

# Policy Briefing

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## Designing AfCFTA E-Commerce Regulations for Africa's Development

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### Recommendations

- AU member states should adopt a new common position which carves out Africa's role in e-commerce negotiations.
- African states must be proactive in developing their own strategies for taxing e-commerce transactions.
- African governments should first establish a set of e-commerce principles or guidelines that they can apply at the regional or domestic level, as recommended in the AU's Digital Transformation Strategy before establishing a binding set of continental rules on e-commerce.
- Without comprehensive policies for the digital economy, Africa will continue to lag digitally. Ultimately, what Africa needs are policies that will foster a predictable regulatory environment for e-commerce rules.

# Executive summary

The African Union is not alone in its pursuit of rules that address the legal and policy challenges posed by e-commerce and the digital economy in general. Harnessing the digital economy and realising its opportunities has become a top policy priority for African governments. Accordingly, the heads of state and government of the African Union mandated negotiations for an African Continental Free Trade Area on E-Commerce Protocol. However, to fully benefit from e-commerce, member states must strategise on the shared vision for the digital economy and discuss possible avenues to regulate and strengthen the linkages between the economy and the digital sector. This would include a common African position on the World Trade Organization Joint Statement Initiatives negotiations, involvement in other international governance and negotiation forums, and being proactive in developing their own strategy for taxing e-commerce transactions among others. Finally – before establishing or negotiating a binding set of continental rules on e-commerce for African governments – member states should establish a set of e-commerce principles or guidelines that they can apply at the regional or domestic level, as recommended in the African Union’s Digital Transformation Strategy.

## Introduction

As the global economy shifts toward a world led by digital trade, institutions must provide the necessary rules so that the ever-increasing opportunities brought about by e-commerce can materialise.<sup>1</sup> In this regard, the African Union (AU) is not alone in its pursuit of rules that address the legal and policy challenges posed by e-commerce and the digital economy. Since the establishment of the African Continental Free Trade Area (AfCFTA), the member states have focused on results and opportunities for Africa’s economic development and integration. Harnessing the digital economy and realising its opportunities has become a top policy priority. Accordingly, the heads of state and governments of the AU mandated the negotiations for an AfCFTA Protocol on E-Commerce under Phase II of the AfCFTA negotiations.<sup>2</sup> The Protocol was originally scheduled for Phase III but has been fast-tracked to Phase II. Formal negotiations are underway to finalise the protocol by July 2023, providing a unique opportunity for member states to operate under harmonised digital economy regulations with the goal of collective economic growth from trade.<sup>3</sup>

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1 According to the WTO Work Programme, e-commerce is defined as the production, advertising, sale and distribution of products via telecommunications networks including books, music and video transmissions; ‘Quick Win No. 2,’ *Trade Experettes*, <https://www.tradeexperettes.org/report-2022-quickwins/quickwins/2>.

2 African Union, Assembly of the Union, ‘Decisions, Declarations, Resolution and Motion,’ Assembly/AU/Dec.749-795(XXXIII), (9-10 February 2020), [https://au.int/sites/default/files/decisions/38180-assembly\\_au\\_dec\\_749-795\\_xxxiii\\_e.pdf](https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf).

3 Inzillia Sasi, ‘AfCFTA Protocol on Digital Trade: Core Provisions that Drafters Should Address,’ *Fie-Consult*, May 10, 2022, <https://fieconsult.com/afcfta-protocol-on-digital-trade-core-provisions-that-drafters-should-address/>.

Within the context of global trade disruptions wrought by the COVID-19 pandemic, supporting Africa's e-commerce development is especially important considering the continent's current integration and development agenda. To fully benefit from e-commerce, AU member states need to strategise on the shared vision for the digital economy and discuss possible avenues to regulate and strengthen the linkages between the economy and the digital sector. Having predictable and stable e-commerce regulations will be key.

Against this background, this policy brief is intended to assist African governments, policymakers and regional economic bodies in negotiating and delivering a comprehensive e-commerce blueprint for the protocol on e-commerce. It proposes four recommendations for policymakers at the regional and continental level: 1) the WTO's negotiations under the Joint Statement Initiative (JSI) on E-commerce, 2) taxation under the WTO's e-commerce moratorium on customs duties, 3) harmonising e-commerce regulations, and 4) areas for coordination for e-commerce under AfCFTA.

