the marks, their respective channels of trade, evidence of actual confusion, and several other considerations.

In the US, these factors were analysed and determined by the court in **In re E. I. du Pont de Nemours & Co. 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973)** and immortalised as the “Du Pont factors”. Du Point judges similarity of the marks in terms of appearance, sound, connotation, and commercial impression as well as the relatedness of the goods and services associated with the marks. So, it is crucial to highlight that monopoly of a brand through trademark protection is limited to particular goods or services and not arbitrary. This is why for instance “Mustang” is a trademark of the Ford Motor Company and is associated with a particular type of automobile. The same word is also a trademark owned by a different company that sells seed under the Mustang trademark. A third company has registered the Mustang mark for the selling of gambling machines and online gaming services. Although each company has registered and uses the same mark, they do so on different goods or services. As a result, none of these identical marks were deemed to be confusingly similar. Are there instances where the Registrar can be justified to allow the registration of two “confusingly similar” marks in the same class for the same goods or services? This is the question that the Supreme Court of Zambia illuminated in the recent case of **LA Group (Pty) Ltd v United States Polo Association’s (hereinafter “USPA”)** whilst interrogating the exceptions allowed in the Trademarks Act of Zambia.



LA Group (Pty) Ltd, (hereinafter “LAG”) filed an opposition against the registration of the United States Polo Association’s (hereinafter “USPA”) DOUBLE POLO PLAYER device trademark in classes 18 and 25. Dispute - was whether USPA was entitled to the registration of a polo player device trademark in the same classes as LAG’s earlier registration of a polo player device trademark. The matter was escalated from the Registrar of Trademarks (hereinafter “the Registrar”), the High Court and the Court of Appeal.

**(APPELLANT)**

**LAG’s Registered Trademark**







The Appellant, LAG, has a registered trademark depicting a single Polo player with a raised mallet on a pony. The respondent, USPA, subsequently applied to register a Polo mark depicting two horses and two players with raised mallets. The parties' respective trademarks appear in the table below:

**(RESPONDENT)**

**USPA's Opposed Trademark**



The appellant had opposed the application in terms of, inter alia, section 17(1) of the **Trade-marks Act of Zambia (Chapter 401 of the Laws of Zambia)** which prevents the registration of a trademark that is similar or identical to a trademark already on the register, with respect to the same or similar goods and/or services. Section 17(1) provides that:

*"Subject to the provisions of subsection (2), no trademark shall be registered in respect of any goods or description of goods that is identical with a trademark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trademark as to be likely to deceive or cause confusion."*

The Registrar, in turn relied on section 17(2) of the Act to permit the registration of the respondent's trademark. This section provides that:

*"In the case of honest current use or other special circumstances which, in the opinion of the Registrar make it proper so to do, the Registrar may permit the registration of trademarks that are identical or nearly resemble each other in respect of the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as the Registrar may think it right to impose."*

The Registrar permitted the registration of the respondent's trademark, despite having found that the respective trademarks were confusingly similar to each other and that the likelihood of confusion was high. The Registrar reasoned that the co-existence of the respective trademarks in various other jurisdictions, as well as the fact that the appellant's trademark had accrued substantial commercial success -such that consumers would be able to distinguish the trademarks from each other- were special circumstances that justified the registration of USPA's trademark.

The Registrar held this despite the fact that there was no evidence of any use by USPA of its trademark in Zambia, no evidence of the respective parties' trademarks co-existing in other jurisdictions and without any argument having been raised, or application for registration on this basis having been made, in the papers or at the hearing.

The Supreme Court held that although special circumstances could permit the Registrar to register confusingly similar trademarks, commercial success does not qualify as a special circumstance through which the Registrar could allow the trademarks in question to co-exist. In fact, the registration of a confusingly similar trademark, would only serve the purpose of dilution to the earlier registered trademark. The Court held further that although the discretion granted to the Registrar should not be lightly interfered with by other courts, such discretion does not grant the Registrar a carte blanche to permit the registration of confusingly similar trademarks without sound reasoning.

The Registrar's decision was accordingly set aside, and LAG's appeal was ultimately upheld, with costs.

Thus, the deadline for all opposition applications with respect to marks published in the Journal must be lodged at the Registry before the 29th of March 2021, being the statutory window for lodging such opposition applications.

