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# Setting the Negotiation agenda for the AfCFTA Protocol on Electronic Commerce: A legal perspective

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## **Declaration**

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## **Abstract**

Digitalisation has created new business opportunities worldwide including in the form of electronic commerce (e-commerce) platforms and digital trade in general. This trend has not left Africa behind. Though slow, African countries are increasingly establishing physical and legal infrastructure to support the digital transformation needed to harness the digital economy including e-commerce and digital trade. Unfortunately, those developments are mostly carried out in 'silos', which could impede cross-border e-commerce and digital trade. To secure a coordinated and integrated approach to e-commerce and digital trade regulation which would support the implementation of the African Continental Free Trade Area (AfCFTA), and advance the African development agenda in general, the African Union decided to expedite the negotiation of the negotiation of AfCFTA rules on e-commerce. The AfCFTA rules on e-commerce would, therefore, create a legal and institutional framework, that harmonises national and regional digital governance strategies and policies. Such a harmonised regulatory environment would ensure legal clarity for cross-border e-commerce. This paper proposes the criteria for setting the negotiation agenda for the AfCFTA rules on e-commerce, and it also makes a case for expediting the negotiations. Most importantly, the paper seeks to guide the negotiations towards developing a continent-wide digital governance landscape comprising elements of digital trade that cater to the development needs of African countries and ensure equal benefit by all Africans from the advancement of digital technologies in the African economies.

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# Chapter one: Digital trade regulation

## 1.1. Introduction

The idea to establish a common African Market was conceived in 1991 under the then Organisation for African Unity (OAU).<sup>1</sup> That idea was later built on by the African Union (AU), the successor of the OAU.<sup>2</sup> As one of its objectives, the AU seeks to strengthen economic relationships among African countries. To effectuate that objective, the AU established the ‘Agenda 2063’, which sets out various priority areas, including continental and regional integration intended to achieve inclusive and sustainable development in Africa.<sup>3</sup> In 2015, the AU commenced negotiations for the African Continental Free Trade Area (AfCFTA) as a flagship programme of the ‘Agenda 2063’. The AfCFTA was successfully established in 2018 and entered into force on 30 May 2019.<sup>4</sup> The AfCFTA aims to, *inter alia*, “create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent.”<sup>5</sup> The AfCFTA is, however, not the only attempt at integrating African economies; there were eight Regional Economic Communities (RECs) that existed before the AfCFTA.<sup>6</sup> Each with its own structure, the RECs coordinate African countries’ interests in wider areas such as peace and security, development, and governance. The AfCFTA considers the RECs as building blocks for the establishment of the AfCFTA and it recognises their progress in integrating African economies by integrating that progress into its workplan.<sup>7</sup> Whilst the AfCFTA, was established in 2018, further negotiations for its various Protocols are ongoing, split in three phases, namely:<sup>8</sup> 1) Phase I which covers negotiations for trade in goods, trade in services and dispute settlement. At the time of writing, Phase I was nearly complete with a few outstanding issues concerning trade in goods related to, tariff schedules, and rules of origin, as well as commitments on trade in services<sup>9</sup>; 2) Phase II covers negotiations for investment, competition policy and intellectual property rights; and 3) Phase

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<sup>1</sup>Members States of the Organisation for African Unity (OAU), in the Article 4 of the Treaty Establishing the African Economic Community (Treaty of Abuja) agreed on a roadmap to create a common African Market [https://au.int/sites/default/files/treaties/37636-treaty-0016\\_-\\_treaty\\_establishing\\_the\\_african\\_economic\\_community\\_e.pdf](https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf) (accessed 06/11/2021)

<sup>2</sup> <https://au.int/en/overview>; Through the Constitutive Act of the African Union, the African Union was launched as a successor of the OAU [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf) (accessed 06/11/2021)

<sup>3</sup> And to building upon the respective rights and obligations under the AU, the Treaty of Abuja, and where applicable, the Marrakesh Agreement Establishing the World Trade Organization, Preamble of the Agreement Establishing the African Continental Free Trade Area, [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) (accessed 06/11/2021); The African Union, Agenda 2063 <https://au.int/en/agenda2063/flagship-projects> (accessed 06/11/2021); Also see <https://allafrica.com/stories/202109140549.html> (accessed 06/11/2021)

<sup>4</sup> By 44 out of 55 Heads of State and Government of the African Union (AU), in 2018 at the AU Extraordinary Summit in Kigali, Rwanda.

<sup>5</sup> Article 3(a) AfCFTA: See also <https://ecdpm.org/wp-content/uploads/10.2021.-PEDRO-Markets-and-people-1.pdf> (accessed 06/11/2021)

<sup>6</sup> These are: The African Union recognises eight RECs: 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).

<sup>7</sup> The Preamble and Article 3 of the AfCFTA.

<sup>8</sup> <https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html> (accessed 06/11/2021).

<sup>9</sup> <https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html> (accessed 06/11/2021).

III would cover negotiations on electronic commerce.<sup>10</sup> In 2021, the Heads of State and Government of the African Union decided to vary the sequencing of the negotiations on electronic commerce by bringing forward the negotiations from Phase III to Phase II.<sup>11</sup> That decision was informed by the growing importance of e-commerce in African countries and the need to fast track the establishment of a continental e-commerce governance framework, which could form the benchmark for harmonising the current patchwork of national and regional digital governance strategies and policies.

This paper argues that the successful implementation of the AfCFTA would depend on the deployment of digital technologies to facilitate various aspects of cross-border trade, including easing financial arrangements, documentation and logistics, correspondences with regulatory bodies, and the establishment of platforms for online orders and purchases.<sup>12</sup> However, from a policy perspective, such endeavor requires policy makers to narrow the gap between technological developments and public policies.<sup>13</sup> To this end, policymakers must introduce new policies and / or update existing ones to regulate the digital economy and to address the challenges associated with digital technologies, such as the competition policy for online platforms, protection of intellectual property rights, digital taxation, privacy and personal data protection, cybersecurity, and international trade policy.<sup>14</sup> Various initiatives are underway at the national and regional levels to establish digital strategies and policies to harness the benefits of the digital age and to mitigate its risks. However, such heterogeneous digital governance frameworks would impede cross-border digital trade beyond the national and regional borders. Therefore, negotiating and establishing continental rules on e-commerce under the AfCFTA would provide a coordinated approach to regulating the digital economy and ensure that the digital polices, laws, and regulations are harmonised across Africa. That would provide legal certainty for cross-border businesses and could reduce the cost of doing business in Africa. The challenge, however, rests on arriving at harmonised rules on e-commerce in Africa amid varying approaches to digital trade regulation not only among African countries but also globally including at the multilateral level. Essentially, the varying approaches to regulating digital trade are a result of the difference in conceptualising and responding to the challenges for trade policy in the digital economy.

In discussing the negotiation agenda for the AfCFTA rules on e-commerce, this paper finds that similar studies have focused on lessons from South-to-South preferential trade agreements. This paper seeks to broaden that scope by looking into digital governance rules being developed or established at various fora, such as, at the multilateral level and through mega-regional trade agreements, as well as the EU digital trade governance framework as an example of a harmonised regulatory framework for the digital economy at the regional level. This paper considers such a broad outlook significant given African countries' trade and investment relations with trading and development partners such as China, the EU, and the US, which in the absence of multilateral rules on e-commerce, could influence the AfCFTA digital trade

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<sup>10</sup> Ibid.

<sup>11</sup> <https://repository.uneca.org/handle/10855/43949#:~:text=Originally%20scheduled%20to%20form%20a,the%20Odeadline%20for%20their%20conclusion> (accessed 06/11/2021).

<sup>12</sup> Tralac trade law centre, 'Trade in the Digital Economy. A Tralac Guide', n.d., 2, <https://www.tralac.org/documents/resources/booklets/3175-trade-in-the-digital-economy-a-tralac-guide-march-2020/file.html>.

<sup>13</sup> OECD.

<sup>14</sup> <https://www.tralac.org/documents/resources/booklets/3175-trade-in-the-digital-economy-a-tralac-guide-march-2020/file.html> (16/12/2021).

governance framework. In that regard, the paper seeks to answer the question concerning the criteria that should guide the negotiation of the AfCFTA rules on e-commerce to ensure that such rules address the development needs and integration agenda of the Africa countries under the AfCFTA.

To begin with, this paper examines in chapter one the challenges for trade policy in the digital economy, and the current regulatory environment for e-commerce and digital trade at the multilateral level. It also discusses the taxonomy of digital trade rules, principles and standards commonly found in trade policy discussions and preferential trade agreements (PTAs). Chapter two analyses the African Union's Digital Transformation Strategy (AUDTS) by identifying key elements of e-commerce and digital trade espoused therein as well as the policy recommendations in terms of rules, standards, and principles for governing digital trade in African countries. Chapter three reviews the state-of-play of e-commerce regulation at the national and regional levels in Africa and in doing so, identifies the common areas of convergence and areas of divergence which the negotiators would have to contend with. Chapter four compares the EU's digital trade policy approach to the African AUDTS and identifies areas of convergence and divergence as well as the likelihood of the EU trade policy approach to influence the AfCFTA rules on e-commerce. Chapter five proposes the criteria for setting the negotiating agenda for the AfCFTA rules on electronic commerce and makes a case for expediting the negotiations. Chapter six concludes with a summary of the key aspects of digital trade governance discussed in the paper to inform the negotiations on the AfCFTA rules on electronic commerce. In terms of scope, this paper addresses only legal and regulatory aspects of electronic commerce in the AfCFTA does not cover infrastructural challenges to electronic commerce in Africa. Additionally, this paper does not seek to evaluate progress of the negotiations on the AfCFTA Protocol on electronic commerce; however, it seeks to suggest priorities for setting the negotiation agenda.



## 1.2. Challenges for trade policy in the digital economy

The exponential growth of internet usage in international trade has, *inter alia*, facilitated multinational value chains and created new tradeable goods and services across borders.<sup>15</sup> Conversely, digitalisation poses various challenges to international trade which warrant attention of policymakers. The first key challenge concerns the classification of digital products. In general terms, a product must be classified as a good or as a service, in order to be subject to the existing body of international trade law, an aspect, Zheng<sup>16</sup> describes as a “conceptual challenge of the multilateral trading system”. Given that international trade rules on goods and services are mutually exclusive, classification either as a good or a service determines the international trade rules applicable, and the commitments attached thereto. Regrettably, neither the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT) nor the WTO General Agreement on Trade in Services (GATS) define a good or service. Essentially, the distinction between goods and services, is drawn from the tangibility of goods and the perceived intangibility of services.<sup>17</sup> On the contrary, digital products are not tangible to the same extent as traditional goods but are more tangible than traditional services,<sup>18</sup> therefore, classification based on tangibility would misrepresent the unique characteristic of digital products. Digital products, such as music and movie CDs, software, and video games can be delivered in a physical form, and would in that context be considered goods, therefore, subject to the GATT. Such products can also be transmitted electronically, but the classification of digitally transmitted products is currently, a highly controversial subject, particularly at the multilateral level. Regarding the tangibility of certain digital products compared to traditional services, Zheng<sup>19</sup> notes that, traditional services require some form of personal delivery, while digital services such as, data creation, storage, and transmission require some form of physical devices.

The second challenge relates to the practical difficulties of applying GATS to digital technologies. According to the United Nations Central Product Classification (UN CPC) as reflected in the WTO document ‘W/120’ on the classification of services under the GATS,<sup>20</sup> a service is classified in only one sector in a given country’s Schedule of Specific Commitments. Simultaneous classification of digital services is not possible, yet, digital products cannot easily be classified in one sector, as they tend to be multifunctional.<sup>21</sup> For example, Google provides, *inter alia*, internet search services and advertising services. According to Zheng<sup>22</sup>, that leads to the question as to whether services offered by such technologies would be classified under computer and related services, or advertising, or telecommunication services? It is difficult to answer that question given the outdated rules on services classification which do not adequately reflect new and rapidly evolving business models of the digital economy, characterised by innovation and technological advancements. Another argument is that digital products do not

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<sup>15</sup> Ibid.

<sup>16</sup> Wentong Zheng, ‘The Digital Challenge to International Trade Law’, 52 *N.Y.U. J. Int’l L. & Pol.* 539, 2020, 543.

<sup>17</sup> Zheng, 543–46.

<sup>18</sup> Zheng, ‘The Digital Challenge to International Trade Law’.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Zheng, 547.

<sup>22</sup> Zheng, ‘The Digital Challenge to International Trade Law’.

fit into the four modes of supply of services under the GATS, namely: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial presence; and 4) Presence of natural person.<sup>23</sup>

The third challenge of digital trade to international trade policy concerns barriers to e-commerce comprising tariff and non-tariff barriers. Regarding tariff barriers to e-commerce, the WTO moratorium on customs duties on electronic transmissions (the moratorium) prohibits WTO Members from imposing tariffs on electronically transmitted digital products such as movies, music, and software. The moratorium was declared in 1998 by WTO Members as a temporary solution to the contentious issue of classifying digital products and has since been extended in subsequent WTO Ministerial Conferences. The continued extension of the moratorium is, however, very controversial. While a group of WTO Members propose to make the moratorium permanent, another group comprising developing WTO Members namely, India and South Africa are opposed to a permanent moratorium, citing permanent loss of revenue that would have accrued from imposing customs duties on electronic transmission.<sup>24</sup> It is also argued, the moratorium contradicts the principle of technology neutrality and is therefore, invalid, since electronically transmitted digital products are exempted from custom duties while the same products when physically delivered are subject to customs duties.<sup>25</sup> That argument is, however, not at the forefront of the debate on customs duties on electronic transmissions. Nevertheless, the practicality of imposing custom duties on electronic transmissions would be highly complex in terms of tracing and establishing the value of electronic transmissions.<sup>26</sup> The prohibition against imposing customs duties, fees or other charges on or in connection with the importation or exportation of content or products transmitted by electronic means is not uncommon in trade agreement, usually accompanied by an exception regarding internal taxes.

Regarding non-tariff barriers to e-commerce. Non-tariff barriers to e-commerce can take many forms, such as data localisation requirements limiting or specifically prohibiting data transfer across-borders. Essentially, data localisation requirements are intended to achieve one or all of the following objectives: 1) To protect citizens privacy and security;<sup>27</sup> 2) To support economic development by protecting and facilitating capacity for infant industries;<sup>28</sup> and 3) To support domestic law enforcement.<sup>29</sup> Data localisation requirements can be imposed at national and/or regional levels and can take different types which can be determined by nature of restriction, such as, local data storage requirement implying that data must be stored in local data centers instead of outside the country, local data processing and storage, and data protection and privacy laws, which can impose stringent requirements for data transfers outside the country.<sup>30</sup> Article XIV (c) (ii) of the GATS on general exceptions to commitments to liberalise trade in services permits WTO Members subject to conditions stipulated therein, to adopt and enforce measures

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<sup>23</sup> Zheng, 'The Digital Challenge to International Trade Law.'

<sup>24</sup> <https://sdg.iisd.org/news/wto-members-highlight-benefits-and-drawbacks-of-e-commerce-moratorium/> (accessed 28/12/2021)

<sup>25</sup> Zheng, 'The Digital Challenge to International Trade Law', 578.

<sup>26</sup> Zheng, 579.

<sup>27</sup> For example, China, see Casalini, F. and J. López González (2019-01-23), "Trade and Cross-Border Data Flows", OECD Trade Policy Papers, No. 220, OECD Publishing, Paris, 22.

<sup>28</sup> UNCTAD, Digital Economy Report 2019, [https://unctad.org/system/files/official-document/der2019\\_en.pdf](https://unctad.org/system/files/official-document/der2019_en.pdf) (accessed 28/12/2021).

<sup>29</sup> Nigel Cory, N. and Luke Dascoli, L. "How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them", Information Technology and Innovation Foundation, July 2021.

<sup>30</sup> Casalini, F. and J. López González "Trade and Cross-Border Data Flows", 22.

intended to protect “the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts”. Other WTO rules cover data transfers in respect to two sectors, namely, financial services<sup>31</sup> and telecommunication services.<sup>32</sup>

The existence of divergent approaches to data protection and privacy requirements creates uncertainties for cross-border digital services which heavily depend on cross-border data transfers. Additionally, from a trade policy perspective, stringent restrictions on cross border data transfers intended to protect personal data are considered significant barriers to digital trade and to a large extent digital protectionism by proponents of liberation of cross-border data transfers.<sup>33</sup> Svetlana Yakovleva, Kristina Irion note that the increase in economic benefits of the digital economy has led to a shift in international trade to international trade in digital services, which has put pressure on governments to liberalise cross-border data transfers.<sup>34</sup> According to the authors that presents a risk of subordinating public interest concerns for privacy and data protection which relate to the dignity of persons for economic benefits. The debate on the role of privacy in international trade at the multilateral level looks to solutions to balance national privacy concerns with facilitating cross-border data flows, however, concerns have been raised on whether international trade law is the right forum for addressing privacy and personal data protection. Whilst Article XIV (c) (ii) of the GATS of the GATS allows WTO Members policy space to protect privacy in relation to processing and transfer of personal data, the legal test of weighing and balancing that policy objective in terms of its effect on international trade as well as the consideration of whether such a measure is arbitrary or unjustifiable discrimination or constitutes a disguised restriction on trade in services is considered hard to satisfy, especially for data protection laws such as the EU’s General Data Protection Regulation (GDPR) which are “fundamentally rights-based” and therefore provide a higher level of protection.<sup>35</sup> Pending a multilateral consensus on that issue, privacy, and data protection in relation to external trade policy on cross-border data flows is predominantly addressed in PTAs.<sup>36</sup>

Other non-tariff barriers to e-commerce relate to digital censorship rules, and lack of and/or favouritism in setting technology standards.<sup>37</sup> Digital censorship impacts the working of the internet internationally and therefore impedes the free flow of data across borders. Censorship is akin to content moderation, which Robert D. Atkinson and Nigel Cory consider “a proxy for the broader conflict over the role of government and human rights in the digital economy”.<sup>38</sup>

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<sup>31</sup> WTO Understanding on Commitment in Financial Services.

<sup>32</sup> GATS Annex on Telecommunication services.

<sup>33</sup> Svetlana Yakovleva, Kristina Irion, Pitching trade against privacy: reconciling EU governance of personal data flows with external trade, *International Data Privacy Law*, Volume 10, Issue 3, August 2020, Pages 201–221.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> For example, EU-UK Trade and Cooperation Agreement, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01))

<sup>37</sup> Dan Breznitz and Michael Murphree, ‘The Rise of China in Technology Standards: New Norms in Old Institutions,’ the U.S.-China Economic and Security Review Commission January 16th, 2013, <https://www.uscc.gov/sites/default/files/Research/RiseofChinainTechnologyStandards.pdf>(accessed 28/12/2021).

<sup>38</sup> Robert D. Atkinson and Nigel Cory, “Cross-Border Data Policy: Opportunities and Challenges”. In H. Wang and A. Michie (eds.), *Consensus or Conflict?, China and Globalization*, 221-223. [https://doi.org/10.1007/978-981-16-5391-9\\_20](https://doi.org/10.1007/978-981-16-5391-9_20)

Overall, countries are increasingly enacting laws and regulations to address issues such as hate speech, disinformation, copyright infringing material, child pornography, and terrorism related material. However, the key issue for trade policy is the variation in the definition of legal and illegal online content and related motivation which could be social or political, for instance, Robert D. Atkinson and Nigel Cory note that “many democratic countries share a concern about countries like China that remove or block access to content for political purposes”.<sup>39</sup> A broad definition of what constitutes illegal content could lead to blocking a substantial number of foreign and domestic websites and content. In the case of China, trading partners such as the US expressed concern that China’s internet censorship serves economic interests by blocking foreign platforms and digital goods in favour of domestic platforms and digital goods, which in international trade law amounts to a violation of the principle of national treatment.<sup>40</sup>

Regarding to use of technology standards as a trade barrier, the WTO Technical Barriers to Trade (TBT) agreement requires WTO members to use internationally accepted standards, except where there are significant security or local country challenges. Given that digital technologies blur traditional boundaries between jurisdictions and allow new digital ecosystems to flourish, the challenges of the digital economy for trade policy equally transcend national boundaries. It is, therefore, significant that e-commerce is regulated at the multilateral level.

### 1.3 Regulating electronic commerce at the multilateral level

Electronic commerce and digital trade have revolutionised the way businesses conduct international trade. International trade rules have, however, not kept pace with emerging technology. While WTO rules contain provisions that govern aspects of digital trade, such as, the General Agreement on Tariffs and Trade (GATT), the Information Technology Agreement (ITA)<sup>41</sup>, and the General Agreement on Trade in Services (GATS), Burri and Polanco<sup>42</sup>, argue that the WTO law, “is still very much in its pre-Internet state;” To address the challenges that digital trade presents to international trade, an update of multilateral trade rule books is needed to ensure that WTO rules are fully equipped to regulate the new business models and barriers to cross-border trade presented by the digital era.<sup>43</sup> Against that backdrop, the WTO Members have initiated efforts towards closing the gap between digital technologies and international trade rules. The first initiative was launched in 1998 via the Declaration on global electronic commerce, that established, the Work programme on electronic commerce (‘the *Work programme*’) to investigate, *inter alia*, the degree of relevance of certain provisions of WTO rules to electronic commerce.<sup>44</sup> Essentially, the *Work Programme* would consider five trade

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Updated in 2015 by the WTO, Ministerial Declaration on Trade in Information Technology Products, WT/MIN (96)/16, 1996.

<sup>42</sup> Mira Burri and Rodrigo Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset’, *Journal of International Economic Law* 23, no. 1 (1 March 2020): 188, <https://doi.org/10.1093/jiel/jgz044>.

<sup>43</sup> Rodrigo Polanco, ‘Regulatory Convergence of Data Rules in Latin America’, in *Big Data and Global Trade Law*, ed. Mira Burri, 1st ed. (Cambridge University Press, 2021), 268–300, <https://doi.org/10.1017/9781108919234.018>.

