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

Karishma Banga, Jamie Macleod and Max Mendez-Parra

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# Executive summary

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

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

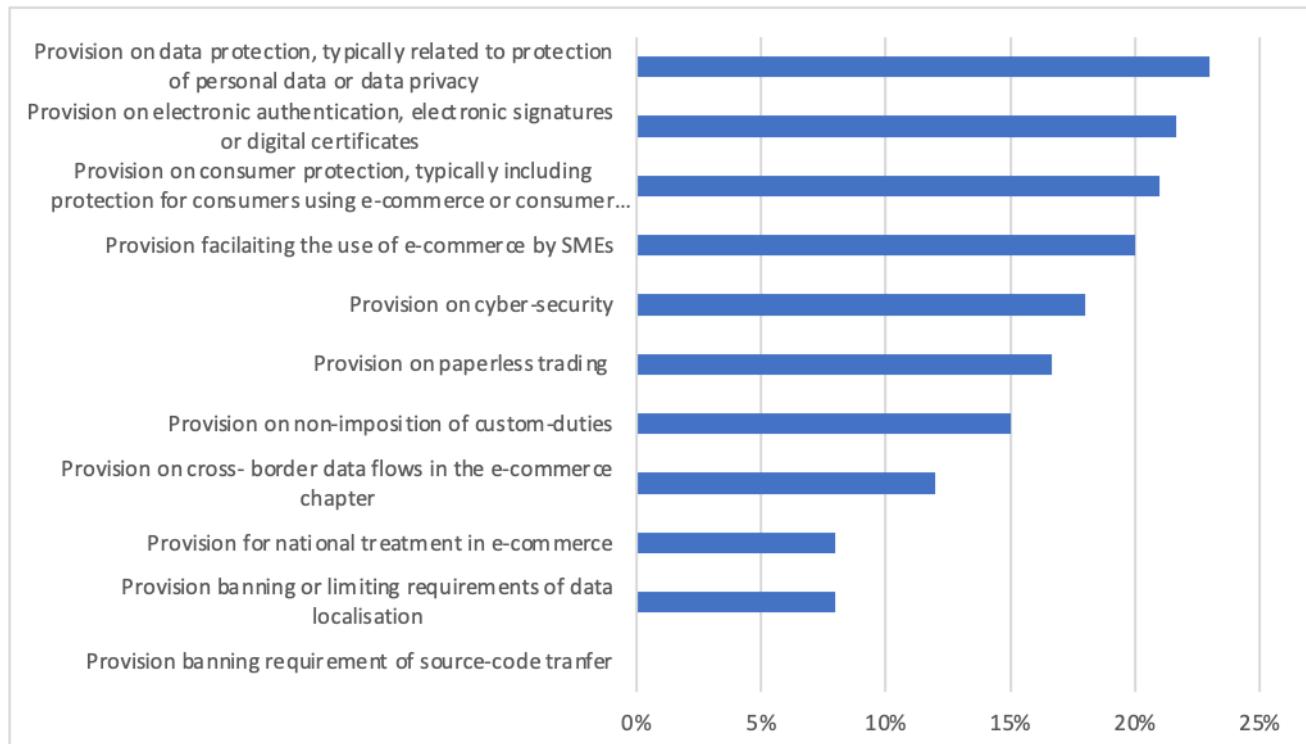
African negotiators can be informed by how e-commerce has been approached in existing trade agreements, particularly those involving other countries at similar levels of development. Of the 345 preferential trading areas (PTAs) in the dataset, 52% have a digital trade provision, but this falls down to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

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

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

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

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



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

Source: Authors, using TAPED.

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

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

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

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

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

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

Source: Authors, constructed using TAPED dataset

# 1 Introduction

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

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

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

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

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

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

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

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

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

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

## 2 Intra-African digital trade

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

Just 10 African countries are responsible for 94% of all online business on the continent (ITC, 2020). The majority of marketplaces in Africa use a domestic, country-focused model; that is, national platforms that only sell in one country. Cross-border e-commerce is limited for various reasons; most transactional platforms have restrictions based on the origin of sellers, 57% of marketplaces allow only domestic sellers on their platform and only 28% of those operating in Africa offer online payments transactions (*ibid.*). The top five reported challenges to cross-border e-commerce in Africa are (i) postal competence and delivery and transport costs; (ii) issues of taxation, including foreign taxation, double taxation and VAT regulations; (iii) lack of reliable payment solutions; (iv) lack of awareness of national and regional rules; and (v) custom duties and custom procedures (Banga et al., 2021). Digital trust issues and lack of e-commerce related consumer protection mechanisms, such as online dispute resolution, continue to constrain the uptake of e-commerce in Africa (*ibid.*). The AfCFTA can therefore play an important role in promoting and boosting cross-border trade facilitation measures.

