



Digital trade provisions in the AfCFTA: What can we learn from South–South trade agreements?

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Table of contents

<u>EXECUTIVE SUMMARY</u>	3
<u>1 INTRODUCTION</u>	6
<u>2 INTRA-AFRICAN DIGITAL TRADE</u>	7
<u>3 AFCFTA: DEFINING THE SCOPE OF THE E-COMMERCE PROTOCOL</u>	9
<u>4 THE E-COMMERCE PROTOCOL AND AFCFTA: LESSONS FROM SOUTH-SOUTH TRADE AGREEMENTS</u>	11
4.1 DATA PROTECTION AND PRIVACY	12
4.2 DISCIPLES ON CROSS-BORDER DATA FLOWS AND DATA STORAGE	15
4.3 ELECTRONIC TRADE FACILITATION	17
4.4 DIGITAL BUSINESS TAXATION	18
4.5 CROSS-CUTTING ISSUES	20
4.5.1 INCREASING MARKET CONCENTRATION	20
4.5.2 RE-DEFINING CONSUMER RIGHTS IN THE DIGITAL AGE	21
4.5.3 TECHNOLOGY TRANSFER AND ACCESS TO SOURCE CODE	21
4.5.4 OTHER CROSS-CUTTING ISSUES	22
<u>5 CONCLUSION: IMPLICATIONS FOR THE AFCFTA E-COMMERCE PROTOCOL</u>	23
<u>REFERENCES</u>	25

Executive summary

The Heads of State and Government of the African Union in their decisions Assembly/AU/4(XXXIII) of 10 February 2020 and Ext/Assembly/AU/Decl.1(XII) of 5 January 2021 mandated negotiations for an E-commerce Protocol to the African Continental Free Trade Area and endorsed December 2021 as the deadline for its conclusion, respectively. This paper analyses digital trade provisions in existing South-South (S-S) trade agreements, with the aim of helping negotiators and policymakers from Africa better understand the practical policy implications behind typically existing and upcoming digital trade-related provisions. This can help guide the design of an effective E-commerce Protocol in the AfCFTA that facilitates inclusive development in Africa.

Digital trade involves products ordered digitally but delivered physically through online marketplaces (e.g. ordering a book from Amazon) as well as products that are wholly electronically delivered (e.g. buying an e-book) – that is, electronically transmitted or ET products. Digital trade provisions, for the purposes of this report, involve the rights and obligations in trade agreements that affect e-commerce. The African market is an important destination for the ET exports of African countries. South Africa, Mozambique, Kenya, Tanzania and Mauritius emerge as the top 5 African countries driving intra-African exports of potentially digitisable products i.e. potential ET products, with South Africa accounting for 46% of total intra-African exports and 31% of intra-African ET imports. Some countries are highly dependent on intra-African trade for ET products; 70% of exports of digitisable products by Rwanda, Mauritius, Namibia, Burundi, Togo, Zambia, Ghana, Zimbabwe and Eswatini are intra-African.

