

Digital Trade and the AfCFTA

The Legal Framework Put to the Test of the Continental Digital Market

Assane Diankha

Economic Investigations Commissioner,
Expert Negotiator for the AfCFTA, Ministry of Commerce, Dakar, Senegal
diankha.assane@yahoo.fr

Abstract

The African Continental Free Trade Area (AfCFTA) represents a large-scale free trade agreement designed to create a unified market facilitating the free movement of goods, services, capital, and data across the African continent. This agreement covers a range of legal domains, including trade in goods and services, investments, competition policy, intellectual property rights, as well as digital trade and the inclusion of women and youth in commerce. By establishing a harmonized legal framework, the AfCFTA seeks to address the continent's main legal challenge, often described as a "legal patchwork". The coexistence of multiple legal regimes—including community and regional regulations, national laws, and international treaties—has led to significant legal complexity. By facilitating the free flow of services and providers in strategic sectors such as professional services, information technologies, telecommunications, media, tourism, transport, and financial services, member states create favorable conditions for promoting inclusive e-commerce. Through the integration of crucial areas such as cross-border data transfer, digital financial transactions, taxation of digital products, and customs duties applicable to digital trade, the AfCFTA offers substantial prospects for digital ecosystem stakeholders as well as regulatory authorities responsible for enforcing these standards. However, achieving a truly digital AfCFTA requires bridging technological, infrastructural, legal, and economic gaps.

Keywords

Legal framework, digital trade, regulatory cooperation, regional integration, AfCFTA


How to cite this paper:

Diankha, A. (2024). Digital Trade and the AfCFTA: The Legal Framework Put to the Test of the Continental Digital Market. *Global Africa*, (8), pp. 120-132. <https://doi.org/10.57832/5d83-3p68>

Received: September 12, 2024

Accepted: October 7, 2024

Published: December 20, 2024

© 2024 by author(s). This work is openly licensed via [CC BY-NC 4.0](https://creativecommons.org/licenses/by-nc/4.0/) 

Introduction

The advent of the African Continental Free Trade Area (AfCFTA) is seen as a major step towards African economic integration, with the potential to transform African economies through increased intra-continental trade, the creation of opportunities for African businesses, economic growth, and reduced dependence on external markets. Considered as one of the foundational steps towards the creation of an African Economic Community¹, it aims to establish a continental common market that facilitates “the free movement of people, capital, goods, services [and data], essential for strengthening economic integration, promoting agricultural development, food security, industrialization, and structural economic transformation” (African Union, 2017, preamble). Ultimately, the objective is to make the continent “a prosperous, integrated, and peaceful space,” in line with the African Union’s (AU) agenda 2063, “The Africa We Want²”. Its operational phase was launched on July 7, 2019, during the 12th Extraordinary Session of the AU Assembly on AfCFTA in Niamey, Niger, a year after its entry into force³. Negotiations, conducted progressively, established “clear, transparent, predictable, and mutually beneficial rules to govern trade” in line with AfCFTA’s objectives across various covered domains, addressing the multiplicity and overlap of trade regimes applicable on the continent. The first phase addressed trade in goods, services, and dispute resolution. The second and third phases collectively cover competition policy, intellectual property rights, investment, digital trade, and women and youth in trade (AfCFTA Secretariat). The AfCFTA emerges at a time when the continent is undergoing major economic transformation driven by digitalization.

Indeed, the digital economy is emerging as a key driver of growth and regional integration, offering opportunities in terms of industrialization (EIB, 2021), job creation, innovation, and prosperity for African economies. With new business models based on network effects and massive data exploitation, it is disrupting existing regulations and social structures. While innovation can challenge dominant positions, it also tends to concentrate markets (Colin et al., 2015).

However, the rapid evolution of the digital economy in Africa also raises complex legal questions and regulatory challenges that require special attention (OECD, 2022). Disparities in digital development across countries and regions (IMF, 2018), the need to foster innovation while protecting intellectual property rights and artificial intelligence (Google, 2024), as well as data governance, digital taxation, and consumer protection are all critical issues that require in-depth legal analysis.

In the AfCFTA era, digital trade is undergoing a radical transformation marked by a revolution in electronic exchanges across the continent. This reflection highlights not only the fundamental changes redefining digital transactions in Africa but also the evolution of the legal framework (as if to bridge the legal gap) necessary to address these new dynamics (Tavengerwei et al., 2022). The focus is placed on how regulations need to evolve to accommodate this digital revolution, in order to ensure equitable and secure growth of e-commerce (Mpabe Bodjongo & Abenelang, 2022).

If the digital economy is defined as “any economic activity that depends on the use of digital inputs or is significantly enhanced by such use, including digital technologies, digital infrastructure, digital services, and digital data” (OECD, 2021), its governance relies on the adoption of tools capable of “not only improving administrative services and user satisfaction but also promoting deeper forms of democracy” (Misuraca, 2012). This is the essence of legislation on e-commerce or digital trade. Indeed, technological evolution has led to a shift in terminology, prompting lawmakers to increasingly adopt the concept of “digital trade” to reflect the broad scope and modern impact of

1 AfCFTA is one of the six stages in the integration process, as set out in Article 6 of the Treaty establishing the African Economic Community, signed in Abuja on June 3, 1991 (African Union, 1991).

2 The African Union Agenda 2063 is the long-term strategic roadmap adopted by the African Union in 2013. Based on six key aspirations, this agenda constitutes the overarching vision for Africa’s socio-economic transformation.

3 The agreement establishing the AfCFTA was adopted by the 10th Extraordinary Session of the Conference of Heads of State and Government on March 21, 2018 in Kigali, Rwanda. It entered into force on May 30, 2019, thirty days after the deposit of the 22nd instrument of ratification with the Chairperson of the African Union Commission (AUC).

electronic transactions. AfCFTA's Protocol on Digital Trade defines digital trade as “the trade of goods and services that can be delivered either digitally or physically, involving both individuals and legal entities” (African Union, 2024, art. 1).

