Scope and Details of the Annexes to the AfCFTA Protocol on Digital Trade

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

The Protocol generally seeks to support the achievement of the objectives of the AfCFTA “by establishing harmonised rules and common principles and standards that enable and support digital trade for sustainable and inclusive socio-economic development and the digital transformation of the continent” (Article 2(1)).

The Protocol establishes the general obligations of State Parties, broad principles and an overarching framework for intra-African digital trade within the AfCFTA framework. The Protocol envisages the development and negotiation of eight (8) annexes – following the adoption of the Protocol by the Assembly – to address nitty-gritty details that flesh out how certain general obligations and broad principles will be implemented. The annexes will address the specific details of the following topics: Rules of Origin; Digital Identities; Cross-Border Data Transfers; Cross-Border Digital Payments; Legitimate and Legal Public Interest Reasons for Requesting Source Code; Online Safety and Security; Emerging and Advanced Technologies; and Financial Technology. Additional annexes may be developed as deemed necessary for the effective implementation of the Protocol (Article 46(2)).

The Annexes shall be developed and negotiated by the AU Member States and approved by the AfCFTA institutions. The Annexes shall, upon adoption by the AU Assembly, form an integral part of the Protocol. While the Protocol will require 22 ratifications to enter into force, the Annexes will not require any ratification by the State Parties. The Annexes will also be subject to the same dispute settlement, review and amendment procedures as the Protocol.

As noted earlier, the Annexes will include details to operationalise specific commitments undertaken by State Parties under the Protocol. The scope and details of the Annexes to the Protocol will be determined and agreed upon by the AU Member States. Nonetheless, some of the corresponding provisions of the Protocol indicate the scope or details of the Annexes.
The Annex on Rules of Origin will be the first of its kind in international trade. There is no free trade agreement that has incorporated rules of origin in digital trade or digital products. The main purpose of this Annex is to ensure that non-originating digital products, third parties and their entities do not have access to the benefits of the Protocol. The Annex shall set out rules to determine the origin of African-owned enterprises, African digital platforms, and African content, as well as define the scope of digital products covered by the Protocol (Article 5). In other words, only African-owned enterprises, African digital platforms, African content, and certain digital products qualify for preferential treatment under the Protocol.

State Parties commit to adopt or adapt digital identity (ID) systems for both natural and juridical persons. Such systems will be developed in accordance with domestic laws of the State Parties (Article 14(1)). Thus, there will be no unified continental digital ID under the AfCFTA. The Annex on Digital ID will therefore seek to foster interoperability of digital ID systems, mutual recognition, and cooperation, and provide comparable protection of the State Parties’ digital ID (Article 14(2)). The Annex will establish principles, standards or rules in relation to the interoperability, mutual recognition, cooperation and comparable protection of digital identities adopted or maintained by State Parties. The development of the Annex can be guided by the AU Interoperability Framework for Digital Identity, the Digital Transformation Strategy for Africa and other frameworks or initiatives developed under the EU, UNECA, Smart Africa Alliance and West Africa.

Article 15 of the Protocol provides guidance on the scope and details of the Annex on Cross-Border Digital Payments. For example, the Annex shall promote interoperability of State Parties’ digital payment and settlement systems. The Annex will not replace existing national, regional, or continental digital payments legal regimes. The Annex will also incorporate principles or rules to promote transparency of digital payment regulations (e.g. regulatory approval, licensing requirements, procedures and technical standards), cross-border authentication and electronic know-your-customer (KYC) verifications of both individuals and businesses. The other issues to be addressed include non-discrimination between financial institutions and non-financial institutions in relation to access to digital payment services and infrastructure. Furthermore, the Annex will address how State Parties promote innovation, fair competition, and the introduction of new financial and digital payment products and services. Other important issues will include cybersecurity, anti-money laundering, consumer protection, and double taxation of cross-border payments.

State Parties commit to allow the cross-border transfer of data, including personal data, by electronic means. Such transfers are only allowed provided the activity is for the conduct of digital trade (Article 20(1)). Transfers may be limited to achieve legitimate public policy objectives or protect essential security interests (Article 20(2)). Article 20(3) of the Protocol suggests some of the issues that the Annex will address including, the legitimate public policy objectives for restricting transfers, “how data may be used, restrictions on sharing of data to third parties, including data protection regulations and restrictions that may be applied by regulators.”

Other issues to consider in the Annex include principles or regulations on sensitive data, protection of personal data, consent, and certification mechanisms.
State Parties commit to not request the “transfer of, or access to, a source code of software owned by a person of another State Party as a condition for the import, distribution, sale or use of that software, or of products containing that software in its territory” (Article 24(1)). However, a regulatory body or judicial authority may require a person of another State Party to make available the source code of the software or an algorithm thereof for a specific investigation, inspection, examination, audit, enforcement action, or judicial proceeding or when required for legitimate and legal public interest reasons (Article 24(2)). There will be an Annex defining legitimate and legal public interest reasons for requesting the transfer of source code. In defining the legitimate and legal public interest reasons for requesting source code, the Annex should also ensure that there are safety measures to protect the legitimate private interests of the businesses. This is necessary to ensure that the Annex is not abused or unreasonably invoked by governments to access source code or algorithm thereof.

State Parties agree to promote a safe and secure online environment that supports digital trade (Article 29(1). The Annex on Online Safety and Security will establish rules or mechanisms on how State Parties will cooperate to promote a safe and secure online environment for governments, businesses and consumers.

The Annex on Emerging and Advanced Technologies will establish general principles and regulations to facilitate the adoption and regulation of emerging and advanced technologies to ensure ethical, trusted, safe, and responsible use of emerging and advanced technologies. Considering the principle of technological neutrality adopted throughout the Protocol, the Annex will not focus on any specific emerging technologies. Furthermore, the Annex will be subject to State Parties’ legitimate public policy objectives and essential security interests (Article 34(1)).

The Annex on Financial Technology (FinTech) will address how State Parties cooperate in promoting close collaboration between their FinTech enterprises and industry bodies, improve opportunities for African FinTech enterprises; adopt relevant FinTech standards, and the development of FinTech solutions for business and financial sectors. Since the Protocol requires FinTech to be regulated in accordance with State Parties’ laws and regulations, the Annex will not establish binding obligations but foster regulatory cooperation between State Parties in relation to FinTech.

[1] Interoperability means the ability of different systems, databases, devices, or applications to communicate, execute programmes, or transfer data.

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