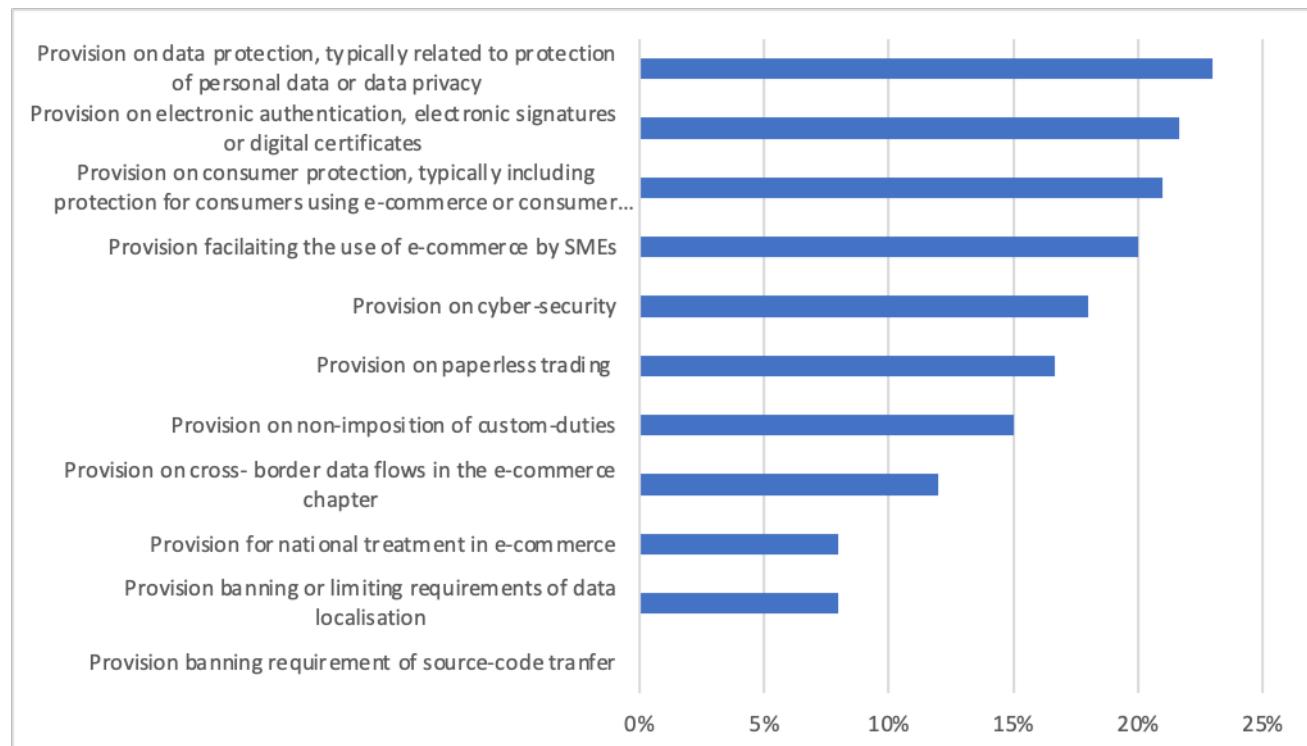
African negotiators can be informed by how e-commerce has been approached in existing trade agreements, particularly those involving other countries at similar levels of development. Of the 345 preferential trading areas (PTAs) in the dataset, 52% have a digital trade provision, but this falls down to 32% in the case of South-South (S-S) PTAs, of which 12% have an e-commerce provision only and 20% a separate e-commerce chapter. The importance of digital trade provisions in S-S trade agreements has evolved over time: of 40 S-S trade agreements signed between 2001-2009, only 6 (i.e. 15%) had an e-commerce provision, compared to 13 of 20 (i.e. 65%) S-S PTAs with an e-commerce provision, signed post 2009. The types of digital trade provisions are summarised in Figure A below.

On data protection, data privacy and data flows, 23% of S-S trade agreements include a provision on data protection, typically related to the protection of personal data or data privacy of any kind; however, under 2% of these commitments are hard - that is binding. Rather, the majority of such commitments are merely ‘best endeavour’ encouragements. Majority of the S-S trade agreements with e-commerce chapters do not have commitments on free cross-border data flows or provisions banning data localisation requirements; only 12% have provisions on free cross-border data flows and 8% have provisions banning or limiting states from requiring data to be held or processed locally.

The AfCFTA could provide a guiding framework for the governance of data flows. There is significant interest within the African private sector in regional e-commerce platforms and intra-regional data-sharing. The creation of a regional market would also generate substantial cost savings by generating economies of scale that make investment in regional data centres that support online services, including cloud hosting, more financially viable. The AfCFTA can build on regional approaches, as in the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS), to provide a cooperative framework for regional economic communities (RECs) on data protection, privacy, processing and storage, guided by the Convention on Cyber Security and Personal Data Protection of the African Union. Sector-specific policies on data could be explored further within the AfCFTA if, for instance, regulators want to retain control of data pertaining to critical sectors.

