

Digital Trade in Trade Agreements: Lessons for the AfCFTA

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The African Continental Free Trade Area (AfCFTA) is in the process of taking shape. While continental free trade has not yet been fully realised, progress has been made in the number of signatories (54) and those having deposited instruments of ratification (43)¹. Among the goals of African economic integration is the creation of a single market for goods and services, included with this being trade that results from digital-ordering/fulfilment as well as digital delivery.² With this in mind, in 2020 the AU Assembly approved the development of a Protocol on e-Commerce, subsequently renamed the 'Protocol on Digital Trade'. This protocol, once accepted, will form the framework around which intra-African digital trade is conducted. The immediate future then, of digital intra-trade on the continent, depends on the approach taken in the protocol.

Digital trade was first addressed in trade agreements in the first decade of the 21st century, with e-commerce becoming a reality in the mid part of the first decade. Trade agreements are intended primarily to create an environment conducive to trade through the removal of direct or indirect trade barriers, and to facilitate the harmonisation of policies and regulations. This is in order to establish stable market conditions in which buyers and sellers can trade across borders subject to known rules and with known costs, and in which investors can invest in the confidence of market stability. In the same way, a digital trade component of a trade agreement is intended to reduce the friction of cross-border digital trade as well as protect market players such as firms and consumers.

Since it is businesses, and not governments or regulators, that create value, the primary outcome of a digital trade protocol for the AfCFTA should then be an optimal business environment for digital trade, with the minimum of trade barriers within or between

¹ As at the end of June 2022. Source: tralac. <https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html>

² 'Digital trade' includes merchandise and services that are ordered online but not delivered digitally as well as those 'products'/services that are also delivered digitally, such as cloud services and software services.

countries. The components of a digital trade agreement that contribute to this are: the absence of duties on cross-border digital trade, adoption of common electronic authentication and e-trust mechanisms and technologies, protection of source code, disallowance of prior authorisation of foreign suppliers to operate³, disallowance of data localisation (with specific, limited exceptions) and the disallowance of restrictions on cross-border data flows for protectionist reasons.

Other important goals of digital trade regulation include the protection of personal information and consumer protection – including protection from unsolicited direct marketing communications (‘spam’) email. Digital trade agreements originating with the EU allow consumer protection to take precedence over requirements against data localisation and cross-border data flows, reflecting the emphasis that community places on privacy as a fundamental right. The EU’s approach to privacy is contained in its General Data Protection Regulation (GDPR). In terms of these regulations, data protection agencies in any EU country are empowered to sue tech companies over privacy issues.⁴

The United States (US), the home of the world’s tech giants, has together with its northern and southern neighbour, recently framed a digital trade chapter in the restructured North American Free Trade Area (NAFTA), now renamed the US-Mexico-Canada free trade area (USMCA FTA). The chapter has standard approaches to data localisation (although importantly, there are no qualifications to data localisation disallowance), the charging of duties on digitally delivered products and access to source code. However, it also goes beyond the EU template as follows:

- Recommends that parties actively reduce regulatory burden
- Recommends that parties harmonise their personal information protection systems and advocates the observance of the APEC Cross-Border Privacy Rules⁵
- Has extensive provisions for cooperation and information-sharing between governmental agencies and regulators. This article even recommends the exchange of information and cooperation around the use of digital tools by government to improve government performance.

³ ‘Prior authorisation’ in this context refers to the situation where a government requires foreign-domiciled enterprises to obtain permits to operate their digital businesses in the domestic market.

