

Digital Economy in Africa

Legal issues, means of coercion and cooperation

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Abstract

Digital technology accelerates the transformation of societies globally and presents Africa with crucial challenges.

There are efforts to regulate the digital economy both at the continental level with the African Union (AU) and at the regional level through the Regional Economic Communities (RECs), which are pillars of regional economies, as well as other organizations. However, there are gaps in terms of completeness and effectiveness in the legal responses provided, raising questions about the governance and regulation model of the digital economy. This article reviews the efforts made at the continental level to regulate the digital economy, highlights the gaps, and calls for consideration of both global issues and, above all, the endogenous issues that only Africans themselves can address. By revisiting legal theories such as positivism and naturalism, this article proposes a “third approach” that would position states and decision-makers as the key drivers of sustainable development for the digital economy in Africa, using law as a lever to, on the one hand, guarantee fundamental rights and the protection of African citizens and, on the other hand, promote the development of digital innovation and value creation from Africa.

Keywords

Digital economy, legal issues, governance and regulation, endogenous development, third approach (positivism and naturalism)

Introduction

In their perpetual quest to satisfy their fundamental needs, Human beings have always been at the heart of the technological revolutions that have shaped history. From the agricultural revolution to the industrial¹ revolution, each era has brought innovations that profoundly transformed social and economic structures. Today, we find ourselves at the heart of a new revolution: the digital revolution. Unlike previous revolutions, this one is dynamic and continually expanding with each new discovery, leading to a digital transformation of society. The effects of the former transcend borders and are more or less felt depending on the part of the world in question. Africa, in particular, stands at a critical juncture in this new revolution (Schwab, 2017, p. 81), facing both remarkable prospects and considerable challenges (Ludik, 2018).

To properly understand digital economy, we begin with an attempt to grasp the concept based on the criteria that define it and its effects. First of all, digital economy involves Information and Communication Technologies (ICT), which have themselves experienced a rapid evolution with increasingly sophisticated innovations. As the foundation of digital economy, new technologies have developed successively in the second half of the 20th century, with an unprecedented acceleration over the past three decades. In addition, the convergence of nanotechnologies, biotechnology, information technology, and cognitive sciences (NBIC) facilitates the development of artificial intelligence (AI), 3D printing, blockchain technologies, as well as cloud computing and big data. Indeed, “to offer a wide range of services, the advanced technologies used rely on large-scale data collection operations and new forms of production such as AI, machine learning, and advanced robotics” (Razzano et al., 2020, p. 5). All these breakthroughs reflect a paradigm shift that is felt globally and impacts international economic relations.

Digital economy also benefits from shrinking borders (economic, geographical, or political...), the emergence of innovative business models. Digital platforms and online services enable economic actors to thrive within this new globalized economy. This shrinking of borders encourages the interconnection of populations and markets, reshaping the global geostrategic landscape. Furthermore, within this ecosystem, “two phenomena generate new mechanisms of value creation: the networking of the world and the widespread of data digitization” (Isaac, 2021). This has led to the emergence of innovative business models that aim for both network effects and economies of scale. These models determine the key players dominating the global digital economy, particularly through the “winner takes all” or “winner takes most” theory (Isaac, 2021).

Often associated with the ICT sector, digital economy transcends this sphere. It refers to all economic activities based on ICT or those that integrate them into part or all of their value chains. It involves a multitude of actors and does not exclude any domain or sector of activity. From agriculture to health, education, cultural and creative industries, and finance, it integrates into all economic activities and occupies a significant share of the global economy. The consequence is that, in today's world, digital economy and traditional economy coexist, offering real opportunities despite the threats and risks that need to be managed. This coexistence is, in fact, only temporary, as digital economy and traditional economy are set to merge once the necessary conditions for this shift are met. This is not specific to Africa but pertains to the entire world. This dynamic is already well underway globally. This is evident in the evolution of the digital economy's contribution to the Gross Domestic Product (GDP). Between 2016 and 2022, e-commerce by businesses increased by nearly 60%, reaching \$27 trillion, with market shares of \$11.32 trillion for the United States, \$5.007 trillion for Europe, \$4.49 trillion for China, \$3.37 trillion for Japan, and \$2.6 trillion split between the rest of the world (UNCTAD, 2024). Business-to-business e-commerce thus accounted for 75% of global GDP. This upward trend is also observable in global South. According to the data from the United Nations Conference on Trade and Development (UNCTAD), “In 2023, exports of digitally deliverable

¹ The steam engine and electricity, as well as that of information.

services from developing economies grew by 9%. The growth was prominent across all developing regions. Digitally deliverable services represented 46% of the total services² exports.” However, these opportunities also come with new challenges especially for African states.

On the one hand, the ownership of digital platforms, as well as the economic flows they generate, critical infrastructures, and data, are often controlled by private companies, mostly located in foreign jurisdictions. This disruption goes beyond a simple technical expansion and redefines the political, economic, and legal balances between states, international organizations, and private actors. In this regard, like other African states, Nigeria (Asquith, 2022) and Kenya (Asquith, 2024) have sought to impose taxes on digital transactions carried out by giants like Google or Amazon, but they have faced implementation challenges, reflecting the complexity of regulating a globalized digital environment. In Senegal, services provided by digital platforms have been subject to Value Added Tax (VAT) since July 1, 2024 (DGID, 2024), which is directly felt by local users. Morocco, for its part, has announced the imminent implementation of electronic invoicing to broaden the VAT base, using digital tools to ensure transparency, authenticity, and reliability in tax payments (Naoumi, 2024).