In Nigeria, the law does not provide for an extension of time application within which to file a Notice of opposition. This means that once the opposition deadline has lapsed, third parties can no longer oppose the entry of a trademark into the trademarks Register save for a cancellation action in the courts.

For more information, Journal searches and reviews, for marks that may potentially infringe on your existing trademark rights, we at Jackson Etti and Edu would be happy to provide timeous advice and guides to the Nigerian trademark filing and opposition process.

## **Updates in Nigerian IP**

### **THE NIGERIAN TRADEMARK REGISTRY: RECENT DEVELOPMENTS EXPECTED TO BENEFIT ALL**

The Nigerian Trademarks Registry has published the first journal of the year 2021, titled the "Online and Pre-IPAS Trademark Journal Vol. 1 No. 1, 29th January 2021". As indicated in the title, the Journal is a publication of both Online and Pre-IPAS applications, signifying the Trademarks Registry's positive response to public feedback that trademarks filed through the IPAS platform should also be published. The publication of this Journal deserves commendation as the Registry has been working in a limited capacity in compliance with the restrictions due to the Covid-19 pandemic.





Meanwhile, to address the issue of the existing backlog in trademark opposition proceedings, the Federal Ministry of Industry, Trade and Investment recently set-up an Opposition Tribunal Office in order to accelerate the opposition process. Although, this development was announced by the Ministry as far back as July 2019, it appears that efforts are now being deployed by the Registry to ensure that the Tribunal Office expeditiously handles opposition matters while delivering sound rulings and decisions. It is expected that the establishment of the Tribunal Office would facilitate speedy resolution of opposition proceedings and ultimately improve the quality of the opposition process.

On a related note, the Registry has phased out the concept of a Temporary Acceptance Notice for matters filed vide the Online Platform and applicants can now obtain an Electronic Acceptance Notice on the said Platform.

By virtue of this laudable move, the Registry has obliterated the need for applicants to go through the hurdles of obtaining a physical copy of the original stamped Acceptance Notice from the Registry. This development is a breath of fresh air particularly for applicants who would typically require the original stamped Acceptance Notice to comply with the requirements of the National Agency for Food and Drug Administration and Control's (NAFDAC) regulations.

Furthermore, in consonance with the Nigerian government's drive to ensure ease of doing business in Nigeria, applicants can now complete the entire chain of the trademark application process online. This means that physical interaction with Registry officials would possibly be limited to obtaining physical copies of the Trademark Registration certificate. Coupled with the Registry's plan to ensure the prompt publication of accepted trademarks, there is no doubt that these developments, where properly implemented, would impact positively on the trademark registration system in Nigeria and benefit all stakeholders.





## **JEE CONGRATULATES DR NGOZI OKONJO-IWEALA AS THE FIRST FEMALE & AFRICAN DIRECTOR GENERAL OF THE WORLD TRADE ORGANISATION (WTO)**

Jackson Etti, and Edu would like to congratulate Dr. Ngozi Okonjo-Iweala who has been confirmed as the first female and the first African Director General of the World Trade Organization ("WTO"), in its 25-years history. She will also be the first American citizen to lead the organization. She replaces Roberto Azevedo following his resignation in August 2020. Dr Okonjo-Iweala was elected by a unanimous vote of all 164 member states, at a special general council meeting on Monday, 15th of February 2021. She takes office officially on the 1st of March 2021 for a renewable four-year term ending on 31st August 2025.

The 66-year-old Nigerian economist and former Finance Minister has vast experience in economics, global finance, and global trade. She has contributed to such crucial mandates as the 2005 agreement where she helped secure to write off \$18 billion of Nigeria's debt to the Paris Club. Dr. Ngozi Okonjo-Iweala is also a former Managing Director of the World Bank, and currently a board member of Gavi – the Vaccine Alliance to immunize people in poorer countries.

Dr Okonjo-Iweala has support from both the "global North and South". Newly elected US

president, Joe Biden has expressed his support for Okonjo-Iweala. President Biden also pledged to work with her on needed reforms.

Dr Okonjo-Iweala takes the helm at a time when the WTO is currently facing its deepest crisis since inception, with failure to hit a 2020 deadline on ending subsidies for overfishing, lack of a major multilateral trade deal and of course, the impact of COVID-19 pandemic.