<sup>44</sup> Adopted during the second WTO Ministerial Conference, ‘Electronic Commerce - Work Programme on Electronic Commerce’, WTO Trade Topics - Electronic commerce, accessed 1 November 2021, [https://www.wto.org/english/tratop\\_e/ecom\\_e/wkprog\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm); In the ‘Declaration on global electronic

issues, namely: 1) Cross-cutting issues relevant for electronic commerce, and the issue of custom duties on electronic transmissions; 2) Application of the GATS legal framework to electronic commerce;<sup>45</sup> 3) Application of the provisions of GATT 1994 to electronic commerce particularly, customs duties and other duties and charges, standards, rules of origin issues, and classification issues; 4) Intellectual property issues arising in connection with electronic commerce, issues such as, “protection and enforcement of copyright and related rights, protection and enforcement of trademarks, new technologies and access to technology”<sup>46</sup>; and 5) The development implications of electronic commerce, taking into account the economic, financial and development needs of developing countries.<sup>47</sup> The *Work Programme* defined electronic commerce to mean “the production, distribution, marketing, sale or delivery of goods and services by electronic means”, however, that was to apply “exclusively for the purposes of the work programme, and without prejudice to its outcome”.<sup>48</sup> Over the years, the activities of the *Work Programme* have been fraught with political, economic development, and ideological differences of the WTO Members, for example, on the issue of classification of digital products the US proposed that digitally transmitted electronic products should be categorised as services and physically delivered electronic products as goods. On the contrary, the European Communities proposed to categorise all electronic products as services.<sup>49</sup> Regarding the classification of services, the European Union prefers that most digital services are classified as “audio-visual,” but that is largely because the “European Union does not have substantial commitments with respect to audiovisual services”.<sup>50</sup> On economic development differences, unlike most developed countries, developing countries take the position that “services such as Facebook or Google are ‘new services’ and outside the scope of the classification under W/120;”<sup>51</sup> These different positions on the classification of digital products and services make it difficult for WTO to deliver concrete results on multilateral rules on electronic commerce.<sup>52</sup> Zheng<sup>53</sup> opines, “to date, the only concrete outcome of the *Work Programme* was the postponement of a final decision on a key issue: customs duties on electronic transmissions”. The customs moratorium on electronic transmissions that was meant to be a temporary solution

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commerce’, the WTO Members requested the General Council to establish a “comprehensive work programme to examine all trade-related issues relating to global electronic commerce, considering the economic, financial, and development needs of developing countries, and to report on the progress of the work programme, with any recommendations for action, to the Third WTO Ministerial Conference”

<sup>45</sup> On issues such as, scope, most-favoured nation (MFN), transparency, increasing participation of developing countries, domestic regulation, standards, and recognition, competition, protection of privacy and public morals and the prevention of fraud, market access commitments on electronic supply of services (including commitments on basic and value added telecommunications services and on distribution services), national treatment, access to and use of public telecommunications transport networks and services, customs duties, classification issues

<sup>46</sup> Yasmin Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members: State of Play and the Impacts of COVID-19’, *International Institute for Sustainable Development*, April 2021, <https://www.iisd.org/publications/e-commerce-negotiations-wto-members-covid-19>.

<sup>47</sup> For instance effects of electronic commerce on small- and medium-sized enterprises (SMEs), challenges and ways to enhance participation in electronic commerce in particular as exporters of electronically delivered products, use of information technology in the integration of developing countries in the multilateral trading system, financial implications of electronic commerce for developing countries; [https://www.wto.org/english/tratop/e/ecom/e/wkprog\\_e.htm](https://www.wto.org/english/tratop/e/ecom/e/wkprog_e.htm) (accessed 29/12/2021).

<sup>48</sup> ‘Electronic Commerce - Work Programme on Electronic Commerce’.

<sup>49</sup> Zheng, ‘The Digital Challenge to International Trade Law’.

<sup>50</sup> Zheng, 550.

<sup>51</sup> Ibid.

<sup>52</sup> Zheng, ‘The Digital Challenge to International Trade Law’.

<sup>53</sup> Zheng, 556.

to the controversy on classification of digital products in the *Work Programme*, has since been extended in subsequent WTO Ministerial Conferences. Regarding the second initiative, in parallel to the *Work Programme*, in 2017, a number of WTO Members in a Joint Statement Initiative (JSI), had “agreed to initiate exploratory work together toward future WTO negotiations on trade related aspects of electronic commerce”<sup>54</sup> and in 2019, under that JSI, seventy-six out of 164 WTO Members launched plurilateral negotiations “seeking to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible.”<sup>55</sup> The participating Members agreed to recognise and to consider “the unique opportunities and challenges faced by Members, including developing countries and LDCs, as well as by micro, small and medium sized enterprises,”<sup>56</sup> in relation to electronic commerce, and encouraged other WTO Members to join the negotiations so that the outcome would apply on a multilateral level.<sup>57</sup> The plurilateral negotiations on trade related aspects of electronic commerce revolve around the six main themes, namely: 1) Enabling electronic commerce; 2) Openness and electronic commerce; 3) Trust and electronic commerce; 4) Cross-cutting issues; 5) Telecommunications; and 6) Market access. The negotiations have made substantial progress in recent years, currently with eighty-six participating Members and finalised texts on, unsolicited commercial messages, electronic signatures, authentication, open government data, and online consumer protection.<sup>58</sup> Six African WTO Members are currently participating in the plurilateral negotiations on trade related aspects of electronic commerce, namely, Benin, Burkina Faso, Cameroon, Côte d’Ivoire, Kenya, and Nigeria.<sup>59</sup>

## 1.4 The current approach to digital trade

Pending the final outcome of the reinvigorated Work Programme and the conclusion of the plurilateral negotiations on trade related aspects of electronic commerce, rules on electronic commerce are being developed unilaterally, bilaterally and through regional Free Trade Agreements (FTAs)<sup>60</sup>, for example recent mega- regional trade agreements, such as the United States-Mexico-Canada Agreement (USMCA), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP )The Regional Comprehensive and Economic Partnership (RCEP). Electronic commerce rules established in these trade agreement play a dual role; firstly, to compensate for the lack of WTO rules on electronic commerce, and secondly, to “remedy some of the ensuing uncertainties including issues outside the ongoing WTO ecommerce negotiations.”<sup>61</sup> Ismail<sup>62</sup> builds on that by noting that , electronic commerce provisions in FTA’s reform outdated regional rules on electronic commerce and develop new regional strategies for regulating electronic commerce to achieve a “harmonised approach to identifying electronic commerce issues, that are or could otherwise be differently regulated

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<sup>54</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/60.pdf&Open=True> (accessed 6/11/2021)

<sup>55</sup> Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members’.

<sup>56</sup> Ismail.

<sup>57</sup> <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True> (accessed 6/11/2021)

<sup>58</sup> [https://www.wto.org/english/news\\_e/news21\\_e/ecom\\_10nov21\\_e.htm](https://www.wto.org/english/news_e/news21_e/ecom_10nov21_e.htm) (accessed 6/11/2021)

<sup>59</sup> Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members’.

<sup>60</sup> Also referred to as Preferential Trade Agreement (PTAs).

<sup>61</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’.

<sup>62</sup> Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members’, 5.

among the parties,”<sup>63</sup> thereby, “providing greater clarity and increasing the region’s attractiveness for foreign investments.”<sup>64</sup> Examples of harmonised regional frameworks on electronic commerce include, the Data Management Framework and the Model Contractual Clauses for Cross Border Data Flows adopted in 2021 by the Association of Southeast Asian Nations (ASEAN)<sup>65</sup>. In Europe, “the European Commission (EC) submitted a proposal for a regulation on a Single Market for Digital Services (Digital Services Act),”<sup>66</sup> aimed at upgrading “liability and safety rules for digital platforms, services and products and complete the digital single market”.<sup>67</sup> That legislative proposal, thus, seeks to modernise the EU’s 2000 Electronic commerce Directive and would create a harmonized regulatory framework across the EU.<sup>68</sup> In this context, the successful conclusion of negotiations on the AfCFTA Protocol on Electronic commerce would add Africa’s continental digital governance framework to the foregoing body of regional and mega-regional rules on electronic commerce. Those examples show that the development of digital trade rules in FTAs is not only for FTAs by developed countries, but also FTAs by developing countries. Despite the ongoing unilateral, bilateral and regional efforts to develop governance frameworks on electronic commerce, support for multilateral rules is still important, since the rules developed in the stated fora create inconsistencies due to variations in coverage and level of commitment, for instance on enforceability. Variations in coverage include rules (i) prohibiting only customs duties on electronic transmissions, (ii) providing for deeper integration by extending WTO rules to new areas of digital trade, (iii) expanding commitments in areas not covered by WTO rules (WTOplus),<sup>69</sup> (vi) “addressing specific issues raised by the WTO Work Programme on Electronic commerce”<sup>70</sup> and (v) “facilitating digital transactions or in general, by making it easier to conduct business online.”<sup>71</sup> Other differences in coverage and requirements are, ideological,<sup>72</sup> for example, China’s prefers a narrow view of digital trade that focuses on trade in goods online,<sup>73</sup> or related to policy preferences, for example the US is more liberal than the EU in promoting data transfer for digital technologies.<sup>74</sup> Zheng,<sup>75</sup> argues that while the rules developed in FTAs have been influenced by OECD models and principles and other international models on electronic commerce such as the United Nations Convention on the Use of Electronic Communications in International Contracts (UN Electronic Communications Convention) and non-binding UNCITRAL Model Law on Electronic Commerce (MLEC), the rules developed in FTAs are a guide to multilateral rule making process since “two-thirds of the WTO Members are party to a PTA with electronic commerce related provisions.”<sup>76</sup> Besides, filling the void for outdated multilateral rules, the digital rules developed in FTAs create a patchwork of digital trade

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<sup>63</sup> Ismail, 5.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members’.; [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/662641/EPRS\\_BRI\(2021\)662641\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/662641/EPRS_BRI(2021)662641_EN.pdf) (accessed 29/12/2021)

<sup>67</sup> <https://www.iisd.org/system/files/2021-04/e-commerce-negotiations-wto-members-covid-19.pdf> (accessed 29/12/2021)

<sup>68</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN> (accessed 28/12/2021)

<sup>69</sup> Zheng, ‘The Digital Challenge to International Trade Law’, 557.

<sup>70</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’, 197.

<sup>71</sup> Burri and Polanco, 197.

<sup>72</sup> Zheng, ‘The Digital Challenge to International Trade Law’, 557.

<sup>73</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’, 190.

<sup>74</sup> Zheng, ‘The Digital Challenge to International Trade Law’, 557.

<sup>75</sup> Zheng, 560.

<sup>76</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’, 193.

regulation, “neither evenly spread across different countries, nor otherwise coordinated,”<sup>77</sup> thus, reducing the prospects for legal certainty and predictability at a global level for different aspects of digital trade governance, however, increasing convergence is emerging.<sup>78</sup>

#### **1.4.1. Taxonomy of existing digital trade rules, principles and standards.**

According to Javier,<sup>79</sup> the digital trade issues informing trade policy discussions and negotiations in FTAs rotate around the following inventory as developed from issues identified by WTO Members as important in their discussions on electronic commerce at the Joint Statement Initiative. In that regard, Javier says, the digital trade issues provided in the Inventory, reflect aspects of digital trade governance that are broadly accepted as important for international discussions on rule-making on digital trade.<sup>80</sup> The inventory also contains rules, principles and standards under discussion in other international fora ranging from global, regional, intergovernmental or nongovernmental. The inventory shows that, at the multilateral level, rules, principles, and standards on digital trade relating to electronic transactions, consumer protection, and trade facilitation are subject of discussion at different fora such as the WTO through the JSI on trade-related aspects of electronic commerce, the UN agencies, the World Customs Organisation (WCO), the OECD and other regional institutions and international standard setting bodies. On the global scale, the UNTRAL has played a leading role by establishing the legally binding United Nations Convention on the Use of Electronic Communications in International Contracts (UN Electronic Communications Convention) and non-binding UNCITRAL Model Law on Electronic Commerce (MLEC). These instruments promote harmonisation or unification of domestic laws and regulations on electronic commerce transactions.<sup>81</sup> The UN Electronic Communications Convention and the MLEC provide three fundamental principles for electronic commerce legislation, namely: 1) Non-discriminatory treatment; 2) Technological neutrality; and 3) Functional equivalence between electronic communications and paper documents.<sup>82</sup> The inventory is, therefore, “a resource for governments to get a snapshot of the various initiatives underway under the broad heading of digital trade.”<sup>83</sup>

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<sup>77</sup> Burri and Polanco, 189.

<sup>78</sup> Zheng, ‘The Digital Challenge to International Trade Law’, 560.

<sup>79</sup> LOPEZ GONZALEZ Javier, ‘Digital Trade Inventory’, *OECD Trade Policy Paper*, no. 251 (2021): 7.

<sup>80</sup> Javier, 6.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*



**Table 1. Issues covered in the Inventory**

Broad area	Specific area
Facilitating electronic transactions	Electronic transaction frameworks
	E-authentication and e-signatures
	Electronic contracts
	Electronic invoicing
	Facilitation of e-payments
Non-discrimination and liability	Non-discriminatory treatment of digital products
	Interactive computer services (limiting non-IP liability for suppliers and users and infringement of persons' rights)
Consumer protection	Online consumer protection
	Unsolicited commercial electronic messages/spam
Privacy	Protection of personal information/privacy
Digital trade facilitation and logistics	Paperless trading
	Electronic transferrable records
	Customs procedures
	De minimis
Flow of Information <sup>1</sup>	Cross-border transfer of information by electronic means
	Location of computing facilities
	Location of financial computing facilities
Cybersecurity	Cybersecurity
Telecoms	Updating the telecommunications reference paper
Customs duties	Customs duties on electronic transmissions
Access to internet and data	Open government data
	Access to the internet
	Access to online platforms/competition
Business trust	Source code
	ICT products that use cryptography
Market Access	Services market access
	Goods market access

Note: This table does not include all the issues discussed at the JSI. For instance, it does not cover transparency and cooperation. While these are issues of great importance in the WTO discussions, they are more general in nature and it is more difficult to draw parallels on these issues across different organisations.

1. This includes flow of all types of information, including personal and non-personal.

Source: Authors' elaboration from agenda of discussions at the WTO Joint Statement Initiative in 2019.

As shown in the table, the principle of no discrimination as developed in the WTO law on GATT and GATS prohibiting discriminatory treatment of goods and services is extended to digital products through FTAs by providing for the national treatment commitment that requires parties not to “adopt or maintain measures that accord less favourable treatment to digital products of the other party than it accords to its own like digital products” and on MFN, the Parties commit not to adopt or maintain measures that accord less favourable treatment to digital products of the other party than it accords to like digital products of a non-party.<sup>84</sup> Digital products are defined in FTA’s as a “computer program, text, video, image, sound recording, or other product that is digitally encoded.”, such digital products can be “fixed on a carrier medium or transmitted electronically.”<sup>85</sup> Some FTAs grant that definition to digital products fixed in carrier medium, which are then made subject to general rules of trade in goods, while other FTAs opt to define digital products regards whether in physical or electronic and regardless “whether a Party treats such products as a good or a service under its domestic law.”<sup>86</sup> The provisions on non-discriminatory treatment are subject to exceptions for instance where domestic producers benefit from government subsidies, government procurement, services supplied in exercise of governmental authority.<sup>87</sup>

In the context of the specific aspects of digital trade governance outlined in the Inventory, ‘Online consumer protection’ relates to unsolicited commercial electronic messages. As noted, the WTO plurilateral electronic commercial negotiations finalised provisions on that aspect. ‘Digital trade facilitation and logics’ relates to, electronic transferable records, customs

<sup>84</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’, 200.

<sup>85</sup> Burri and Polanco, 202.

<sup>86</sup> Ibid.

<sup>87</sup> Burri and Polanco, 202.

procedures, de minimis, and paperless trading which requires public authorities to digitise trade processes and procedures or to provide the option to submit trade administration documents electronically “as the legal equivalent of their paper version.”<sup>88</sup> Commitments on facilitating electronic transactions commonly aim to create a favourable environment to harness the economic opportunities of electronic commerce, while recognizing the importance of “creating an environment of trust and confidence of the consumers or user”, and the “importance of having clear, transparent, and predictable domestic regulation as well to foster electronic commerce, promoting interoperability, innovation, and competition.”<sup>89</sup> Provision on ‘Facilitating electronic transactions’ tend to cover aspects relating to: a) Electronic authentication, “which typically allow authentication technologies and mutual recognition of digital certificates and signatures”<sup>90</sup> and e-signatures stipulating that “the legal validity of a signature shall not be denied solely on the basis that the signature is in electronic form”<sup>91</sup> (the WTO JSI electronic commerce negotiations finalised provisions on this aspect), electronic contracts requiring that Parties recognize the validity or enforceability of a communication or a contract presented in electronic form<sup>92</sup>, and electronic invoicing “requires an electronic document to be accepted for invoicing in the same manner as a hard copy.”<sup>93</sup> ‘Privacy and data protection’ concerns the protection of personal information while contracting for goods online and accessing digital services. ‘Flow of information’ ensures against unnecessary barriers to cross-border transfer of information by electronic means through data localisation requirements such as location of computing facilities. ‘Cyber-security’ is concerned with protection against risks of unauthorised access to data for criminal activities that affect national security, public order, etc. ‘Customs rules’ relate to customs duties on electronic transactions. ‘Access to internet and data’ covers aspects of open government data (WTO JSI on electronic commercial negotiations finalised provisions on this aspect), access to the internet, access to online platforms and/or competition. ‘Business trust’ protects businesses from unjustifiable requirements to disclose their intellectual property such as source code. While ‘Market access’ ensures market access for digital products and services.

As side from the above OECD Inventory, at the regional level, the EU has developed an ambitious digital trade governance framework which seeks to facilitate digital trade, to address unjustified barriers to trade enabled by electronic means and to ensure an open, secure, and trustworthy online environment for businesses and consumers.<sup>94</sup> The main objective is to develop a digital single market to generate smart, sustainable and inclusive growth in Europe. Achieving a Digital Single Market “will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally”.<sup>95</sup> In 2021 trade policy review, the EU aims at leading the way in digital standards and regulatory approaches.<sup>96</sup> In setting the agenda for the electronic commerce negotiations in the African Union, the negotiators could be informed by electronic commerce provisions in South-to-South FTAs particularly in countries at the same level of economic development. However, this paper finds it interesting to analyse the EU's approach digital trade since the EU has developed a comprehensive digital trade regulatory framework comprising a majority of the taxonomy

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<sup>88</sup> Burri and Polanco, 205.

<sup>89</sup> Burri and Polanco, 204.

<sup>90</sup> Burri and Polanco, 207.

<sup>91</sup> Javier, ‘Digital Trade Inventory’, 11.

<sup>92</sup> Javier, 12.

<sup>93</sup> Ibid.

<sup>94</sup> European Commission, ‘Shaping Europe’s Digital Future’, February 2020, [https://ec.europa.eu/info/sites/default/files/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://ec.europa.eu/info/sites/default/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf).

<sup>95</sup> COM (2015) 192 final, 6.5.2015, p. 2.

<sup>96</sup> COM(2021) 66 final, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.p.g.15.

shown in table 1. Additionally, the EU economic relations with African countries from FTAs for goods market access to development assistance. And lastly, the EU would serve as good example of a harmonised regulatory framework for digital economy at regional level. This paper is timely since rapid digitalisation of economies in Africa has been accelerated by the covid-19 pandemic.<sup>97</sup>Digitalisation in Africa is evident in four key aspects, namely: 1) It enables trade in services i.e. online provision of professional and financial services; 2) Facilitates trade in goods through data flows; 3) Enables small businesses to participate global economy via internet platforms combined predominantly with mobile (money) payment option and a growing access to delivery services, “allowing for an increasingly seamless national and most recently regional electronic commerce experience”<sup>98</sup>

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<sup>97</sup> <https://unctad.org/news/intricacies-impact-and-opportunities-electronic-commerce-trade-and-development> (Accessed 26/09/2021). Much of this digital innovation is taking place in Africa through Public – Private sector partnerships for example in Senegal, the Ministry of Trade and SMEs partnered with the private sector to facilitate delivery of essential goods and services through electronic commerce. In Uganda, the Ministry of ICT has made a call to develop digital solutions in the fight against COVID-19 to support health systems and public service delivery. Leading electronic commerce platforms reported a substantial increase in demand for online shopping and sales due to the pandemic. For instance, according to Jumia Technologies AG (2020), the leading online retail platform in Africa, its annual active consumers reached 6.4 million, with a year-on-year (YoY) increase of 51% in the first quarter of 2020.

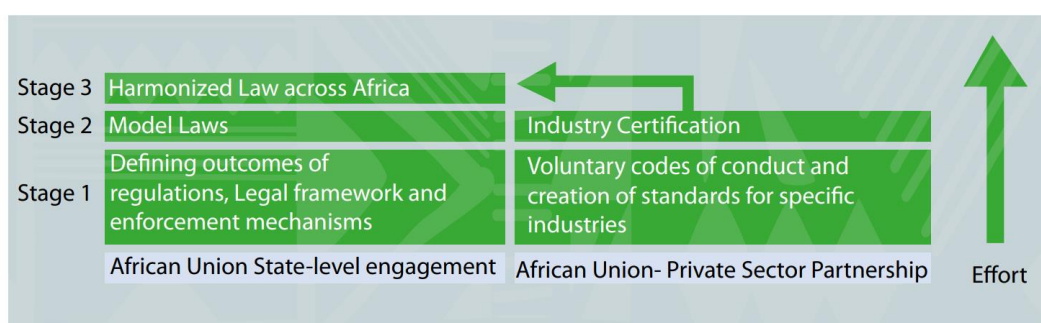
<sup>98</sup> Tralac trade law centre, ‘Trade in the Digital Economy. A Tralac Guide’.

# CHAPTER TWO: ANALYSIS OF THE AFRICAN UNION DIGITAL TRANSFORMATION STRATEGY

## 2.1. Introduction

This chapter traces the introduction of the African Union’s Digital Transformation Strategy (AUDTS). It also looks at key elements of the AUDTS on ecommerce governance, analyses the related rules, standards, and principles, as well as key definition in the AUDTS. The chapter also looks at other related digital governance initiatives at the continental. The Digital Transformation Strategy for Africa 2020-2030 (AUDTS) was adopted on 9 February 2020, by the African Union.<sup>99</sup> The AUDTS includes recommendations and actions highlighted from other policy papers of the African Union and external cooperation strategy formulations with development partners, such as the AU-EU Digital Economy Task Force report<sup>100</sup>. The AUDTS builds onto “the existing initiatives and frameworks such as the Policy and Regulatory Initiative for Digital Africa (PRIDA), the Programme for Infrastructure Development in Africa (PIDA), the African Continental Free Trade Area (AfCFTA), the African Union Financial Institutions (AUFIs), the Single African Air Transport Market (SAATM), and the Free Movement of Persons (FMP) to support the development of a Digital Single Market (DSM) for Africa, as part of the integration priorities of the African Union. The Smart Africa Initiative has set the creation of a Digital Single Market in Africa as its strategic vision.”<sup>101</sup> The African Union Commission proposes a three-staged framework as a road map towards the harmonising national digital strategies and laws on electronic commerce shown in figure 2.<sup>102</sup>

**Figure 2** Dual approach to building trust for e-commerce in Africa



Source: African Union Commission (2020).

From figure 2, the AU proposes to accelerate digital governance strategies through a dual approach: (i) Focused on efforts at African Union State-level, where African countries are required to define “outcomes of regulations, legal frameworks and enforcement mechanisms for issues such as technology standards, consumer protection and digital regulations to support cross-border electronic commerce and the Fourth Industrial Revolution”<sup>103</sup> translated into model laws on digital governance, ultimately developed into harmonised laws across Africa; and (ii) focused on African Union – Private Sector Partnership, to develop voluntary codes of conduct and to create standards for specific industries, as well as industry certification, that should lead to harmonised digital governance framework across Africa in those aspects.<sup>104</sup>

<sup>99</sup> <https://digital-strategy.ec.europa.eu/en/policies/africa#title2> (accessed 25/09/2021)

<sup>100</sup> Ibid.