While their meanings can slightly differ depending on their usage, the terms “e-commerce” and “digital trade” are sometimes used interchangeably. Traditionally, e-commerce refers to commercial transactions conducted via the web. In contrast, digital trade encompasses the entire automated purchase process, regardless of the user's device, including websites, app stores, virtual reality, cloud computing, artificial intelligence, or online meeting platforms (Burri & Chander, 2023). Thus, the real added value of digital trade lies in the quantity of data generated throughout this process (Casalini & González, 2019). In an increasingly connected world, this sector presents significant challenges for public authorities, particularly in less-developed countries often lagging in adopting new technologies. It is crucial for these countries to establish an appropriate regulatory framework to govern this constantly evolving sector, ensuring it is both inclusive and secure.

The AfCFTA Agreement emerges as a legal and institutional framework creating a single continental market that promotes the free movement of goods, services, people, capital, and data. However, the issue of digitalization within AfCFTA is complex and multidimensional. Despite significant progress in digital transformation, most countries continue to face structural and socioeconomic challenges, struggling to reap the benefits of technology. Beyond market fragmentation related to digital infrastructure and logistics, as well as the concentration of transactions among a few actors, the problem of the digital divide persists in various forms. Three countries (South Africa, Kenya, and Nigeria) alone accounted for half of online shoppers in Africa (UNCTAD, 2018), and 60% of transaction traffic is concentrated on just 1% of the platforms operating on the continent (ITC, 2020). Additionally, this digital divide manifests in different dimensions: technological, economic, commercial, legal, and social.

This paper examines the evolution of digital trade legislation before proposing possible solutions to enable AfCFTA member countries to benefit from digital transformation. The first section addresses the disparity of existing national laws, highlighting the challenges posed by this regulatory diversity. It explores how differences in personal data governance and fiscal approaches to digital transactions impact digital trade at both domestic and cross-border levels. The second section focuses on harmonization efforts within AfCFTA to create a consistent legal framework suited to the new realities of digital trade. Harmonization is achieved through the adoption of regulatory cooperation frameworks tailored to the specificities of digital trade. Indeed, several critical service sectors for digital trade development have been liberalized, and numerous digital domains are now included in the protocol on digital trade. Finally, the last section will be devoted to recommended solutions for both the continent and member states.

Digital Commerce in Africa or the Disparity of Applicable National Legislations

Digital governance involves mobilizing political, legal, and institutional tools to establish rules and standards governing digital usage. In practice, it entails defining the rights and obligations of various actors within the digital ecosystem and strengthening democratic institutions (OECD, 2022) to ensure proper governance (Berg & Hofmann, 2021).

However, in Africa, digital governance faces numerous challenges, particularly the fragmentation of the regulatory framework. Continental initiatives are often supplemented—or even contradicted—by policies within regional economic communities (RECs) and national regulations. This overlapping of legislative and regulatory frameworks complicates the implementation of coherent and harmonized legislation across the continent, making it even harder to achieve sovereignty, inclusion, and protection goals central to governance.

The health and economic crisis caused by the COVID-19 pandemic significantly boosted digital transactions and the growth of e-commerce (WTO, 2023). On the continent, however, this expansion has been accompanied by widely varying legal frameworks from one country to another (Tavengerwei et al., 2022), creating a regulatory patchwork that impacts economic development and innovation. National legislation on digital commerce plays a crucial role in shaping this evolving ecosystem, establishing the rules for businesses, platforms, and consumers alike.

The fragmentation of regulations applicable in the digital sector can hinder technological progress, reduce competition, and limit business opportunities (UNCTAD, 2021). It also makes cross-jurisdictional collaboration challenging if regulations are not interoperable (Feijoo et al., 2020).

This is reflected in national legislations on data transfer and digital taxation. These two issues are critical if we are to establish an open and competitive market and promote the development of sustainable, inclusive digital commerce.

Data Governance in Africa: Navigating a Legal Labyrinth

To address the issue of data governance in the African context, we generally focus on three aspects: the movement (cross-border transfer), localization (storage), and protection (implementation of norms and standards) of data. Only the first is of interest here.

With regard to cross-border transfer, it is essential to note that the free circulation of data is vital to the creation of a common market (Boshe et al., 2022). Any restrictions on this flow inevitably limit exchanges between trading partners. However, significant disparities exist in national legislation. For instance, Algeria's Law No. 18-07 of June 10, 2018⁴, on the protection of personal data imposes a regime of authorization (Art. 44) for all transfers of personal data, whereas Senegalese law⁵ does not necessarily require authorization if the transferred personal data are not classified as sensitive. The declaration⁶ alone may suffice if the recipient country guarantees of "sufficient protection of the privacy, freedom, and fundamental rights of individuals with regards to the processing"⁷ of the personal data (sufficient level of protection).

Data fluidity is not just useful for commercial transactions, since these are also a subject of interest to researchers. However, research activities often conflict with certain fundamental principles of personal data protection (Métille, 2024).

The diversity of national laws on personal data protection has led African Union heads of state to adopt the Malabo Convention on Cybersecurity and Personal Data Protection in 2014 (African Union, 2014 ; Diallo, 2024). Although mainly declaratory, the convention urges states to develop national laws aligned with its established norms and principles. The Malabo convention aims to strengthen users' trust in digital technologies by ensuring data protection and combating cybercrime (Babalola, 2023). However, it only came into force in 2023.⁸

Regional frameworks mandating personal data protection in Africa are limited. There is however, the ECOWAS⁹ Additional Act A/SA.1/01/10 on the protection of personal data of February 16, 2010 (ECOWAS, 2010). Other international data protection rules exist but are not convincing enough to fully govern data management in Africa.