Her objectives as incoming Director General include the following:

1. working with members to quickly address the economic and health consequences brought about by the COVID-19 pandemic,
2. prioritising delivering a successful MC12 (that is the 12th Ministerial Conference on "Safeguarding Trade Interests of Least Developed Countries - LDCs and Securing Trade Interests of Graduating LDCs") with good outcomes on fisheries, agriculture, and other areas,
3. prioritising updating the rulebook,
4. unlocking the dispute settlement system,
5. working on transparency and notification,
6. enhancing the work of regular bodies, and
7. strengthening the Secretariat.

In her campaign speech delivered to the WTO General Council on Wednesday the 15th July

2020, Dr Okonjo-Iweala, said: *"My vision is of a WTO with Purpose where Members coalesce around the capacity of trade to help foster economic growth and sustainable development. A WTO with Trust where Members work in concert to solve problems. While a key mutual benefit of its Members, it appears that this very concept is now a divisive issue as a result of the perceived imbalances in the rights and obligations of Members and the perceived uneven distribution of the gains from trade."*

## Updates in African IP

### MAJOR CHANGES AT ARIPO & OAPI

#### ARIPO



#### New Director General

ARIPO has elected a new Director General, Mr. Bemanya Twebaze from Uganda for a fixed term of four years, starting from January 1, 2021, to December 31, 2024. The new DG was voted in at the Forty-Fourth session of the organization to take over from Dr Fernando Dos Santos.

Once again, the management and staff of Jackson, Etti and Edu (JEE), congratulates the new DG as we look forward to fruitful relationship with the organization under his keen leadership.

Mauritius now the newest member of ARIPO

The Republic of Mauritius deposited its Instrument of Accession to the Lusaka Agreement of December 9, 1976 establishing the African Regional Intellectual Property Organization (ARIPO) with the Director General of ARIPO on September 25, 2020.

In accordance with Article XVI (3) of the Lusaka Agreement, the Republic of Mauritius becomes a full member of ARIPO. The accession of The Republic of Mauritius to the Lusaka Agreement brings the total number of ARIPO's Member States to twenty.

### MAJOR CHANGES IN ARIPO

ARIPO has tabled various important changes on Trademarks, Patents & Industrial Designs in terms of procedure/process and substance. Whilst we await finalisation, it is important for stakeholders to acquaint themselves with these updates as they may have financial and documentary implications. We have briefly captured some of the developments as follows:

#### 1. PATENTS (the Harare Protocol)

##### **Patent applications**

Third party observations- The proposal, contained in Section 2, is to allow for third party observations to ARIPO patent and Utility Model applications. The observer will not become a party to the proceedings.

##### **Request for grant**

Section 3 (1) is to be amended by specifically requiring the application to contain *'a request for the grant of an ARIPO patent' rather than simply 'identify the patent'.*

##### **Converting to a national**

A Section 3(6)(b) is to be added. This will state that *'if the designated State refuses the application, the applicant may, within three months from being notified of such refusal, request that his application be treated in the designated State as an application according to the national law of that State.'*



## 2. UTILITY MODELS

### **Novelty and industrial applicability**

Section 3, which provides that a utility model must be new and industrially applicable, is to be amended by providing that *'a utility model shall be considered to be new if it is not anticipated by the prior art within the jurisdiction of the Contracting States of the Protocol.'* As for industrial applicability, this will be present *'if it can be made or utilized in any kind of industry including agriculture'*.

## 3. INDUSTRIAL DESIGNS

### **Duration**

Section 6 is to be amended to provide that the duration shall be 15 years (previously 10) from the filing date, *'except for designated States with a shorter term of protection'*, where the term *'will expire at end of term of protection provided for under their respective national design laws.'*

### **Regulations under the Harare Protocol (patents)**

### **Additional Fees**

Rule 11 bis is to be amended by making it clear that the additional fee payable for an ARIPO patent application will be *'calculated on the basis of the pages of the description, claims, any drawings and abstract.'* It further says that *'if an amendment filed after payment of additional fees introduces more claims and pages than those paid for, fees shall be payable on/for the extra claims and pages.'*

### **Time Limits**

Rule 15(bis), which sets out the time limit for the applicant to request the Office to reconsider a matter, shall be *'not less than two months and not more than six months'* after the date of notification of the decision of the Office that the application has been refused.