On the other hand, there are challenges related to energy, governance and political stability, insufficient infrastructure, society, and talent. According to the 2024 UNCTAD report on digital economy, “digital devices and ICT networks account for an estimated 6% to 12% of global electricity use” (UNCTAD, 2024). On the social level, the impacts of digital usage are assessed in terms of quality equipment, content accessible to the public, the addictive nature of social networks, and the inadequate regulation of content that may offend the public’s sensibilities or have harmful effects on their health... A real public health issue arises for Africa’s young population, where over 60% are under 25 years old (Gouro, 2023). The lack of control over digital content, combined with excessive consumption, can have devastating consequences for this youth.

In light of the challenges related to digital economy, a governance model that enables the African continent to achieve the Sustainable Development Goals (SDGs) and the 2063 Agenda should be considered. In addition, there are regulatory challenges, particularly in areas such as the taxation of digital businesses, cybersecurity, data flows, and the protection of citizens’ rights and innovation.

Given all these considerations, the digital economy is forcing African states and regional or continental communities to rethink the transformation governance and regulation models it brings about. This has required the gradual implementation of legal and strategic frameworks across the continent to regulate it, by addressing issues related to electronic communications, electronic transactions, personal data protection, regulation of non-personal data, information and system security, protection of innovation, respect for intellectual property rights, and consumer protection, or digital technology users protection. In addition to these central and cross-cultural issues, legal frameworks are also needed for digital applications in various sectors such as health, education, agriculture, culture, and financial services. Addressing all or part of the previously identified issues, several initiatives have emerged in Africa, at the regional level with the AU, at the community level with the REC³, and at the national level, to support the building of a digital economy that benefits Africans.

However, the complexity of the African legal environment remains an obstacle. Several countries have joined different Regional Economic Communities (RECs), sometimes with overlapping areas of competence, not to mention legal frameworks that are not harmonized. This situation affects the effectiveness of coercive means and creates legal uncertainty in the countries concerned. Nevertheless, progress is visible, such as the creation of the African Continental Free Trade Area (AfCFTA), which strives to facilitate intra-African trade, including in the digital sector (see article by Assane Diankha in this issue).

² UNCTAD, infographics: <https://unctadstat.unctad.org/fr-FR/Infographies.html> (consulted on Oct. 18, 2024).

³ The African Union recognizes eight Regional Economic Communities (RECs) as pillars of regional integration in Africa, namely: the Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

To fully seize the opportunities, the law can serve as a key lever to drive a dynamic towards a digital economy that is adapted and that promotes sustainable development in Africa.

It is essential to ask whether the existing legal mechanisms provide effective solutions to the challenges of the digital economy in Africa. Common markets struggle to function due to gaps in digitalization, infrastructure, and security, as well as outdated regulation, sometimes opposed by political resistance.

The issue is not just about updating legislation, but also about repositioning the law to promote sustainable and inclusive economic development.

Before the rise of digital technology, the predictability of legal rules did not pose major difficulties. However, with the digital world's constant evolution, we need to adapt the governance and regulation model through law.

To address these legal issues, our contribution first analyzes the current legal framework and its coercive mechanisms (I), before examining, in terms of prospects, how legal integration can encourage enhanced cooperation to address these issues (II).

Building a Legal Framework: Evolution and Limitations

Aware of the impact that a legal framework for digital technology can have on the continent's digital transformation and digital economy in particular, African decision-makers have engaged at various levels to implement such a framework (A). This effort has yielded encouraging responses but also reveals limitations that are holding back the growth of the digital economy on the continent (B).

Status of Initiatives for a Harmonized Legal Framework

The need to regulate digital technology in order to ensure user confidence and the security of goods, services, and users, is understood at the highest levels on the continent. The African Union (AU), the Regional Economic Communities (RECs), and other organizations, along with most member states, are working to implement a harmonized digital legal framework, taking into account the essential prerequisites and key issues that need to be addressed to encourage a dynamic of digital ownership among Africans. The gradual transposition of these legal instruments into domestic law is a crucial step to ensure their effectiveness and a better understanding of how the systems implemented address the challenges of digital technology and the requirements for sustainable development on the continent.

With the adoption of the Malabo Convention in 2014, the African Union (AU) made, albeit belatedly, a significant step towards the ambitious goal it set to harmonize the legislation of member states on electronic transactions, data protection, and cybersecurity. This convention, which came into force on June 8, 2023⁴, marks an important milestone in the harmonization of cyber legislation across the continent (Diallo, 2024). The initiatives undertaken also include implementing strategic frameworks aimed primarily at overcoming challenges related to emerging technologies. These include the continent's Digital Transformation Strategy (African Union, 2020), adopted by the AU in 2021, the Data Governance Strategy adopted in 2022 (African Union, 2022), and the more recent African Digital Compact (African Union, 2024a), adopted at the 45th ordinary session of the AU Executive Council held in Accra on July 18 and 19, 2024. All these strategic measures focus significantly on the governance and regulation of digital technology across the continent.

In West Africa, the Economic Community of West African States (Ecowas) adopted texts on electronic transactions, personal data protection and cybersecurity back in the 2000s. These texts aim to adapt the legal framework to the changes brought about by digital technology in society. In addition, a project to revise the additional act on personal data protection has been announced. A workshop was held in this regard by the ECOWAS Commission in July 2024 (ECOWAS, 2024).