According to data from the United Nation Conference on Trade and Development (UNCTAD), 61% of African countries (33 out of 54) have legislation in place to protect personal data¹⁰. Achieving interoperability between these diverse laws remains a significant challenge for the continent.

4 <https://www.joradp.dz/FTP/jo-francais/2018/F2018034.pdf>

5 Law 2008-12 of January 25, 2008 on the protection of personal data

6 The entity (e.g., the company) wishing to transfer personal data must first inform the authority in charge of personal data protection.

7 Article 49, paragraph 1 of law 2008-12 of January 25, 2008 on the protection of personal data.

8 In accordance with Article 36, the Convention entered into force on June 8, 2023, thirty days after Mauritania deposited its 15th instrument of ratification.

9 ECOWAS, the Economic Community of West African States, comprises 15 states (Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo), 4 of which are currently under sanction (Burkina Faso, Guinea, Mali and Niger).

10 <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>

The divergence of legal frameworks often reflects cultural diversity, priorities, and competing public interests across countries (ITU & World Bank, 2020). This also explains the distinct approaches to data governance at the international level. Data governance reflects societal values, whether in China, the United States, or the European Union (UNCTAD, 2021).

In the United States, data governance is based on an open market, opposed to any form of digital protectionism (Clinton, 2010). Data management and processing, (viewed as competitive advantages), are almost exclusively left to private companies. States like California and Virginia are exceptions, adopting privacy laws similar to the EU's General Data Protection Regulation (GDPR) (Christakis, 2020). In contrast to the free market in the USA, data governance in China is based on strong state apparatus intervention and strict sovereign control of cross-border data flows (Lee, 2018; Hoffman et al., 2020). By adopting the General Data Protection Regulation (2016), the European Union wished to focus on secure privacy protection (Denis, 2018). This regulation requires that European's data can only be processed outside European territory if the privacy is guaranteed. This gives it an extraterritorial effect that is sometimes difficult to apply (Greze, 2019).

These different approaches highlight the influence of the cultural and political context on data governance, but raise concerns about fragmentation of global governance. Regulatory heterogeneity affects cross-border data flows and complicates online operations.

International Initiatives have been launched to harmonize the digital sector in general, and E-commerce in particular:

-The United Nations Commission on International Trade Law (UNCITRAL¹¹), the UN's principal legal body for international trade law, aiming to harmonize and modernize this field, has drawn up three model laws on e-commerce: the model law on Electronic Commerce (1996), the Model Law on Electronic Signature (2001), and the model law on electronic transferable records (2017).

-Since 1998, World Trade Organization (WTO), in which most of the continent's countries¹² participate has adopted a work program on e-commerce (consisting of exploratory work on electronic commerce) and a moratorium suspending customs duties on electronic transactions. Despite the systemic extension of the moratorium since that date, the work carried out to date has never led to the opening of the formal negotiations within the WTO's dedicated bodies;

-In 2017, at the WTO ministerial conference in Argentina, some member countries¹³ launched an initiative—the Joint Declaration on E-commerce¹⁴—to advance discussions on e-commerce. In 2019, they expressed their intention to begin plurilateral negotiations. On July 26, 2024, the co-organizers of the initiative (Australia, Japan and Singapore) announced, on behalf of the participants, that after five years of negotiations, a stabilized text¹⁵ had been drafted.

Ultimately, despite ongoing efforts, progress toward harmonizing and modernizing digital and e-commerce regulations has been slow and often fragmented. This does signal however, a movement toward greater international coordination, even as challenges remain in achieving global harmonization in e-commerce.

Digital Taxation: A Fiscal Overload

The imposition of customs duties on digital trade is a critical issue in common markets. Currently, an agreement between WTO members, in force since 1998 (the moratorium on e-commerce mentioned in the previous paragraph), suspends customs duties on digital transmissions, and is automatically extended (Barbet, 2003). During the WTO's latest ministerial conference, some African countries voiced concerns about the moratorium's continuation due to revenue losses it causes.

11 [United Nations Commission on International Trade Law](#).

12 African countries not members of the WTO are Algeria, Equatorial Guinea, Eritrea, Ethiopia, Libya, Somalia, Sudan and South Sudan. With the exception of Eritrea, all these countries have observer status within the WTO.

13 This initiative brings together all the countries that dominate global e-commerce, with the exception of India. The African countries taking part are Benin, Burkina Faso, Cape Verde, Cameroon, Côte d'Ivoire, Gambia, Kenya, Mauritius and Nigeria. However, major countries such as South Africa, Egypt, Tunisia, Ghana, Morocco, Rwanda and Senegal are not taking part.

14 This declaration marks the start of plurilateral negotiations between certain WTO members to establish rules on e-commerce, in the absence of consensus at multilateral level.

15 [INF/ECOM/87 directdoc.aspx \(wto.org\)](#)

For example, the value of information and communication technology (ICT)-related service imports by African Union (AU) member states grew significantly from \$19 billion in 2007 to \$37 billion in 2017 (TISMOS data¹⁶). Removing customs duties on digital products within the African Continental Free Trade Area (AfCFTA) could lower technology costs (Cruz et al., 2024). However, countries can explore alternative mechanisms for generating fiscal revenue.

Some states have begun applying taxes on digital service. In Kenya¹⁷, companies are subjected to a 1.5% tax on revenues generated by any company providing digital services to nationals. In Zimbabwe¹⁸, a 5% tax is levied on the annual turnover of digital platforms. Senegal, for its part has introduced a VAT of 18%¹⁹ on the supply of digital services from foreign providers.

These tax policies represent forms of fiscal optimization (Collet, 2021), akin to the OECD²⁰'s action plan on Base Erosion and Profit Shifting (BEPS).