### **Extensions**

Perhaps due to the Covid-19 pandemic, Rule 15 – which deals with extensions of time limits – is to be amended to make provision for extensions due to *'an exceptional occurrence such as a pandemic, a natural disaster, war, civil disorder or a general breakdown in any means of electronic communication.'*

### **Examination as to substance**

Rule 18 will be amended to regulate, inter alia: how an applicant can respond to examination through comments, corrections or amendments etc; how an applicant must identify amendments and indicate the basis for them.

### **Observations**

A Rule 19 will be introduced. This will provide that, following publication of an ARIPO patent application, any person will be entitled to present observations concerning the patentability of the invention. Further points include:

- The observations can be considered if they relate to novelty, inventive step, claims clarity, sufficiency of disclosure, patentability of subject matter and allowable amendments.
- The observations must be in English, although supporting evidence may be in another language.
- The person filing the observations does not become a party to the proceedings.
- The observations should preferably be electronic.
- If the observations relate to patentability of the invention the Office must consider them in any proceedings that are pending before the Office.
- Where observations are filed during the international phase, ARIPO as the designated Office will consider them upon entry into the Regional phase.
- International applications



## 4. TRADEMARKS (the Banjul Protocol)

### ***Publication of refusals***

Section 6 bis will be amended to include a 6bis.1(B) reading: *An application for registration of mark which has been refused by the office... or by a designated state...shall be published in the Marks Journal as having been refused.* Restoration Section 7 currently allows for the restoration of a trademark registration that had been removed due to non-payment of renewal fees. The proposed amendment was to remove this wording from Section 7 and introduce Section 7bis to amplify on the restoration provisions and also allow for the restoration of any lapsed applications due to failure on the applicant's part to comply with any formalities. Comments on the proposed amendments have been provided, and these are now under review.

### ***Classification***

Rule 3 will provide that the surcharge for all words over 50 in a specification must be paid at the time of filing. The amendment simply provides clarity on the timing of the payment.

### ***Cancellation of designated states***

Rule 13 will provide that an applicant will be entitled to cancel the number of designated states at any time, subject to the payment of a fee. The proposed changes relate only to the fee and prescribed forms.





## OAPI



Perhaps following recent ARIPO developments, OAPI has also announced several changes and additions to law and procedure across all services: Copyright, Trademarks, Patents and Industrial designs.

The governing treaty (Bangui Agreement), will be amended to cater for such changes as follows:



Service	Expected changes	Timeline
Copyright	Overall modernisation of the laws in line with digitisation, data protection etc.	2021
Trademarks	Provision for international registrations; an extension of the definition of a trademark to cover non-traditional marks; the introduction of protection for certification marks; provision for goods and services to be included in a single application; publication after filing; provision for third-party opposition; a five-year prescription term for infringement claims; Customs Watch provisions; extended protection for Geographical Indications.	2021
Patents	Introduction of substantive examination and opposition	2021
Industrial Designs	New provisions for opposition	2021
Enforcement	Introduction of mediation & arbitration; enhancement of anti-counterfeiting procedure; appeals against rejections; confirmation that the civil courts of the member countries have the right to rule on the validity and ownership of all IP rights. etc.	2021


 COPYRIGHT

In addition, there shall be general changes such as deferral of fees and allowance of processing delays in times of crisis such as Covid-19 pandemic, as was done by ARIPO. Overall, the first changes will take effect in 2021 (copyright, trademarks and industrial designs), whilst patents will take effect in 2022.

As is expected in international treaties, the amendments of the Bangui Agreement may take some time as this requires assent of all members states as well as capacity challenges to be dealt with especially for substantive examination services. We continue to monitor the space for updates on actual dates of effect.

## **KENYA'S NEW STRATEGY FOR "UNWANTED TRADEMARKS"**



Kenya's trademark registration system intends to control all unwanted trademark registrations. This

is a progressive development in Kenya's new Section 23 of the Kenyan Trademark's Act.

A trademark is valid for ten (10) years in Kenya. Upon expiry, the Registry will send out a notification. Trademark owner has up to sixty (60) days to renew the mark. If no response is received by the Registry, the mark will be registered by default and the trademark owner has a further thirty (30) days to make payment (payment and penalty fees). If payment is not received in 30 days, then the mark is rendered unwanted and struck off the journal. Our understanding is that this is not the end of the trademark, a trademark owner can still apply for restoration.