<sup>101</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (accessed 25/09/2021)

<sup>102</sup> Imperative for expediting ACFTA negotiations on electronic commerce page 7

<sup>103</sup> Imperative for expediting ACFTA negotiations on electronic commerce page 7

<sup>104</sup> Ibid.

## 2.2. Conceptualisation of electronic commerce governance in the AUDTS

The AUDTS underlines the challenges to digitalisation in Africa as, lack of proper infrastructure for digital technologies, the digital and technological gap among African countries and the continent as whole, as well as the lack of proper policies to regulate digital technologies and products.<sup>105</sup> In terms of interaction between private and public sectors, the AUDTS notes high disparities in the level of deployment of e-government services among Africa countries. While on the political level, there is limited political will and structures to coordinate the development of digital governance strategies among African countries.<sup>106</sup>

The AUDTS underscores that addressing those challenges will facilitate rapid technological development needed to create new markets, lower transaction costs, and reduce information asymmetry in digital trade and international trade in general.<sup>107</sup> The AUDTS set, therefore, its objective, on harnessing “digital technologies and innovation to transform African societies and economies to promote Africa's integration, generate inclusive economic growth, stimulate job creation, break the digital divide, and eradicate poverty for the continent’s socio-economic development and ensure Africa’s ownership of modern tools of digital management”.<sup>108</sup> In addition, and pertinent to facilitating the implementation of the AfCFTA, the AUDTS emphasises the development of digital financial services<sup>109</sup>, and the introduction of a single pan African digital identification system.<sup>110</sup>

Since the AfCFTA is one of the flagship programmes of Agenda 2063, and the AUDTS seeks to facilitate implementation of the AfCFTA, the AUDTS incorporates the objective of the Agenda 2063 including the focus on fair competition and advanced consumer protection in digital trade aimed ultimately at integrating “Africa into a single digital market characterised by electronic commerce and digital financial inclusion”, facilitating the implementation of the AfCFTA by deploying digital financial services and cross-border payments systems, and digitalisation of African economies to cut red tape and reduce trade costs through e-payments, e-government and the digitalization of public services”<sup>111</sup>. The AUDTS has set, as its primarily aim, the establishment of an integrated single digital market with harmonised policies and regulations across all African countries, which is also one of the objectives of the Agenda 2063. The AUDTS seeks to encourage the liberalization of specific services needed to facilitate ecommerce through cross border supply of trade in digital services and to promote the commitment to and adaptation of common rules, principles and standards through harmonised policies and laws at the national, regional, and continental levels. To achieve that level of regulatory convergence on ecommerce rules among the African countries on areas of common interest, the AUDTS sets out the critical sectors needed to drive digital transformation and underscores policy recommendations, selected, and analysed in this chapter based on the relevance to their topic of this paper.

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<sup>105</sup> African Union Digital Transformation strategy for Africa (2020-2030),

<sup>106</sup> Ibid., 29

<sup>107</sup> African Union Digital Transformation strategy for Africa (2020-2030), <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (accessed 25/10/2021).

<sup>108</sup> Ibid., 2.

<sup>109</sup> Ibid., 26.

<sup>110</sup> Ibid., 29

<sup>111</sup> Ibid., 24.

## 2.3. Key elements of the AUDTS

### 2.3.1. Digital trade and financial services.

On digital trade and financial services, the African Union seeks to develop “a robust digital market characterized by increased quality of financial inclusion, fair competition and advanced consumer protection.”<sup>112</sup>The African Union considers ecommerce and digital financial inclusion as key enablers of the foreseen digital single market in Africa.<sup>113</sup> On that note, the AUDTS defines digital trade and ecommerce transactions separately indicating that ecommerce is a sub set of digital trade by adopting the OECD definition of both terms:

*“Digital trade encompasses digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments (OECD). Electronic commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The payment and the ultimate delivery of the goods or services do not have to be conducted online (OECD).”<sup>114</sup>*

That definition of the electronic commerce focuses on the “ordering process as the defining characteristic of electronic commerce transaction, the coverage of both goods and services the electronic commerce transactions are “not based on product characteristics, but encompasses online purchases of both goods and services”<sup>115</sup> therefore capturing the “increasing bundling of goods and services” for instance products that can be delivered in physical form as well as electronically such as books, music, “as long as they are ordered by electronic means”.<sup>116</sup>The bundling of goods and services, as shown in chapter one, is one of the complexities of the electronic commerce from a trade policy perspective, regulatory issues arise because traditional trade rules are conceptually “based on a goods and services dichotomy”.<sup>117</sup> Additionally, the definition covers a wide range of network types for making orders, and a payment may or may not be made online, indicating that “electronic commerce does not hinge on a specific mode of payment”.<sup>118</sup> The definition of electronic commerce transactions is, therefore, broad, albeit, the focus on “how the purchase is initiated rather than on the form of delivery or nature of the product”.<sup>119</sup> The definition of digital trade was developed to cater to the complexities involved in electronic commerce from a trade policy perspective; as digital technologies advance, the policy “debate in this field has substantially broadened in recent years and increasingly refers to the term 'digital trade’”.<sup>120</sup> While the definition of digital trade “includes electronic commerce transactions as defined by the OECD, but also includes several distinct types of cross-border transactions, including digitally delivered services, irrespective of the method by which they are ordered”. Effectively, this paper considers reference to electronic commerce in

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<sup>112</sup> Ibid., 25.

<sup>113</sup> Ibid.

<sup>114</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (Accessed 26/09/2021)

<sup>115</sup> <https://www.oecd-ilibrary.org/sites/1885800a-en/index.html?itemId=/content/component/1885800a-en> (Accessed 26/09/2021)

<sup>116</sup> OECD, *Unpacking Electronic commerce: Business Models, Trends and Policies* (OECD, 2019), <https://doi.org/10.1787/23561431-en>.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> OECD, 7.

<sup>120</sup> OECD, *Unpacking E-Commerce*.

the AUDTS as reference to one of the components of the broader topic of digital trade in regard to cross-border transactions. Notably, “cross-border trade policy discussion still often uses the term “electronic commerce” in line with the broader WTO understanding”.<sup>121</sup> By defining both electronic commerce transactions and digital trade, the AUDTS, offers a guide and a precursor to the breath of the negotiations on the AfCFTA Protocol on electronic commerce as discussed later in chapter five.

The AUDTS demonstrates that digital technologies in Africa, albeit slow in catching up to the rest of the world, are very versatile, and are increasingly deployed by governments to deliver public services, such as, visa processing and issuance, civil registration, tax payments and tendering, by trade portals to “provide trade information, and single windows to enable the virtual completion of trade formalities” as well as “coordinate the processes of the multiple government agencies operating at seaports”, leading to reduction in time and cost of clearing goods at ports, thereby, facilitating trade.<sup>122</sup> By these examples, the AUDTS, shows digital technologies, as key in the broader objective of facilitating the implementation of the AfCFTA. In that context, the AUDTS attaches significance to the development of digital financial services in African countries. According to the AUDTS, promoting digital financial services offers not only flexibility in making financial transactions, but also and significantly, would reduce the cost of intra-Africa trade through quicker and accessible payment services, reduce cost of business in Africa through efficient, easily to track and monitor payment systems as well as promote sustainability by moving to paperless transactions.<sup>123</sup> The AUDTS defines digital financial services as, “a broad range of financial services accessed and delivered through digital channels, including payments, credit, savings, remittances and insurance”.<sup>124</sup> The “digital channels” used for to offer financial transactions include, “the internet, mobile phones, Automated Teller Machines (ATMs), Point of Sales (POS) terminals”.<sup>125</sup> The expansion of the concept of digital financial services concept across African is driven by “the emergence of the use of mobile phones to access financial services and execute financial transactions such as M-Banking, M-payments and M-money”<sup>126</sup>

The AUDTS requires policy makers to link the digital trade rules to the broader agenda of facilitating intra-continental trade, through, “the development of cross-border digital commerce designed at least initially, within an intra-continent framework so that it contributes to promoting the complementarity of African economies”.<sup>127</sup> That policy recommendation discourages copying and pasting electronic commerce rules outside the African continent which may not be suited to the current development needs of African countries. The AUDTS, requires, “member states to reduce barriers to cross-border digital trade and market access in line with the AfCFTA”.<sup>128</sup> Here, the AUDTS directs the ongoing implementation of the AfCFTA focused on removing legal and technical barriers to traditional trade, to also integrate the long-term objective of establishing a digital single market in the implementation process.

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<sup>121</sup> OECD.

<sup>122</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.26.

<sup>123</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.26, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, (Accessed 26/09/2021)

<sup>124</sup> Ibid. 25

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid. 27.

<sup>128</sup> Ibid.

Recognising the significance of mobile money transfers in Africa, the AUDTS guides the policy makers on how digital trade rules should interact with the financial sector by calling for development of regulations on cross-border mobile money transfer.<sup>129</sup> In the past decade, cross-border retail payments significantly increased in Africa; Sub-Saharan Africa is at the forefront of the mobile money industry and in 2020, the industry accounted globally, for forty three per cent of new accounts.<sup>130</sup> Despite that growth, cross-border mobile money transfer is limited due to high cross-border transaction costs, hence, the need to develop and adapt harmonised policies and standards at the national, regional and continental levels.<sup>131</sup> In that context, efforts are ongoing to develop at the regional level, digital payments systems “to reduce the cost and time associated with cross-border trade, such as, COMESA Regional Payment and Settlement System, East African Payments System, SADC Integrated Regional Electronic Settlement System”<sup>132</sup> and at the continental level, payments and settlement platforms are also under development for instance by Worldwide Electronic Payment System (UPU) and Afreximbank.<sup>133</sup> In addition, several projects are being developed to solve the issue of separate and unintegrated regional payment systems among the RECs, for example, the EAC member states are in a pilot project for cross-border COMESA digital payments. The project aims to “avoid disputes arising from overlapping systems” by introducing “payments platform for informal cross-border trade in the COMESA bloc, with the EAC members Tanzania, Kenya, Uganda and Rwanda on board”. At the continental level, the African Union Commission notes that, a Pan-African Payment and Settlement System (PAPSS) is among the key digital deliverables of the ongoing implementation of the AfCFTA, with the objective of allowing quick settlements of cross-border transactions through digitalised means, that will ensure “quicker payments and settlements and enhance market liquidity and deepen national, regional, and continental capital and financial markets”.<sup>134</sup> In that context, the UNCTAD opines that, “the adoption of the pan-African payment and settlement system as one of the five key instruments of the operational phase of the AfCFTA is a milestone towards greater integration of digital financial services.”<sup>135</sup> The prominences given to promoting integrated digital

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<sup>129</sup> <https://policyaccelerator.uncdf.org/briefs/regional-harmonisation-dfs> (Accessed 26/09/2021).

<sup>130</sup> <https://www.forbes.com/sites/tobyshapshak/2021/05/19/mobile-money-in-africa-reaches-nearly-500bn-during-pandemic/> (Accessed 26/09/2021).

<sup>131</sup> <https://policyaccelerator.uncdf.org/briefs/regional-harmonisation-dfs> (Accessed 26/09/2021).

<sup>132</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (Accessed 26/09/2021).

<sup>133</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.27. “a public-private partnership dialogue is underway to discuss a draft model policy for the COMESA platform and specifically designed to benefit micro, small and medium-sized enterprises (MSMEs) under the bloc’s Digital Financial Inclusion Project. The aim of the platform will be to further integrate informal traders into formal markets through better access to digital finance systems which are fast becoming the global norm. The envisaged common regional scheme will be geared towards facilitating bottom-of-the-pyramid informal traders (cross-border and domestic) to carry out transparent, affordable and secured digital transactions. Progress has been made in reaching an agreement on rules and guidelines for the platform and the adoption of a COMESA Digital Integrated Common Payment Policy and Framework for MSMEs.”

<sup>134</sup> African Union Commission and OECD, *Africa’s Development Dynamics 2020*, 58.

<sup>135</sup> <https://unctad.org/news/intricacies-impact-and-opportunities-electronic-commerce-trade-and-development> (Accessed 26/09/2021).



financial services could as well as signal an expectation of greater financial services liberalisation in the negotiations for a AfCFTA Protocol on Trade in Services.<sup>136</sup>

The electronic commerce Protocol is expected to be a “catalyst for greater services liberalization by African countries”.<sup>137</sup> At the multilateral level, many African countries have not liberalised their services sectors, and a few that made commitments, those commitments are outside the key sectors critical for digital trade: telecommunications, audiovisuals, computer and related services, data-based services, and financial services. The AUDTS signals the need to update the list of sectors in the schedule of commitments to include key sector relevant to fostering the development of the digital economy in Africa, thus go beyond the WTO Central Products Classification. In that context, it could be argued that it is an advantage that the development of schedules of specific commitments in the five priority sectors of the AfCFTA Protocol on Trade in Services is still on-going. Additionally, the rapid deployment of digital services during the Covid-19 has shone a spotlight on the significance of ramping up efforts toward cross-border trade in digital services. A reasonable expectation could be made for increased efforts toward greater services liberalisation to reduce market access restrictions at the regional and continental levels, in order to enable the application of the AfCFTA Protocol on Electronic commerce to services sectors critical for digital trade.

Apart from promoting digital financial services, for an electronic commerce friendly regulatory framework at the continental level, the AUDTS is looking at common rules for consumer protection; integration of data markets through open standards based on security safeguards; and regulation of unjustified geo-blocking which the AUDTS defined as, “where delivery of online products is not permitted” basically to due to restrictions on accessing websites outside a given country, which would be equivalent to a prohibition enforced at the border of a country in tradition trade. Although the AUDTS does not go further into the concept of geo-blocking, the AUDTS is against online discrimination based on nationality or country of residence of the digital services provider.<sup>138</sup> Such discrimination can manifest through re-routing consumers to country specific websites and limiting payment methods for instance accepting only debit or credit cards from a certain country. While commenting on intra-Africa digital trade, Banga<sup>139</sup>

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<sup>136</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, p.24 (Accessed 26/09/2021); “At the July 2017 Summit, the Assembly of the African Union adopted modalities for trade in services negotiations. A Services Protocol was signed as part of the consolidated text of the Agreement Establishing the AfCFTA at the March 2018 Kigali Summit. The Services Protocol entered into force on 30 May 2019. Under Article 22 of this Protocol, each State Party must provide a schedule of specific commitments. At the July 2018 Summit, the Assembly adopted five priority services sectors for initial commitments. The priority services sectors are transport, communications, tourism, financial, and business services. At the February 2019 Summit, the Assembly adopted the Guidelines for Development of Specific Commitments and Regulatory Cooperation Framework for Trade in Services and the new Roadmap for Finalization of the AfCFTA negotiations. June 2021 is the deadline to finalise the development of schedules of specific commitments in the five priority sectors”<https://www.tralac.org/documents/resources/faqs/4293-updated-tralac-afcfta-faqs-march-2021/file.html> (accessed 25/09/2021)

<sup>137</sup> <https://ictsd.iisd.org/bridges-news/bridges-africa/news/the-digital-trade-agenda-and-africa>(accessed 25/09/2021)

<sup>138</sup> Karishma Banga, Jamie Macleod, and Max Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA’, n.d., 28. The notes, that “the majority of marketplaces in Africa use a domestic, country-focused model; that is, national platforms that only sell in one country. Cross-border electronic 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”.

<sup>139</sup>The authors note further that 57% of marketplaces allow only domestic sellers on their platform. Banga, Macleod, and Mendez-Parra.

says, that, “the majority of marketplaces in Africa use a domestic, country-focused model; that is, national platforms that only sell in one country”, therefore, limiting cross-border electronic commerce since “most transactional platforms have restrictions based on the origin of sellers”. Notably, geo-blocking can be justified on grounds of protecting copyright content, health care and social services.<sup>140</sup>

### **2.3.2. Digital Governance.**

The AUDTS identifies the deployment of digital governance structures as solution to cutting red tape and reducing cost of doing business in Africa. Existing efforts to digitalise government services are isolated, and not attuned to the particularities of the African countries since such efforts are sponsored and developed by external development partners. In this regard , the AUDTS highlights that, “for years, efforts to digitalize government services have mirrored the vertical silos of the government organization and, often, that of donors”.<sup>141</sup> Ongoing efforts are ongoing to digitalise “core government back-office processes to address challenges relative to specific government functions”, such as, integrated financial management information systems, human resources management information systems, e-procurement, intended to increase efficiency and automation of processes.<sup>142</sup> However, such digitalised government structures are in most cases not integrated across government institutions, thus not interoperable, leading to reduced efficiency. That aspect entails that citizens and businesses must deal with multiple government entities, each with its own processes and systems. .<sup>143</sup> Recognising the seminal role of easing private sector interaction with government entities within and across borders, the AUDTS recommends adoption of “comprehensive digital governance strategies at the national, regional, and continental levels, with e-Government interoperability and common standards based on internationally recognized standards.”<sup>144</sup>

### **2.3.3. Cross cutting themes:**

#### **2.3.3.1. Digital content and applications<sup>145</sup>.**

The AUDTS advocates for harmonised content regulatory framework and shared standards of practices for content dissemination. With respect to transparency and accountability as means of protecting consumers while using online platforms and applications, the AUDTS encourages African countries to establish, “legislative and regulatory measure that combat the use online platforms for the dissemination of content that compromises the dignity and rights of citizens”.<sup>146</sup> The AUDTS advocates further for regulations on contracts for the supply of online or digital content,<sup>147</sup> with the objective of harmonising consumer contract law across the continent, that would provide for high level consumer protection and legal certainty while accessing digital content and using contracting for digital services for instance contracts for the sale of goods

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<sup>140</sup><https://digital-strategy.ec.europa.eu/en/policies/geoblocking#:~:text=What%20is%20unjustified%20geo%2Dblocking,considered%20as%20unjustified%20geo%2Dblocking>. (accessed 28/12/2021)

<sup>141</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.29, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>. (Accessed 26/09/2021)

<sup>142</sup> Ibid.

<sup>143</sup> Ibid., 29.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid., 38.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

online, and contracts for the supply of digital content and digital services like music streaming, social media platforms.

The AUDTS promotes local content quotas in terms of liberalisation of audio-visual services, noting that, “review local content quotas to apply to all distribution platforms including the over-the-top services, consider regulations that will enforce reciprocity of national content in the parent countries of Audio -Visual content companies”.<sup>148</sup>The AUDTS also identifies the need to facilitate access to audio-visual services by calling for the modernisation of the copyright legal framework to adapt to the digital age noting, “review copyright legislation to align to digital environment for content production and distribution to protect African content” and to also use that opportunity to promote African works and preserve African cultural heritage.<sup>149</sup> In this context, the AUDTS notes, “the marketing strategies for content to other contents given the oversupply of western countries in the continent or use the multilateral agreement and global treaties on the unfair practices of Multilateral especially in African countries”.<sup>150</sup>

### **2.3.3.2. Digital Identity**<sup>151</sup>

The AUDTS emphasises the need to introduce a single pan African digital identification system, as one of key pillars to facilitate the implementation of the AfCFTA.<sup>152</sup> The AUDTS states that “identity forms the basis of human activity” and is a “right” and notes the benefits of having an legal identity to “include gender equality, social protection delivery, financial inclusion, improved governance, safer migration, superior health delivery, enhanced and refugee child protection, reducing statelessness, and better access to land and property rights”<sup>153</sup>, adding that “the United Nations concept of 'legal identity for all' supports the attainment of the sustainable development goals and Agenda 2063”. To achieve a digital identification system that delivers the benefits for regional integration, the AUDTS, calls for a standards-based digital identification system that enables a trusted flow of data across borders.<sup>154</sup> On standards, the AUDTS advocates for a “holistic and harmonized approach based on standards and principles and supporting the development of strategies and policies, including interoperability and scalability”.<sup>155</sup> Recognising seminal role of data flows as a building block of the digital single market that is being developed in line with the AfCFTA, the AUDTS finds it equally critical to establish electronic trust in data flows and secure cross-border digital interactions and transactions.<sup>156</sup>As such, the AUDTS recommends development of legal and regulatory frameworks on data privacy, security, and user rights, as well as the design and implementation of digital identity systems to empower individuals to protect their privacy. In this setting, the AUDTS considers protection of online privacy as a fundamental right.<sup>157</sup> Considering that data is the life blood of digital trade, the right to privacy has gained increasing recognition as a fundamental right. In international law, article 17 of the International Covenant

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid., 38.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid., 39.

<sup>152</sup> Ibid., 29

<sup>153</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (accessed 28/12/2021)

<sup>154</sup> Ibid., 40.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid., 42.

on Civil and Political Rights (ICCPR) is the key provision on the right to privacy, providing that<sup>158</sup>:

- “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks”.

In the African context, while the African Charter on Human and Peoples’ Rights (African Charter) does not contain an express provision on the right to privacy, it is “argued that the right can – and should – be read into the African Charter through to the right to respect for life and integrity of the person, the right to dignity, and the right to liberty and security of the person”, based on “the approach taken by the African Commission on Human and Peoples’ Rights (African Commission) in *Social and Economic Rights Action Centre and Another v Nigeria*”<sup>159</sup>. A clear mention of privacy and data protection is found in the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention) which underscores in the preamble the African Union's commitment to building the information society and to protecting “the privacy of its citizens in their daily or professional lives, while guaranteeing the free flow of information”<sup>160</sup>. However, the Malabo Conventions is not yet in force, as it has not received the requisite number of ratifications.<sup>161</sup> At the domestic level, “more than 50 African constitutions, inclusive of amendments and recent reviews, include reference to the right to privacy”.<sup>162</sup> Furthermore, the AUDTS, requires policymakers to ensure that “digital identity data belongs to, and remains in the control of Africans”.<sup>163</sup> Even if the AUDTS does not expand on that recommendations, it seems to signal toward preference for localisation of digital identity data. More specifically on data localisation requirements, the AUDTS recommends the regulation of e-services developed by both the public and private sector and further that such laws should require that data needed to provide e-services in a member state is hosted in Africa and openly available on request subject to application of data protection principles.<sup>164</sup> The AUDTS also advocates for localisation of data to protect the “privacy of African citizens and residents.”<sup>165</sup>

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<sup>158</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 20/11/2021)

<sup>159</sup> Avani Singh, ‘Privacy and Security Online’, *Media Legal Defence Initiative*, n.d., 1. “It bears mention that other African regional instruments do recognise the right to privacy. For example, article 10 of the African Charter on the Rights and Welfare of the Child provides that, “No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.” <https://www.mediadefence.org/ereader/wp-content/uploads/sites/2/2020/06/Module-4-Privacy-and-security-online.pdf> (accessed 20/11/2021)

<sup>160</sup> [https://au.int/sites/default/files/treaties/29560-treaty-0048\\_-\\_african\\_union\\_convention\\_on\\_cyber\\_security\\_and\\_personal\\_data\\_protection\\_e.pdf](https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf) (accessed 20/11/2021)

<sup>161</sup> Singh, ‘Privacy and Security Online’, 2.