## The stakes: Re-evaluating the position and strategy of the WTO JSI E-commerce negotiations

E-commerce negotiations are currently being held at the WTO under the JSI. The JSI is an informal negotiating device, which was launched at the 11th WTO Ministerial Conference by 71 WTO members. The goal was to 'initiate exploratory work together toward future WTO negotiations on trade-related aspects of e-commerce.'<sup>4</sup> However, African countries remain underrepresented, with only six (Nigeria, Kenya, Burkina Faso, Cameroon, Benin and Côte d'Ivoire) out of the 86 WTO members participating. African WTO members argue that the plurilateral negotiations contradict the WTO's fundamental principles, namely multilateralism, decisions by consensus and rules-making. Despite its current challenges, the WTO remains a relevant institution. With marginal representation in the JSI negotiations, what is needed is a common African position, otherwise, the representation of the continent is compromised. This situation should be avoided as African countries risk becoming 'rule takers' rather than 'rule makers' in terms of e-commerce frameworks. It would be short-sighted to not participate fully and leave international e-commerce negotiations to the interests of high-income countries that do not represent the region.

Hence, going forward, AU member states should update and adopt a new common position which carves out Africa's role in e-commerce negotiations. Such a position will need to reflect the diverse interests of unevenly developed countries, whose strength lies in unity and collective action. It should create policy and regulatory conditions that contribute to the integration of African (data) markets and digital systems, which would enable them

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<sup>4</sup> WTO, 'Joint Initiative on E-commerce' (Geneva: February 2022), [https://www.wto.org/english/tratop\\_e/ecom\\_e/joint\\_statement\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm).

to operate and compete internationally as a more effective bloc.<sup>5</sup> Africa has a role to play in these negotiations – now is the time to be actively involved.

Involvement should not be limited to the WTO but also include other international governance and negotiation forums where possible. Proper representation in international forums is critical due to the far-reaching impacts of their outcomes and decisions. Indeed, the necessity for such participation arises out of the current negotiation environment. Most of the e-commerce discussions are taking place in various forums where African actors are not present at all (such as the G7 and the OECD) or marginally represented (the G20), despite Africa representing 17% of the world's population (and 25% by 2050).<sup>6</sup> Ultimately, representation in international negotiation forums is necessary for strengthening Africa's role and voice in the global digital debate. Initial exchanges at the international level can be useful in jump-starting, shaping and negotiating a development-focused agenda. This in turn can provide useful insights for the Protocol on E-Commerce negotiations and implementation.

## Governing and regulating e-commerce taxation under the WTO moratorium on e-commerce

The current international digital taxation climate is fragmented and uncertain at best.<sup>7</sup> In the absence of formal regulations to guide policymakers and regulators, the regulation of taxing e-commerce has been burgeoning in different forums, including plurilateral forums – the WTO and the OECD<sup>8</sup> – regional and bilateral trade agreements, and sometimes unilaterally. This uncertainty is an issue, particularly for e-commerce taxation which is vital for Africa's revenue generation. To navigate this uncertainty, African governments need to establish a harmonised framework to tax e-commerce and the Protocol on E-Commerce provides that opportunity. In that regard, the WTO AU member states will need to first consider the impact of future e-commerce taxation on the WTO moratorium on e-commerce. WTO members have upheld a moratorium to not impose tariffs on electronic transmissions since the 1998 ministerial conference. The moratorium is renewed every two years at the ministerial conference, with the last renewal being in June 2022.

Given that digital economy technologies are primarily externally driven, designing regulatory frameworks that benefit various African countries has been challenging under the WTO moratorium. As such, several African WTO members have recently questioned the renewal of the moratorium and voiced concerns that it limits their policy space and

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5 Internet and Jurisdiction Policy Network, *Framing, Mapping & Addressing Cross-Border Digital Policies in Africa, An Internet & Jurisdiction Policy Network Regional Status Report*, (Paris : 2022), <https://www.internetjurisdiction.net/uploads/pdfs/IJ-Status-Report-Cross-border-Digital-Policies-in-Africa.pdf>.