The country is also working on a draft Films Bill to build capacity in the national film industry.

She seeks to establish governance frameworks, funding, skills development & protection of film makers.

## **MOZAMBIQUE'S NEW PATENT SYSTEM**



Mozambique now has a compulsory "substantive examination" for ALL patent filings whether priority or national phase. This type of examination checks whether your invention is new and inventive enough. It also checks that your description and claims match and are good enough to patent. The examination will show if your application meets the legal requirements.

As you may be aware few African countries conduct substantive examination due to capacity constraints. To that end, we normally advise all our clients to file patents through the two regional Intellectual Property bodies (OAPI for Francophone states in Yaoundé, Cameroon and ARIPO for Anglophone states in Harare, Zimbabwe). This is a well come development, however it means additional expenses and time. Substantive examination official fees cost about US\$170.

These changes are pursuant to the Article 69, IP Code of Mozambique. Take note that the IP registry of Mozambique is fully operational.

## **Mozambique now a Member of Banjul Protocol**

Mozambique deposited its Instrument of Accession to the Banjul Protocol on **15 May 2020**, and the provisions of the Banjul Protocol will enter into force in Mozambique on **15 August 2020**.

This means that we will be able to designate Mozambique under ARIPO for trademark filings. This brings the total of countries under Banjul to eleven (11): Botswana, Malawi, Tanzania, Lesotho, Namibia, Uganda, Liberia, Swaziland, Zimbabwe, Sao Tome & Principe, and Mozambique.

## ZIMBABWE INTELLECTUAL PROPERTY OFFICE ON LOCKDOWN



Zimbabwean president, Emmerson Mnangagwa has initiated level four national lockdown measures amidst rise in coronavirus cases in the country. Only “essential services” have been allowed to move about, that is medical, power, social services, and security etc.

Unfortunately, the Zimbabwean high court last year ruled that legal services are not essential services, so the Zimbabwe Intellectual Property Office (“ZIPO”) will be closed during the lockdown period. ZIPO does not currently have any online or e-service facilities for applications, filing of documents or payments. As such, it is expected that any deadline during this period will automatically be extended until the first business day after the re-opening of offices.

The ZIPO office has not been functioning at full capacity for several months due to a breakdown of the equipment used by the Industrial Property Automation System (“IPAS”) system. Unfortunately, the government has thus far been unable to replace the equipment or have it repaired. Whilst ZIPO has been able to file documents for applications, obtain date stamps and government payment receipts, the applications have not been processed and in case of new application no filing number can be assigned. At the beginning of 2021, the problem had not been resolved. As such the applications which were filed in 2020 during the breakdown of the IPAS system will have to be assigned filing numbers for 2021 when the system is finally restored unless the government discovers a way to revise the IPAS system.

As a result of this incapacity, it is advisable for our clients to designate all applications in Zimbabwe through ARIPO, since Zimbabwe is party to the Banjul Protocol on Trademarks and Harare Protocol on Patents..

## SOUTH AFRICAN UPDATES



The South African Government is working on regulating its crypto assets. “Crypto assets” are a form of fintech innovation that may impact on the financial sector of the country. It is an umbrella term for various types of “digital assets” through “block-chain” technology. The Inter-governmental Fintech Working Group of South Africa has published a draft policy on crypto assets and crypto asset-related activities for public comment. The final paper will set the policy position for South Africa on crypto assets which will lead to the development of a regulatory regime.

The operative provisions of the Protection of Personal Information Act, 2013 (“POPIA”) came into force on **1 July 2020**. POPIA is South Africa’s data privacy law which governs when and how organisations collect, use, store, delete and otherwise handle personal information. Our clients need to be advised that they have up until **1 July 2021** to become compliant. This means that although there will be no sanctions for non-compliance they must work towards compliance. Clients are advised to commence an analysis of all personal information within their organisation; source of the information and purpose. This exercise is quite complex and involving, hence it needs to commence as soon as possible to avoid future penalties by the Information Regulator. The fines and penalties vary depending on the offence, with a maximum of 10 years in prison or a ZAR10 million fine (US\$576,230).