⁴ <https://www.euronews.com/2021/06/15/big-tech-companies-exposed-to-privacy-challenges-after-eu-court-decision>

⁵ <https://www.apec.org/about-us/about-apec/fact-sheets/what-is-the-cross-border-privacy-rules-system>

- Indemnifies web hosting service providers from the content they host but have not themselves created
- Recommends ‘open government data’ – granting citizen access to government data in the areas of economic and social development, competitiveness and innovation. This definition is quite wide-ranging and recognises the potential efficiencies and gains from information collected by government being made available to the private sector

In contrast to the approach taken in digital trade agreements initiated by the developed regions – as summarised above – digital trade agreements concluded between developing countries have up to now been less firm or binding in a number of areas. Banga, Macleod and Mendez-Para (2021)⁶ found that about 23% of ‘South-South’ trade agreements addressed data protection, but that less than 2% of the contain binding commitments. Furthermore, only 8% of South-South trade agreements prohibit data localisation, something disallowed in the agreements initiated by developed countries. When it comes to electronic trust and authentication, most South-South agreements are non-binding on the recognition of these technologies – which are important to enable contracting in the digital economy.

Furthermore, Banga et al. found that 85% of South-South digital trade agreements do not prohibit duties on digitally-delivered products, in stark contrast to the approach taken by developed countries. The non-tariffing of digitally-delivered products was agreed by WTO members at the twelfth Ministerial Conference in June 2022, but may change next year if the developing country lobby has its way.⁷ Non-discriminatory treatment of digital products is important in developed country digital trade agreements, but only 8% of South-South digital trade agreements provide for this, according to Banga et al. They also find ‘weak’ protection for intellectual property rights (IPRs) (as relating to digital products) and software source code.

The question then arises as to what lessons can be drawn for the AfCFTA’s own digital trade protocol – which will be a ‘South-South’ digital trade agreement as defined by Banga et al. Markets function best when regulatory intervention is for welfare-raising reasons, such as the regulation of competition, prevention of price distortions, prevention of the abuse of market power and the facilitation of the flow of information. Regulatory measures for the sake of increasing tax receipts, surveillance and discrimi-

⁶ Banga, K., Macleod, J. and Mendez-Parra, M. (2021). [Digital Trade Provisions in the AfCFTA: what can we learn from South-South trade agreements?](#) Supporting Economic Transformation (SET) working paper series. ODI, London.

⁷ <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/32.pdf&Open=True>

nating against foreign suppliers are not efficiency raising but rather create costs, distort prices and flows of services and ultimately compromise the business sector and growth.

The developing countries are by far, consumers rather than producers of digital products, but this should not cause them to incorrectly fashion their approach to their digital trade deficits with the developing countries. Existing South-South digital trade agreements do not prioritise:

- Prevention of data localisation
- Non-discriminatory treatment of digital products (including disallowing customs duties on digital products)
- Protection of digital IP and software code

The AU approach has as its goal the emergence of an African-owned e-commerce industry and this is a worthy goal, however, sight should not be lost of the considerable potential benefits of digital services to micro, small and medium enterprises (MSMEs). Services such as cloud applications, software as a service (SaaS) and digital platforms are all market entry barrier-lowering mechanisms for MSMEs and the protocol should establish an environment that is accommodating to them.

The current South-South agreements are predicated on the members being consumers of third party digital products, rather than members potentially entering the markets as suppliers. However, the AfCFTA's purpose is to create a single African market for goods and services, including digital products. This implies that African countries should be both consumers and producers of digital products. For this reason, getting the protocol right is of high importance. The AfCFTA should fashion an intra-African digital trade protocol that reflects best practice, as envisaged by the nations that are currently the world's leaders in the supply of digital products. This includes, but is not limited to:

- No data localisation requirements
- Free cross-border data flows
- Full legal status for electronic trust and electronic authentication
- No duties on digitally-delivered products and services, with the possible exception of entertainment products

The caveat to the final bullet reflects the preponderance of video streaming in bandwidth use globally, although this is not yet the case in Africa due to constrained connectivity.

An approach such as this is a good starting point; to this can be added recommendations for cooperation and information sharing, interoperability of electronic trust and authentication services and measures to encourage and support e-government and open government data. If a protocol founded on principles such as this can be put into place, African countries will be well positioned to participate in the digital economy increasingly as suppliers and not just consumers. This can only be to Africa's ultimate advantage in an increasingly digital world.