6 Internet and Jurisdiction Policy Network, 'Framing, Mapping & Addressing'.

7 Simon J Evenett and Johannes Fritz, *Emergent Digital Fragmentation: The Perils of Unilateralism*, Joint report of the digital policy alter and global trade alert. (Global Trade Alert: 28 June 2022), <https://www.globaltradealert.org/reports/gta-29-report>.

8 'Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,' OECD, October 8, 2021, <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

may further result in tariff revenue losses.<sup>9</sup> However, initial UN Conference on Trade and Development studies in 2017<sup>10</sup> and 2019<sup>11</sup> citing revenue losses from the moratorium have been refuted by the OECD study and others.<sup>12</sup> Reportedly, countries gain far more through the moratorium in terms of broader economic benefits than they would give up in tariff collections.<sup>13</sup> In that, the opportunity costs of the moratorium in terms of the revenue foregone (eg, loss of tariff revenue) are low, and the benefits of conducting trade electronically with the moratorium in place exceed the costs of lost revenue.<sup>14</sup>

Ultimately, African governments will need to carefully assess different outcomes. These persistent ambiguities of the moratorium and the rapid technological advances – which affect the volume of products transmitted electronically – make it particularly challenging for developing countries to assess the likely effect of permanently foregoing their ability to charge duties on electronic transmissions.<sup>15</sup> In addition, a surge in e-commerce coupled with pandemic-related restrictions has highlighted the increasingly important role of digitalisation on the African continent.<sup>16</sup>

Indeed, with a conflict in the data cited by the African WTO members and the possibility of the moratorium being further extended, the Protocol on E-Commerce can be instrumental in establishing a new common framework for digital taxation and proposing solutions to these ambiguities. For African governments and policymakers, developing a common understanding of the regulation of the digital economy – and the terms upon which foreign firms can access domestic markets – must be facilitated by accurate, up-to-date, easily accessible and impartially collected and classified information on the legal and regulatory developments.<sup>17</sup> It is therefore critical that African states be proactive in developing their own strategy for taxing e-commerce transactions. This, in part, will depend on their final position on the moratorium, including further investigating the limitations of the moratorium or exploring other avenues. How AU member states balance their WTO commitments and continental agenda will be critical for the overall success of the e-commerce tax regime.

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9 UNCTAD, *Rising Product Digitalisation and Losing Trade Competitiveness*, conference report (Geneva: December 05, 2017), [https://unctad.org/system/files/official-document/gdsecidc2017d3\\_en.pdf](https://unctad.org/system/files/official-document/gdsecidc2017d3_en.pdf).

10 UNCTAD, 'Rising Product Digitalisation'.

11 Rashmi Banga, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD, Research paper No 29 (Geneva: February 2019), [https://unctad.org/system/files/official-document/ser-rp-2019d1\\_en.pdf](https://unctad.org/system/files/official-document/ser-rp-2019d1_en.pdf)

12 Andrea Andrenellii and Javier López González, 'Electronic transmissions and international trade - shedding new light on the moratorium debate,' OECD Trade Policy Papers, No. 233 (OECD Publishing: Paris, November 2019), 11-13. <http://dx.doi.org/10.1787/57b50a4b-en>; Hosuk Lee-Makiyama and Badri Narayanan Gopalakrishnan, 'The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions,' European Centre for International Political Economy,' (August 2019), <https://ecipe.org/publications/moratorium/>.

13 Lee-Makiyama and Gopalakrishnan, 'The Economic Losses'.

14 UNCTAD, *What is at Stake for Developing Countries in Trade Negotiations on E-Commerce? The Case of the Joint Statement Initiative*, (Geneva: February 19, 2021), <https://unctad.org/webflyer/what-stake-developing-countries-trade-negotiations-e-commerce>.