Further, the country is implementing her 2018 IP Policy in phases. The first phase focuses on public health & international cooperation. To that end, Parliament is considering draft Bills on Copyright, Trademarks, Patents & Designs. They are also launching a new law on Indigenous Knowledge.

On international cooperation, South Africa is acceding to the Madrid Protocol.



## African Trade & Investment

### AFCFTA COMMENCES TRADE.

The African Continental Free Trade Area (AfCFTA) has been officially opened effective 1st January 2021. Trade was initially scheduled to kick-start on 1st July 2020 but had to be delayed due to the uncertainty and challenges posed by the pandemic. 34 Member States have deposited their ratification instruments with the African Union, whilst Algeria, CAR, Malawi, Somalia & Zambia are in the process of doing so. Eritrea is the only African state that has abstained from even signing the agreement.

AfCFTA was ratified whilst negotiations for all salient aspects of the framework were still mid-way. These include trade in goods, tariff concessions and rules of origin, and for trade in services, specific commitments for the five (5) priority services sectors. The AfCFTA Secretariat was appointed on 1st April 2020 under the leadership of HE Mr Wamkele Mene of South Africa and will sit in Accra, Ghana. The Secretariat's immediate goal is the creation of the Protocol on Investment as they initiate Phase 2. The full operationalisation of the Secretariat has been delayed by the Covid-19 pandemic.

In addition to the Executive Secretariat under leadership of Mr Mene, the AU has appointed an African Business Council ("AfBC"), a representative body of the private sector (interim Chairperson, Dr Amman Asfour). In principle, trading has started under AfCFTA. Practically, the AU has agreed to allow member states to implement the changes incrementally, bearing in mind the developmental differences amongst states. To that end, 41 members have submitted their schedule of tariff concessions which show 90% of the tariff lines to be liberalised.

The Phase 1 Protocols are the ones guiding the launch: Trade in Goods, Trade in Services & Dispute Resolution. The Rules of Origin have been singled out as a major outstanding issue under the Protocols of Trade in Goods & Services. June 2021 is the deadline for all outstanding issues.

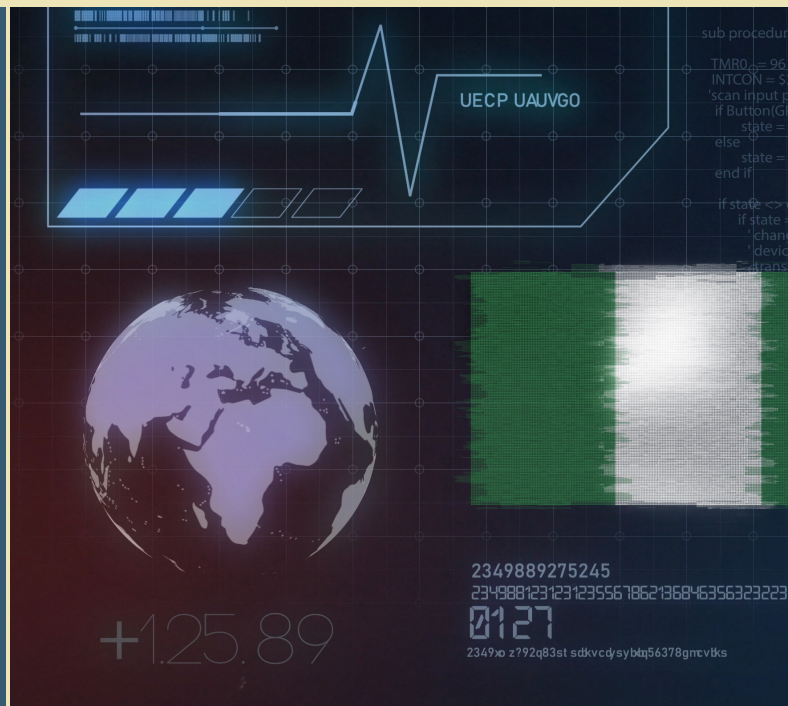
In our view, private sector engagement is key at this stage as there are several crucial outstanding issues, so AfBC is a welcome development. Intra-African Trade is already low, as there is only 15% of the goods produced within Africa being exported to African markets. Further, the Regional Economic Communities like ECOWAS and Comesa need to capacitate the operationalisation of the agreement. Their role, beyond being hailed as the "building blocks" is still not clear and the potential dangers of multiplicity needs to be nipped in the bud.



