

IMPERATIVE FOR EXPEDITING AFRICAN CONTINENTAL FREE TRADE AREA NEGOTIATIONS ON **E-COMMERCE**



United Nations
Economic Commission for Africa

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I. Background: E-commerce in the African Continental Free Trade Area

According to the World Trade Organization (WTO) definition, e-commerce is the “production, distribution, marketing, sale or delivery of goods and services by electronic means” (WTO, 1998). As shown below, however, this is interpreted by different trade negotiators to cover a broad range of issues.

E-commerce was first included as a topic in a free trade agreement (FTA) in 2001.¹ Since then, the number of FTAs that address e-commerce has been regularly increasing, now representing 30 per cent of all notified trade agreements with WTO (Monteiro and Teh, 2017). E-commerce is included in virtually all of the recent mega-regional trade agreements, including the concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the United States–Mexico–Canada Agreement (USMCA), and the Regional Comprehensive Economic Partnership agreement.

On 10 February 2020, the Assembly of Heads of State and Government of the African Union:

DECIDE[D] that Phase III Negotiations focuses on an AfCFTA Protocol on E-Commerce immediately after conclusion of Phase II Negotiations and

DIRECT[ED] the African Union Commission to embark on preparations for the upcoming negotiations and mobilize resources during 2020 for capacity building for African trade negotiators to be involved in the negotiation of e-commerce legal instruments at the level of the African Continental Free Trade Area (African Union, 2020).

This briefing note provides an illustration of the types of issues that can be approached in an African Continental Free Trade Area (AfCFTA) protocol on e-commerce. It makes a case for expediting those negotiations – given the considerable changes in the world economy since the thirty-third ordinary session of the Assembly of Heads of State and Government of the African Union, held in Addis Ababa on 9 and 10 February 2020 – particularly due to the COVID-19 pandemic, the imperative to build back better for the Fourth Industrial Revolution, the value of consolidating a pan-African position on e-commerce negotiating issues, and to better enable coherence with the other protocols of AfCFTA (ECA, forthcoming a).

¹ The first such FTA was the New Zealand–Singapore Closer Economic Partnership, concluded in 2001.

II. Options for approaching e-commerce in the AfCFTA

The gamut of e-commerce issues considered under trade agreements is large (see table). Some of these issues cut across the protocols of AfCFTA, while others could be specific to a protocol on e-commerce. Of equal importance is the extent to which negotiators address any such issues, ranging from basic cooperation frameworks, through to common principles, harmonized regulations and even unified laws, depending on the level of ambition.

Many of these options originate in the proposals of more developed countries and may be considered less relevant, or even inappropriate, for the African context. Negotiators may consider approaches to e-commerce that prioritize liberalization or regulation, or both, or entirely different intentions, and would be advised to respond to the “bottom-up” priorities of actual e-commerce businesses in Africa, rather than merely follow the content of agreements elsewhere in the world (African Union Commission, 2020). In a recent survey of African tech micro-, small and medium-sized enterprises by ECA, the most frequently cited priorities for boosting cross-border e-commerce were harmonizing laws, including on taxation; electronic trade; digital signatures; e-transactions; data standards; privacy laws; and consumer protection regulations for building digital trust (ECA, forthcoming a).

Options for e-commerce in the African Continental Free Trade Area^a

Category	Issues covered	Examples
E-commerce issues for consideration in the AfCFTA e-commerce protocol		
Data governance rules and regulations	<ul style="list-style-type: none"> Data protection, portability, security and privacy, including principles, frameworks or harmonization of rules on personal data, company data, health data or public data; Cross-border data flows and data localization provisions; Coordinated cybercrime laws, investigations and information sharing; Liability of intermediary service providers. 	<ul style="list-style-type: none"> European Union General Data Protection Regulation and most European Union trade proposals; Costa Rica–Colombia FTA; United States–Republic of Korea FTA; Comprehensive and Progressive Agreement for Trans-Pacific Partnership; USMCA; United States proposal in United States –Kenya FTA.
Electronic transactions	<ul style="list-style-type: none"> E-transaction laws, including legal recognition of electronic signatures and contracts, and the delineation of jurisdiction in cross-border electronic transactions disputes. 	<ul style="list-style-type: none"> United Nations Commission on International Trade Law Model Law on E-commerce; United States–Peru Trade Promotion Agreement.
E-commerce taxation	<ul style="list-style-type: none"> Prohibitions on the imposition of customs duties on electronic transfers; Principles, frameworks or the harmonization of laws for the taxation of cross-border e-commerce, including online jurisdictional issues. 	<ul style="list-style-type: none"> WTO Moratorium on Customs Duties on Electronic Transmissions; Organization for Economic Cooperation and Development/Group of 20 negotiations.

