Overview of the AfCFTA Protocol on Digital Trade

The Protocol on Digital Trade (Protocol) to the Agreement Establishing the African Continental Trade Area (AfCFTA) was adopted by the Assembly of the Heads of State and Government of the African Union (AU Assembly) during its Thirty-Seventh (37th) Ordinary Session held in Addis Ababa, Ethiopia from 17 to 18 February 2024.[1]

The Protocol seeks to support the attainment of the objectives of the AfCFTA Agreement by establishing a common legal framework for digital trade among State Parties, with harmonised rules, and common principles and standards that enable and support digital trade. This is also intended to provide State Parties with common rules and standards when negotiating digital trade related agreements with third parties, either bilaterally or multilaterally. The specific objectives of the Protocol include to facilitate intra-African digital trade by eliminating barriers to digital trade, to establish predictable and transparent harmonised rules and common standards for digital trade, to create a safe and secure digital trade environment for businesses and consumers, to enable cross-border interoperability of frameworks and systems, and to encourage the safe and responsible deployment of emerging technologies. In addition, the Protocol aims to promote digital skills development, digital innovation and digital entrepreneurship.

Digital trade is defined as “digitally enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve natural and juridical persons.“[2] This definition is adapted from the Digital Transformation Strategy for Africa (DTS), and the Organisation of the Economic Cooperation and Development (OECD). Compared to the definitions of DTS and OECD, the definition of the Protocol does not include digital trade that involves governments. Equally important, the Protocol does not apply to government procurement or information held or processed on behalf of the government.

The Protocol covers substantive areas including market access, digital trade facilitation, data governance, business and consumer trust, digital trade inclusion, emerging technologies and innovation.
In relation to market access, the Protocol provides that State Parties shall not impose customs duties on digital products (i.e. electronic programmes, text, video, image, sound recording or any products digitally encoded and transmitted electronically) originating from other State Parties. The AfCFTA State Parties agreed to remove duties on digital products permanently. Under the World Trade Organisation, the commitment to eliminate customs duties on electronic transmissions has been renewed every two years since 1998.[1] To prevent free riding of the Protocol by third parties and their entities, the AfCFTA State Parties agreed to establish rules of origin to determine the products and firms that qualify for preferential treatment under the Protocol.

Further, the Protocol includes details rules for digital trade facilitation. These rules seek to cut red tape and make trade across borders cheaper, faster and more secure by committing State Parties to adopt or maintain domestic laws and regulations that do not discriminate between digital and paper-based transactions and documents. The rules include, among others, acceptance and authentication of electronic contracts, electronic invoicing, digital identities, digital payments, and electronic transferable records in digital trade.

The Protocol further covers data governance issues. The Protocol allows cross-border transfer of data, including personal data for the conduct of digital trade. Thus, the Protocol does not cover cross-border data transfers for other activities or purposes other than digital trade. The State Parties agreed to further negotiate an Annex on how cross-border data transfers under the Protocol will be governed and administered. Equally important, the Protocol requires State Parties to adopt laws for the protection of personal data. The Protocol further requires State Parties to allow businesses to use or locate their computing facilities in any territory.

Furthermore, the Protocol establishes rules for enhancing consumer and business trust in digital trade. This includes, among others, States’ commitment to adopt cybersecurity measures, online consumer protection laws, and measures to combat SPAM. The States agreed to negotiate an Annex on Online Safety and Security to promote a safe and secure online environment for digital trade under the AfCFTA.

The Protocol includes a dedicated chapter for digital trade inclusion. The chapter aims to promote and facilitate the participation of micro, small and medium enterprises (MSMEs), women, youth, rural communities and persons with disabilities in digital trade. The chapter commits States to adopt measures including providing accessible, affordable, safe and reliable internet, promoting access to ICTs and other digital technologies, and providing incentives, preferential grants, credit, and loans for MSMEs, women and youth in digital trade. In addition, the chapter commits State Parties to adopting measures to promote digital innovation and entrepreneurship and digital skills development to promote and facilitate the inclusion of MSMEs, women, youth, rural communities and persons with disabilities in intra-African digital trade.
Moreover, the Protocol recognises the importance of emerging technologies and innovation in promoting and facilitating digital trade. In this regard, States agree to facilitate the adoption and regulation of emerging technologies but subject to legitimate public policy objectives and essential security interests. States agreed to negotiate an Annex that will establish detailed rules on the adoption and regulation of emerging technologies in digital trade. Furthermore, the Protocol includes rules to promote financial technology in digital trade, particularly in relation to facilitating digital payments, and digital financial inclusion. States also agreed to negotiate an Annex on the rules to promote financial technologies.

Disputes under the Protocol shall be settled in accordance with the AfCFTA Protocol on Dispute Settlement.

The Protocol shall enter into force upon ratification by twenty-two (22) State Parties. A State Party must ratify the Agreement first before ratifying the Protocol. The review and amendment of the Protocol shall be conducted in accordance with Articles 28 and 29 of the AfCFTA Agreement, respectively.

The Protocol includes a Built-In Agenda for annexes on rules of origin, digital identity, legitimate public interest reasons for source code disclosure, cross-border digital payments, cross-border data transfers, online safety and security, emerging and advanced technologies, and financial technology. See a separate Conference Note providing the details of the elements to be covered in the Annexes to the Protocol on Digital Trade.

[2] Article 1(h) of the Protocol on Digital Trade, 2024