4 This entry into force follows the ratification by 15 member states of the convention adopted in June 2014.

In Central Africa, the Economic Community of Central African States (ECCAS) has also invested in harmonizing the legal framework applicable to digital technology in general. This is also the case for the Southern African Development Community (SADC), which has introduced three model laws on cybercrime, data protection, and electronic transactions⁵. Furthermore, to more specifically address the issues related to digital economy in a context of increasing complexity in information-gathering methods and business practices, SADC has a draft model law on digital economy. Recommended since 2020 by Research ICT Africa (Razzano et al., 2020, p. 27), was announced by the Secretary-General of Parliament in 2023 (Magadza, 2023). Other initiatives, yet to be followed by action, exist, particularly within the Arab Maghreb Union (UMA)⁶. The main constraint that could explain this lies in internal political factors within the Union⁷.

Other organizations, such as the Organization for the Harmonization of Business Law in Africa (OHADA)⁸ have also contributed to the harmonization effort, particularly by introducing digitalization into their regional legal frameworks. These initiatives reflect the common will of African decision-makers to promote the digital economy while aligning with international standards and strengthening cooperation with international technical and financial partners.

To encourage electronic transactions, one of the fundamental rules commonly accepted by continental and regional legislations has been the acceptance of electronic documentation through the introduction of the principle of functional equivalence, which grants it the same legal value as paper-based documents, under certain conditions. This acceptance is accompanied by a broad conception of electronic⁹ commerce, as well as obligations designed to guarantee the confidence and security of service¹⁰ recipients.

Moreover, there are specific dispositions to regulate transactions in more targeted areas, such as financial transactions. These dispositions deserve to be addressed specifically due to both their catalytic role in the development of the digital economy and the legal and economic challenges they present¹¹. Furthermore, given the specific regulation of payment systems and financial instruments by central banks, specific provisions govern these financial transactions. In Africa, there are several monetary union initiatives in the works, including one with a continental dimension aiming for a single African currency. While awaiting their completion, only the West African Economic and Monetary Union (WAEMU) and the Central African Economic and Monetary Community (CEMAC), both of which use the CFA franc as their currency, as well as a common monetary zone in Southern Africa, are effective, whereas 42 currencies are still in circulation across Africa (Wellisz, 2022). This situation complicates intra-African transactions, particularly in terms of currency exchange transfer costs. Led by Afreximbank, the AU Commission, and the AfCFTA¹², Secretariat, the PAPSS¹³ initiative aims to simplify pan-African payments by allowing participants to make secure instant or semi-instant payments from payers to beneficiaries in their local currencies, regardless of where they are located in Africa. In May 2024, inviting banks to join the initiative, its director stated:

The PAPSS is fully operational and progressing rapidly. We have signed agreements with 13 African central banks and connected over 115 commercial banks and 10 payment switches across Africa. Another 115 commercial banks are in the process of being connected. Our foundations are solid, and the time has come to act and accelerate. It is time to use the system to boost trade in Africa, for Africans, by Africans. (Afreximbank, 2024)

5 The model laws on cybersecurity developed under the HIPSSA project and approved in November 2012.

6 The UMA (Arab Maghreb Union) includes 5 North African countries: Algeria, Morocco, Mauritania, Tunisia, and Libya.

7 Regional integration within the UMA has been hindered by political tensions, particularly between Morocco and Algeria, thus limiting the progress of the organization. The UMA relies on the voluntary participation of its member states, which reduces the effectiveness of harmonization initiatives.

8 Articles 82 to 100 of the AUDCG and Articles 93, 133-1, 133-2 of the AUSCGIE, along with Articles 53 and 64 of the AUS

9 E-commerce, according to the legislator's perspective, can include services that are not directly remunerated by their final recipient.

10 Malabo Convention (Art. 7), the Model Law of the CDAA (Section 7), ECOWAS regulations (Art. 34), COMESA regulations (Art. 8), as well as texts from CEEAC-CEMAC (Art. 12).

11 Obligation for suppliers of goods or services to use sufficiently secure electronic payment methods during transactions (cf. Art. 7.1 of the Malabo Convention; Art. 25.1 of the CDAA Model Law).

12 «About PAPSS» : <https://papss.com/fr/a-propos-de-nous/> (accessed on September 12, 2024).

13 Pan-African Payment and Settlement System – a Pan-African payment and settlement system.

In the WAEMU (West African Economic and Monetary Union), the reform of payment systems in 2002¹⁴ led to the recognition and promotion of electronic payment methods. Some notable developments include Instruction No. 013-11-2015 regarding the terms and conditions for conducting money transfer activities as a sub-agent within the West African Monetary Union (WAEMU) (BCEAO, 2015a), Instruction No. 008-05-2015 governing the conditions and modalities for the activities of mobile money issuers in the WAEMU member states (BCEAO, 2015b), and the one adopted on January 23, 2024, related to payment services within WAEMU (BCEAO, 2024a).