<sup>162</sup> Singh, 2.

<sup>163</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.42, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, (Accessed 26/09/2021)

<sup>164</sup> The Digital Transformation Strategy for Africa (2020-2030), P. 8. <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (Accessed 26/09/2021)

<sup>165</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.47, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, (Accessed 26/09/2021); In this regard, the African Union Commission (AUC) is developing a 'Data Policy Framework for Africa'. “The AUC has commissioned Research ICT Africa (RIA) to support this process. To ensure that the continental data policy meets its envisioned objectives, RIA adopted a dynamic consultation process, to reflect the interests of all stakeholders, including a consultation workshop to gain further inputs and validation from jurisdictions across the continent across two themes: the economic regulation of data and data governance. The consultation framework for stakeholders addressed those two themes, especially, as they relate to the role of sovereignty and localisation when

### **2.3.3.3. Emerging Technologies.**

According to AUDTS, “Emerging technologies such as blockchain, artificial intelligence, Internet of things, 3D printing provide practical ways of applying them to perform tasks normally requiring human intelligence”<sup>166</sup>, hence the term disruptive technologies due their ability to drive innovation in all sectors of the economy. The AUDTS notes that emerging technologies are currently unregulated in Africa.<sup>167</sup> In that state of affairs, it is important to “protect citizens and ensure fair markets while allowing the emerging technologies and businesses flourish” by adapting “policies and regulations that address emerging technologies with regard to how best to protect citizens, ensure fair markets and enforce regulations while allowing new technologies and business to thrive such as 5G and AI strategy, and IoT devices in particular”.<sup>168</sup>

### **2.3.3.4. Cyber security, Privacy and Personal Data Protection.**

Recognizing the risk of illicit access to data in today’s digital economy, the AUDTS requires the African countries to “reinforce human and institutional capacity to secure the cyberspace by building trust and confidence in digital technologies through, the development and adaptation of national cybersecurity strategies, cybersecurity standards and governance, and cybercrime”.<sup>169</sup> Equally, the AUDTS, calls for “legal and regulatory framework for personal data protection or privacy, as well as strengthening of legislation on personal data for better control of personal data” by the data subject, in that context, the AUDTS recommends “the adaption of legislation to regulate social networks, on issues relating to cybersecurity, privacy and data protection”, and to “accelerate the establishment of personal data protection authorities”.<sup>170</sup> National policies do take time to develop and implement especially in Africa, for various reasons such as lack of political will and commitment, limited resources in terms of human capital and financial resources, as well as time. Considering these shortcomings, AUDTS recommends to African countries to utilise continental conventions and existing initiatives on digital issues such as, the Malabo Conventions which seek for “a common approach at continental level on the security of the cyberspace and to set up minimum standards and procedures to define a credible digital environment for developing the electronic communications and guarantee the respect of the privacy online”. The Malabo Convention provides for three main issues: 1) Electronic transactions; 2) Personal data protection; and 3) Cybercrime. The data protection provisions of in the Malabo Convention are based on EU directive 95/46/EC, which has since 2018 been repealed by the EU and replaced with the

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considering data security and value creation chains, as well as the regulatory frameworks and political instruments, which define a trust environment, needed for the realisation of an integrated African digital market. An important focus of the discussion was ensuring that the framework promotes human and data rights beyond the right to privacy”<https://researchictafrica.net/2021/08/05/consultation-workshop-africa-data-policy-framework-african-union-commission/> (accessed 25/09/2021)

<sup>166</sup> <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf> (Accessed 26/09/2021)

<sup>167</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.44, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>, (Accessed 26/09/2021)

<sup>168</sup> Ibid.

<sup>169</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.47,

<sup>170</sup> Ibid.

General Data Protection Regulation (GDPR).<sup>171</sup> As international best practice, the AUDTS promotes the Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data<sup>172</sup>, and GDPR<sup>173</sup> as models for shaping national regulatory frameworks to promote competitiveness of African companies outside the continent”.<sup>174</sup> Other policy initiatives for cooperation in the digital area, set up by the African Union include the Policy and Regulatory Initiative for Digital Africa (PRIDA), established 2018 with the aim of accelerating regulatory harmonisation and regional cooperation for digitalization.<sup>175</sup> PRIDA’s key digital deliverables include common positions across Africa on Internet governance, PRIDA digital Platform, harmonisation of information and communication technology (ICT) policy, and legal and regulatory frameworks.<sup>176</sup> In this regard, PRIDA has since, April 2020, in collaboration with the Information Technology Union (ITU) and the European Union, launched two working groups: 1) On authorisation and licencing regimes; and 2) On data protection and localisation, “with a view to assess regulations, identify best practices and harmonise them across the continent”.<sup>177</sup>

## 2.4. Other AfCTA protocols applicable to electronic commerce.

In addition to the trade in services, other AfCFTA protocols relevant for electronic commerce include the AfCFTA Protocol on Trade in Goods, which applies to goods purchased online and delivered in physical form across borders i.e., electronic transactions, in that regard, the tariff commitments and schedules would be relevant for electronic commerce, however, recent reports show that the tariff schedules are still under negotiation. Equally relevant to

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<sup>171</sup> <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (Accessed 20/11/2021). Studies opine that Africa countries have adopted comprehensive data protection laws similar to EU GDPR to secure better chances for off-shoring business from Europe.

<sup>172</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807c65bf](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807c65bf) (Accessed 20/11/2021) notably, the Convention is open to accession by non-European countries and in that regard, so far, from Africa, Mauritius and Senegal have accessed to the Convention while Morocco, Tunisia, and Cape Verde have been invited to the Council of Europe to accede to its instruments. African Data Privacy Laws [https://books.google.be/books?id=Y8CiDQAAQBAJ&pg=PA318&lpg=PA318&dq=EAC+regional+framework+for+cyber+laws+\(2010\)&source=bl&ots=6fC7JxS0Wp&sig=ACfU3U145IWz6SkJB1K5dCcuoMWHG2g9-A&hl=en&sa=X&ved=2ahUKewjU64er9Kj0AhXS3KQKHbYiCz4Q6AF6BAgQEAM#v=onepage&q=EAC%20regional%20framework%20for%20cyber%20laws%20\(2010\)&f=false](https://books.google.be/books?id=Y8CiDQAAQBAJ&pg=PA318&lpg=PA318&dq=EAC+regional+framework+for+cyber+laws+(2010)&source=bl&ots=6fC7JxS0Wp&sig=ACfU3U145IWz6SkJB1K5dCcuoMWHG2g9-A&hl=en&sa=X&ved=2ahUKewjU64er9Kj0AhXS3KQKHbYiCz4Q6AF6BAgQEAM#v=onepage&q=EAC%20regional%20framework%20for%20cyber%20laws%20(2010)&f=false) (accessed 21/11/2021)

<sup>173</sup> <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (Accessed 20/11/2021). Studies opine that Africa countries have adopted comprehensive data protection laws similar to EU GDPR to secure better chances for off-shoring business from Europe.

<sup>174</sup> African Union Digital Transformation strategy for Africa (2020-2030), p.47, “The AU Executive Council at its 32nd Ordinary Session held from 25- 26 January 2018, in Addis Ababa, Ethiopia adopted decision EX.CL/Dec.987(XXXII) in which it endorsed the AU Declaration on Internet Governance and development of digital economy and adopted Cyber Security as a flagship project of the African Union Agenda 2063. Furthermore, the AU 23rd Assembly of Heads of State and Government adopted the African Union “Convention on Cyber Security and Personal Data Protection”. The convention is now open to all Member States of the African Union for signature and ratification in conformity with their respective constitutional procedures and subsequently the convention shall enter into force thirty (30) days after the date of the receipt by the Chairperson of the Commission of the African Union of the fifteenth (15th) instrument of ratification, African Union Digital Transformation strategy for Africa (2020-2030), p.45-46, <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>. (Accessed 26/09/2021).

<sup>175</sup> <https://africa-eu-partnership.org/en/projects/policy-and-regulation-initiative-digital-africa-prida>, (Accessed 26/09/2021)

<sup>176</sup> Ibid.

<sup>177</sup> African Union Commission and OECD, *Africa’s Development Dynamics 2020*, 56.

digital trade is the AfCFTA Protocol on Technical Barriers to Trade (TBT) yet to be concluded. The TBT protocol intends to include MFN and national treatment obligations as well as a commitment to base domestic technical regulations on international standards where they exist, therefore policy makers in the world have to adhere to those obligations considering that technical standards could have a range of implications for digital trade, including in areas such as standards for broadband networks, regulations on encryption, privacy, and data storage. On cross border data flows, the data localisation requirements could also be related to for electronic commerce taxation as the well as the competition policy in Competition Protocol in under negotiation in Phase 2.

## **2.5. Conclusion**

This chapter has shown that the AUDTS aims at guiding policy makers in the process of creating an enabling policy and regulatory environment needed to effectively govern digital transformation in Africa. In this regard, the AUDTS recommends the development and implementation of national, regional, and continental digital, transformation strategies based on local environment and development needs of Africa. The AUDTS seeks to support the harmonisation of national and regional digital strategies, that are currently being developed in silos to ensure interoperability and coherence of policies needed to achieve digital transformation in Africa needed to support the envisaged digital single market. Accelerating the continental harmonisation of data regulatory frameworks is essential, for instance, through the AfCFTA Protocol on Electronic Commerce. Moreover, given the international scope of digital data value chains, African countries should, therefore, not cling to isolated national strategies for data regulation.

# CHAPTER THREE: REGULATORY CONVERGENCE OF ECOMMERCE STRATEGIES OF SELECTED AFRICAN COUNTRIES.

## 3.1. Introduction

This chapter gives an account of the state of play of rules, principles, and standards, based on inventory in table 1 noted in chapter one, as adopted by the African RECs and a number of African countries where such legal framework exists. The chapter also underscores regulatory convergences and divergences based for example on the language used and references to specific regional continental or multilateral rules. This chapter aims at highlighting areas where the African countries have a common basis of understanding on electronic commerce regulations and the broader aspect of digital trade for an informed and resource saving discussion during the negotiations on the AfCFTA Protocol on Electronic commerce. It also acts as a resource for African governments in the development of their national digital strategies by showing a broader picture of various regulatory initiatives necessary for digitalisation of African economies. Examples of specific aspects of digital trade regulation are derived regional digital strategies of regional economic blocs and selected Africa countries.

## 3.2. Regulatory convergence on electronic commerce rules in African countries and their RECs

In African regulation of electronic commerce is emerging across a range of fora, predominantly through regional economic blocs and national digital strategies, although sluggishly compared to the rest of regions in the world. Evidently, and most importantly, lack of inclusion of electronic commerce provision or chapters in trade agreements between African countries and third countries, is a missed opportunity, compared to other trade agreements, such as, the United States Mexico Canada Agreement (USMCA), the EU-Japan Economic Partnership Agreement (EU-Japan EPA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), that increasingly include provisions related to trade in the digital era.<sup>178</sup>

The development of national and regional digital policies varies in pace and depth from country to country and region to region depending on domestic social and political constraints. Due to time and space constraints, this chapter is framed in a general discussion of regional economic communities' digital policies than on the country level, save for examples highlighting Africa countries national digital policies and legal enactments. Additionally, much of the discussion is based on sub-Saharan Africa, albeit differences in economic, political, and cultural norms, there are sufficient commonalities in economic structures, and governance conditions that warrant examination of convergences and divergences of digital policies. Following one of the guiding

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<sup>178</sup> “Trade agreements have an important contribution to make to the legal and institutional frameworks that will enable electronic commerce and digital trade. Increasingly, regional and bilateral trade agreements include provisions on electronic commerce, digital trade and the digital economy. These range from best endeavours agreements to promote electronic commerce all the way to the comprehensive, justiciable provisions of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).” <https://www.tralac.org/documents/resources/booklets/3175-trade-in-the-digital-economy-a-tralac-guide-march-2020/file.html> (accessed 28/12/2021)



principles of the AfCFTA, namely, *acquis*<sup>179</sup> which allows the African Union heads of State and Government to make commitments building on regional approaches developed in the RECs, the provisions electronic commerce frameworks examined in this chapter, would in addition to the AUDTS, provide a foundation for building the AfCFTA Protocol on Electronic commerce.

Before the AUDTS conceived the idea for a continent-wide electronic commerce regulatory framework, African RECs and a number of African countries, had already started developing policies and rules to regulate the digital environment, albeit at varying levels. This sub-section delves into those rules and policies by regulatory convergences that could potentially be areas of common ground during the negotiations of the AfCFTA Protocol on electronic commerce, and underlining areas of divergence that could potentially become controversial points during the negotiations. According to Polanco<sup>180</sup>, regulatory convergence reduces unnecessary regulatory incompatibilities, that negative policy impacts businesses by increasing the cost of doing business due to information asymmetries, duplication of procedures, lack of transparency, or clarity of regulations. It is, thus, an important aspect in promoting crossborder trade. Regulatory convergence can be achieved through substantive and / or procedural harmonisation.

According to Abimbola et.al.,<sup>181</sup> “only handful of African countries do not have some form of digital policy or strategy in place; African countries digital policies and strategies, as shown in figure 3, can be found in legal texts, stand-alone digital strategies, as sections of national development plans or within aspects of other policies”, covering various aspects of digital trade, such as, electronic commerce, digital privacy, development of efficient services delivery, e-government, and cybersecurity.<sup>182</sup> The most national strategies are criticised for aiming at turning a country into a 'regional digital hub' without prioritising regional and continental co-operation.<sup>183</sup> The development of those digital policies and strategies is supported by internal and external stakeholders, for instance, the European Union, is the largest overall donor on the African Continent, which affords “the European Union maintains considerable leverage in shaping the African countries policy strategies including the digital regulatory framework”.<sup>184</sup>

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<sup>179</sup> Article 5 of the African Continental Free Trade Area.

<sup>180</sup> Polanco, ‘Regulatory Convergence of Data Rules in Latin America’.

<sup>181</sup> Olumide Abimbola, Faten Aggad, and Bhaso Ndzendze, ‘What Is Africa’s Digital Agenda?’, n.d., 3.

<sup>182</sup> Abimbola, Aggad, and Ndzendze, 3.

<sup>183</sup> African Union Commission and OECD, *Africa’s Development Dynamics 2020*, 30.

<sup>184</sup> Abimbola, Aggad, and Ndzendze, ‘What Is Africa’s Digital Agenda?’, 1.

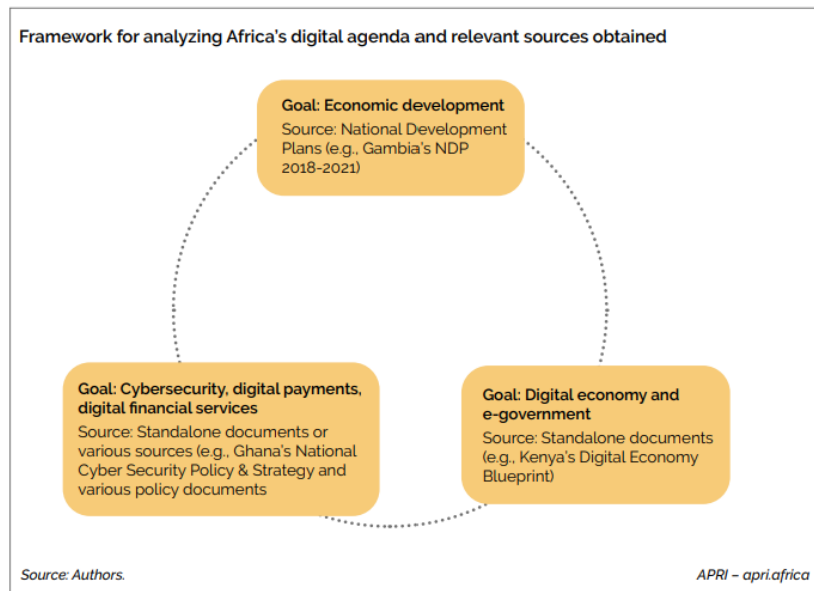


Figure 3

Abimbola et.al.,<sup>185</sup> seek to answer the following questions that this paper finds relevant for this chapter, “What emerges as Africa’s digital agenda when one reviews the agendas of individual African countries? What interactions have African countries been having with other global players in the digital eco-system?”, “What could be done to ensure that external players partner effectively with the continent to ensure that its digital potentials are realized for the benefit of all Africans?” This chapter, in addition, seeks to investigate whether the AUDTS matches to Africa's digital agenda identified and described in this sub-section.

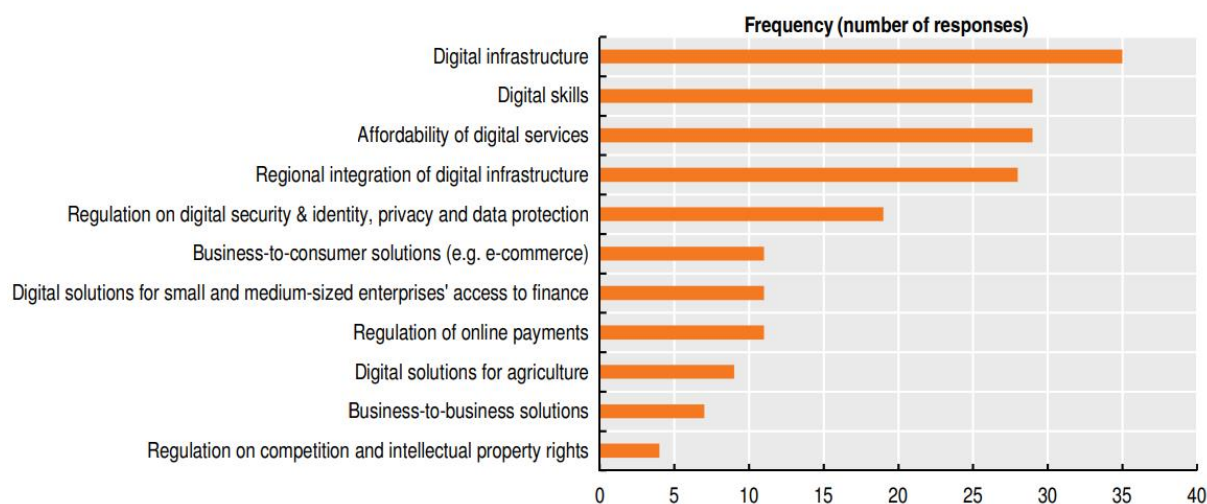
To arrive at the trends in Africa’s digital agenda, Abimbola et.al.,<sup>186</sup> studied various digital policies or strategies of several Africa countries and arrived at “certain issues that appear to be a priority for African governments” as shown in figure 4, that the authors conclude shows “an emerging digital agenda for Africa and the vision that African countries have in their approach toward digital space from a policy perspective.” This paper reviews those priority areas by examining possibility for regulatory convergence at the regional and continental level.

Figure 4

<sup>185</sup> Abimbola, Aggad, and Ndzendze, 2.


<sup>186</sup> Abimbola, Aggad, and Ndzendze, 9.

Figure 7. Priority areas for regional and continental co-operation: Results from the AUC/OECD 2020 Expert Survey on Digitalisation in Africa



Notes: This figure shows answers to the survey question, “Which of the following areas of digitalisation do you think should be the priorities for regional and continental co-operation to help create more and better jobs in your region?”. It is based on responses from six (out of Africa’s eight) Regional Economic Communities and on individual assessment on 23 African countries. Respondent to the survey included policy makers, experts on digitalisation and representatives of private companies working in Africa’s telecom and digital activities. For this question, each respondent was asked to select five top priority areas out of an open-ended list of 15 areas, with an option to add any additional areas of their choice.

Source: AUC/OECD 2020 Expert Survey on Digitalisation in Africa.

StatLink  <https://doi.org/10.1787/888934203187>

Source: Africa’s Development Dynamics 2021: Digital Transformation for Quality Jobs © Auc/Oecd 2021

### 3.2.1 E-government

According to Abimbola et.al.,<sup>187</sup> almost all African countries have included e-government in their digital strategies or national development plans. However, the approach is more inclined toward inter-institutional interoperability by integrating the different state institutions into a single platform for efficient delivery of government services. The authors do not indicate, however, whether priority for e-government interoperability includes cross-border digital services for instance at regional level, despite figure 4 showing regional integration of digital infrastructure as one of four key priority areas regional and continental cooperation. On the inventory of digital trade rules, principles and standards, noted previous, e-government relates to digitisation of government services and it therefore, an area of regulatory convergence among African countries.

### 3.2.2 Cybersecurity

According to Abimbola et.al.,<sup>188</sup> cybersecurity is another prominent feature of the African countries’ digital strategies, aimed at “improving confidence in the use of digital services”, albeit most African countries not having yet “developed national cybersecurity strategies or data protection regulations or laws”, only 39 Africa countries have a formal legislation, two

<sup>187</sup> Abimbola, Aggad, and Ndzendze, 10.

<sup>188</sup> Ibid.

have draft legislation and 12 have no legislation.<sup>189</sup> The authors note the adoption in 2014 of the African Union Convention on Cyber Security and Personal Data Protection, (the Malabo Convention), but do not relate the lack of national cybersecurity strategies as a limitation of its domestic implementation. The authors pointed out that Senegal has taken further steps to strengthen its ‘digital sovereignty’ by requiring all government data to be transferred to Senegal’s national data centers including all national data hosted outside Senegal. As noted in previous, data localisation requirements can imposed in through various measures, such as, a requirement for local storage of data and process, i.e., local data centres are used to process the data, but the data can still be transferred abroad, and a ban on the transfer of data.<sup>190</sup> The authors do not, however, state whether the Senegal’s proclamation on localisation of all national data was based on protection against cybersecurity risks. On the state of play of data localisation requirements in African countries, Banga, et.al.,<sup>191</sup> show that a number of African countries have some form of data localisation restrictions related to data privacy save for Nigeria which has established a data localisation law requiring local storage of consumer, government, and subscription data as well as local processing of sales data and ATM transactions data. It is uncertain that data localisation would be an area of regulatory convergence among African countries. Some African countries have, in the plurilateral negotiations on electronic commerce at the WTO multilateral level, raised concerns on a general binding international rule against data localisation requirements. The developing and least developed members of the WTO request for specific carve-out for cross-border data flows as well as support measures for developing countries to develop digital capacities and close the digital divide between them and developed countries.<sup>192</sup> These developing countries are seeking for an exemption from free flow of data obligations and from a proposed prohibition of forced data localisation (except for financial purposes) that would be created under the WTO electronic commerce rules. The proponents of this these exemptions led by Nigeria<sup>193</sup>, are motivated the by need close the digital gap between developed the WTO Members and the developing as well as least developed WTO Members. The proponents believe that the exemptions would allow the local digital firms to collect sufficient local data necessary to compete and/or be shielded from competition from thier counterparts in digitally advanced countries. Essentially, the exemption would imply that developing and least developed WTO Members would not be in breach of WTO rules on ecommerce for maintaining data localisation measures and imposing restrictions on the free flow of data cross borders. While this request has been criticised for not clearly defining the developing countries that would benefit from these exemptions and the conditions under which these exemptions would apply, in terms of scope or potential time-limits, it still remains to be seen how the plurilateral negotiations on the WTO ecommerce rules will evolve on this issue.<sup>194</sup>

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<sup>189</sup> The UNCTAD Global Cyberlaw Tracker, <https://unctad.org/page/cybercrime-legislation-worldwide> (accessed 21/11/2021)<sup>o</sup>

<sup>190</sup> Karishma Banga, ‘E-Commerce in Preferential Trade Agreements: Implications for African Firms and the AfCFTA’, ODI: Think change, 28, accessed 20 October 2021, <https://odi.org/en/publications/e-commerce-in-preferential-trade-agreements-implications-for-african-firms-and-the-afcfta/>.