The AfCFTA e-commerce protocol could consider the aspect of the enforcement of data protection, which is considered to be fragmented across the continent: some countries, such as Morocco, Nigeria and Tunisia, do not provide for notification of breaches in their laws; others, such as Botswana, Equatorial Guinea, Kenya, Madagascar, Seychelles and Uganda, have not yet to set up a data protection authority (DPA). The protocol could facilitate the creation of regional DPAs, which would pool resources to address the challenges of independence, financial constraints, institutional capacity and others.

Figure A: Digital trade provisions in S–S trade agreements (% of agreements)



Note: The official UN classification is followed for categorisation of S–S trade agreements (<https://www.arab-ecis.unsouthsouth.org/about/what-is-south-south-cooperation/>).

Source: Authors, using TAPED.

On electronic trade facilitation, of the 60 S–S PTAs analysed, 25% recognise the importance of promoting e-commerce and 21% actually include a provision on electronic authentication, electronic signature or digital certificates. Of these, only two have hard commitments. Commitments on electronic trade facilitation tend to be non-binding. Meanwhile, 20% include targeted provisions for small and medium enterprises; a lesser share – 16% – include a provision on paperless trading. Potential priorities for electronic trade facilitation in the AfCFTA include a single common digital certificate of origin (CoO) system as a standard platform that all exporters and administrative agencies in state parties can access easily. Here, the experiences of the regional blocs, particularly the Common Market for East and Southern Africa (COMESA), ECOWAS and SADC, provide important insights for the design and implementation.

On e-commerce taxation, while a ban on custom duties is one of the most common provisions found in the PTAs with digital trade rules globally, 85% of S–S trade agreements do not have such provisions. Of the 60 agreements, only nine have (hard) commitments on non-imposition of custom duties. In eight of these, the ban extends only to customs duties, fees or other charges on or in connection with the importation or exportation of digital products BUT not to internal taxes, fees or other charges, provided they are imposed in a manner consistent with the agreement. The only trade agreement with an African country that has a chapter on e-commerce is the US–Morocco agreement. It contains a detailed article committing parties to non-discriminatory treatment in the area of e-commerce. But only 8% of the S–S trade agreements provide for National Treatment to foreign e-commerce players.

Several **cross-cutting issues**, while extend beyond the purview of the AfCFTA e-commerce protocol itself, hold immense potential to affect cross-border e-commerce and digital trade in Africa. One key issue is that around updating policies under the AfCFTA Competition Protocol to account for the changing landscape and nature of competition in the digital age. Another cross-cutting issue is that of e-commerce-specific aspects of intellectual property (IP), such as source codes and algorithms and cyber-theft of trade secrets.

Table A presents a summary of e-commerce and cross-cutting issues and how are they being dealt in the existing S–S trade agreements.

Summary Table A: E-commerce issues in PTAs and how they are dealt with in S–S PTAs