However, such taxes may have unintended consequences for the continent, potentially distorting regional markets (Charrié & Janin, 2015). Studies indicate that taxation could affect both local consumers and digital platforms offering goods or services (Pellefigue, 2019). For a continent where many businesses rely on imported digital services, such taxes may increase operational costs, particularly for small and medium-sized enterprises (SMEs). Moreover, variations in tax policies across countries could further complicate the fiscal environment, imposing heavier burdens on companies and making the tax landscape more restrictive.

Nevertheless, regulatory harmonization at continental level could mitigate the negative effects of digital taxation in Africa. It is in this context that AfCFTA appears as a potential solution by promoting legal alignment and regulatory cooperation across the continent.

The AfCFTA: Harmonizing the Digital Legal Framework at Continental Level

The rapid and widespread disruptions brought about by digital technologies present promising opportunities for innovation, growth, and employment for Africa's population. However, these changes also pose complex political and legal challenges that require coordinated action at the continental level. Individually, African countries cannot fully harness the opportunities or address the challenges associated with these transformations. This is why the Heads of State and Government have set themselves the ambition, through the African Continental Free Trade Area (AfCFTA), of creating a "digital" common market among states parties (African Union, 2024, Art. 2), guaranteeing the free movement of goods, services, data, capital, and people within a framework of fair competition and consumer protection.

Thus, the provisions of the AfCFTA, while seeking to eliminate regulatory fragmentation, also promote smoother access to digital goods and services for businesses and consumers across the continent. This harmonization effort is evident throughout the foundational texts of the AfCFTA. Nevertheless, our analysis will mainly focus on two specific protocols: the protocol on trade in services, and the protocol on digital trade, which play a pivotal role in facilitating trade and advancing digital integration within the region.

16 TISMOS, or Trade in Services Data by Mode of Supply, is an experimental data set created by the WTO and funded by the European Commission's Directorate-General for Trade. https://www.wto.org/french/res_f/statis_f/trade_datasets_f.htm

17 The income tax (digital service tax) regulations of Kenya, 2020, Microsoft Word - L.N. 205-206 COMBINED INCOME TAX EDVAT (AMENDMENT) REGULATIONS.docx (kra.go.ke)

18 More highlights on Zimbabwe's proposed 5 percent digital tax—MNE Tax

19 Order repealing and replacing order no. 034269 of November 8, 2023 on the application of the provisions of article 355 bis of the CGI relating to VAT on digital services supplied by foreign taxable persons

20 OECD/G20 project on tax base erosion and profit shifting, July 11, 2023. This document presents the outcome statement as approved by 141 members of the OECD/G20 inclusive framework on BEPS as of May 27, 2024. <https://www.oecd.org/content/dam/oecd/fr/topics/sujets-policy-issues/beps/declaration-de-resultat-sur-la-solution-reposant-sur-deux-piliers-pour-resoudre-les-defis-fiscaux-soulevés-par-la-numerisation-de-l-economie-juillet-2023.pdf> <https://www.oecd.org/content/dam/oecd/fr/topics/sujets-policy-issues/beps/declaration-de-resultat-sur-la-solution-reposant-sur-deux-piliers-pour-resoudre-les-defis-fiscaux-soulevés-par-la-numerisation-de-l-economie-juillet-2023.pdf/>

Liberalization of Priority Service Sectors for the Development of Digital Trade

The AfCFTA Protocol on trade in services²¹ is largely based on principles established by the World Trade Organization's General Agreement on Trade in Services (GATS²²). This protocol aims to set clear objectives and obligations to regulate the provision of services across the African continent, creating a coherent and integrated framework for service trade. Building on the foundations of GATS, the protocol seeks to facilitate the progressive liberalization of service trade while safeguarding the economic interests of member states.

However, the WTO noted in 2019 (WTO, 2019) that, despite reforms carried out by many member countries in recent years, trade in service faces greater barriers than trade in goods, and introducing new reforms through trade agreements remains particularly complex. Indeed, opening up markets to trade in service is no easy task, as it often requires domestic or regional reforms (ITC, 2013).

For a long time, the need for agreements on service trade was questioned since many sectors such as hospitality, telecommunications, or healthcare were often considered as state-controlled or state-owned due to their domestic or monopolistic nature. However, sectors like international finance and maritime transport have been open for centuries. Technological advancements, such as the internet, and recent regulatory reforms have exposed many previously protected services to competition, facilitating market access and reducing distance-related barriers.

In this context, the AfCFTA service trade liberalization negotiations established a detailed process for creating specific²³ sectoral commitments (African Union, 2017, Art. 22), which form an integral part of the protocol (African Union, 2017, Art. 28). These commitments enable member states to define the services they will liberalize and the conditions under which these services will be provided. These modalities have led to the prioritized liberalization of five key service sectors: service provided to businesses, communication services, financial services, tourism and travel services, and transport services²⁴. The aim is to stimulate innovation and competitiveness in these areas, by facilitating their opening up and access to the market. Each of these sectors plays a vital role in developing e-commerce and the digital economy by enhancing the efficiency of online transactions, promoting business integration into the digital economy, and strengthening the infrastructure needed to support the sector's growth.

Technological changes and recent innovations no longer allow us to define the contours of the various service sectors on the basis of the classifications already established by both the WTO (W120²⁵) and the United Nations (CPC-UN²⁶). However, according to Bachetta et al. (1998), four categories of service can be identified. The first groups together the service sector that support e-commerce infrastructure, such as telecommunication and computer services. Business and financial services that can be provided online make up the second category. The third category includes logistics services such as transport, postal, and courier services. The final category is about sectors benefiting from electronic information flows, enabling them to reduce costs and improve the efficiency of the data transmission.

21 https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_fr.pdf

22 The GATS came into force in January 1995 following the Uruguay Round negotiations to extend the multilateral trading system to services. https://www.wto.org/french/docs_f/legal_f/26-gats_01_f.htm

23 The lists of specific commitments are complex documents in tabular form, in which each country identifies the service sectors to which it will apply the market access and national treatment obligations set out in the Protocol, and any exceptions to these obligations that it wishes to maintain.