<sup>191</sup> Banga, 28.

<sup>192</sup> <https://borderlex.net/2021/06/21/wto-electronic-commerce-nigeria-brings-developing-country-exceptions-for-data-flows-into-picture/>(accessed 16/11/2021)

<sup>193</sup> Ibid.

<sup>194</sup> It is not uncommon for WTO rules to grant exemptions to developing and least developed WTO Members by that allows them policy space to maintain non-conforming measures intended to meet their development needs. These exemptions are coined under the phase ‘Special and differential treatment’ See [https://www.wto.org/english/tratop\\_e/dev\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm) (accessed 16/11/2021)

South African's President Cyril Ramaphosa noted that “the management of data flows must be left to governments to decide according to their own specific needs for embarking on digital industrialisation”.<sup>195</sup> In addition to those two contentions, the United Nations Conference on Trade and Development<sup>196</sup> argues against treating “data flows” as “trade flows” emphasising that trade fora like the Joint Statement Initiative on electronic commerce at the WTO and trade agreements such as the CPTPP are not the proper forum for developing rules on “data flows” rather the report proposed the United Nations as the proper forum for providing global governance on “data flows”. In that regard, the report states:

“Given the different characteristics of data in comparison to goods and services, cross-border data flows are to be considered a new kind of international flow; data flows remain distinct from trade, and treating them as trade can be problematic, for various reasons. While much global data being produced, stored and exchanged are related to commercial transactions, a huge share of these data are not related to such transactions, but to other aspects of human life, and there are challenges facing the distinction between different types of transactions. As such data are produced, collected, stored and transferred, these processes impact issues related to privacy, personal data, social relations and security, among others, and treating these issues just through a “trade lens” implies taking a too-narrow approach”.

### 3.2.3 Data protection, and privacy

The discussion on localisation requirements leads into analysis of the privacy and data protection, as other areas of potential divergence among African countries, albeit being one of the priority key priority areas for regional and continental cooperation, as shown in figure 4.

At the multilateral level, data protection is a contentious topic in electronic commerce negotiations<sup>197</sup>. According to Makulilo<sup>198</sup>, “data privacy laws are not indigenous of any African country”, they originate from Western countries, and are provided for in most African national constitutions as the under the broad right to privacy but less enforced.<sup>199</sup> The case law on the constitutional right to privacy in Africa is limited, and consequently, it is less clearly known how the right should be exercised in practice.<sup>200</sup> To that effect, Banga<sup>201</sup> notes that many African countries have not established yet domestic policies and regulatory frameworks on data protection<sup>202</sup>, “only 27 African countries out of 54 currently have a formal legislation on data protection and privacy, nine have draft legislation, and 13 counties have no legislation yet”. Even where data protection legislation has been adopted, in most cases, such laws are to be properly enforced due to delays in establishing data protection authorities, problematic enforcement, or the law is simply not yet in force.<sup>203</sup> Indicating, therefore, that African countries are still lagging in developing legal and regulatory frameworks for data collection, classification

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<sup>195</sup> <https://www.twn.my/title2/wto.info/2021/ti211002.htm> (accessed 16/11/2021)

<sup>196</sup> United Nations Conference on Trade and Development, *Digital Economy Report 2021: Cross-Border Data Flows and Development*. (S.I.: United Nations, 2021).

<sup>197</sup> Karishma Banga, Jamie Macleod, and Max Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’, April 2021, 28.

<sup>198</sup> Alex B. Makulilo, *African Data Privacy Laws* (Springer, 2016), 20.

<sup>199</sup> Makulilo, 20.

<sup>200</sup> Ibid.

<sup>201</sup> Banga, ‘E-Commerce in Preferential Trade Agreements’, 29.

<sup>202</sup> Banga, 29. According to the UNCTAD Global Cyberlaw Tracker

<sup>203</sup> Makulilo, *African Data Privacy Laws*, 20.

into personal and non-personal data as well as sensitive and non-sensitive data, and data processing “and use of data as a tool for increasing competitiveness and market share.”<sup>204</sup> However, efforts are on-going to harmonise data protection regulation at the regional level through RECs, such as the EAC regional framework for cyber laws (2010) The EAC Framework for Cyberlaws recommends that each member state develop a regulatory regime for data protection based on international best practices to achieve legal harmonisation as the response to legal challenges to the digitalisation era. On data processing, the EAC Framework for Cyberlaws makes two significant recommendations of obligations of data controllers: 1) comply with principles of good practice relating to accountability, transparency, fair and lawful processing limitation, data accuracy and data security; and 2) Data subject rights such right for data subjects to access their data held by the data controller, and the right to rectify such data. UNCTAD, finds, however, that the EAC Framework for Cyberlaws does not but it makes no specific recommendations on selection of the law.<sup>205</sup> From Western Africa, the Personal Data Protection for the Economic Community of West African States (ECOWAS) and in Southern Africa is the Data Protection Model Law 2012 for Southern Africa Development Community (SADC) that establishes principles of data processing that include data minimisation, accuracy, storage limitations, lawfulness and fairness, purpose limitation and accountability.<sup>206</sup> In the contrast to the data protection regimes of ECOWAS and SADC, the EAC Framework for Cyberlaws are only recommendations for Partner States to adopt data privacy rules in accordance with international standards.<sup>207</sup> Additionally, the SADC and ECOWAS data protection frameworks “mandates member states to create a DPA to address data breaches and enforcement”.<sup>208</sup> More so, the ECOWAS Member States adopted a Supplementary Act on Personal Data Protection to the ECOWAS Treaty, that “establishes the content required of a data privacy law in each ECOWAS member state, including the composition of a DPA”, making it “the only binding regional/international data protection agreement yet in force in Africa”.<sup>209</sup>

Regarding disciplines on cross-border data flows, examples of data protection and privacy frameworks at the national level, include Rwanda’s 2017 Data Revolution Policy granting Rwanda exclusive sovereignty over national data, with a possibility for “hosting data on the cloud or in a collocated environment in data centres within or outside the country, under agreed terms and governed by Rwanda.”<sup>210</sup> Kenya’s Data Protection Act of 2019, grants the government discretion to determine “certain types of processing which may only be conducted through a server or data centre located in Kenya on the basis of strategic interests of the State or for the protection of revenue”, the same law also adopts a sectoral approach on health data, by prohibiting the storage of health data outside Kenyan territory.<sup>211</sup> South Africa’s Protection of Personal Information Act that came into effect in July 2020, provides for “the transfer of

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<sup>204</sup> Banga, ‘E-Commerce in Preferential Trade Agreements’, 29.

<sup>205</sup> UNCTAD 2016.

<sup>206</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>207</sup> Makulilo, *African Data Privacy Laws*.

<sup>208</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>209</sup> Ibid.

<sup>210</sup> Banga, ‘Electronic commerce in Preferential Trade Agreements’, 28.

<sup>211</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

personal information about a data subject to a third party in a foreign country under a number of conditions”.<sup>212</sup>

While there seems to be no resistance to personal data protection and privacy rules, the enforcement of these disciplines are fragmented across the African continent, since “some African countries, such as Morocco, Nigeria and Tunisia, do not provide for notification of breaches in their laws”, while countries, such as, Ghana and Mauritius mandate their data protection authorities to take action or issue fines for non-compliance with respective personal data protection laws; others, such as Botswana, Equatorial Guinea, Kenya, Madagascar, Seychelles and Uganda, have not yet to set up a data protection authority”.<sup>213</sup> These aspects limit the effective implementation of personal data protection rules in Africa.

### **3.2.4 Taxing digital services**

Taxing the digital economy is one of the policy challenges arising from the digitalisation of economies. Tax policy challenges arising from the digitalisation of the economy relate to the question of “how to fairly tax businesses that rely on intangible assets and have no or only an insignificant physical presence in the tax jurisdictions where they operate”.<sup>214</sup> Taxation of digital services is not prominent in national strategies and policies of most African countries, but it is an emerging topic for instance at the continental level. Some African governments already have digital services tax of some kind, for example, South Africa’ value added tax rules were amended “to better capture the digital economy and foreign and local digital suppliers” by requiring “foreign suppliers of e-commerce services, such as, music, e-books, internet games, electronic betting and software, among others, to register as VAT vendors and account for output tax, provided their turnover in South Africa meets the threshold of one million rand”.<sup>215</sup> Kenya, Uganda, and Nigeria have also recently, introduced digital services tax on certain types of electronic transactions conducted via electronic channels or platforms.<sup>216</sup>

### **3.2.5 Electronic trade facilitation**

African countries digital trade strategies “recognise the importance of promoting electronic commerce and include in provisions on electronic authentication, electronic signature or digital certificates”.<sup>217</sup> Legal provisions on electronic trade facilitation aim at using “digitalisation or automation to make trade easier, faster, and simpler”.<sup>218</sup> Out of 54 African countries, 33

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<sup>212</sup> Ibid.

<sup>213</sup> “No data protection authorities have yet been appointed in 15 of the 32 countries with data privacy laws”, Banga, Macleod, and Mendez-Parra.

<sup>214</sup> Taxing the digital economy. New developments and the way forward, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698761/EPRS\\_BRI\(2021\)698761\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698761/EPRS_BRI(2021)698761_EN.pdf) (accessed 28/12/2021)

<sup>215</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>216</sup> Abimbola, Aggad, and Ndzendze, ‘What Is Africa’s Digital Agenda?’, 11.

<sup>217</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>218</sup> Banga, Macleod, and Mendez-Parra.

currently have adopted formal electronic transaction legislation,<sup>219</sup> however, it is yet clear, whether all the 33 Africa countries have established the required national certification authorities, generally required under electronic transaction rules.<sup>220</sup> Electronic transaction law contain key principles relating to “technology neutrality, non-discrimination of electronic communications and functional equivalence”.<sup>221</sup> In Uganda, for example, to facilitate and secure the growth of electronic trade, the Government introduced the Electronic Transactions Act 2011, the Computer Misuse Act & Electronic Signatures Act, 2011.<sup>222</sup> This governance framework provides rules for recognition of electronic records (“functional equivalence” between paper transactions and electronic transactions), electronic contracts, electronic signatures, admission of electronic evidence in court and arbitration proceedings, and guarantees the effective enforcement of consumer’s rights in case of violation and therefore, “facilitates the development of electronic commerce in Uganda by broadly removing existing legal impediments that may prevent a person from transacting electronically.”<sup>223</sup> Notably, there are disparities on technology neutrality of electronic signatures among Africa countries’ legislations on electronic transactions. While countries, such as South Africa, “adhere to the principle of technology neutrality in regulating electronic signatures to promote equivalence of legal treatment between offline and online signatures”, some Member States of ECOWAS, “have enacted technology-specific legislation based on e-signatures, such as public key infrastructure, to increase reliability of e-signatures”.<sup>224</sup> The issue of technology neutrality, poses, therefore, potential area of divergence in regulating electronic trade facilitation in Africa. At the regional level, support for electronic trade facilitate is evident in the promotion of single common digital certificate of origin systems to create standard platforms that can easily be accessible to cross-border traders and administrative agencies, for example the SADC trade facilitation programme aims at, *inter alia*, introducing electronic certificates of origin, and data exchange and interconnectivity.<sup>225</sup> While in COMESA, the COMESA electronic certificate of origin (eCo) system is one of the latest tools developed under the COMESA Digital Free Trade Area initiative to address challenges on the movement of goods across-borders, such as the onerous manual certification process.<sup>226</sup>

### 3.2.6 Intellectual property rights protection

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<sup>219</sup> UNCTAD Global Cyberlaw Tracker 2020.

<sup>220</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>221</sup> Ibid.

<sup>222</sup> <https://www.nita.go.ug/publication/electronic-transactions-act-2011-act-no-8-2011> (accessed 28/12/2021)

<sup>223</sup> Ibid.

<sup>224</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>225</sup> <https://www.sadc.int/news-events/news/sadc-ministers-trade-approve-extension-trade-facilitation-programme/#:~:text=SADC%20Ministers%20of%20Trade%20approve%20extension%20of%20Trade%20Facilitation%20Programme,-The%20Committee%20of&text=The%20SADC%20TFP%20is%20aimed.and%20technical%20barriers%20to%20trade.> (accessed 28/12/2021).

<sup>226</sup> <https://www.comesa.int/over-10-member-states-ready-to-pilot-the-comesa-electronic-certificate-of-origin/> (accessed 28/12/2021).



Intellectual property rights protection relevant to the digital economy includes aspects of “source codes and algorithms and cyber theft of trade secrets”.<sup>227</sup> Most of the African countries provide for intellectual property rights regimes and are party to several regional and international agreements on intellectual property rights protection including the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. In terms of intellectual property rights policy by regional economic blocs, so far, only COMESA has a regional intellectual property rights policy, however, efforts are underway in the East Africa Community Partner States to “implement the TRIPS with a view to promoting copyright and cultural industries, traditional knowledge, geographical indications and technology transfer”.<sup>228</sup> Given the wide uptake of intellectual property rights protection in Africa countries, albeit their ineffective enforcement, negotiation of Continental intellectual property policy may be not challenging save for the issue of source code relating to the prohibition of transfer of technology, production processes or other proprietary information discussed further in chapter five.

### 3.2.7 Competition policy

Most Africa countries have not established competition regulations and regulatory institutions. Out of 54 African countries, “only 23 African countries have competition laws in place as well as competition authorities to enforce those laws”.<sup>229</sup> In terms of regulating competition, African countries, therefore, fall under three categories, namely: 1) Those with legislation in place or under consideration; 2) Those with no legislation; and 3) Those with no legislation and more flexible provisions sector specific provisions.<sup>230</sup> Progress in establishing competition rules and institutions is, however, evident at the regional level, for instance, the Common Market for Eastern and South Africa’s regional Competition Commission, that has supranational enforcement authority over anti-competitive practices in the region and is the first regional competition commission in Africa and the second in the world after the European Competition Authority.<sup>231</sup> The COMESA competition policy and law harmonises national competition policies and laws.<sup>232</sup> The Southern African Development Community adopted a declaration on regional cooperation in competition and consumer policies, setting out a cooperation framework on competition policy in the region and provides for Competition and Consumer Policy and Law Committee to foster cooperation and dialogue among competition authorities in the region.<sup>233</sup>

## 3.3 How does the emerging agenda fit with the continental agenda?

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<sup>227</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>228</sup> Ibid.

<sup>229</sup> Banga, Macleod, and Mendez-Parra.

<sup>230</sup> Draper p.16

<sup>231</sup> <https://www.comesacompetition.org/competition-law-for-business-and-industry/> (accessed 28/12/2021).

<sup>232</sup> Ibid.

<sup>233</sup> <https://www.sadc.int/themes/economic-development/trade/competition-policy/#:~:text=The%20Declaration%20on%20Cooperation%20in,and%20prohibit%20unfair%20business%20practices>. (accessed 28/12/2021).

Abimbola et.al.,<sup>234</sup> observe that foundational pillars in the AUDTS, as discussed in chapter two, are representative of the core areas identified by the authors in Africa's emerging digital agenda. Therefore, the emerging national and regional digital governance frameworks in Africa, fit with in the governance aspects of electronic commerce identified in the AUDTS. The authors, however, note as a key challenge, the possibility of connecting the AUDTS and regional digital trade regulatory regimes, that are likely to be affected by the AfCFTA rules on electronic commerce, digital agenda, to the national efforts towards developing digital strategies.<sup>235</sup>

### **3.4 Conclusion**

The key regulatory aspects of electronic commerce examined in this chapter pertaining to African RECs, and the country specific examples, provide an understanding of the areas of convergence and divergence. The areas of common interest such as electronic government, electronic trade facilitation, cybersecurity, privacy, and data protection, provide a base for developing a harmonised continental framework on electronic commerce. Divergences in the national digital policies and regional digital policies, for example, on data location, and customs duties on electronic transmissions, reflect the differences in understanding of the content or application of aspects of digital governance, and the divergences in economic interests indicating how each country or region could benefit from a particular policy aspect.

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<sup>234</sup> Abimbola, Aggad, and Ndzendze, 'What Is Africa's Digital Agenda?', 12.

<sup>235</sup> Abimbola, Aggad, and Ndzendze, 12.

# CHAPTER FOUR: COMPARING THE AUDTS AND THE EU DIGITAL TRADE POLICY

## 4.1. Introduction

This chapter compares the EU digital trade policy approach with the African Digital Transformation Strategy (AUDTS) to establish if the EU approach could be considered a suitable approach for digital governance under the AfCFTA Protocol on Electronic Commerce. In that regard, the Chapter investigates the areas of potential convergence and divergence, the reasons for the differences in approach, as well as the positions taken in the WTO electronic commerce negotiations. Given that the EU is the largest donor in Africa, with development assistance programs involving technical assistance aimed at facilitating the establishment of legal, regulatory, and institutional frameworks in Africa, at the national, regional, and continental level, including in the field of digital environment, it is likely that certain aspects of the AfCFTA rules on electronic commerce will be influenced by the EU's digital trade policy. This chapter, therefore, seeks to show the negotiators of the AfCFTA rules on electronic commerce, how the EU's principles and fundamental values are incorporated in its digital trade policy and its external trade relations on digital trade as well as the potential impact of the EU's digital trade policy on its trade relations.

## 4.2 The EU Digital Trade Policy

The EU as emerged as a forerunner in global regulatory race for digital technologies and platforms. The EU has created a comprehensive legal, regulatory, and institutional framework for the digital economy through the digital single market. The EU's Road map to a comprehensive regulatory rule book on digital single market entails a series of policy paper adopted and launched by the European Commission containing legislative and non-legislative initiatives, addressing various aspects of digital governance. Through the various policy initiative, the EU aims at keeping abreast with technology changes and advancements, that influence new business models and create risks related to privacy and personal data protection, competition policy, intellectual property rights protection, as well cybersecurity. One of such policy papers adopted by EU is the European Commission's communication on 'Shaping Europe's Digital Future'<sup>236</sup>, that states:

“For the next five years, the Commission will focus on three key objectives to ensure that digital solutions help Europe to pursue its own way towards a digital transformation that works for the benefit of people through respecting our values. It will also put Europe in a position to be a trendsetter in the global debate”

The three policy objectives mentioned in the European Commission's communication on 'Shaping Europe's Digital Future' are, namely: 1) 'Technology that works for people' that concerns the development of legislative framework for trustworthy artificial intelligence and follow-up on safety, liability, fundamental rights and data, as well as European cybersecurity strategy; 2) 'A fair and competitive economy' with a proposed legislative framework for data governance and possible Data Act, Digital Services Act, and Communication on Business

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<sup>236</sup> European Commission, 'Shaping Europe's Digital Future', 2.

Taxation for the 21st century; and 3) ‘An open, democratic and sustainable society’, with proposed legislative initiatives relating to new and revised rules to deepen the internal market for digital services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms’ content policies in the EU.<sup>237</sup>

Electronic commerce in the EU is an integral part of the digital trade policy, in fact both have largely developed concurrently. In 2015, digital trade was incorporated into the EU single market framework and rephased to the digital single market, through the ‘Digital Single Market Strategy for Europe’<sup>238</sup>, that states:

“A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. Achieving a Digital Single Market will ensure that Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally”.<sup>239</sup>

The President of the European Commission, Ursula Von der Leyen, presented in the political guidelines for the next European commission 2019-2024, under theme ‘A Europe fit for the digital age’<sup>240</sup> the following regulatory proposals to harness the opportunities from the digital age withing safe and ethical boundaries; development of joint standards for 5G networks, achievement of technological sovereignty in some critical technology areas, defining standards for new generation technologies (blockchain, high performance computing, quantum computing, algorithms, and tools for data sharing and data usage) that will become the global norm, legislation for a coordinated European approach on the human and ethical implications of artificial intelligence, New Digital Services Act to upgrade the liability and safety rules for digital platforms, services and products, and a joint cyberunit to speed up information sharing. The policy objective of ‘A Europe fit for the digital age’ is to balance the flow and wide use of data with preserving high privacy, security, safety, and ethical standards.<sup>241</sup> Since June 2020, the Directorate General for Trade of the European Commission has been conducting a major review of the EU's trade and investment policy aiming at enhancing “the role of trade policy to support the digital transition and is guided by a conceptual framework for open strategic autonomy”, that “aims to strengthen then EU's capacity to pursue its own interests independently and assertively, while continuing to work with partners around the world to deliver global solutions to global challenges”.<sup>242</sup> Specifically, the Strategic Plan 2020-2024 of Directorate General for Trade of the European Commission “explicitly states that EU trade

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<sup>237</sup> European Commission, ‘Shaping Europe’s Digital Future’.

<sup>238</sup> COM (2015) 192 final, 6.5.2015, p. 2.

<sup>239</sup> COM (2015) 192 final, 6.5.2015, p. 2.

<sup>240</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en) (accessed 28/12/2021)

<sup>241</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en) (accessed 28/12/2021)

<sup>242</sup> COM (2021) Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.

policy will be the embodiment of the mix of EU values.”<sup>243</sup> To this end, in February 2021, in its review of EU trade policy, the European Commission, notes:<sup>244</sup>

“Digital transformation is another key enabler of sustainable development, but also a space of competition and inadequate multilateral governance. As it embarks on its Digital Decade, supporting Europe’s digital transformation is a priority both in internal and external policies including trade policy and instruments”.