Category	Issues covered	Examples
Facilitation of e-commerce goods trade	<ul style="list-style-type: none"> De minimis thresholds and simplified customs regimes for promoting e-commerce parcel trade. 	<ul style="list-style-type: none"> USMCA "reciprocal" de minimis levels provision.
General principles and coordination	<ul style="list-style-type: none"> Most favoured nation and national treatment provisions for electronic and digital products and services; Non-discrimination of digital goods and services; Cooperation, transparency and coordination over the design, implementation and review of national e-commerce rules and regulations; Capacity-building and resource pooling. 	<ul style="list-style-type: none"> Singapore–Australia FTA; United States–Republic of Korea FTA; United States–Singapore FTA; Republic of Korea–Viet Nam FTA; Many WTO proposals incorporating Aid for Trade on e-commerce, such as JOB/GC/116.
E-commerce issues that could cut across other AfCFTA protocols		
Trade in goods	<ul style="list-style-type: none"> Tariff elimination for goods necessary to support e-commerce (such as computers, telecommunications equipment and semiconductors); Digital trade facilitation for trade in goods, including e-logistics, paperless trading, single windows and electronic customs procedures. 	<ul style="list-style-type: none"> WTO Information Technology Agreement; Costa Rica–Colombia FTA; China–Peru FTA; Most recent Australia and New Zealand FTAs.
Trade in services	<ul style="list-style-type: none"> Liberalization commitments on services necessary to support e-commerce (such as telecommunications services, computer services, electronic payments and delivery), most importantly on modes 1 and 2 of supply of service under AfCFTA. 	<ul style="list-style-type: none"> General Agreement on Trade in Services (GATS) (depending on interpretation of the classification of e-commerce, see following section).
Intellectual property rights	<ul style="list-style-type: none"> E-commerce-specific aspects of intellectual property, such as source code and algorithms, and cyber theft of trade secrets; Technology transfer issues. 	<ul style="list-style-type: none"> Recent United States FTAs (for example, on digital rights management and source code disclosure); United States WTO proposals.
Competition	<ul style="list-style-type: none"> Online consumer protection and safety provisions, including returns, consumer safety and supplier liability; Updated definitions of dominance and anti-competitiveness accounting for digital business models and the importance of data; Rethinking of mergers and buyouts of start-ups and related small and medium-sized enterprises in the e-commerce ecosystem. 	<ul style="list-style-type: none"> Costa Rica–Colombia FTA; Singapore–Australia FTA; Japan–Mongolia EPA; Republic of Korea–Viet Nam FTA; Proposals in United States–Kenya FTA negotiations (third party liability limitations).
Investment	<ul style="list-style-type: none"> E-commerce-related investment issues: investment through electronic platforms and crowdfunding. 	<ul style="list-style-type: none"> United States WTO proposals.
Other	<ul style="list-style-type: none"> Open government data; E-procurement provisions. 	<ul style="list-style-type: none"> USMCA; European Union–Indonesia proposals.

Sources: Adapted from different sources (Ogo, 2020; Monteiro and Teh, 2017; MacLeod, 2017; Wu, 2017; ECA, African Union Commission, AfDB and UNCTAD, 2019).

^a These are explicitly not recommendations, merely a demonstration of conceivable options.

III. Nature and classification of e-commerce

A key outstanding issue in multilateral e-commerce negotiations that could be broached by AfCFTA is the classification of e-commerce products (goods and services): some e-commerce products may be digitalized (e-books and video games), while others are tangible goods ordered electronically, in addition to electronically traded services (streaming content, cloud computing, software management and the like). Since e-commerce emerged after the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, the WTO negotiations are silent on the subject, with issues emerging around the classification of e-commerce products within the existing WTO framework.

If the Internet is treated as simply a channel of delivery through which transaction for a given physical product is made from one WTO member to another, then electronically traded goods – such as software, e-books and video games – will be treated as goods and will be covered by WTO rules, as specified under the General Agreement on Tariffs and Trade in 1994.

If these products are treated as electronically traded services, then this brings into question the applicability of general GATS rules and specific commitments to e-delivery of services. Furthermore, if these products are classified as digital services, then there is an issue around applicability of different modes of supply, such as whether these services should be classified as mode 1 services (cross-border trade) or mode 2 (consumption abroad). If these services are classified as mode 1, then any WTO member that has made commitments to open up a given sector to mode 1 delivery has agreed to open up that service sector to digital trade of that service, subject to the limitations listed in its GATS schedule.

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