Category	E-commerce specific issues	Example of S–S PTA covering the issue (N=60)	Cross-cutting issues
Data governance rules and regulations	▪ Data protection, portability, security and privacy, including principles, frameworks or harmonisation of rules on personal data, company data, health data or public data	23% include a provision on data protection, typically related to protection of personal data or data privacy of any kind.	
Data flows	▪ Cross-border data flows and data localisation provisions ▪ Coordinated cybercrime laws, investigations and information-sharing ▪ Third-party content liability laws	▪ 12% have a provision on cross-border data flows. ▪ 8% have a provision banning or limiting the requirements of data localisation ▪ 18% include a provision on cybersecurity	Data localisation for e-commerce taxation; related to Competition Protocol in Phase 2
Electronic transactions	▪ E-transaction laws, including legal recognition of electronic signatures, digital certificates, etc.	▪ 22% include a provision on electronic authentication, electronic signature or digital certificates	Electronic CoO; Trade in Goods Protocol, Phase 1
E-commerce taxation	▪ Customs duties on electronic transfers ▪ Principles, frameworks or the harmonisation of laws for the taxation of cross-border e-commerce, including online jurisdictional issues ▪ MFN and national treatment provisions for electronic and digital products and services ▪ Non-discrimination of digital goods and services	▪ 15% have a provision on the non-imposition of custom duties ▪ Only 8% provide for national treatment to foreign e-commerce players	Harmonisation of taxation rules for promoting cross-border trade, including e-commerce in Phase 2 negotiations.
E-commerce-related issues under other protocols			
Trade liberalisation and facilitation	▪ <i>De minimis</i> thresholds and simplified customs regimes for promoting e-commerce parcel trade ▪ Liberalisation of capital goods and equipment under the Information Technology Agreement ▪ Rules of origin	▪ 22% of agreements include provisions about trade in goods related to Big Data (E.g. rules on robotics, Internet of Things).	Trade in Goods Protocol under Phase 1
Liberalisation of services trade	▪ Commitments on services necessary to support e-commerce (such as telecommunications, computer services, electronic payments and delivery) ▪ Liberalisation of electronically traded ‘services’	▪ In 13% of agreements, the e-commerce chapters refers to provisions in other chapters of the agreement, such as services and investment chapters. ▪ Only 7% have hard commitments on liberalizing sectors needed for e-commerce	Trade in Services Protocol under Phase 1
Tech transfer and protection of trade secrets	▪ E-commerce specific aspects of intellectual property, such as those related specifically to source code and algorithms and cyber theft of trade secrets ▪ Technology transfer issues	▪ 15% provide a provision that reconcile ecommerce with intellectual property. ▪ No agreements restrict government access to business source-code	IP and Investment Protocol under Phase 2
Consumer protection and digital business models	▪ Updated definitions of dominance and anti-competitiveness accounting for digital business models and the importance of data ▪ Online consumer protection provisions, including returns, consumer safety and supplier liability	▪ 21% include provisions on consumer protection; typically including protection for consumers using e-commerce, or consumer confidence in e-commerce measures.	Competition Protocol under Phase 2

Source: Authors, constructed using TAPED dataset

1 Introduction

On 10 February 2020, the Heads of State and Government of the African Union decided to mandate negotiations for an e-commerce protocol to the African Continental Free Trade Area (AfCFTA).¹ Originally scheduled to form a “Phase III” of the negotiations, the e-commerce protocol was subsequently fast-tracked almost a year later, on 5 January 2021, in a decision that endorsed December 2021 as the deadline for their conclusion.²

The negotiations for an e-commerce protocol to the AfCFTA present a unique opportunity for African countries to collectively establish common positions on e-commerce, harmonise digital economy regulations and leverage the benefits of e-commerce. Emerging evidence suggests that the Covid-19 pandemic has directly accelerated e-commerce, with a spike in both business-to-business (B2B) and business-to-consumer (B2C) online sales, particularly in medical supplies, household essentials and food products (WTO, 2020). Though a similar spike in e-commerce has also been experienced across African countries (Banga et al., 2021; ITC, 2020), the accelerating impact of Covid-19 on e-commerce in Africa has been constrained by persisting weaknesses in the continent’s digital economy that continue to frustrate e-commerce development (Futi and Macleod, 2021). These include high internet costs, weaknesses in postal services and capacities, cross-border trade costs, and the limited update of electronic and digital payment systems (*ibid*).