Additionally, in the same EU trade policy review, the European Commission reiterated its commitment to seek a “rapid conclusion of an ambitious and comprehensive WTO agreement on digital trade” that would provide rules on data flows, geared towards “full compliance with the EU’s data protection framework, and provisions on enhancing consumer trust ensuring a high level of consumer protection”.<sup>245</sup> The European Commission also intends to “explore the possibility of closer regulatory cooperation with like-minded partners on issues of relevance for digital trade.”<sup>246</sup> The EU trade policy, therefore, shows that the EU digital trade agenda is an important element of EU trade negotiations. Currently, the EU and US are in discussions towards global standards on digital technologies in their Trade and Technology Council.<sup>247</sup> In a Joint statement<sup>248</sup>, the two parties agreed to cooperate on the “development and deployment of new technologies” in ways that reinforce their shared democratic values such as respect for universal human rights. The parties also intend to “encourage compatible standards and regulations” and to cooperate “to effectively address the misuse of technology”, to protect their societies from information manipulation and interference, as well as to “promote secure and sustainable international digital connectivity.”<sup>249</sup>

### **4.3. Comparing the EU digital trade policy and the AUDTS**

#### **4.3.1. Objectives pursued.**

As noted in chapter one, the primary focus of the AfCFTA is to integrate its Member States into a common African market, while AUDTS seeks to encourage the establishment of national, regional, and continental level digital transformation strategies that are harmonised to support Africa’s growing cross-border electronic commerce. Similarly, the EU’s digital trade policy seeks to harmonise EU Member States approaches to electronic commerce regulation. Currently that goal has changed by evolving into a broader agenda on digital trade policy permeating through all aspects of EU’s trade policy and seemingly more directed toward the interaction and competition with technically advanced markets. That ambitious goal is stated in the Trade Policy Review, that states, “supporting Europe’s digital agenda is a priority for EU trade policy. The objective is to ensure a leading position for the EU in digital trade and in the area of technology, most importantly by promoting innovation”.<sup>250</sup> Compared to the AUDTS

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<sup>243</sup> COM (2021) Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.

<sup>244</sup> European Commission, ‘Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’, 18 February 2021, 2, [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159438.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159438.pdf).

<sup>245</sup> European Commission, 15.

<sup>246</sup> European Commission, 15.

<sup>247</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_5308](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5308) (Accessed 28/12/2021)

<sup>248</sup> [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_4951](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951) (Accessed 28/12/2021)

<sup>249</sup> Ibid.

<sup>250</sup> European Commission, ‘Trade Policy Review - An Open, Sustainable and Assertive Trade Policy’, 15.

that is seeking harmonisation and interoperability of digital regulatory frameworks in Africa, the EU seems to have surpassed that stage and is now focused on securing a competitive and level playing field for EU's digital economy.

### **4.3.2. Choice of terminology.**

The AUDTS defined both electronic commerce and digital trade by borrowing the OECD definition of both terms as shown in chapter two. By defining both terms, the AU seeks to show an understanding that electronic commerce is a subset of digital trade, which can be pursued separately or in parallel with broader concept of digital trade. In that regard, the AUDTS seems to be more focused on first promoting the regulation of ecommerce, while keeping an eye on ultimate goal of integrating African countries into a digital single market, which is the focus of the African Union Agenda 2063. The OECD, explains that its definition of electronic commerce “focuses on the ordering process as the defining characteristic, the coverage of both goods and services, and the wide range of network types considered.”<sup>251</sup> The focus is, thus, on how the purchase is initiated rather than on the form of deliver or nature of the product.<sup>252</sup> According to the OECD<sup>253</sup>, the complexities involved in electronic commerce from a trade policy perspective, the term has over the years, broadened to ‘digital trade’ which “includes digitally enabled transactions in goods and services that can be delivered digitally or physically”. This definition includes electronic commerce “transactions as defined by the OECD, but also includes several distinct types of cross-border transactions, including digitally delivered services, irrespective of the method by which they are ordered”.<sup>254</sup>The European Commission defines digital trade as “commerce enabled by electronic means” such as telecommunications and/or information communication technology services that covers trade in both goods and services and affects all sectors of the economy.<sup>255</sup>There seem to be no traces of differences in approach from the choice of terminology between the AUDTs and the EU digital trade policy

### **4.3.3. Scope of coverage.**

Having seen that AUDTS focuses on the creation and harmonisation of digital governance strategies of African countries.<sup>256</sup> The AUDTS does not make a specific categorisation of digital products as either trade in services or trade in goods, it has broad coverage of regulatory aspects relevant for the digital economy, ranging from enabling electronic commerce, to privacy and data protection, cybersecurity, digital content regulation. However, an argument could be made that the AUDTS is more focused on electronic commerce facilitation complement and enhance the implementation of AfCFTA trade in goods and services.<sup>257</sup> The EU has an even broader and ambitious scope of digital trade governance coverage since ‘digital technology impacts on every aspect of EU policy’,<sup>258</sup> more so due to the evolving and innovation driven nature of digital technologies, with an increasing role of services trade

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<sup>251</sup> OECD, *Unpacking Electronic commerce*, 2.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> <https://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/digital-trade/> (accessed 28/12/2021)

<sup>256</sup> The African Union Digital Transformation Strategy, p.2.

<sup>257</sup> Ibid.

<sup>258</sup> COM (2017) 228 final, p. 2

compared to goods.<sup>259</sup>The EU digital trade policy is focused on supporting Europe’s digital transformation in internal and external policies including trade policy and instruments and covering the following aspects as enumerated in European Commission’s communication on ‘Shaping Europe’s Digital Future’ namely: legislative framework for trustworthy artificial intelligence, safety, liability, fundamental rights and data, as well as European cybersecurity strategy; legislative initiative on data governance Digital Services Act, and Business Taxation; and legislative initiatives relating to “new and revised rules to deepen the internal market for digital services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms’ content policies in the EU”.<sup>260</sup>

#### **4.3.4. Type of trade barrier.**

In terms of policy objectives aimed at eliminating barriers to electronic commerce, the AUDTS seeks to address the non-tariff barriers impeding traditional trade in goods by recommending the digitalisation and simplification of cumbersome customs procedures, specific to non-tariff barriers impacting electronic commerce, the AUDTS addresses not only discrimination against or among digital products and service providers in general, but also specific types of trade barriers such as restriction on cross-border data flows, data localisation requirement and business trust (source code).<sup>261</sup> The AUDTS recommends the establishment of regulatory environments that ensure an open, secure, and trustworthy online environment for governments, businesses and consumers.<sup>262</sup> However, the AUDTS does not seem to mention tariff barriers relating to customs duties on electronic transmissions. Custom duties on electronic transmissions are prohibited under the EU digital trade policy, since the EU categorises the electronic transmissions as provision of services thus not subject to customs duties.<sup>263</sup> On cross-border dataflows, unlike the EU, the AUDTS indicates policy preference for some form data localisation, justified on ground of development of local data centres that would support the development of a local digital industry.<sup>264</sup>

Unlike, the EU, the AUDTS is less ambitious in tackling anticompetitive practices relevant to the electronic commerce and the protection of intellectual property rights. For example, the EU’s Digital Markets Act is a legislative initiative that seeks to create an equitable regulatory environment for small and medium-sized enterprises by addressing anti-competitive business models, such as market concentration due to network effects by multinational online platforms, through enforceable data access rights.

Additionally, the EU digital trade policy diverges from AUDTS on depth of privacy and personal data protection. The EU has endorsed data protection as a fundamental right. According to Article 8 (1) of the Charter of Fundamental Rights of the European Union<sup>265</sup>, “Everyone has the right to the protection of personal data concerning him or her.” Like the EU,

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<sup>259</sup> COM (2021) 66 final, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.p.g.15.

<sup>260</sup> European Commission, ‘Shaping Europe’s Digital Future’.

<sup>261</sup> The African Union Digital Transformation Strategy, p.2

<sup>262</sup> Ibid.

<sup>263</sup> Burri and Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements’, 199.

<sup>264</sup> Banga, ‘E-Commerce in Preferential Trade Agreements’, 28.

<sup>265</sup> ‘Charter of Fundamental Rights of the European Union’, Pub. L. No. (2012/C 326/02), 17 (n.d.).

the AUDTS considers the protection of personal data as a fundamental right and encourages the African countries to adopt the standards of the EU's General Data Protection Regulation (GDPR) as a one of the models for shaping national regulatory frameworks to on privacy and data protection.<sup>266</sup> African countries data protection regimes, are therefore, not as stringent as the EU's privacy and data protection framework. For example, on international data transfers, the GDPR requires the data importing country to have an equivalent regulatory standard of privacy and data protection as the EU. According to Meltzer<sup>267</sup>, the EU's stringent privacy and data protection regime reflects the EU's preference for privacy and "the trade-off in GDPR between privacy protection and the opportunities from digital trade; an outcome which may be odds with how other countries would prefer to protect privacy and engage in digital trade." For example, China and the United States, do not consider data protection as fundamental right. US takes a liberal approach to digital trade regulation by giving priority to market access for digital products than right to data protection or national security. However, the US's digital trade policy priorities and approach may be changing due to currently ongoing policy debates in the US relating to possibilities to introduce Federal legislative proposals on liability by internet companies for online content, and data privacy.<sup>268</sup> Equally, the renewed cooperation with the EU on regulation of digital technologies through the Trade and Technology Council could indicate the US's interest in exploring other policy approaches to digital trade governance.<sup>269</sup> To support the competitiveness of EU digital trade industry, the EU attempts to reconcile and balance its position on privacy and data protection with the economic objective of promoting cross-border data flows that is the lifeblood of the digital economy, For instance, in recent trade agreements such as the EU-UK Trade and Cooperation Agreement, the EU agreed to cross-border data flows on ground that privacy and personal data protection is recognised as a fundament and non-negotiable right along with broad exceptions that aim at preserving the right to regulate in interest of privacy and data protection.<sup>270</sup>

#### **4.3.5 Digital trade governance approach in Free Trade Agreements**

EU FTA provisions generally related to ban on customs duties on digital products, prohibition of forced disclosure of source code, commitment to the principles non-discrimination and transparency of domestic regulation, enabling electronic commerce through legal recognitions of electronic signatures and electronic contracts, as well as measures on consumer protection. EU digital trade policy is very ambitious and comprehensive but in bilateral trade agreements the EU places greater emphasis on regulatory dialogue.<sup>271</sup> That regulatory dialogue relates to cooperation on risks of cybersecurity, and cooperation on contentious elements of digital trade such as liability for online platforms, and privacy and personal data protection "for which EU

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<sup>266</sup> <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (Accessed 20/11/2021). Studies opine that Africa countries have adopted comprehensive data protection laws similar to EU GDPR to secure better chances for off-shoring business from Europe.

<sup>267</sup> Joshua P. Meltzer, 'Governing Digital Trade', *World Trade Review* 18, no. S1 (April 2019): 25, <https://doi.org/10.1017/S1474745618000502>.

<sup>268</sup> Emily Jones et al., 'The UK and Digital Trade: Which Way Forward?' (Blavatnik School of Government, 19 February 2021), <https://doi.org/10.35489/BSG-WP-2021/038>.

<sup>269</sup> [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_21\\_4951](https://ec.europa.eu/commission/presscorner/detail/en/statement_21_4951) (Accessed 28/12/2021)

<sup>270</sup> Jones et al., 'The UK and Digital Trade'.

<sup>271</sup> Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance', *Harvard International Law Journal* 57 (2016): 28.



FTAs excludes hard obligations or commitments.”<sup>272</sup> Before, the EU-UK Trade and Cooperation Agreement, the unlike in U.S. FTAs, the EU did not include obligations on cross-border data flows or localisation in its FTAs.<sup>273</sup> Thus, commitments relating to prohibition of data localisation requirements are a recent development in the EU’s external digital trade regulatory approach.<sup>274</sup> While the EU digital trade policy seeks to enable digital trade by prohibits unjustified barriers to trade enabled by electronic means, it specifically, excludes audiovisual services in its trade agreements. According to Irion and Burri<sup>275</sup>, that, “reflects the longstanding practice of the EU to exclude audiovisual services from its international trade agreements, even in deals with like-minded partners on cultural protection issues, such as Canada, under the Comprehensive Economic and Trade Agreement (CETA).” The AUDTS advocates for the development of regional and continent digital trade framework in Africa, geared toward promoting intra-Africa trade and the development of digital single market, less emphasis is on placed on the external digital trade governance approach, save for recommending provisions on data localisation and local content on audiovisual services, aimed at promoting local digital industries.<sup>276</sup> On digital content and application, the AUDTS recommends that “regulations that will enforce reciprocity of national content in the parent countries of Audio -Visual content companies.”<sup>277</sup> Moreover, almost none of the Africa countries has concluded a trade agreement with a third-party country with provisions on digital trade, save for FTA between Morocco and the US<sup>278</sup>. The AfCFTA rules on electronic commerce, therefore, could form the basis for Africa’s digital trade approach in free trade agreements.

#### **4.3.6 Position at the WTO JSI on electronic commerce.**

Six African WTO Members are currently participating in the JSI negotiations on trade related aspects of electronic commerce, namely, Benin, Burkina Faso, Cameroon, Côte d’Ivoire, Kenya, and Nigeria.<sup>279</sup> Some African countries, such as Nigeria and South Africa have raised concerns the establishing multilateral rules electronic commerce against *inter alia*, a general binding international rule prohibiting data localisation requirements. Nigeria, requested for specific carve-out for cross-border data flows as well as support measures for developing countries to develop digital capacities and close the digital divide between them and developed countries,<sup>280</sup> thus, seeking for an exemption from free flow of data obligations and from a proposed prohibition of forced data localisation (except for financial purposes) that would be created under the WTO electronic commerce rules. That such an exemption would allow the developing and least developed countries to close the digital gap between them and the developed the WTO Members and, therefore, enable local digital firms to collect sufficient

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<sup>272</sup> Rachel F Fefer, ‘EU Digital Policy and International Trade’, *Congressional Research Service*, n.d., 30.

<sup>273</sup> Fefer.

<sup>274</sup> Jones et al., ‘The UK and Digital Trade’, 10.

<sup>275</sup> Kristina Irion and Mira Burri, § 16 Digital Trade 2021 (unpublished).

<sup>276</sup> African Union Digital Transformation Strategy, p.2.

<sup>277</sup> African Union Digital Transformation Strategy, p.38.

<sup>278</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>279</sup> Ismail, ‘E-Commerce Joint Statement Initiative Negotiations Among World Trade Organization Members’.

<sup>280</sup> <https://borderlex.net/2021/06/21/wto-electronic-commerce-nigeria-brings-developing-country-exceptions-for-data-flows-into-picture/>(accessed 16/11/2021)

local data necessary to compete and/or be shielded from competition from their counterparts in digitally advanced countries.<sup>281</sup>

The EU norms on digital trade are reproduced in the EU's negotiation proposal to the WTO JSI on electronic commerce.<sup>282</sup> The EU negotiating proposal contains obligations to ensure cross-border data flows and prohibitions on data localization, but also has a provision allowing parties to "adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data."<sup>283</sup> That proposed exception is criticised for as nullifying the commitment on cross-border data flows.<sup>284</sup> On the contrary, similar to its approach in the FTAs, the US' negotiating proposal is focused on eliminating barriers to cross-border data flows relating to custom duties on electronic transmissions, data localisation requirements and forced technology transfer or source code sharing.<sup>285</sup> Regarding the ban on customs duties on electronic transmissions, the EU's proposal is narrowly defined, i.e., applies only to services, different from US which applies to digitally transmitted products. In general, the US proposals on digital trade are beyond WTO regulatory framework. Similarly, the EU supports further plurilateral WTO negotiations to liberalise trade in services in sectors going beyond electronic commerce.<sup>286</sup> China "follows existing multilateral trading rules with simple clarifications to improve application but not adding new rules."<sup>287</sup>

#### **4.4. Likelihood for EU to influence the negotiation agenda on AfCFTA electronic commerce protocol**

The EU's potential gains through digital trade with African states are likely to be of marginal commercial significance, however the EU's interest in promoting its digital trade policy in Africa stems from its position as the largest donor in Africa, leading in technical assistance programs relating to capacity building for development of legal, regulatory and administrative frameworks. For instance, through the EU's Digital4 Development (D4D) policy, "the EU has also set out to mainstream digital technologies in its development policies and relations with third partner countries."<sup>288</sup> In 2019, the President of the European Commission, Ursula von der Leyen, in her Political Guidelines for the European Commission 2019-2024<sup>289</sup>, "called for a new comprehensive strategy with Africa, and to support the continent in designing and implementing its own solutions to local challenges". In the sixth EU-Africa business forum held in November 2017, it was concluded that "the digital economy is a driver for inclusive growth job creation and sustainable development. The digital economy provides cost-effective

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<sup>281</sup> Ibid.

<sup>282</sup> EU Proposal for WTO disciplines and Commitments relating to electronic commerce, 26<sup>th</sup> April 2019.

<sup>283</sup> Ibid. pg.4.

<sup>284</sup> US Congressional Research Services.

<sup>285</sup> Digital or Trade? The Contrasting Approaches of China and US to Digital Trade Henry Gao., pg 308.

<sup>286</sup> COM (2021) 66 final, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy.p.g. 15

<sup>287</sup> Henry Gao p.317

<sup>288</sup> <https://ettg.eu/wp-content/uploads/2020/10/ETTg-Publication-Strengthening-the-digital-partnership-between-Africa-and-Europe.pdf> (accessed 25/09/2021)

<sup>289</sup> [https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en.pdf) (accessed 25/09/2021)

solutions to ongoing development challenges”.<sup>290</sup> The participants agreed on an EU-Africa digital cooperation platform, leading to the establishment of the Digital4Development<sup>291</sup>, which is currently a fully-fledged policy of the European Union. The Digital4Development aims at; 1) Supporting the digital integration of the African continent under the guidance of the African Union; 2) “Supporting the deployment of affordable broadband connectivity and assuring a direct link with the EU through a cross-border backbone infrastructure;”<sup>292</sup> 3) Helping African partners to equip young people with digital skills for the future; 4) Using the potential of the African digital entrepreneurs to create sustainable jobs; 5) Investing in the deployment of digital services such as e-government, e-education, e-health, electronic commerce, e-agriculture or fin tech to create inclusion, efficiency, transparency and better services for citizens.

## 4.5 Conclusion.

The AUDTS and the EU digital trade policy converge on facilitation of electronic trade, addressing unjustified barriers to trade enabled by electronic means, protection against cyber risks and data protection to ensure security and trust of the online environment, but diverge on the depth and breadth of the ambition to prevent or address these unjustified trade barriers., for instance, it unlikely that the AfCFTA rules on electronic commerce would set stringent rules on cross-border data transfer to protect the privacy and data protection to the same extent as the EU’s digital trade policy. However, the AUDTS indicates preference for data localiation rules to protect local digital industries in African countries. Regarding the likelihood of the EU digital trade policy to influence the AfCFTA negotiations on electronic commerce, this chapter has shown that EU’s GDPR is the most influential source of policy reform in Africa on privacy and data protection and is referenced by the AUDTS as best practice. The EU's active role in technical and capacity building for the development of national strategies on digitalisation as well as implementation into legislation is evidenced by the Digital4Development initiative. These developments signify the EU’s influence over policy development in Africa at the national, regional and continental level.

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<sup>290</sup> [https://africa-eu-partnership.org/sites/default/files/documents/final\\_declaration\\_au\\_eu\\_summit.pdf](https://africa-eu-partnership.org/sites/default/files/documents/final_declaration_au_eu_summit.pdf) (accessed 25/09/2021)

<sup>291</sup> [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2017\)157&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2017)157&lang=en) (accessed 25/09/2021)

<sup>292</sup> <https://digital-strategy.ec.europa.eu/en/policies/africa> (accessed 25/09/2021)

# CHAPTER FIVE: SETTING THE NEGOTIATION AGENDA FOR THE AfCFTA PROTOCOL ON ELECTRONIC COMMERCE

## 5.1. Introduction

This chapter proposes the criteria for setting the negotiation agenda for the AfCFTA rules on electronic Commerce. It also makes a case for expediting the negotiations. The mandate to negotiate the AfCFTA protocol on electronic commerce was issued by the Assembly of Heads of State and Government of the African Union, on 10 February 2020, in their decision that Phase III Negotiations focusing on an AfCFTA Protocol on Electronic commerce would commence immediately after conclusion of Phase II Negotiations. The Heads of State and Government of the African Union directed 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 electronic commerce legal instruments at the level of the African Continental Free Trade Area”<sup>293</sup>(emphasis added).

As noted in chapter one, the AU’s decision to bring forward and expedite the negotiations of the AfCFTA rules on e-commerce was motivated by the advances in digital trade in African countries and the significance of cross-border data flows to the implementation of the AfCFTA. Additionally, the issues discussed in this chapter are informed by the AUDTS’ conceptualisation of Africa’s digital landscape and the sectors identified in the AUDTS as critical for digitalisation of Africa, to which the AUDTS makes policy recommendations for the effective governance of e-commerce and digital trade in Africa. The AUDTS could, therefore, form a strong foundation for negotiating the AfCFTA rules on electronic commerce. Additionally, the existing digital strategies and laws established by African countries and their RECs noted in chapter three, as well other rules, principles, and standards, developed in recent advanced bilateral and mega-regional trade agreement with advanced and dedicated chapters on electronic commerce noted in chapters one and four, could inform the negotiations on the AfCFTA rules on electronic commerce. Most importantly, this chapter seeks to direct the negotiations towards developing a continent-wide digital governance landscape comprising elements of digital trade that cater to the particular development needs of African countries and ensure equal benefit by all Africans from the advancing digital technologies in the African economies.

In that context, it pertinent to underscore the challenges to cross-border electronic commerce in Africa that continues to constrain uptake of electronic commerce in Africa<sup>294</sup>, which could be catergorised into two, namely:1) infrastructure related challenges, such as, postal competence and delivery and transport costs; and 2) Governance related challenges, such as of taxation i.e., foreign taxation, double taxation and VAT regulations, lack of awareness of national and regional rules, custom duties and custom procedures, digital trust issues to guarantee reliable payment solutions, privacy, and lack of ecommerce related consumer protection mechanisms, such as online dispute resolution. The AfCFTA rules on electronic commerce, can, therefore, play an important role not only in promoting and boosting cross-

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<sup>293</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on Electronic commerce’, Working paper, November 2020, <https://repository.uneca.org/handle/10855/43936>.

<sup>294</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

border trade but also set the tone for harmonising governance frameworks on digital trade aspects.

## **5.2. Criteria for setting the negotiation agenda for the AfCFTA Protocol on Electronic commerce**

Draper<sup>295</sup>, while discussing the political economy of Economic Partnership Agreements for the EU-Africa trade relations, noted that some issues were better left out of the negotiations to avoid, unnecessary regulatory burden, that includes issues which could unnecessarily politicise the agenda, and issues where African countries have no leverage. Instead, Draper<sup>296</sup>, preferred that the negotiations focus on areas with fewer expected trade-offs, “provided objective criteria is used and on a non-discriminatory basis”. This paper adopts and relies on that argument, in defining the criteria for setting the negotiating agenda for the AfCFTA rules on electronic commerce, albeit the negotiations occurring among African countries. Moreover, this paper has noted in chapter four, a growing interest by external actors in influencing Africa’s digital agenda. In that regard, this paper contends that criteria for setting the negotiation agenda could be guided by the following considerations.