In the CEMAC (Central African Economic and Monetary Community), the legal framework for financial transactions was initiated by Regulation No. 02/03/CEMAC/UMAC/CM of April 4, 2003, relating to payment systems, methods, and incidents (CEMAC, 2003). This regulation was the first to address mobile money (Article 193 and following). It was followed by several texts strengthening the regulation of financial services, including Regulation No. 04/18/CEMAC/UMAC/COBAC of December 21, 2018, related to payment services (CEMAC, 2018), Instruction No. 001/GR/2018 on defining the scope of interoperability and interbanking of electronic payment systems (BEAC, 2018), and Regulation No. 01/20/CEMAC/UMAC/COBAC of July 3, 2020, which protects consumers of banking products and services (CEMAC, 2020). Thus, the instant payment system Gimacpay was launched in 2020 to facilitate transactions and reduce cash circulation. As of today, it has “96 participants and connects 42 million mobile accounts, enabling interoperable and secure transactions” (Lokossi, 2024).

Furthermore, in the context of administrative transactions, an important lever for developing the digital economy, organizations on the continent are actively involved, even though the Malabo Convention does not directly address them. For example, to promote integrated e-commerce at the continental level, WAEMU (West African Economic and Monetary Union) has regulated the digitalization of procedures and formalities for foreign trade (WAEMU, 2023, p. 98), including the electronic certificate of origin. In the same vein, the implementation of one-stop shops to facilitate interactions between economic operators and public administration follows this logic of regional and international integration, in line with international recommendations (CEFACT-UN, 2020).

Personal data protection is being harmonized at the continental level with instruments that implement fundamental principles to regulate the processing of personal data, thereby defining the obligations of data controllers and the rights of data subjects (cf. Chapter II of the Convention, Articles 8 to 23; Diallo, 2024). In addition, personal data protection authorities are supposed to be implemented at the national¹⁵ level, playing a role in raising awareness to encourage compliant data¹⁶ processing, and most of them hold sanctioning powers in collaboration with judicial authorities. The cooperation observed between these authorities on the continent favors the emergence of best practices (CDP, 2019) that help address the gaps and constraints arising from the discrepancy between the increasing complexity of data processing and the legal framework that does not evolve as quickly.

Furthermore, the Malabo Convention considers cybersecurity as an imperative that states must put into practice. Whether at the national or regional level, digital security issues are being addressed but only scattered solutions are being implemented. In this regard, several reforms have been undertaken in the community zone, both within the CEMAC¹⁷ and the WAEMU¹⁸.

14 Regulation 15-2002 concerning payment systems in the member states of the West African Economic and Monetary Union (WAEMU).

15 As of December 31, 2023, 37 countries had data protection laws and 29 had data protection authorities, according to Tech Hive (2024). Since then, Ethiopia and Somalia have also adopted their Data Protection Acts (respectively the Personal Data Proclamation 1321/2024 and Data Protection Act No. 005.2023) and established their data protection authorities.

16 See the African network of personal data protection authorities: [Who are we ? | NADPA-RAPDP](#) (consulted on Sept. 20, 2024). The Association francophone des autorités de protection des données à caractère personnel (French-speaking association of personal data protection authorities) also offers a framework for cooperation between French-speaking states, although beyond the continental sphere : <https://www.afapdp.org/> (consulted on Sept. 20, 2024).

17 Regulation No. 03/CEMAC/UMAC/CM of December 21, 2016, concerning payment systems, means, and incidents; Regulation No. 04/18/CEMAC/UMAC/COBAC of December 21, 2018, concerning payment services in the CEMAC zone.

18 Regulation No. 15/2002/CM/WAEMU concerning payment systems in the member states of WAEMU; Instruction No. 001-01-2024 concerning payment services in the UMOA.

The legal framework implemented in Africa provides a solid foundation upon which any efforts to promote the digital economy can rest. However, given the rapid evolution of technologies and the issues they bring, such as those related to AI, this framework remains limited. Many legislative, regulatory, and even governance challenges thus remain to be addressed.

Limitations of Regulatory Frameworks in the Face of Persistent Digital Challenges

Despite these efforts, countless challenges are hampering the emergence of a digital economy that benefits Africans. These challenges include, first and foremost, what can be considered normative speculation, with a multitude of regional¹⁹ organizations, and the fragmentation of certain member states between multiple communities, which may affect their level of commitment or the coherence of their actions at the national level, or even encourage “forum shopping” in conflict resolution.

The development of the digital economy on the continent is mainly hindered by the ineffectiveness of the legal and regulatory frameworks implemented. This is may due to the absence of a specific national legal framework, the incompleteness of the existing framework, or the inadequacy of the laws, due to the lack of consistency of internal rules applicable to sectors specifically affected by regulatory evolution. In addition, there are gaps in the operationalization of adopted rules, which, when combined with legal incompleteness, create a situation where laws remain unimplemented. Most African countries face some or all of these challenges, particularly due to the slow adoption of rules intended to ensure full alignment with regional²⁰ and community instruments. For example, Guinea-Bissau, a member of OHADA, WAEMU, and ECOWAS, has not yet introduced specific digital laws, despite the obligations of these regional organizations. However, the absence of a national legal framework makes it difficult to domesticate regional harmonization rules and discourages local ownership of these rules. Moreover, coercive mechanisms against recalcitrant states, when they exist, are ineffective because they are not rigorously applied to member states. The existence of countries within community spaces that do not adhere to regional integration affects other member states due to the shared market and the fragmentation that results. Another limitation is the contradictory provisions that can be found from one community to another, creating ambiguity that undermines harmonization efforts and creates cacophony regarding the preferred coercive mechanisms in the event of non-compliance with the existing legal frameworks.