15 UNCTAD, 'What is at Stake'.

16 Faith Tigere Pittet, 'African Participation in WTO E-Commerce Negotiations: Policy Positions and Development Issues,' *South African Institute for International Affairs Policy Insights*, no 131 (2022), <https://saiia.org.za/wp-content/uploads/2022/07/Policy-Insights-131tigere-pittet-FINAL.pdf>.

17 Evenett and Fritz, 'Emergent Digital Fragmentation'.

Alternatively, African governments can be tempted to bolster their revenue collection efforts in the digital economy through, for example, applying an indirect tax on e-commerce goods and services (such as a surcharge on VAT) to capture lost import tariff opportunities.<sup>18</sup> However, African governments need to be cautious about taxing the digital economy. Heavy-handed regulations stifle commercial initiatives, hamper the deployment of digital technologies, and limit the contributions to national employment and economic growth.<sup>19</sup> Ultimately, African governments must develop digital taxation rules that are both conducive to growth and tailored to the African continent, while remaining mindful of international governance frameworks. This will ensure that the rules apply to both domestic and foreign entities under a competitive and level playing field for all domestic and international e-commerce transactions.

Achieving consensus on e-commerce taxation rules where some states do not have policies yet in place will be difficult. Instead of establishing or negotiating a binding set of continental rules on e-commerce for African governments to implement, AU member states can establish a set of e-commerce principles or guidelines that they can apply at the regional or domestic level, as recommended in the [AU's Digital Transformation Strategy](#). This can form the foundation on which the AU will build and support a set of e-commerce rules while considering the different levels of development and the taxation priorities of each country.

## Harmonising e-commerce regulations

An overarching theme when discussing Africa's legal landscape is that it is highly fragmented with minimal harmonisation across a broad range of regulations and policies. If different African countries design separate and different e-commerce policies, the lack of coherence risks compromising the overall goal of a single market. Indeed, fragmentation impedes collective action and creates operational barriers, a further obstacle to crafting a continental strategy. While coordinated and concerted measures are needed for a continental approach, the stark disparity of the legal and economic structures among African countries makes achieving full harmonisation a particularly difficult objective.<sup>20</sup> For African governments and policymakers, a unified approach will provide better developmental outcomes that capture Africa's overlapping challenges for different government mandates at multilateral forums. However, members need to be cognisant of this reality and develop policies that progressively aim for harmonisation. They should also consider development capacities (including uneven levels of digital readiness) and national contexts without requiring simultaneous conformity.<sup>21</sup>

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18 It is critical that policymakers distinguish between applying customs duties on digital products and applying VAT on digital products, as the two are not the same.

19 Evenett and Fritz, 'Emergent Digital Fragmentation'.

20 Internet and Jurisdiction Policy Network, 'Framing, Mapping & Addressing'.

21 Internet and Jurisdiction Policy Network, 'Framing, Mapping & Addressing'.

A one-size-fits-all approach is not the solution to counter potential digital fragmentation. Rather, a flexible approach might be necessary to accommodate the different situations without introducing excessive distortions in the competition landscape.<sup>22</sup> To do this, policymakers must focus on tangible and achievable goals. They should intensify efforts to identify the policy and regulation gaps that need alignment (including regional initiatives).<sup>23</sup> This will avoid overlaps and produce one document with a streamlined strategy. The regulation of policy initiatives must also be credible and realistic, with clear deadlines that account for Africa's diversity, including its economic landscape, population size, governance capacities, digital infrastructure and development needs.

Finally, to speed up designing e-commerce regulations, AU member states must swiftly adopt existing policy tools drafted on e-commerce to carve out a more harmonised digital strategy. The policy groundwork has been laid with numerous policy documents including the AU Agenda 2063,<sup>24</sup> the Digital Transformation Strategy for Africa<sup>25</sup> and the AU Data Policy Framework.<sup>26</sup> Agenda 2063 provides the overarching development strategy for science, technology, research and innovation investments. The Digital Transformation Strategy seeks to create a single digital market through:

- supporting the development and implementation of digital strategies;
- establishment of harmonised policy, legal and regulatory framework; and
- strengthening collaboration between African Institutions and regulators in charge of digitalisation and the protection of personal data.<sup>27</sup>

The AU Data Policy Framework makes specific recommendations relating to various areas in the digital sector, including digital ID, data privacy and cybersecurity. The policy framework recommends that member states: seek and establish a reliable and trustworthy data environment through cybersecurity, protection of personal data, the rule of law and capable, responsive and accountable institutions.<sup>28</sup> For example, protecting rights through the rule of law and enforcing any breach of personal data.