### **5.2.1. An electronic commerce governance framework suited to the common interests of the Africa countries.**

This paper has noted that digital technologies enable international trade and create new tradeable goods and services, equally, the advancement of digital technologies and the related new business models has created policy concerns relating to balancing trade policy with, privacy and personal data protection, competition issues, taxation of online transactions, risks to cybersecurity, and national security, as well as barriers to international trade, such as data localisation requirements and restrictions on the free flow of data. Policy solutions to these challenges are being developed through bilateral, regional, mega-regional, and plurilateral trade agreements, as well global forums. African countries are to a large extent, not party to many of these trade arrangements that have devised solutions to digital governance issues. Therefore, the current rules, principles, and standards as developed through these fora “originate in the proposals of more developed countries and may be considered less relevant, or even inappropriate, for the African context.”<sup>297</sup> The negotiators for the AfCFTA Protocol on electronic commerce should focus on establishing a digital government framework based on common areas of interests, attuned to development needs of the African countries. These attributes would make the product of the negotiations domestically owned and managed by Africa countries rather than one that would be considered externally imposed, hence, inappropriate, and potentially, difficult to implement. Indeed, the African Union Commission cautioned the negotiators against merely following digital governance frameworks developed trade agreements outside Africa, rather, the African Union Commission proposed to the negotiators to, “consider approaches to electronic commerce that prioritize liberalization or

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<sup>295</sup> Peter Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’, *Jan Tumlrir Policy Essays*, no. No.2/2007 (n.d.): 10.

<sup>296</sup> Draper, 10.

<sup>297</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South-South Trade Agreements?’

regulation, or both, or entirely different intentions”, and “to respond to the ‘bottom-up’ priorities of actual electronic commerce businesses in Africa”<sup>298</sup>.

To arrive at an appropriate and implementable digital governance framework, the negotiators would first have to “identify their countries’ interests and ensure that those interests are, accurately identified in their respective domestic policies and laws”<sup>299</sup>. To this end, The Global Economic Governance Africa Programme<sup>300</sup> proposes three ways that can assist policy makers to identify their countries digital governance interests, namely: 1) The definition of electronic commerce developed should account for the local environment and also reflect international trends and debates; 2) Develop an understanding of the current size and nature of the digital trade industry, including “imports and exports, trade barriers and new growth areas”, this would solve the perverse issue of lack of data on the electronic commerce industry in Africa;<sup>301</sup> 3) Considering that bridging the gap between trade policy and digital economy requires reviewing and/or enacting new legislation to regulate the digital economy, policymakers should access the costs and benefits of the various options.<sup>302</sup>

#### **5.2.1.1. Appropriate definition of electronic commerce**

Most recently, trade policy discussions have evolved from regulating electronic commerce to regulating digital trade. Electronic commerce, is therefore, largely considered a subset of digital trade rules. However, digital trade is still loosely defined, more so due to the rapidly evolving nature of digital technologies and data flows, this phenomenon creates a knowledge gap between policy makers and the digital innovators, particularly for new and emerging technologies, such as the internet of things, and artificial intelligence. Digital trade is so far mostly, defined through national digital trade policies, and trade agreements, even so, trade agreements with digital trade rules avoid taking a position on the controversy surrounding classification of digital products by setting electronic commerce rules under a separate chapter.<sup>303</sup> In this regard, it is best for the negotiators of AfCFTA rules on electronic commerce to first understand the best practices to digital governance, and the three different approaches to digital trade governance adopted by the EU, the US and China, and incorporate the ones most suited to their countries digital trade interests. Unfortunately, majority of the African countries are “capacity stripped”, therefore, the process of identifying their negotiating interests on all or specific aspects of digital trade governance could be challenging and difficult to manage. Lack of capacity may, therefore, lead most Africa countries to merely follow and adopt existing policy approaches and regulations to digital governance developed outside Africa. Foster and Azmeh<sup>304</sup> caution against that arguing that there are, “risks in agreeing to overly-broad rules on open digital trade” since digital trade is “still a very loosely defined term” and the implications

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<sup>298</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on E-Commerce’.

<sup>299</sup> Adheesh Budree, ‘GEG Africa - Policy Considerations for Electronic commerce in South Africa and Other African Countries’, 2, accessed 18 October 2021, <http://www.gegafrika.org/publications/policy-considerations-for-electronic-commerce-in-south-africa-and-other-african-countries>.

<sup>300</sup> Budree, ‘GEG Africa - Policy Considerations for E-Commerce in South Africa and Other African Countries’.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>304</sup> Christopher Foster and Shamel Azmeh, ‘The Digital Trade Agenda and Africa’, *Bridges Africa* 7, no. 2 (2018): 16.

of digital trade rules “are still not well understood”. It is, thus, preferred, that the definition of electronic commerce products chosen applies to the local environment and also reflects international trends. However, defining electronic commerce, would also require classification of electronic commerce products either as goods or services. As noted, the classification of electronic commerce products is still an unresolved debate, at the multilateral level and is highly contentious. Depending on classification of digital products chosen by the negotiators, the following scenarios are envisaged: 1) If the internet is taken as a medium for executing transactions for given physical products between one African country and another, then electronically traded goods, would be classified as goods and would be subject to the AfCFTA on trade in goods and the GATT; 2) If, however, the negotiators treat electronically traded products as electronically transmitted services, then the question of the applicability of the GATS and AfCFTA trade in services rules and specific commitments on electronic delivery of services would arise; and 3) If the electronically traded products are classified as digital services, the negotiators would contend with identifying the applicable mode of supply, i.e., either Mode 1 on cross-border supply of services or Mode 2 on consumption broad. Negotiators should recognise the implication of selecting the former. Classifying electronically traded products as digital services under Mode 1, for example, in the case of GATS, any commitments made to liberalise a given sector under Mode 1 “opens up that sector to digital trade in that service, subject to the limitations listed in schedule of specific commitments”.<sup>305</sup> Additionally, the negotiators would have to identify the appropriate sectoral commitments, i.e., “audio visual, value addition or basic telecommunications under the GATS as well as the classification of new and emerging digital services.”<sup>306</sup> Considering that AfCFTA rules on trade in services and specific commitments are still pending, it is unclear which option, the African countries are inclined towards. In the past, African countries granted limited services liberalisation in trade agreements; if electronic commerce products are categorised as services, but only a few services are liberalised in the specific schedules of commitments on services, that lack of market access may limit the private-sector from leveraging the AfCFTA rules on electronic commerce.

#### **5.2.1.2. Understanding size of electronic commerce industry**

The digital trade governance framework of African Union should be based on Africa’s unique trade profile. It is not uncommon for trade rules to reflect the country’s unique trade profile and domestic regulatory framework, arguably, this explains the existence of different approaches to digital trade governance. It is, therefore, important that the negotiators adequately understand, the current size and nature of the electronic commerce industry in their respective countries and Africa as whole, including imports and exports, trade barriers and new growth areas. Such an undertaking would highlight the economic benefits of digital trade to African countries and the policy areas needed for its development for instance through stakeholder consultation, and it would equally, benefit the public, by making available information on the digital trade industry in Africa, currently considered to be “generally scarce or non-existent”.<sup>307</sup>

#### **5.2.1.3. Assess the costs of adopting the relevant regulatory framework**

The process of bridging the gap between trade policy and technology development, as noted, requires creating new or updating existing policies and laws. Policymakers are required to “understand the costs and benefits of the various options” needed to accommodate electronic

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<sup>305</sup> Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’.

<sup>306</sup> Ibid.

<sup>307</sup> Budree, ‘GEG Africa - Policy Considerations for Electronic commerce in South Africa and Other African Countries’, 2.

commerce and the digital economy.<sup>308</sup> This paper has noted that most African countries are capacity stripped, hence, it is important that negotiators access the costs of adopting the digital governance rules. That lack of capacity affects governance capabilities of African countries as well, due to cost constraints to participate in the negotiations fully and actively and to effectively implement the agreed rules into domestic laws. On this issue, Draper<sup>309</sup> says that African countries supported the WTO negotiations on the Trade Facilitation Agreement, “on condition that developed countries would deliver appropriate development assistance, including its forms, i.e., areas targeted for support, and the amount.” This negotiating approach would unfortunately, not serve as a model in the African Union context, given the commonalities in levels of economic development of most African countries. Generally, African countries as part of the developing and least developed Members of the WTO, benefit from the aid for trade programmes regarding implementation of multilateral trade rules comprising technical assistance and institutional support.<sup>310</sup> The European Union also extends technical and institutional support for its trade agreements with developing countries and LDC’s.<sup>311</sup> It is, however, unlikely that the African Union has enough capacity to offer similar services at the same scale to African countries to implement the AfCFTA Protocol on Electronic Commerce. More so, considering that trade negotiations are time consuming and complex due to the cross section of sectors to be considered as well as stakeholder to be consulted, this paper finds that a tailored and sequenced negotiating approach on Africa’s digital governance framework would be more efficient, for instance, in achieving consensus on areas where convergence is expected, such as, digital trade facilitation than on currently controversial topics such as the customs moratorium. A tailored and sequenced negotiation approach would reduce the cost burden of negotiations and costs of adapting the domestic regulatory framework.

#### **5.2.1.4. Governance and governance capabilities**

The issue of governance and governance capabilities concerns African countries capability to negotiate and implement negotiated outcomes and is closely related to accessing the cost of adopting the relevant digital governance framework. For the negotiators, this means, “the overall scope of negotiations and electronic commerce commitments, and the manner in which they are sequenced” should be determined by the “capacity of African countries both to negotiate electronic commerce rules but more importantly, to implement negotiated outcomes.”<sup>312</sup> Hence, not only it is important for the negotiators to consider the costs of participating in the negotiations and implementing the outcomes of the negotiations, but also governance capabilities of the African countries. Generally, Africa’s poor governance system and pervasive institutional weakness makes control of national borders difficult for traditional trade. The deficient border administration makes it difficult to manage trade flows, this problem risks to be compounded with the expansion of cross-border electronic commerce products. For analogy, the EU is currently in the process of reviewing its Customs rules with the aim to improve the capability of customs officials to manage the exponential growth of cross-border electronic commerce products.<sup>313</sup> The content of the negotiation agenda and the sequencing of

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<sup>308</sup> Ibid.

<sup>309</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’.

<sup>310</sup> [https://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/aid4trade\\_e.htm#:~:text=The%20WTO%2Dled%20Aid%2Dfor,developing%20and%20least%2Ddeveloped%20countries](https://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm#:~:text=The%20WTO%2Dled%20Aid%2Dfor,developing%20and%20least%2Ddeveloped%20countries). (accessed 28/12/2021)

<sup>311</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’, 5.

<sup>312</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’.

<sup>313</sup> [https://ec.europa.eu/taxation\\_customs/customs-4/wise-persons-group-challenges-facing-customs-union-wpg\\_en](https://ec.europa.eu/taxation_customs/customs-4/wise-persons-group-challenges-facing-customs-union-wpg_en) (accessed 28/12/2021)



the implementation could be based on political and technical capacity of the African countries. To get ahead of these challenges, the negotiations could follow a tailored and sequences approach that focusing on namely, addressing pre-existing issues such as trade facilitation which would also cater for digital trade facilitation.<sup>314</sup> That approach could lead to the establishment of a “realistic (implementable), and modernizing regulatory agenda that extends and locks in regulatory reforms, without unduly foreclosing policy options, backed up by requisite resources.”<sup>315</sup>

## **5.2.2. Taxonomy of issues to be covered by the AfCFTA Protocol on Electronic commerce**

### **5.2.2.1. The Typology of electronic commerce negotiating issues**

The negotiators of the AfCFTA Protocol on electronic commerce have two questions to answer, namely: 1) How broadly they would like to address electronic commerce; and 2) How deeply they would like to address such issues. Concerning the depth of the electronic commerce issues, the negotiators would have to decide how deep the electronic commerce commitments should be. These could range from “basic cooperation to common principles for regulations, to unified laws.”<sup>316</sup> To arrive at the typology of electronic commerce issues for the AfCFTA rules on electronic commerce, the negotiators would benefit from a comprehensive consultation process to obtain a sense of the private sector position on various aspects of digital trade governance and preferred depth. The negotiators could consider a policy cooperation approach for certain aspects of electronic commerce for the reason that securing interests protected by rules through dispute settlement could be challenging.

On the question of how broadly to address electronic commerce issues, this paper has noted that electronic commerce issues are diverse due to lack of consensus on the definition of ‘electronic commerce’ and the classification of digital trade products. Therefore, current, electronic governance approaches reflect “offensive negotiating interests or defensive deflections away from sensitive areas”.<sup>317</sup> This state of affair, should prompt the negotiations to seek to establish an electronic commerce governance framework based on Africa’s interests i.e., considering the local environment, current size and nature of the digital trade industry in Africa and reflecting the international trends and debates. That approach could assist the negotiators in deciding and selecting aspects of electronic commerce most relevant to Africa. This paper has shown in Chapter one the diversity in breath of coverage of electronic commerce issues in preferential trade agreements, ranging from ambitious approaches to electronic commerce by addressing a wide range of issues, to simply reaffirming the WTO moratorium on custom duties on electronic transfers and seeking cooperation between regulatory authorities. In between are heterogenous agreements that address “customs duties and non-discriminatory treatment to domestic regulatory frameworks, electronic signatures, consumer

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<sup>314</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’, 6.

<sup>315</sup> Draper, 6.

<sup>316</sup> Karishma Banga, Mohamed Gharib, Max Mendez-Parra and Jamie Macleod February 2021page 14

<sup>317</sup> Karishma Banga, Mohamed Gharib, Max Mendez-Parra and Jamie Macleod, Electronic commerce in preferential trade agreements Implications for African firms and the AfCFTA February 2021page 14

protection, data protection, paperless trading and unsolicited or undesired electronic messages”.<sup>318</sup>

### ***Trade facilitation***

This paper argues that certain aspects of electronic commerce are most relevant to African countries for now, than others, for instance, trade facilitating aspects of electronic commerce, such as, paperless trading, and digitalisation of customs procedures. These are considered “traditional topics of trade negotiations such as trade facilitation”.<sup>319</sup> African countries are characterised by inefficient “regulatory capacities in terms of customs and associated border agencies that are either excessively cumbersome, understaffed or both.” African countries have been left out of the expanding global ecommerce, thus, greater focus on digital trade facilitation is needed during the negotiations since with electronic commerce, regulatory procedures would become more complex. That would entail harmonising the laws on electronic trade and digital signatures including addressing the disparities on technology neutrality noted in chapter three, as well as adopting a single common digital certificate of origin system, “here the experience of regional economic blocs particularly the Common Market for East and Southern Africa and Southern African Development Cooperation, provide important insights into the design and implementation of such a system”, to boost intra-regional electronic commerce.<sup>320</sup> Banga<sup>321</sup>, opines that, the negotiators should consider regulatory aspects of electronic trade facilitation beyond electronic signatures by incorporating “other important contractual terms, such as time and place of dispatch and receipt, acknowledgement of receipt, party location and use of automated message systems”. The Authors further recommend to negotiators to “address international aspects of e-commerce, such as choice of law, which is one of the potential issues of conflict in cross-border e-commerce”, as well as provide for “specific provisions to address challenges facing SMEs, including through electronic trade facilitation”.<sup>322</sup> It is equally relevant to consider eliminating tariffs on infrastructure equipment necessary for digital trade specified in the Information Technology Agreement in the WTO, to facilitate investment in that equipment and ultimately accelerate the available of digital technologies needed for the digital economy. That is a traditional trade in goods issue that negotiators would be addressed under the AfCFTA rules on trade in goods.<sup>323</sup>

### ***Digital business taxation***

As noted in chapter three, taxation of digital services, is not a prominent policy objective in most African countries national digital strategies. The negotiators of the AfCFTA rules on electronic commerce could consider the efforts to create digital tax rules taking shape at the continental level through the African Tax Administration Forum (ATAF), an African pan-governmental organization, that “issued a ‘Suggested Approach document’ to drafting legislation on digital sales tax services in Africa”.<sup>324</sup> The negotiators should consider the African Tax Administration Forum initiative alongside other similar global initiatives on “how

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<sup>318</sup> Karishma Banga, Mohamed Gharib, Max Mendez-Parra and Jamie Macleod February 2021 page 14

<sup>319</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA’; 7.

<sup>320</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Abimbola, Aggad, and Ndzendze, ‘What Is Africa’s Digital Agenda?’, 11.

to tax digital services, namely, the OECD's Two Pillar approach and the G7's new proposal for minimum tax rates for multinational companies".<sup>325</sup> In respect to the former, the "ATAF has already responded to the Pillar One of OECD's proposals from an African perspective".<sup>326</sup> The negotiators further should consider "the central point of both of ATAF's interventions is that there are some specificities to the African context that need to be taken into account when a digital services tax is considered in either a global or African framework."<sup>327</sup>

The negotiator's approach to taxing the digital economy in Africa should be "based on cooperation and specific principles for taxing transactions". To ensure that the digital taxation policy caters to the interests of the African countries, the negotiators should obtain "certainty in how a tax applies, effective tax administration" and seek to strike "a balanced approach to taxation that offers a reliable revenue stream to the government but at the same time does not discourage economic growth and efficiency in African firms".<sup>328</sup> Ultimately, the negotiators should be guided by the private-sector position on digital taxation that seeks to harmonisation of rules for taxation, "as the most critical regulation for boosting cross-border electronic commerce in Africa".<sup>329</sup> A suggestion is that the negotiators could consider granting "preferential treatment for electronic goods originating within AfCFTA state parties".<sup>330</sup> Additionally, the negotiators should consider Africa's unique challenge with digital taxation. Unlike the general key issue in the digital tax debate related to the ability for many digital businesses to remotely participate in the domestic economies "enabled by digital means, without a taxable physical presence", thus "exacerbating tax base erosion".<sup>331</sup> This new business model has "rendered existing international taxation frameworks, based on physical presence, less effective".<sup>332</sup> Global efforts are ongoing spearheaded by the OECD to develop legal structures to address this issue.<sup>333</sup> Banga<sup>334</sup> argues that "for African countries, the digitalisation of the tax base is itself the challenge, in addition to limited capacities to address administrative challenges.

It could be equally relevant for the negotiators to establish "a guiding framework for applying indirect tax to digitally traded goods".<sup>335</sup> Notably, trade agreements have focused mainly on prohibiting digital custom duties on electronic transmission and the principles of most-favoured nation and national treatment. The ban on customs duties on electronic transmissions is, however, restricted 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,

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<sup>325</sup> Abimbola, Aggad, and Ndzendze, 11.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Banga, Macleod, and Mendez-Parra, 'Digital Trade Provisions in the AfCFTA: What Can We Learn from South-South Trade Agreements?'

<sup>329</sup> Ibid.

<sup>330</sup> Banga, Macleod, and Mendez-Parra, 'Digital Trade Provisions in the AfCFTA': According to the authors, "intra-African exports account for a significantly high share in some African countries' exports of digitisable products. These products are identified using the WTO's (2016) classification of digitisable goods, and broadly covers goods such as software, videogames, printed matter, etc., which are currently being transmitted through electronic channels or hold the potential to be transmitted electronically in the future. Figure 1 shows that over 70% of exports of digitisable products by Burundi, Eswatini, Ghana, Mauritius, Namibia, Rwanda, Togo, Zambia and Zimbabwe are intra-African".

<sup>331</sup> Banga, Macleod, and Mendez-Parra, 'Digital Trade Provisions in the AfCFTA: What Can We Learn from South-South Trade Agreements?'

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid.

provided they are imposed in a manner consistent with the agreement”.<sup>336</sup>In this context, the negotiators should consider Africa countries position on customs duties on digital products, and the relationship between the definition of digital products and digital taxation. If the AfCFTA Protocol on Electronic Commerce adopts a broad definition to electronically transmitted digital products, that would imply that “all services that can be supplied cross-border via online channels (Mode 1)” would have market access, which could erode the “protection given by African countries to some of their domestic services sectors under the GATS”.<sup>337</sup> Conversely, if the AfCFTA Protocol on Electronic Commerce adopts a narrow definition of digital products electronically transmitted, that would imply that African countries would not impose customs duties on such products, which could lead to “substantial tariff revenue loss to the developing countries, which will rise continuously as more and more products are digitalised”.<sup>338</sup> However, imposing customs duties on intra-Africa trade in digital products could impede the development of cross-border electronic commerce. Moreover, according to Banga,<sup>339</sup> “intra-Africa trade is faring better in terms of electronically transmitted products”.<sup>340</sup> Digitisable products such as software, and videogames, “which are currently being transmitted through electronic channels or hold the potential to be transmitted electronically in the future, account for a significantly high share of intra-African exports”.<sup>341</sup> In this context, the negotiators could consider reserving the issue of like the customs moratorium on electronic transmissions for discussion at the multilateral level because a negotiated outcome could be incoherent with WTO disciplines on customs moratorium.

### ***Privacy, data protection and data flows***

According to Banga,<sup>342</sup> issues like data protection and third-party content liability laws are relatively novel issues that negotiators may have to contemplate on whether to include them in the electronic commerce protocol or provide for them in other AfCFTA protocols or explore discussing them in an entirely different forum. This paper has shown in chapter two that the AUDTS finds data flow to be the life blood of ecommerce and considers data protection as a human right which should be protected to build trust and security of the digital space. While personal data protection is a highly political-economic contentious issue for at the multilateral trading system, in Africa, as noted in chapter three, personal data protection is a novel issue, thus not controversial to the same extent. The AUDTS recommends that policy makers seek to reconcile the economic policy objective of free cross-border data flows with the objective of personal data protection. It is, therefore, pertinent, that negotiations consider and provide for data protection to ensure the security and sustainable growth of African nascent digital. Moreover, Chapter two has shown that currently, there are ongoing initiatives for cooperation on data protection at the continental level. As noted in chapter three, regional economic blocs in Africa have also established personal data protection frameworks that establish, for example, in case of the Economic Community of West African States, the content required of a data protection law in each Member State, these regional data protection rules could play an important role in harmonising personal data protection rules and in addressing the disparities in enforcing data protection rules, particularly by “pooling resources to help with enforcement in

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<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid.

<sup>339</sup> Banga, Macleod, and Mendez-Parra.

<sup>340</sup> Ibid.

<sup>341</sup> “Over 70% of exports of digitisable products by Burundi, Eswatini, Ghana, Mauritius, Namibia, Rwanda, Togo, Zambia and Zimbabwe are intra-African”, Banga, Macleod, and Mendez-Parra.