In the field of digital financial services, the issue of interoperability²¹ remains a major obstacle. As early as 2002, WAEMU promoted the use of electronic payment methods through the Central Bank of West African States (BCEAO) and supported cooperation on interbank payments and interoperability. Furthermore, Article 7 of Instruction No. 008-05-2015 stipulates that “the issuing institution must, in particular, ensure that technical and operational arrangements have been made to facilitate interoperability with other payment systems.” This text presents an important opportunity for consumers of digital financial services in the region. The BCEAO launched the pilot phase of the WAEMU interoperable instant payment system (BCEAO, 2024b). This phase is still ongoing and has not yet been widely implemented for the general public²². At the continental level, there are initiatives such as PAPSS, but they are based on conventional foundations, which raises questions about freedom of competition if other players wish to offer similar solutions. However, with the continental market initiative of the AfCFTA (African Continental Free Trade Area), it is essential to promote interoperability through clear rules designed to encourage it.

19 See, in particular, the 8 RECs recognized as pillars by the African Union (AU).

20 See UNCTAD (2021). This source indicated that, for 54 member states, 33 countries have laws on electronic transactions (61%), 28 countries have consumer protection laws (52%), 33 countries have laws on personal data protection (61%), and 39 countries have laws on cybercrime (81%). Since then, the data has evolved: for electronic transactions, 42 countries now have legislation (Congo, 2019; Guinea, 2016; Gabon, 2021; Equatorial Guinea, 2017; CAR, 2022; Uganda, 2011; Chad, 2015; Eswatini, 2022; Cameroon, 2010). For personal data: 43 countries now have legislation (Eswatini, 2022; Tanzania, 2023; Somalia, 2024; Ethiopia, 2024).

21 See art. 3 of regulation 15-2002 on payment systems in WAEMU member states, op. cit.

22 September 30, 2024.

Another obstacle to the development of the digital economy in Africa concerns the functional equivalence between paper-based and electronic documents, which is often poorly respected in public administrations. The persistence of the requirement for paper-based documents in administrative procedures is a prime example. Senegal, for instance, still requires paper-based documents (signed and legalized) for several administrative formalities, which slows down digitization. This issue highlights the importance of popularizing the legal rules applicable to digital technologies, as well as raising awareness and training those responsible for their implementation. The slow progress of dematerializing administrative procedures in several countries worsens this issue and triggers a negative leveling impact on the digital economy. Even actors who could be considered “digital-friendly” are forced to adapt to the dominance of paper in order to have their procedures processed effectively.

Cybersecurity remains largely outsourced in national strategies. However, significant investment is essential to secure infrastructures, information systems, institutions, and frameworks, ensuring their robustness and resilience. Less than 50 %²³ of African Union member states have a Computer Security Incident Response Team (CERT or CSIRT), despite the central role of cybersecurity in digitalization challenges. “In total, out of the 55 member states of the African Union, only 26²⁴ (47.3%) have a Computer Security Incident Response Team” (Huet, 2023). This insufficient coverage impedes the growth of a secure and sustainable digital economy on the continent and erodes public confidence in digital technologies.

Although more than half of African states now have laws on personal data protection and a data protection²⁵ authority, their effectiveness could be improved. Cooperation between data protection authorities of the Regional Economic Communities (RECs) could be a solution to ease administrative procedures and strengthen regional integration. However, it is currently not possible for a data controller operating in several member states of a REC to carry out these procedures in just one of the member states, with the responsibility for the data protection authorities being to exchange information regarding the processing activities conducted in their respective countries. Naturally, such a measure would be accompanied by the provision of adequate human and material resources, as well as alignment among the member states of a community on the principles and values to be preserved in personal data protection.

Moreover, with the development of emerging technologies such as AI and the innovations that accompany them, humans are being imitated in their domain of expertise: intelligence. Ethical and responsible concerns about setting boundaries that should not be crossed by science and technology in the name of sustainability should occupy a central place in the governance and regulation of digital technologies. From this perspective, an analysis of the legal framework implemented at the continental, regional, and national levels reveals unmet needs that are urgent to address in order to ensure the safety and confidence of the population. The African Union’s data strategy notes that:

Most of the regulatory efforts regarding data on the continent have focused on personal data protection, with the main objective of respecting and protecting the privacy rights of internet users (African Union, 2022, p. 7).

If personal data protection favors a digital economy based on confidence, the evolution of technology has increased data sharing and circulation at a large scale through big data. Non-personal data is generally not regulated across the continent, leading to divergent practices in terms of access, sharing, usage, circulation, or reuse between countries. Even within a single country, anti-competitive practices may emerge in the absence of effective control mechanisms due to a lack of data governance. As the AU highlights, “as data in and of themselves have little value, it is only through the processing, transmission, storage and combination that value is added.” (African Union, 2022, p. 7). Therefore, the access, circulation, sharing, and usage of data should be encouraged, especially since the development of the digital economy in Africa requires it to stimulate local entrepreneurship and

²³ See in this regard, the data from AfricaCert: <https://www.africacert.org/african-csirts/>

²⁴ South Africa, Algeria, Benin, Botswana, Gambia, Ghana, Kenya, Burkina Faso, Libya, Cameroon, Côte d’Ivoire, Egypt, Ethiopia, Malawi, Mauritius, Mozambique, Morocco, Nigeria, Uganda, Rwanda, Somalia, Sudan, Tanzania, Togo, Tunisia, Zambia.