24 This classification of service sectors is based on the WTO classification, also known as W120 (MTN.GNS/W/120). This classification comprises 12 service sectors. Other classifications also exist, such as the United Nations Central Product Classification (CPC).

25 This classification is adopted by WTO members to ensure the comparability and consistency of commitments between countries. https://www.wto.org/french/tratop_f/serv_f/accountancy_f/accountancy_f.htm#:~:text=Les%20services%20comptables%20figurent%20dans,et%20la%20tenue%20de%20livres.

26 The United Nations Central Product Classification (CPC) provides a consistent classification structure for products (goods and services) based on internationally recognized concepts, definitions, classification rules and principles. https://unstats.un.org/unsd/classifications/Econ/Download/In%20Text/CPCprov_french.pdf

These various service sectors, classified by the authors as covering digital commerce or e-commerce, correspond precisely to the five priority service sectors identified by the AfCFTA. These are 1/ business services: professional services (legal, accounting), IT services (management service, data processing), R&D services, etc; 2/ communication services: telecommunications (internet), audiovisual services (cinematography, Over-The-Top-OTT, advertising), postal and courier services (logistics, express delivery); 3/ financial services: banking services (digital payments, fintech), insurance; tourism and travel services: ticket bookings, hospitality, and accommodation services; 5/ transport services (land, rail, maritime, air, and multimodal transport).

To foster a dynamic service market, AfCFTA member states are required to make substantial commitments to liberalize these service sectors. However, commitments regarding market access and national treatment (to facilitate the mobility of services and service providers and reduce discriminatory measures) often codified in sector-specific lists are insufficient to guarantee the free movement of services and providers across the continent (WTO, 2019). A list-based approach provides legal security, allowing states to manage the opening up of their respective service sectors (Fabri & Crontiras, 2003). Establishing harmonized frameworks or mechanisms for regulatory cooperation is essential to overcome these barriers and enable businesses to navigate national regulations more easily. Member states must also recognize the “urgent need to build upon and consolidate achievements in service liberalization and regulatory harmonization at both regional economic community (REC) and continental levels” (African Union, 2017, preamble).

To boost intra-African trade, “the liberalization process focuses on gradually eliminating adverse measures affecting service trade to provide effective market access” (African Union, 2017, Art. 18). It is on the basis of this general principle of progressivity that other equally important areas for the promotion of inclusive e-commerce will be taken into account during the second phase of AfCFTA negotiations.

Inclusion of Key Areas for Promoting Digital Trade

The rapid growth of digital trade and its significant impact on the exchange of goods and services have led to the integration of specific provisions in recent free trade agreements. Countries like the United States often view such agreements as the most effective way to ensure the free circulation of digital goods and services among signatories while regulating the data flows that enable these commercial transactions²⁷ (Haji & Leblond, 2022).

The development of disciplines to govern digital trade in the African market had already begun during the first phase of negotiations. Indeed, certain provisions of the protocols on trade in goods and services already apply to digital trade. Digital trade covers “trade transactions in goods and services” (African Union, 2024, Art. 1) delivered between individuals or legal entities. Officially however, it is only with the opening of “phase II negotiations and beyond” that formal negotiations were initiated on this issue. It was decision Assembly/AU/4(XXXII), taken during the 33rd Ordinary Session of the Conference of Head of States and Government of the African Union, held in Addis Ababa, Ethiopia, from February 9 to February 10, 2020 that clearly defined the direction to be followed. Point 22 of this decision states that:

Phase III negotiations focus on an AfCFTA protocol on e-commerce immediately after the conclusion of Phase II negotiations, and tasks the African Union Commission to initiate preparations for upcoming negotiations and mobilize resources in 2020 for capacity building of African trade negotiators participating in the negotiation of the of the e-commerce legal instrument at the AfCFTA level. (African Union, 2020a).

²⁷ See Chapter 19 of the Canada-U.S.-Mexico Free Trade Agreement (<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/19.aspx?lang=fra>) or Chapter 14 of the U.S.-Morocco Free Trade Agreement (https://www.ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file194_3848.pdf).

At the 37th Ordinary Session of the African Union Conference of Heads of State and Government held on February 17–18, 2024 in Addis Ababa, Ethiopia, the ZLECAF Protocol on digital trade was adopted by Decision Assembly/AU/Dec.885(XXXVII). In adopting the protocol on digital trade, the ZLECAF member states had the following general objectives:

support the achievement of AfCFTA objectives outlined in Article 3²⁸ of the agreement by establishing harmonized rules, common principles, and standards that enable and support digital trade for sustainable and inclusive socioeconomic development and the digital transformation of the continent. (African Union, 2024, Art. 2).

Its scope extends to:

all measures adopted or maintained by State Parties that affect digital trade commerce [with the exception of], public procurement and information held or processed by a State Party or on behalf of a State Party, or measures relating to its collection. (African Union, 2024, Art. 3)

Although the protocol excludes from its scope public data (“information held or processed by a State”) for reasons of State sovereignty, “open government data” (African Union, 2024, Art. 39) is covered by the protocol’s provision. The latter refers to “non-proprietary information and data held by or on behalf of central, regional, or local administrations” (African Union, 2024, Art. 1). The question is, then, which public (proprietary) data are excluded. While the Lasserre et al. (2000) report refers to “data collected or produced by public services using public funds as part of their mission and intended for dissemination”, it is necessary to consider the scope and legal status of the data to be disseminated (Guglielmi, 2013). This may exclude, for example, data relating to security policy, data held by judicial authorities for the purpose of prevention, detection, investigation or criminal prosecution (European Union, 2016, Art. 2).