## EUIPO PAN-AFRICAN PROJECT

Around February 2020, the European Union IP Office ("EUIPO"), embarked on an empowerment project focused on enhancing IP in Africa jurisdictions called, "afrIPI". This is a 4-year project whose objective includes increasing protection and promotion of IP rights in Africa as a means to enhance trade and investment.

Most notably, afrIPI aims to reinforce the EU's commitment and cooperation to further implement all IP related aspects of the AfCFTA agreement. In practical terms, the project will be based on technical capacity building, skills transfer and knowledge exchange.



# DATA PRIVACY WEEK

## 7 THINGS YOU PROBABLY DO NOT KNOW ABOUT DATA PROTECTION IN NIGERIA

The 28th of January was Data Privacy Day, a day set aside globally to raise awareness and promote privacy and data protection best practices. This year, we mark the celebration with a gift to you.

In commemoration of this year's Data Privacy Day, we have thought to share 7 quick nuggets on what you probably did not know, about data protection in Nigeria.

**Number One:** Data Protection is not a favour to the Data Subject; it is an advantage for your Organisation!

A lot of organisations believe that data protection is solely for the benefit of the data subject and consider it strictly a regulatory obligation. In actuality, data protection is an investment, and it provides as much a competitive advantage and a ROI to your organisation as any other investment. Proper data protection practices enable your organisation to; improve internal processes and ensure efficiency in dealing with large volumes of personal data, create more value from data due to proper management and cataloguing of data,

improve customer loyalty by protecting their privacy, and save your organisation from the risk of privacy enforcement lawsuits.

**Number Two:** Privacy by Design & Default - It Starts at the Beginning.

Article 3.2 (v) of the NDPR Implementation Framework (2020) states that organisations are to design and maintain technical systems to be data protection compliant and show that their systems are built with data protection in mind. This is also provided in Article 2.6 of the NDPR.

**Number Three:** Lawful Purpose - You cannot process Data without a Lawful Purpose!

Under Art. 2.2 of the NDPR, an organisation can only process personal data where such processing falls within the ambit of one of the lawful purposes contained in the regulation. If you must process personal data, it must be:

- with the consent of the data subject, or
- necessary for the performance of a contract or in furtherance of a contract with the data subject, or



- necessary to protect the vital interest of the data subject or another natural person, or
- necessary to perform a legal/statutory obligation, or
- ***in the interest of public policy - public policy being objectively defined.***

**Number Four:** Data Security vs Data Privacy- Data Security is not Data Privacy.

Many organisations equate data privacy with data security, but both concepts are distinct. While Data Security means protecting digital data from unauthorised third-party access and destructive forces, such as a cyberattack or a data breach and is mostly an IT function, Data Privacy describes the practices which ensure that the data shared by customers are used for its intended purpose, are used lawfully with due recourse to the privacy rights of data subjects, are stored properly and are secured.

**Number Five:** Data Privacy Rights – Data Subjects have Rights, and You have to Respect Them.

Many organisations are not fully aware that Data Subject have rights over their personal data which organisations hold within their systems.

Some of these rights include, amongst others:

- the right to be informed; data subjects must be informed of the fact that their data is being processed,
- the right of access; they can demand access to their data contained within an organisation's system,
- the right to rectification; they can demand that incorrect data be corrected,
- the right to erasure; they can request complete deletion of their data, and
- the right to restrict processing; they can request that their data only be processed in a limited way.

**Number Six:** Every Organisation Should conduct an Audit!

Under art. 4.1 (7) of the NDPR, where an organisation processes the Personal Data of more than 2000 data subjects in a period of 12 months, such an organisation is to conduct an audit and submit a soft copy of the summary of the audit to NITDA. Nonetheless, every organisation should conduct an audit to identify loopholes in their data processing activities, remedy such loopholes, adopt global standards for internal processes and safeguard itself from the risk of third-party lawsuits for data misappropriation or breach. It is like a health check-up! You should not wait till you fall sick!

**Number Seven:** You need a DPO! Especially where...

- Under art. 3.4 of the NDPR Implementation Framework (2020), some organisations are required to have data protection officers ("DPOs"), who are essentially data protection experts, whether forming part of the organisation's internal staff or an external consultant, who will guide organisations in implementing day to day compliance with data protection obligations.

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