²⁵ More than half of the states still do not have a personal data protection authority on the continent (see Chapter II of the Convention, Articles 8 to 23; Diallo, 2024).

create African champions. The absence or insufficiency of regulation of non-personal data benefits the tech giants who are able to capture the data, thus weakening the local economy. This creates legal uncertainty, favoring the strongest actors who can implement systems for data collection and reuse that benefit their economic models, without always ensuring compliance with the necessary competition and security rules. States lack traceability over the data capture chain, which hinders the implementation of appropriate public policies.

Specifically concerning consumer protection, the limitations identified include non-compliance with rules related to commercial activity and unfair competition encouraged by social media platforms, as well as non-conformities in the orders processing. The risk of legal insecurity for consumers is high, as the low value of the transactions involved leads consumers to refrain from using available legal remedies. This situation results in consumer resignation and a loss of trust in e-commerce. Furthermore, although the strategic framework for digital governance is increasingly comprehensive (African Union, 2020; 2022, p. 7), it has not yet been translated into specific texts addressing key issues such as Artificial Intelligence (AI), algorithm regulation, and issues particular to online platforms... As a result, urgent issues remain unaddressed. In the same vein, there is insufficient commitment to the ethics of the technological solutions being offered. This lack of commitment is evident in strategies based on neuromarketing or highly optimized techniques designed to capture and hold users' attention, creating addictive behaviors that damage their physical and, more importantly, mental health.

Taxation is also a significant constraint that hinders the development of the digital economy, as a substantial portion of taxes eludes states due to the lack of a physical presence of digital businesses. Given the profits generated by these companies on the continent, despite being predominantly based outside Africa, there is a need to rethink the tax theories upon which the current taxation mechanisms are built.

It is natural that with the evolution of society, the legal framework should also change. However, the specifics of the Fourth Industrial Revolution, linked to the ongoing emergence of disruptive technologies and the structural transformations they induce in society, require a more proactive regulatory and governance approach to ensure alignment between the rules implemented and social reality. These observations invite us to rethink our approach to effectively regulate digital technologies and sustainably develop the digital economy on the continent. However, even the effective transposition of community or regional initiatives into national law does not always guarantee the harmony sought.

The Legal Integration in Service of a Sustainable Digital Economy in Africa: A Work in Progress

Legal integration appears as a *sine qua non* condition for the development of the digital economy on the continent. The African Union (AU) has understood this by defining its vision within the framework of its Digital Transformation Strategy for Africa 2020-2030 as “an integrated and inclusive digital society and economy in Africa that improves the quality of life for Africa’s citizens” (African Union, 2020).

Legal integration encourages a sense of trust among investors, users, and secures relationships and interactions, which is crucial for the successful economic integration of the continent. However, despite the commitment of African policymakers, their level of engagement should be strengthened (A). Moreover, the current transformations driven by AI and emerging technologies highlight the urgent need for inclusion to ensure the sustainability of the solutions to be implemented. However, this inclusivity should first be reflected at the very outset of the implementation of digital governance and regulation frameworks. A multi-level and multi-stakeholder approach is therefore necessary to ensure a sustainable digital economy in Africa (B).

The Urgent Need of Strengthening State Commitment for Harmonized Digital Governance

The urgency highlighted here is based on the observation that African states often express a willingness to contribute to the building of an information society.

However, the materialization of this expressed will remains nuanced, given the actual outcomes observed on the continent in terms of harnessing digital opportunities for economic, sociocultural, or even political development.

Nevertheless, the need for Africa to successfully govern and regulate digital technology in general, and digital economy in particular, is now unprecedented. Given that the challenges at hand are both universal and endogenous, Africa needs to accelerate its efforts, especially since its internal challenges will only be optimally addressed and managed by Africa itself. Muriel Fabre-Magnan (2021, p. 72) remarked that “the globalization of the world has given rise to the ambitious, though complex, goal of building a universal community and a fairer world order through the universal recognition and distribution of human rights.” However, she also rightly cautioned about the need “to pay attention to the other great cultures of the world” to avoid what Alain Supiot (2005, p. 285) referred to as the “fundamentalization” of law, which he described as a “Western fundamentalism.”

The adoption of the Malabo Convention on cybersecurity and data protection at the continental level appears to be an exception. The African Union (AU) is more accustomed to implementing strategic frameworks and recommendations rather than binding regulatory texts. Furthermore, the time taken for its entry into force (Diallo, 2024) demonstrates that such a process under the same conditions and modalities could be destined to fail in the future.

Thus, the commitment of African states, regional and community organizations should be strengthened to better address the challenges of the digital economy. Several texts have pointed out the weakness of insufficient interinstitutional cooperation in Africa, despite its numerous Regional Economic Communities (RECs), which could serve as relays for the AU. This is notably the case with the Digital Transformation Strategy for Africa, which identifies as one of the internal weaknesses in the continent’s digital development, the “weak coordination among continental institutions pursuing the digitalization agenda of the continent”, as well as the weak cohesion, cooperation, coordination, and harmonization between regional and continental actors. The same strategic document highlights the urgency of “immediately overcoming this gap, otherwise, the project is already destined to fail even before being implemented” (African Union, 2020).