With these policy documents, countries should work collaboratively around common e-commerce policy issues to achieve clearly defined goals based on political priorities and developmental objectives. This will also ensure the rules' predictability and stability. Furthermore, this will save costs, rather than starting from the beginning to regulate e-commerce.

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22 Internet and Jurisdiction Policy Network, 'Framing, Mapping & Addressing'.

23 Policy and regulatory gaps include developing new digital policies in the absence thereof and removing or updating outdated policies. Policy areas include data flows, data protection, cybercrimes laws, e-transaction, ICT infrastructure, etc.

24 African Union, *Agenda 2063: The Africa we want (Popular version)*, (Addis Ababa, June 10, 2013), [https://au.int/en/Agenda2063/popular\\_version](https://au.int/en/Agenda2063/popular_version).

25 African Union, *The Digital Transformation Strategy for Africa*, (Addis Ababa, May 18, 2020), <https://au.int/en/documents/20200518/digital-transformation-strategy-africa-2020-2030>.

26 African Union, *AU Data Policy Framework*, Department of Infrastructure and Energy, (Addis Ababa, February 2022), <https://au.int/sites/default/files/documents/42078-doc-AU-DATA-POLICY-FRAMEWORK-ENG1.pdf>.

27 AU, 'The Digital Transformation Strategy'.

28 AU, 'Data Policy Framework'.

# Areas for coordination and cooperation of digital services within other areas of the AfCFTA

Coordination and cooperation on e-commerce within other areas (eg, intellectual property, investments and competition) of the AfCFTA will be fundamental for the digitisation of the economy and fostering e-commerce-led growth across the continent. Cross-cutting issues include consumer data and competition legislation, where mergers involving businesses using consumer data may distort competition.<sup>29</sup> Another issue is cybersecurity and data protection, lapses of which may discourage foreign investments if they entail extra costs in doing business. Cross-border commercial exchanges of products and services with an intellectual property component will affect global trade. Countries will thus need to adopt new ways of thinking about the digital economy and cooperate on simplifying and harmonising e-commerce policies with other areas of the AfCFTA. They should design policies that can help this cooperation and implementation. At the regional and sub-regional levels, digital cooperation can help African countries to develop digitally and progress rapidly towards achieving transformational growth.<sup>30</sup> The lack of comprehensive policies for the digital economy will further exacerbate the continent's digital lag – what Africa truly needs are comprehensive policies that will foster a predictable regulatory environment for e-commerce rules.

## Conclusion

The AfCFTA Protocol on E-Commerce will be critical for achieving Africa's economic e-commerce agenda and addressing the digital divide.<sup>31</sup> Concerted efforts by African governments and policymakers will be required to harmonise the fragmented regulatory frameworks and gaps in digital policies. The AU has in place several policy instruments on e-commerce and the digital economy, and with these African member states can structure and design new regulations. These will lay the foundation needed for African countries to play a central role in the WTO negotiations and other governance forums. The continent will only reap the benefits from the digital economy if the e-commerce rules are responsive to their population and developmental needs.

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29 Internet and Jurisdiction Policy Network, 'Framing, Mapping & Addressing'.

30 Rashmi Banga and Karishma Banga, 'Scoping the Potential for a Digital Led Recovery from COVID-19 in Africa,' *Journal of African Trade* no 9 (2022), 120-143.

31 Layers to the digital divide include between developed and developing countries, between African countries, within African countries (eg, social divides including communities and gender).



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### Cover image

Ivory Coast: A delivery man checks his phone as he sits on a transporter advertising Nigeria's e-commerce site Jumia in Abidjan, 2019. Jumia became, on April 12, 2019 the first African start-up to make its debut on Wall Street (Issouf Sanogo/AFP via Getty Images)

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