The protocol covers diverse areas found in many free trade agreements, including, customs duties on electronic transmissions (Art. 6), cross-border data flows (Art. 20), data protection (Art. 21) and privacy, cybersecurity and online consumer protection (Art. 27), cross-border digital payment systems (Art. 15), electronic signatures (Art. 8), invoices (Art. 13), and authentication (Art. 9), emerging digital technologies (Art. 34), and the institutional frameworks for implementing and managing the protocol (Art. 37).

By way of comparison, the text stabilized under the joint initiative e-commerce covers the same issues: electronic signatures and authentication (Art.5), contracts (Art.12), and electronic invoicing (Art.7), electronic payments (Art.10), custom duties on electronic transmissions (Art.11), online consumer protection (Art.14), personal data protection (Art.16), cybersecurity (Art.17), and institutional arrangements (Art.28).

In addition to these provision, it is planned to annex other texts to the protocol in order to specify the content of the commitments with article 46. These annexes will cover respectively: rules of origin, digital identities, cross-border digital payments, cross-border data transfers, criteria for determining legitimate and lawful reasons of public interest justifying the disclosure of the source code, online safety and security, emerging and advanced technologies, and financial technologies.

The AfCFTA, along with its various annexes, aims to foster an accessible and reliable e-commerce ecosystem on the African continent. This major regulatory reform, coupled with improved connectivity, will reduce transaction costs on the continent by up to 25% (Joint WTO-World Bank Guidance Note, 2023). This free trade area creates a competitive digital marketplace, enabling local businesses to access technology and strengthen their competitiveness (World Bank, 2019).

²⁸ One of the overall objectives of the AfCFTA is “to create a single market for goods and services facilitated by the movement of people in order to deepen the economic integration of the African continent and in line with the Pan-African vision of an ‘integrated, prosperous and peaceful Africa’ as set out in Agenda 2063”.

Building a “Digital AfCFTA”: Solutions to Propel Intra-African Trade

The harmonization of the digital legal framework, driven by the regulatory structure established by AfCFTA, demonstrates that member states are engaging in a constructive and dynamic approach to optimize the gains from the digital transformation of local economies. This reform is particularly motivated by the rapidly growing trend in the number of e-commerce users in Africa, projected at over 520 million by 2025, having risen from 135 million to over 437 million between 2017 and 2023. Building a Digital AfCFTA is thus not only a necessity but also an opportunity to propel intra-African trade and transform the continent’s economic dynamics. To fully achieve this, several foundational initiatives must be prioritized:

- *strengthening digital skills*: recognizing the digital skills gap in Africa, the African Union (2020b) reminds us that that investments in technology education represent the most robust strategy for the continent’s future and a key pathway toward achieving thematic indicator 4.4.2 of the Sustainable Development Goal (SDG) (United Nations, 2015);
- *densification of digital infrastructure*: infrastructure is crucial for the development of digital trade in Africa. The Program for Infrastructure Development in Africa (PIDA) (African Union, 2012), launched by the African Union Commission, highlights that addressing the infrastructure deficit is essential for the continent’s economic prosperity and sustainable development. This issue requires solutions on a regional and continental scale. Since the digital divide is essentially geographical, economic integration across the continent can only be achieved through interconnected markets. The infrastructure challenge, covering projects in energy, transportation, ICT, and water resources, is estimated at \$360 billion by 2040 (African Union, 2012).
- *strengthening investments in innovation*: the impact of COVID-19 raises the need for states to pay particular attention to innovation in their economic development plans, based in particular on smart specialization strategies. These strategies offer frameworks and tools to support innovation initiatives (Dosso & Diankha, 2022). The AfCFTA should inspire a genuine culture of innovation, especially in the field of technology, and encourage the creation of regional technology hubs.

At the state level, it will be necessary to intensify efforts already undertaken by certain countries that derive optimal benefit from digital trade (WTO, 2024). In addition to investing in the sectors mentioned, these countries are paying particular attention to reducing transaction and connectivity costs while providing various forms of support to ecosystem players, both legal and fiscal, as illustrated by the example of the Start-up Act of Senegal.

Conclusion

The main characteristic of intra-African trade is its concentration (Lo & Sy, 2022). 50% of trade flows are conducted by the continent’s two largest economies, South Africa and Nigeria (UNCTAD, 2019). However, trade between African countries contains more technological content compared to exports directed outside the continent (IMF, 2019). Alongside this concentration of trade is a fragmentation of regulations, particularly those related to the digital economy and digital trade.

These statistics highlight the challenges posed by the setting up of the AfCFTA. The digitization of trade is a major asset for achieving its objectives. However, the fragmented nature of legal frameworks is an obstacle to the continent’s economic and inclusive transformation (Sorgho, 2023). The adoption of legal measures by the AfCFTA to harmonize regulations applicable to digital trade must be accompanied by several initiatives at both the regional and national levels. Moreover, given the disruptive impact of technology, the search for an appropriate legal framework has become an imperative for authorities.