At the same time, the African Continental Free Trade Area (AfCFTA) has been launched with the goal of implementing a single regional market. Its effectiveness undeniably depends on the level of cooperation between the different member states and among the various Regional Economic Communities (RECs). The Continental Free Trade Agreement implements “a dispute resolution mechanism that applies to the settlement of disputes between state parties²⁶ ». To implement such a mechanism, the Protocol on Rules and Procedures for the Settlement of Disputes provides for a series of graduated procedures, starting with consultations aimed at finding an amicable solution prior to any contentious phase, proceeding to the procedure before the special body that initiates the contentious phase, and including good offices, conciliation, or possible mediation during the proceedings, as well as an appeals process available to any state dissatisfied with a decision of the special²⁷ organ. For this mechanism to be effective, the will of the member states, as well as their commitment to using it, are crucial. This objective presents no minor challenge, given that, to date, regional integration efforts have not fully succeeded, and the dispute resolution mechanisms implemented face competition from other jurisdictions. The Economic Community of Central African States (ECCAS) itself acknowledges the difficulty of regional integration. It notes that:

Politically speaking, the understanding and rapprochement between countries, in line with the spirit of the African Union, represent the greatest challenge to regional integration

²⁶ Article 20, Continental Free Trade Agreement

²⁷ Article 6, Protocol on Rules and Procedures Relating to the Settlement of Disputes.

in Africa. The region is composed of fragile states, landlocked countries, and forested nations. This configuration gives full meaning to the process of regional integration in Central Africa (ECCAS, 2023).

In the same vein, the current situation of the Alliance of Sahel States (AES)²⁸ represents a new challenge that hinders the collective commitment of ECOWAS member states towards building a sustainable digital economy. In the Arab Maghreb Union (UMA), the same issues of political instability or interstate conflicts also prevent such collective engagement. Nevertheless, it is more important than ever for African countries to join forces. Local markets are increasingly insignificant in the globalized digital economy.

Very recently, the African Union (AU), after observing that “the plans and programs it has developed over the years have not yielded the expected results,” announced the implementation of a framework for monitoring and evaluating the state of African regional integration (African Union, 2024b). While such mechanisms are essential tools for the success of African integration, they are not, however, sufficiently powerful levers to strengthen the commitment of member states. This would be the result of a full awareness of both the great importance of the turning point we are currently experiencing for the future of the continent and the responsibility of states to work for the well-being of African citizens.

Therefore, enhanced inter-institutional cooperation would also provide a common solution to the issues threatening African integration, in terms of political instability, armed or unarmed conflicts, religious extremism, etc. The monitoring and evaluation mechanisms for regional integration would thus serve as tools for these institutions. It is clear that the issues lie less in the existence of institutions that sustain integration, but rather in the genuine commitment and determination of actors to shift paradigms, with greater agility and creativity, in addressing Africa’s concerns in a digitalized world. “If the traditional hierarchy pursued values of coherence, security, stability, and obedience, the network, on the other hand, cultivates values of creativity, flexibility, pluralism, and continuous learning.” (Ost & Van de Kerchove, 2002, p. 18).

The dual benefit of commitment for Africa would be, on the one hand, to successfully achieve regional integration and, on the other hand, to ensure the effectiveness of legal frameworks at the national level, with the central role of the state being repositioned both nationally and continentally. This would be reflected in the existence of clearly implemented mechanisms to adopt inclusive measures that are integrated into the international order.

Towards Inclusive and Innovative Digital Governance

Emerging technologies represent a significant opportunity to develop the digital economy on the African continent. Actions must be coordinated now more than ever through an inclusive approach involving all stakeholders, based on a strong commitment from states.

Without governance systems capable of adapting and responding to the growing complexity of the digital ecosystem, digital technology development risks exacerbating inequalities rather than promoting greater opportunities and shared prosperity (Razzano et al., 2020, p. 9).

If this were to be the case, the law would fail in its primary mission, which, from a positivist perspective, would be to “form a system of norms that regulate human conduct” (Kelsen, 1999, p. 13). Addressing the challenges related to the digital economy in Africa, therefore, requires not just legal frameworks but successful governance. Described by Ost and Van de Kerchove as a “polycentric and negotiated process, a multitude of partial adjustments, a network of relations in search of coordination principles” (Kelsen, 1999, p. 29), governance involves implementing appropriate institutional, organizational, and legal frameworks that.

²⁸ The Sahel States Alliance is composed of Burkina Faso, Mali, and Niger.

From a legal perspective, two opposing approaches highlight their respective limits in the face of the growing issues and stakes of the digital world. On the one hand, the conservative approach, grounded in legal positivism, favors regulation through law, with a binding legal framework, even a monistic one, in which the state is the only guarantor of rigor. On the other hand, the liberal approach, rooted in natural law, advocates for self-regulation by actors with minimal, or even no, intervention from the state. At first glance, these two approaches may seem antagonistic. However, considering that “law is by nature plural when one is willing to see its realities as such, without ideological preconceptions” (Cissé, 1999), a third approach seems possible. This is all the more relevant given that the issues of governance are deeply intertwined with those of globalization. These issues should prompt a “pluralist reinvention of our legal frameworks inherited from European history, and a pluralist approach to juridicity that involves actors other than the state” (Eberhard, 2009).