<sup>342</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA’; 7.

less capacitated African countries”.<sup>343</sup>Notably, the African Union Convention on Cyber Security and Personal Data Protection 2014<sup>9</sup> aims to “establish cooperation mechanisms among the African data protection authorities, but does not formally establish such a grouping or a formal mechanism for such cooperation”,<sup>344</sup> the AfCFTA rules on electronic commerce could supplement the African Union Convention on Cyber Security and Personal Data Protection 2014<sup>9</sup>, by providing for formal mechanism for cooperation among the Africa data protection authorities. The data protection regimes of the regional economic blocs could equally be harmonised through a continent-wide framework on personal data protection. Banga<sup>345</sup> argues that “given the differences in development and status of data governance frameworks across African countries, a regional approach within the AfCFTA may be more effective”. The negotiations could also explore sector-specific policies and rules that would allow “regulators to retain control of data pertaining to critical sectors”.<sup>346</sup>In terms of disciplines on cross-border data flows and data storage, chapter three has shown that several African countries impose restrictions on cross-border data flows, for reasons related to data security (cyber-security), consumer protection (privacy and data protections), and most importantly, economic development (to encourage investment in local data centres as well as to build the domestic digital industry). These reasons are reiterated by the AUDTS in chapter two. According to Banga<sup>347</sup>, “there is significant interest by the African private sector in developing and selling on regional e-commerce platforms and in intra-regional data-sharing”, however, that interest should be matched with the capacity to use “data for competitive advantage, as well as better clarity on terms and conditions for data-sharing”. The AfCFTA rules on electronic commerce could, therefore, supplement the Africa Union Convention on Cyber Security and Personal Data Protection which, as noted in chapter two, currently, regulates cross-border data flows in Africa but has not been ratified yet by majority of Africa countries.<sup>348</sup>Therefore, the AU is a competent forum for to negotiate on aspects of privacy and data protection, as well as data cross-border data flows and data storage in the AfCFTA Protocol on ecommerce.

### ***Cross-cutting issues***

Besides the issues specific to electronic commerce, it could be relevant for negotiators of AfCFTA rules on electronic commerce to cooperate with and consider the negotiations under the different AfCFTA protocols that also affect electronic commerce, such as, commitments being negotiated under AfCFTA rules on trade in services, particularly relating to financial and telecommunications services as well as computer-related services, and negotiations under the trade in goods, intellectual property and competition rules.<sup>349</sup>

### ***Consideration of competition***

Since African markets are small, they are easy to dominate. That is compounded by the fact that “only 23 African countries have competition laws in place as well as competition authorities to enforce those laws”. The negotiators should consider competition policy and

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<sup>343</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> Banga, Macleod, and Mendez-Parra.

institutions to regulate firms in the digital market.<sup>350</sup> In developing the continental competition policy, the negotiators could ensure that AfCFTA rules on Competition “go beyond addressing standard competition issues (such as anticompetitive agreements, cartels, abuse of dominance and merger control)”, that have been rendered less effective by the new business models of the digital economy, rather the rules should address competition challenges relating to digital platforms, such as, “use of artificial intelligence, data fusion, app-based transactions, algorithmic business intelligence and other digital platforms”.<sup>351</sup> That could cater for the policy void in most African countries “regarding the control and use of data”, which increases “the risk of their data being controlled by whoever gathers and stores data and then has exclusive and unlimited rights to it”.<sup>352</sup>

To enhance the effective of the AfCFTA competition rules, Banga<sup>353</sup>, advocates for building capacity within African competition authorities either at the continental, regional or national level “to deal with the rising power of digital platforms and the changing landscape of competition”. To further ensure that the AfCFTA rules on competition effectively address “new challenges and the abuse of dominance using data and data-related capabilities in the digital economy”, the negotiators would have to deal with four main competition related aspects of digital economy, as outlined by Banga<sup>354</sup>, namely: 1) “Distinguishing predatory practices from innovation-driven price reductions”; 2) “Understanding the power of network effects on competitiveness”; 3) “Adjusting competition laws based on new definitions of ‘market shares’, which go beyond asset control to capture intangible assets such as reputation and digital control”; and 4) “Defining the relevant market in the context of digital apps and platforms that are increasingly penetrating across industries”.<sup>355</sup>

### ***Intellectual property protection***

Considering the shortcomings of many African governments in implementing intellectual property rights rules that are a key regulatory element of electronic commerce since such rights affect the competitiveness of players in the digital economy and ultimately affect the development of digital trade on the Continent, it could be argued that negotiators should put more emphasis on implementing the WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. The negotiators of the AfCFTA rules on intellectual property rights should consider that the TRIPS Agreement “does not provide exceptions to regional PTAs established after its coming into force”, therefore, any intellectual property rights benefits to be

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<sup>350</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’, 7.

<sup>351</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South-South Trade Agreements?’

<sup>352</sup> Banga, Macleod, and Mendez-Parra. The Authors argue further that “Sectoral case studies from South Africa further demonstrate the high degree of heterogeneity in value creation and platform functions, platform power and value extraction, and the need for appropriate competition policies Andreoni & Roberts (2020). For instance, owing to challenges in last-mile delivery and logistical challenges, e-commerce in South Africa is led by the local provider Takealot, with rising concerns about the market share and position of the lead provider; on the other hand, digital advertising in e-commerce in South Africa is dominated by Google and Facebook. This has reinforced a ‘digital ad divide’ whereby large businesses, including MNEs, are able to make use of the data to quickly adopt and extend their reach through cheaper and more targeted advertising (ibid.)”

<sup>353</sup> Banga, Macleod, and Mendez-Parra.

<sup>354</sup> Banga, Macleod, and Mendez-Parra.

<sup>355</sup> Ibid.

extended to Africa countries must equally be extended to all WTO Members.<sup>356</sup> Additionally, beyond the TRIPS Agreement, “African countries have different levels of obligations in IP treaties”, arising from “participation in multilateral IP treaties and commitments arising from bilateral trade agreements”.<sup>357</sup> In this context, the proper approach would be “one providing a cooperation framework”.<sup>358</sup> The negotiators should also seek to advance the work so far done by regional institutions like the African Regional Intellectual Property Organization and the Pan-African Intellectual Property Organization in providing “for regional cooperation in the management of IP”.<sup>359</sup> Regarding the issue of source code sharing, the private-sector is largely in favour of rules granting access to “digital intelligence generated by platforms using the data provided by the private sector”. For an effective policy on technology transfer, “a regional approach under the AfCFTA may be useful in negotiating access to source code for market access”, however, this “would require harmonised policies on data protection and privacy, potentially negotiated in the E-Commerce Protocol”.<sup>360</sup> The negotiators would, therefore, have to reconcile the policy objective of promoting electronic commerce with intellectual property rights protection as well other policies relating to “taxation, competition law, technology transfer and government procurement, which could help protect domestic African industries against unfair practices”.<sup>361</sup>

#### **5.2.2.2. Emphasis on harmonisation and interoperability**

This paper has noted in chapter two, that AUDTS has prioritised the harmonisation and interoperability of digital norms in Africa. That would address two challenges facing the digital transformation process in Africa, namely: 1) Lack of digital governance frameworks and lack of inclusion of digital friendly provisions in trade agreements that African countries are party to.<sup>362</sup> While most African countries have embarked on establishing regulatory framework to support their nascent digital economies, there is still a challenge of harnessing cross-border markets due to lack of interoperability among national digitalisation strategies and absent or lean digital clauses in FTAs.<sup>363</sup> Notably, through national digital strategies, African countries set policy frameworks that, “seek to create or strengthen governance on all aspects relevant for digitising the economy, such as, intellectual property protection, data protection, access to the internet and content regulation, electronic government, and facilitating electronic commerce through e-contracts”.<sup>364</sup> The national digital strategy serve, therefore, a dual purpose, firstly, creating the legal and regulatory environment for the digitising the economy, and secondly, creating an open and predictable environment necessary for investment and promoting of trade in the country.<sup>365</sup> For these reasons, the AUDTS emphasizes regulatory harmonisation and interoperability of digital norms in Africa. According to a recent survey of African micro, small and medium-sized tech enterprises, “the most frequently cited priorities for boosting cross-border electronic commerce were harmonizing laws, including on taxation; electronic trade; digital signatures; e-transactions; data standards; privacy laws; and consumer protection

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<sup>356</sup> Ibid.

<sup>357</sup> Ibid.

<sup>358</sup> Ibid

<sup>359</sup> Ibid.

<sup>360</sup> Banga, Macleod, and Mendez-Parra.

<sup>361</sup> Ibid.

<sup>362</sup> <https://www.csis.org/analysis/digital-africa-leveling-through-governance-and-trade> (Accessed 27/09/2021)

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

regulations for building digital trust”.<sup>366</sup>This position on of the private sector should guide the negotiators to establish a much needed bottom-up approach to digital trade governance in Africa.

### **5.2.2.3. Negotiations should focus on the broader agenda of fostering regional integration**

Coordination at the AU level will be required to build on the range of AfCFTA Protocols that are relevant for electronic commerce and envisaged digital single market. Policymakers in those Protocols should consider commitments on standards, tariff reduction that support the cross-border digital trade. Regional integration and inter-regional trade and investment is the most viable option to create diversified economies in Africa, south Africa being the exception. Africa’s economic development, according to Draper<sup>367</sup>, suffers two types of challenges, namely: 1) Supply side constraints relating to infrastructure namely, physical, financial, institutional, technological and regulatory framework: and 2) Market access constraints relating to trade liberalisation for goods and services. He says because of the supply side constraints, African countries receive less foreign direct investment. The FDI received for a longtime has been resource seeking thus less reinvestment in the economies. However, new entrants focus on manufacturing and services sectors, which has benefits for the economy in terms of diversification, but it still incomparable to FDI flow to east Asia which is both market seeking and efficiency seeking.<sup>368</sup>Intra-Africa digital trade has the potential to build regional economic integration, thus, the negotiations on electronic commerce should be used on pursuing this objective. One of the EU’s objectives for supporting the African Union’s aim to create a digital single market it’s potential to pose as an instrument to build regional economic integration in Africa. Regional integration is promoted by both African States and development partners like EU as a solution to the small, dispersed and primarily subsistence domestic markets. For African, regional integration is also a means to “building institutional strength in negotiations with external actors”.<sup>369</sup> The AfCFTA rules on electronic commerce would provide a guiding framework for the governance of data flows at the regional and continental level. As noted, the private-sector support for harmonising rules on taxation, electronic trade, digital signatures, electronic transactions, data standards, privacy laws, and consumer protection, indicate significant interest in development of regional electronic commerce platforms and intra-regional data sharing as well as the creation of “regional data centres that support online services, including cloud hosting”.<sup>370</sup>The AfCFTA Protocol on electronic commerce presents an opportunity to build on existing regional strategies and rules on electronic commerce, for example the SADC, EAC digital trade frameworks as noted in chapter three, therefore, providing a cooperative framework for Africa’s regional economic communities on digital governance.

## **5.3. The case for expediting ecommerce negotiations in AfCFTA**

### **5.3.1. Improve coherence and consistence of electronic commerce laws across the continent**

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<sup>366</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on Electronic commerce’, 2.

<sup>367</sup>Draper 9.

<sup>368</sup> Draper, ‘EU-Africa Trade Relations: The Political Economy of Economic Partnership Agreements’, 6.

<sup>369</sup> Draper 9

<sup>370</sup> Banga, Macleod, and Mendez-Parra, ‘Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?’



As noted in chapter three, the policymakers in African countries are trying to close the gap between existing policies and the growing digital economy, by updating the existing or creating new governance frameworks to regulate the digital economy. These electronic commerce rules are, however, being developed in silos, that is creating the risk of incoherence and inconsistency unsuitable to promote cross-border electronic commerce in Africa.<sup>371</sup> The adoption and implementation of the protocol would, therefore, ensure that “new laws and regulations are harmonised to support cross-border electronic commerce developments across the continent.”<sup>372</sup> On that basis, that this paper advocates for expediting the negotiations for AfCFTA Protocol on Electronic Commerce.

### **5.3.2. Consolidating Pan-African position on electronic commerce ahead of trade agreement with third countries on electronic commerce**

While some studies consider the lack of trade agreements with provisions or chapters on electronic commerce between African countries and third parties as lost opportunity to develop regulatory and institutional capacity governance of digital trade, others consider this state of affair as an opportunity for Africa to develop its own position on digital governance at the regional and continent level, based on common shared interests, considering that concluding such trade agreements could “entrench fragmented rules and regulations that would be inappropriate or even un conducive to the cross-border development of electronic commerce in Africa.”<sup>373</sup> So far, only one Africa country – Morocco, has committed to electronic commerce provisions in free trade agreement with a third country, i.e., Government of the United States of America and Government of the Kingdom of Morocco, 2004. External pressure is, however, mounting on Africa countries to conclude free trade agreements with third countries with binding rules on electronic commerce, for example, the US indicated its “intention to include electronic commerce rules in post-African Growth and Opportunity Act negotiations with African countries”, and has reportedly, engaged in electronic commerce negotiations with Kenya.<sup>374</sup> Accordingly, the Heads of State and Government of the African Union, in their decision adopted during the thirty-third ordinary session in February 2020, urged the Member States to<sup>375</sup>:

*“to critically review approaches that are being made to them by bilateral partners to enter into bilateral electronic commerce legal instruments with them in order to ensure that Africa is able to negotiate and implement an AfCFTA Protocol on electronic commerce where Africa has full authority on all aspects of electronic commerce such as data and products being traded under electronic commerce, and to promote the emergence of African owned electronic commerce platforms at national, regional and continental levels as part of our preparations for the negotiation of an AfCFTA Protocol on electronic commerce.”*

At the Multilateral level, most African countries decided not to participate in the WTO plurilateral negotiations on electronic commerce on the grounds that the different levels of development and the digital divide between them and the developed WTO members, would

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<sup>371</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on Electronic commerce’, 6.

<sup>372</sup> Ibid.

<sup>373</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on Electronic commerce’, 8.

<sup>374</sup> Banga, ‘E-Commerce in Preferential Trade Agreements’.

<sup>375</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on E-Commerce’, 8.

disadvantage their nascent digital economy. African trade ministers, according to Banga,<sup>376</sup> “have argued that it would be premature for African countries to engage in multilateral rules on electronic commerce.” The African countries’ hesitation to join the WTO plurilateral negotiations should be seen as “an important part of the process of finding equitable policy-direction”.<sup>377</sup> More so, given that African countries are still developing national digital strategies, it could be “too early for African states to commit to the types of digital trade policy typically being set out in negotiations.”<sup>378</sup> It is, therefore, important that African countries avoid “overly committing to rules that will have long-term impacts.”<sup>379</sup>

Through regional and mega-regional trade agreements, such as, the USMCA and the CPTPP, the future direction of digital trade is gradually getting institutionalised, since the rules established in these trade agreements could form the norms for future multilateral rules on digital trade. Negotiating and establishing the AfCFTA Protocol on Electronic Commerce, therefore, could afford the African countries an opportunity to set an African digital policy alliance, through which African countries are able to articulate their position, and shape their negotiation agenda to ensure digital policy coherence.

The AfCFTA Protocol on electronic commerce would set a precedent on how African Countries could negotiate with third parties. Negotiating a simple, clear and attainable protocol on electronic commerce would have positive implications for African Countries’ bilateral and regional agreements in the sense that the protocol articulate Africa’s position on digital governance based on common shared interests.

Additionally, expediting the AfCFTA negotiations on electronic commerce, could assist in establishing and entrenching Africa’s foundations and principles before Africa countries advance in digital trade negotiations with third party countries. Recounting the objective of the ‘Agenda 2063: The Africa We Want’, of the African Union, the Economic Commission for Africa noted that the AfCFTA Protocol on Electronic Commerce would provide a platform for Africa to “speak with one voice and act collectively” to promote Africa’s “common interests and positions in the international arena and of the importance of “unity and solidarity in the face of continued external interference”<sup>380</sup>Therefore, the AfCFTA Protocol on Electronic Commerce would enable Africa to achieve more from other trade negotiations by allowing African countries to negotiate “collectively rather than with 55 smaller voices in disunion.”<sup>381</sup>

### **5.3.3. Coherence with existing phase I and phase II protocols**

As noted in this chapter, electronic commerce is affected by a range of cross-cutting issues currently under negotiation in other AfCFTA Protocols, such as, commitments being negotiated under AfCFTA rules on trade in services, and negotiations under the trade in goods, intellectual property rights, and competition policy. Electronic commerce issues relating to trade facilitation are relevant for AfCFTA rules on trade in goods being negotiated under Phase 1 of the AfCFTA, and includes de minimis thresholds, simplified customs processes, rules for promoting electronic commerce parcel trade, and liberalisation of capital goods and equipment under the

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<sup>376</sup> Karishma Banga, Mohamed Gharib, Max Mendez-Parra and Jamie Macleod February 2021page 18

<sup>377</sup> Christopher Foster and Shamel Azmeh, *The Digital Trade Agenda and Africa*, Bridges Africa, Volume 7, Issue 2, March 2018.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> Economic Commission for Africa, ‘Imperative for Expediting African Continental Free Trade Area Negotiations on E-Commerce’, 8.

<sup>381</sup> Economic Commission for Africa, 8.

WTO the Information Technology Agreement. Regarding the negotiation on trade in services under Phase 1 of the AfCFTA, commitments on trade in services relevant for digital trade include telecommunications, computer services, electronic payments, and delivery. On intellectual property rights negotiations under Phase 2 of the AfCFTA, aspects of technology transfer (source code sharing) and protection of trade secrets affect electronic commerce. In terms of consumer protection, the AfCFTA rules on competition policy under Phase 2 negotiations, would be required to update definitions of dominance and anti-competitiveness necessary to consider new digital business models and the importance of data to the digital economy. Expediting the negotiations on electronic commerce rules to occur concurrently with these AfCFTA negotiations could promote and enable coordinated and cooperative approach in developing Africa's digital governance framework. That coordination and cooperation could assist to "clearly streamline and delineate responsibility for electronic commerce-related issues" affected by a range of negotiating topics, "while ensuring a coherent overall framework for electronic commerce".<sup>382</sup>

## **5.4 Conclusion.**

The chapter has shown that in setting the negotiation agenda for the AfCFTA Protocol on Electronic Commerce, negotiators must first understand the concept of electronic commerce, and the existing international best practices. Secondly, the negotiators must define Africa's position on electronic commerce regulation. Given the depth and broad scope of electronic commerce issues so far covered or being negotiated in free trade agreement outside Africa, this chapter proposes a tailored and sequenced approach to electronic commerce regulation. In this regard, key enabling elements for electronic commerce and trade facilitating elements of electronic commerce should be addressed in the AfCFTA Protocol on electronic commerce, while cross-cutting issues should be addressed in other AfCFTA Protocols to which such cross-cutting issues closely relate. The extent to which the negotiators address the issues specific to electronic commerce may range, from basic cooperation frameworks, through to common principles, and harmonised regulations.

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<sup>382</sup> Economic Commission for Africa, 9.

## CHAPTER SIX: CONCLUSIONS

Digitalization has revolutionised the way businesses operate, ranging from innovating and manufacturing, to interacting with consumers, including accessing international markets. Digitalisation has enabled e-commerce platforms to emerge as well as international trade in digital services. In that context, the growing digitalisation of African economies including an increase in the uptake of e-commerce and digital trade presents an opportunity to integrate Africa's small and fragmented markets, which could incentive businesses to scale and in the process contribute to economic development. Digitalisation of African economies is, therefore, seminal to building an integrated African continent. For digitally integrated African economies to function smoothly, cooperation at continental level is indispensable. A common approach is needed to harness the benefits of digitalization and to safeguard against its risks especially concerns around consumer privacy and data protection as well challenges relating to competition policy for online platforms, intellectual property rights protection, digital taxation, cybersecurity, and interaction with international trade policy. At the multilateral level, international trade rules have not kept pace with the emerging technologies. The AfCFTA rules on e-commerce could fill that gap and add to the current and developing body of e-commerce and digital trade governance rules developed through bilateral, regional, and mega-regional agreements, such as, EU digital trade policy, the USMCA, and the CPTPP.

To assist the negotiators of AfCFTA Protocol on Electronic Commerce, this paper investigated the criteria for setting the negotiation agenda. In that regard, the suitability of current regulatory approaches to e-commerce being discussed at the multilateral trading system as well as approaches developed at the national, bilateral, regional, and mega-regional levels were considered. This paper finds that the digital trade rules developed under these fora require contextualisation to suit Africa's unique and complex socio-economic, cultural, and political circumstances. For example, this paper has shown that the AUDTS and the EU's digital policy converge on a range of regulatory issues including on addressing unjustified barriers to trade enabled by electronic means, and diverge on the depth and breadth of the ambition to prevent or address such unjustified trade barriers. The AUDTS indicates preference for data localisation rules with the objective of protecting local digital industries in African countries, an aspect that is highly controversial in digital trade policy discourse at the international level. Additionally, an overview of policy and regulatory developments on privacy and data protection in some African countries has also shown that such rules are less stringent rules on cross-border data transfer compared to the EU's GDPR and as reflected in its digital trade policy.

To a large extent, the AUDTS reflects the conceptualisation of the African digital landscape, therefore, the policy recommendation provided therein, could, arguably, provide an indication of common areas of digital regulatory interest, based on the local environment and the development needs of Africa. In this regard, negotiators of the AfCFTA Protocol on electronic commerce should consider the digital aspects espoused in AUDTS as necessary to achieve significant levels of regulatory convergence on electronic commerce rules among the African countries and the envisaged digital single market. The negotiators could further benefit from a comprehensive examination of the key regulatory aspects of electronic commerce being developed in African RECs, and national digital strategies and laws. In that context, areas of common interest, such as, electronic government, electronic trade facilitation, cybersecurity, privacy, and data protection, could provide a basis for expediting consensus on the negotiations for AfCFTA rules on electronic commerce while areas of potential divergence for example, on data location, and customs duties on electronic transmissions, that reflect the differences in understanding of the content or application of those aspects of digital governance, and the

differences in economic interests on how each country or region could benefit from a particular digital policy aspect, could be addressed in a tailored and sequenced manner.

Additionally, in setting the negotiation agenda for the AfCFTA Protocol on Electronic Commerce, negotiators must seek to understand the concept of electronic commerce, and the existing international best practices, and thereafter, define Africa's position on electronic commerce regulation. Moreover, given the depth and broad scope of electronic commerce issues so far covered or being negotiated in free trade agreement outside Africa, this paper proposes a tailored and sequenced approach to electronic commerce regulation. Essentially, key enabling elements for electronic commerce and trade facilitating elements of electronic commerce should be addressed in the AfCFTA Protocol on electronic commerce, while cross-cutting issues should be addressed in other AfCFTA Protocols to which such cross-cutting issues closely relate. The extent to which the negotiators address the issues specific to electronic commerce may range, from basic cooperation frameworks, through to common principles, and harmonised regulations. In setting the negotiation agenda for AfCFTA on electronic commerce, one cannot, however, rule out the likelihood of the external influence from Africa's development partners, such as the EU, considering its active role in delivering technical and capacity support in the development of national strategies on digitalisation as well as implementation into domestic legislation, through its programmes, such as the Digital4Development initiative. These developments signify the EU's continued influence over policy development in Africa at the national, regional, and continental levels. Whilst external influence may seem inevitable, African countries should actively participate in steering the negotiation agenda for the AfCFTA Protocol on electronic commerce towards an outcome that addresses the development needs of African countries and ensures equal benefit for all Africans from the advancement of digital technologies in the African economies.

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