Bibliography

- African Union (1991). Treaty Establishing the African Economic Community, signed at Abuja on June 3 1991. <https://au.int/en/treaties/treaty-establishing-african-economic-community>
- African Union (2012). Program for Infrastructure Development in Africa (PIDA). Cadre stratégique 2012-2040. <https://www.au-pida.org>
- African Union (2014). Convention de l'Union africaine sur la cybersécurité et la protection des données à caractère personnel. Malabo. https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_f.pdf
- African Union (2017). Protocole de la ZLECAf sur le commerce des services. Niamey.
- African Union (2018). Accord portant création de la ZLECAf. Niamey. https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_fr.pdf
- African Union (2020a). Décision Assembly/AU/4(XXXII) de la conférence des chefs d'État et de gouvernement de l'Union africaine lors de la 33^e session ordinaire tenue à Addis-Abeba, Éthiopie, du 9 au 10 février 2020. https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_f.pdf
- African Union (2020b). Stratégie de transformation numérique pour l'Afrique (2020-2030). Addis-Abeba. <https://au.int/fr/documents/20200518/strategie-de-transformation-numerique-pour-lafrique-2020-2030>
- African Union (2024). Protocole de la ZLECAf sur le commerce numérique. Addis-Abeba.
- Babalola, O. (2023). Régime juridique de protection des données et gouvernance des données en Afrique : une vue d'ensemble CREA, document de travail DG-003, consortium pour la recherche économique en Afrique, Nairobi.
- Bacchetta, M., Low, P., Mattoo, A., Schuknecht, L., Wager, H., & Wehrens, M. (1998). Le commerce électronique et le rôle de l'OMC, WTO Special Studies, No. 2f, World Trade Organization (WTO), Genève. https://www.econstor.eu/bitstream/10419/107053/1/wto-special-study_2_f.pdf
- Barbet, P. (2003). Commerce électronique et régulation des échanges internationaux. *Annals of Telecommunications*, 58(1-2), 251-265. <https://shs.hal.science/halshs-00206108/document>
- Berg, S., & Hofmann, J. (2021). Digital Democracy. *Internet Policy Review*, 10(4).
- Boshe, P., Hennemann, P., & Von Meding, R. (2022). African Data Protection Laws – Current Regulatory Approaches, Policy Initiatives, and the Way Forward. Forthcoming in *Global Privacy Law Review*. <https://ssrn.com/abstract=3947664>
- Burri, M., & Chander, A. (2023). What Are Digital Trade and Digital Trade Law? *AJIL Unbound*, 117, 99-103. <https://doi.org/10.1017/aju.2023.14>
- Casalini, F., & González, J. L. (2019). Trade and Cross-Border Data Flows. *OECD Trade Policy Paper*, 220.
- Charrié, J., & Janin, L. (2015). Le numérique : comment réguler une économie sans frontière ? Notes de l'Institut national du service public, 35. <https://documentation.insp.gov.fr/insp/doc/SYRACUSE/177751/le-numerique-comment-reguler-une-economie-sans-frontiere-julia-charrie-et-lionel-janin-n-35-2015-oct>
- Christakis, T. (2020). "European Digital Sovereignty": Successfully Navigating Between the "Brussels Effect" and Europe's Quest for Strategic Autonomy. *SSRN*. <https://ssrn.com/abstract=3748098> or <http://dx.doi.org/10.2139/ssrn.3748098>
- Clinton, H. R. (2010). Remarks on Internet Freedom. *United States Department of State*. <https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm>
- Colin, N., Landier, A., Mohnen, P., & Perrot, A., (2015). "The Digital Economy". *Les notes du conseil d'analyse économique*, 26(7), 1-12.
- Collet, M. (2021). Taxation of the digital economy: global challenge, local responses? *RED*, 2021/1, 2, 140-144.
- Cruz, M. (ed) et al. (2024). Digital Opportunities in African Businesses. *The World Bank*.
- Denis, M.-L. (2020). La protection des données personnelles, un enjeu majeur. *Cahiers français*, 415(2), 40-49. <https://shs.cairn.info/magazine-cahiers-francais-2020-2-page-40?lang=fr>
- Diallo, B. (2024). Malabo Convention Takes Effect: Beyond the Positive Announcement, Challenges of Implementation and Modernization. *Global Africa*, (5), pp. 56-70. <https://doi.org/10.57832/57wg-c486>
- Dosso, M., & Diankha, A. (2022, février). ZLECAf et changement structurel en Afrique de l'Ouest : de la pertinence des stratégies de spécialisation intelligente en Côte d'Ivoire et au Sénégal. *Repères et perspectives économiques*, [En ligne], 5, n° spécial. <https://doi.org/10.34874/IMIST.PRSM/RPE/30650>
- ECOWAS (2010). Acte additionnel A/SA.1/01/10 relatif à la protection des données à caractère personnel du 16 février 2010. <https://www.afapdp.org/wp-content/uploads/2018/06/CEDEAO-Acte-2010-01-protection-des-donnees.pdf>
- European Investment Bank (2021). *The rise of Africa's digital economy – The European Investment Bank's activities to support Africa's transition to a digital economy*. <https://doi.org/10.2867/135126>