In the framework of digital economy governance that promotes cooperation and inclusivity, the goal would be to implement a combined and responsible approach. This would involve a clear analysis of the current situation in Africa and prioritizing responses that fully capitalize on the digital economy for the continent’s endogenous development, positioning it within the global value chain. Such a combined approach would require moving away from regulatory and governance automatism and adopting a creative, fresh perspective. In this regard, UNCTAD noted in its 2019 report on the digital economy that “to unlock its potential for the benefit of the many, and not just a few privileged, creativity must be demonstrated and new policies²⁹ must be experimented with”.

The theory of “smart power,” borrowed from Joseph Nye (2010), could perfectly apply to the concept of this third approach. It involves combining a binding legal framework (“hard power”) with flexible legal support (“soft power”) to best regulate the digital economy. This strategy not only protects fundamental rights and addresses certain endogenous concerns but also encourages technological innovation by empowering actors to continuously consider human factors in their decisions. “Smart power” could be translated into the implementation of binding legal frameworks with principles and values to embody, while also safeguarding fundamental rights such as privacy and online reputation. In this regard, the European model serves as an example³⁰. Today, “hard power” is the preferred model, particularly in national law, where the binding nature of regulations is more easily perceived.

On the other hand, the use of law as a governance tool should be increasingly prioritized as it aligns better with the continuous transformations driven by digital technologies. Law appears as a “soft power,” operating in the background to facilitate the experimentation of innovative solutions adapted to the transformation of our society, without major legal constraints that would hold them back. While strict legal frameworks remain essential, they must adapt and support innovation. It is important not to confuse “soft law” with “soft power.” Soft law remains relevant for filling certain legal gaps or normative deficiencies (Sarr, 2012). Nevertheless, it remains a limited form of regulation, both in its scope and impact. “Soft law seeks to use incentives and adhesion to influence behavior through gentleness, rather than through punishment” (Deumier, 2020). The goal is to make law *a true diffuse power* throughout the digital ecosystem, serving the society that is transforming. This “soft power” would help accompany innovation while addressing issues revealed by the digital economy. With this approach, African legislators would prioritize a dynamic model for the production of law allowing them to expand the scope of binding rules only when the level of mastery over the issues and challenges, as well as the impact on society, and the means of prevention and coercive, are guaranteed. In practice, such experimentation could take place through the implementation of “regulatory sandboxes,” where actors test technical and legal solutions before scaling them up, with “by-design” regulation that is more likely to encourage user appropriation. Such an approach would also help maintain, or even strengthen, user confidence in the law’s ability to promote organized economic development. This is the model the Central Bank of West African States (BCEAO) is trying to implement within the WAEMU region through the interoperability of digital financial services.

²⁹ UNCTAD, Digital Economy Report 2019, cited by Razzano et al. (2020, p. 6).

³⁰ EU Regulation 2016/679 of the European Parliament and the Council of April 27, 2016, on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC.

Developing the digital economy in Africa through ‘smart power’ would serve both the interests of African countries and those of their international partners by rebalancing the benefits drawn for each party. Africa is, in fact, a digital single market that plays a significant role in the revenues of other parts of the world. Instead of having its valuable primary resources exploited, Africa could rebalance the terms of cooperation, particularly in the digital economy, through experimentation. In this way, African interests would be defended with greater relevance in international forums, as they would be aligned with the identified needs.

This cooperation is the most viable from our perspective. It would combine internal cooperation at the national level thanks to the inclusion of all stakeholders (state, private sector, international and governmental organizations [IGOs], consumers, etc.), at the community and regional levels, as the Regional Economic Communities (RECs) and their member states would engage in this dynamic, and also at the international level with a relationship rebalancing. In addition, Africa’s commitment will be facilitated, as instead of thinking of its resources as being exploited, it would see the benefit of fully investing in the regulation of the digital economy.

International organizations such as the International Telecommunication Union (ITU) and UNCTAD contribute to the harmonization of these frameworks beyond African borders.

Moreover, technological capacity building is a key element of development, requiring our states to invest in the training of African skills in order to raise the level of our talent to international standards. This encourages the creation of hubs and a critical mass through the ongoing organization of training courses by experts proficient in cutting-edge technologies. The production technology in Africa can thus contribute to a sustainable digital economy that benefits Africans. Rather than exporting our raw materials, we will be able to create our own technological products at competitive and environmentally sustainable costs. This requires a rebalancing of relations with our North-South or South-South partners.

Conclusion

To address the legal and cooperation challenges of the digital economy on the African continent, Africa needs to proactively and innovatively adapt its strategies and legal frameworks.

Going beyond traditional the governance and regulation model, the third approach proposed in this contribution offers a privileged solution. It positions the law as a fully-fledged power, held by national and continental decision-makers who are called to engage with various stakeholders in order to better serve them. These decision-makers are not charged with exercising this power alone but are instead called to organize it in a distributed manner, according to the requirements of protecting fundamental rights, promoting economic development, and building a society aligned with sustainable development aspirations...

Combining rigor through binding rules designed to protect African citizens and flexibility to better support technological innovations, this third approach places experimentation at the heart of the creative process of law. Combining binding legal rules that protect fundamental rights “hard power” with inclusive, multi-actors, and multi-level cooperation, allows for a fresh and creative approach to addressing endogenous legal challenges, with the aim of serving the African citizen by involving various actors in regulatory sandboxes.

The ultimate goal of such an approach is to provide Africa with the mechanism to regulate its digital economy in the most suitable way for sustainable social, cultural, and economic development.

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