‘E-commerce’ can be a broad topic in trade negotiations. When African negotiators begin tackling e-commerce under the AfCFTA, they will need to decide what parts of the menu of e-commerce issues are most relevant for their purposes. Moreover, some issues, such as requirements for the use of electronic customs processing, might be better considered part of the traditional topics of trade negotiations, such as ‘trade facilitation’. Similarly, eliminating tariffs on infrastructure equipment necessary for digital trade, as in the Information Technology Agreement (ITA), may be considered merely a conventional trade in goods issue. Other issues, such as data protection or third-party content liability laws, would seem wholly novel e-commerce issues. As a result, negotiators and policy-makers must also decide *where* they might like to speak on these issues – in the dedicated and upcoming AfCFTA E-Commerce Protocol, in other existing AfCFTA protocols, or in entirely different fora altogether. While it is beyond the scope of the E-Commerce Protocol to directly address the infrastructural challenges that affect cross-border e-commerce within Africa, it is important for it to identify, coordinate and boost initiatives/institutions that work to reduce the challenges associated with cross-border e-commerce (Ogo, 2020).

This paper analyses digital trade provisions in existing South–South (S–S) trade agreements, with the aim of helping negotiators and policy-makers from Africa better understand the practical policy implications behind typically existing and upcoming e-commerce-related provisions. This can help guide the design of an effective digital trade protocol in the AfCFTA that facilitates inclusive development. There are two reasons for drawing lessons for the AfCFTA from S–S trade agreements. First, only six African countries have adopted three regional trade agreements (RTAs) – two of which make only broad reference to e-commerce.³ Morocco is the only African country with a RTA that

¹ Decision Assembly/AU/4(XXXIII) of 10 February 2020

² Decision Ext/Assembly/AU/Decl.1(XII) of 5 January 2021

³ In the EU–Eastern and Southern Africa States Interim Economic Partnership Agreement (EPA) (2012), information and communication technology (ICT) policy, infrastructure and services are included in the development cooperation areas. In EU–Ghana (2016), reference to e-commerce is limited to the parties endeavouring to facilitate the conclusion of a global EPA with West Africa, which should cover, *inter alia*, trade in services and electronic commerce.

includes provisions on e-commerce, and that is with the US (the Morocco-US Free Trade Agreement (FTA)). Second, a growing body of literature points to the importance of S-S digital cooperation (UNCTAD, 2019). With the exception of China, countries in the Global South, including African countries, face similar capacity issues and contextual and political constraints to innovation, and are relative ‘digital latecomers’, struggling to achieve convergence with countries in the Global North. Therefore, how Southern countries address digital trade provisions in trade agreements with each other can reveal important insights for African policy-makers as they set out to design the E-commerce Protocol in the AfCFTA.

To analyse S-S trade agreements, we make use of the recently launched Trade Agreements Provisions on Electronic-commerce and Data (TAPED) dataset,⁴ which covers more than 340 PTAs since 2000, going beyond those that are currently in force and notified to the World Trade Organization (WTO) and covering those that are not notified and those that are signed but not yet in force. As of September 2019, 59% of the PTAs with digital trade provisions have been negotiated between developed and developing countries and 36% between developing countries (Burri and Polanco, 2020). We classify 60 agreements in the TAPED dataset as S-S agreements.⁵ Analysis in this paper, unless otherwise specified, is restricted to these 60 trade agreements.

Section 2 below provides an overview of the currently fragmented nature of intra-African e-commerce. Section 3 discusses the potential scope of the E-Commerce Protocol. Section 4 identifies and analyses priority areas for the E-Commerce Protocol in the AfCFTA, drawing lessons from existing S-S trade agreements. Section 5 concludes the study.

2 Intra-African digital trade

As per the Organisation for Economic Co-operation and Development (OECD)–World Trade Organization (WTO)–International Monetary Fund (IMF) *Handbook of Digital Trade* (2020), digital trade covers digitally ordered but physically delivered products (e.g. buying a physical book from Amazon) and that which is digitally ordered and digitally delivered (e.g. purchasing an e-book). The scope of digital trade varies significantly across African countries.

Just 10 African countries are responsible for 94% of all online business on the continent (ITC, 2020). The majority of marketplaces in Africa use a domestic, country-focused model; that is, national platforms that only sell in one country. Cross-border e-commerce is limited for various reasons; most transactional platforms have restrictions based on the origin of sellers, 57% of marketplaces allow only domestic sellers on their platform and only 28% of those operating in Africa offer online payments transactions

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