- European Union (2016). Règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE (règlement général sur la protection des données). Journal officiel de l'Union européenne. <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32016R0679>
- Fabri, H. R., & Crontiras, J.-P. (2003). L'OMC et les services publics. Institut du développement durable et des relations internationales (IDDRI), 65p. https://www.iddri.org/sites/default/files/import/publications/id_0310_ruiz%26fabri.pdf
- Feijoo, C., Kwon, Y., Bauer, J. M., Bohlin, E., Howell, B., Jain, R., Potgieter, P., Vu, K., Whalley, J., & Xia, J. (2020). Harnessing artificial intelligence (AI) to increase wellbeing for all: The case for a new technology diplomacy. *Telecommunications Policy*, 44(6), 101988. <https://doi.org/10.1016/j.telpol.2020.101988>
- Google (2024). *AI Sprinters: Capturing the economic opportunity of AI in emerging markets*. <https://static.googleusercontent.com/media/publicpolicy.google/fr//resources/ai-digital-sprinters.pdf>
- Greze, B. (2019). The extra-territorial enforcement of the GDPR: a genuine issue and the quest for alternatives. *International Data Privacy Law*, 9(2), 109-128.
- Guglielmi, G. (2013). Networks, Public Services, and the Revolution of Their Users. *Revue française d'administration publique*, 146(2), 433-436. <https://shs.cairn.info/journal-revue-francaise-d-administration-publique-2013-2-page-433?lang=en>.
- Haji, R., & Leblond, P. (2022). L'ACEUM et le commerce numérique. *Quebec Journal of International Law*, n° hors-série, 197-216. <https://doi.org/10.7202/1090924ar>
- Hoffmann, S., Lazanski, D., & Taylor, E. (2020). Standardising the Splinternet: How China's Technical Standards Could Fragment the Internet. *Journal of Cyber Policy*, 5(2), 239-264. <https://doi.org/10.1080/23738871.2020.1805482>
- IMF (2018). Sub-Saharan Africa Regional Economic Outlook: Domestic Resource Mobilization and Private Investment. World Economic and Financial Surveys. International Monetary Fund.
- IMF (2019). La zone de libre-échange continentale changera-t-elle la donne en Afrique ? Dans *Perspectives économiques régionales pour l'Afrique subsaharienne* (pp. 41-58). Fonds monétaire international.
- International Telecommunication Union (ITU) & World Bank (2020). *Digital Regulation Handbook*. <http://documents.worldbank.org/curated/en/099140201092256498/P17225906ca5880a9083d30910f8c79bfd>
- ITC (2013). Mobiliser les entreprises pour le commerce des services. https://www.intracen.org/sites/default/files/media/file/media_file/2023/09/29/mobiliser_les_entreprises_pour_le_commerce_des_services.pdf
- ITC (2020). African Marketplace Explorer. The Landscape of B2C Online Marketplaces for Physical Goods in Africa. EcomConnect. <https://ecomconnect.org/page/african-marketplace-explorer>
- Lasserre, B., Chantepie, P., Japiot, O. (2000). *L'État et les technologies de l'information et de la communication. Vers une administration « à accès pluriel »*. La Documentation française, p. 113.
- Lee, J. A. (2018). Hacking into Chinese Cybersecurity Law. *Wake Forest Law Review*, 53(1).
- Lo, M., & Sy, A. (2022). Défis, opportunités, impacts et facteurs de succès de la ZLECAf. *Policy Paper*. https://www.policycenter.ma/sites/default/files/2022-09/PP_13-22_Moubarack%20Lo.pdf
- Métille, S. (2024). *Protection des données personnelles et recherche*. Stämpfli.
- Misuraca, G. (2012). Renouveler la gouvernance à l'ère du numérique. *Télescope*, 18(1-2), 21-43.
- Mpabe Bodjongo, & M., Abenelang, S. (2022). Analyse comparative de l'encadrement du commerce électronique : cas de six États africains. *Revue internationale de droit économique*, t. XXXVI(1), 75-101. <https://doi.org/10.3917/ride.361.0075>
- Nations unies (2015). Objectifs de développement durable (ODD). <https://sdgs.un.org/goals>
- Note d'orientation conjointe OMC-Banque mondiale (2023). Faire du commerce numérique un catalyseur du développement de l'Afrique. https://www.wto.org/french/thewto_f/minist_f/mc13_f/policy_note_digital_trade_africa_f.pdf
- OECD (2021). *Perspectives de l'économie numérique de l'OCDE 2020 (version abrégée)*. Éditions OCDE. <https://doi.org/10.1787/3b257711-fr>
- OECD (2022). Transformer la gouvernance publique au service de la démocratie numérique. Dans *Building Trust and Reinforcing Democracy: Preparing the Ground for Government Action*. Éditions OCDE.
- Pellefigue, J. (2019). *Taxe sur les services numériques, étude d'impact*. Deloitte.
- République du Sénégal (2019). Loi n° 2019-17 du 24 janvier 2019 portant création et promotion des start-up au Sénégal.
- Sorgho, Z. (2023). Développement industriel de l'Afrique : comment la zone de libre-échange continentale africaine (ZLECAf) peut-elle y contribuer ? *Ferdi*, document de travail.
- Tavengerwei, R., Mumbo, V., & Kira, B. (2022). *Points à examiner à l'approche des négociations de phase II de la ZLECAf : enjeux de la politique commerciale numérique dans quatre pays d'Afrique subsaharienne*. Série de documents de Digital Pathways at Oxford, n° 16. https://doi.org/10.35489/BSG-DP-WP_2022/01

- UNCITRAL (1996). Model Law on Electronic Commerce. United Nations. https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce
- UNCITRAL (2001). UNCITRAL Model Law on Electronic Signatures. United Nations. https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures
- UNCITRAL (2017). UNCITRAL Model Law on Electronic Transferable Records. United Nations. https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records
- UNCTAD (2019). Economic Development in Africa Report 2019: Rules of origin for enhanced intraAfrican trade. Genève.
- UNCTAD (2021). Rapport sur l'économie numérique 2021. Flux transfrontière de données et développement : à qui profitent ces flux ? Nations unies, numéro de vente F.21.II.D.18.
- UNCTAD (2018). B2C E-Commerce Index 2018. Focus On Africa. https://unctad.org/system/files/officialdocument/tn_unctad_ict4d12_en.pdf
- World Bank (2019). World Development Report 2019: The Changing Nature of Work.
- WTO (World Trade Organisation) (1994). The General Agreement on Trade in Services (GATS). WTO.
- WTO (World Trade Organisation) (2017). Déclaration conjointe sur le commerce électronique, adoptée lors de la conférence ministérielle. 10-13 december 2017, Buenos Aires, Argentine.
- WTO (World Trade Organisation) (2019). Rapport sur le commerce mondial 2019. L'avenir du commerce des services. OMC. https://www.wto.org/french/res_f/booksp_f/00_wtr19_f.pdf
- WTO (World Trade Organisation) (2023). Rapport sur le commerce mondial, La remondialisation pour un avenir sûr, inclusif et durable. OMC, Genève.
- WTO (World Trade Organisation) (2024). Aid for Trade: Challenges and success stories. Senegal: Five steps for digital transformation. https://www.wto.org/english/tratop_e/devel_e/a4t_e/cssta4t-senegal_e.htm