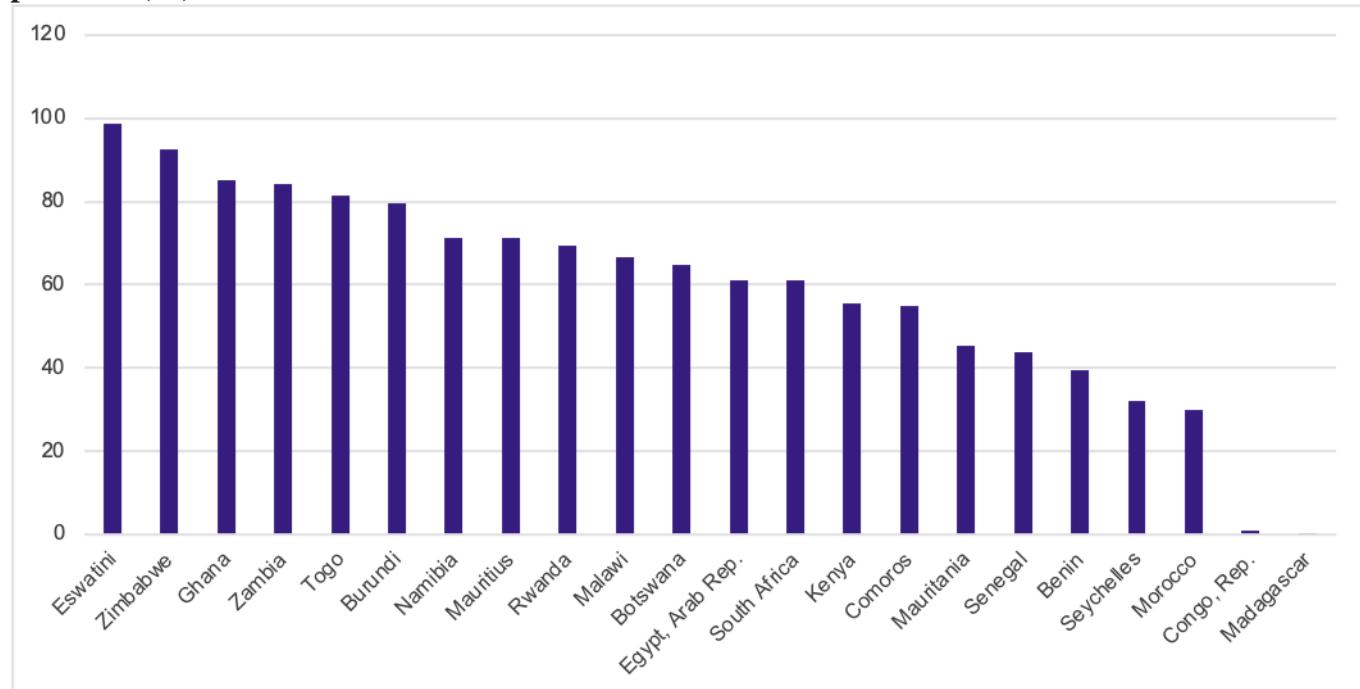
<sup>4</sup> <https://www.unilu.ch/en/faculties/faculty-of-law/professorships/managing-director-internationalisation/research/taped/>

<sup>5</sup> Here, S–S follows UN classification and refers to agreements between developing countries in the Global South, which includes Asia (with the exception of Japan, Hong Kong, Macau, Singapore, South Korea and Taiwan), Central America, South America, Mexico, Africa and the Middle East (with the exception of Israel).

Intra-Africa trade is faring better in terms of electronically transmitted (ET) products – that is, products that are both ordered and delivered through the internet. Figure 1 shows that 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. The E-Commerce Protocol could lead to preferential treatment for electronic goods originating within AfCFTA state parties.

Table 1 presents further analysis on intra-Africa ET trade using bilateral data on imports and exports in the period 2017–2019. It is observed that South Africa, Mozambique, Kenya, Tanzania and Mauritius emerge as the top five African countries driving intra-African ET exports, with South Africa accounting for 46% of total intra-African exports and 31% of intra-African ET imports. The E-commerce protocol to the AfCFTA could explore approaches to promote the trade of electronic goods and services originating in Africa – which is related to Africa's industrialisation and digitalisation agendas (Ogo, 2020).

**Figure 1: Share of intra-African exports in country's total exports of potentially digitisable products (%)**



Source: Authors, using WITS and WTO's (2016) HS six-digit classification of products that can be electronically transmitted

**Table 1: Top 10 intra-African exports of digitisable products, average 2017–2019**

	Share in intra-African exports (%)	Intra-African exports (US\$ '000s)	Share in intra-African imports (%)	Intra-African imports (US\$ '000s)
South Africa	46.17	124,263.43	31.60	108,409.39
Mozambique	16.30	52,928.47	3.20	11,773.92
Kenya	14.90	40,675.42	1.44	4,788.87
Tanzania	11.90	42,577.13	3.27	12,122.97

Mauritius	4.30	12,245.14	0.40	1,317.18
Eswatini	3.69	10,406.23	4.60	14,850.71
Egypt	2.18	5,610.38	0.04	136.95
Uganda	2.17	7,204.91	1.86	6,442.01
Botswana	1.79	5,226.27	4.63	15,091.95
Morocco	1.47	3,872.62	1.48	4,739.69

Source: Authors, using WITS; data from 2017, 2018 and 2019

### 3 AfCFTA: defining the scope of the E-Commerce Protocol

**Define e-commerce:** It is important for African negotiators to reach a consensus on the definition of e-commerce, suited to the objectives and direction of African trade liberalisation and integration. If ET products are classified as digital goods, then they will be covered by WTO rules as specified under the General Agreement on Tariffs and Trade (GATT) in 1994. If ET products are classified as digital services, then the General Agreement on Trade in Services (GATS) commitments undertaken by African countries will apply, but with concerns regarding which mode of supply applies to the trade of such services. Should these services be classified as Mode 1 (cross-border trade) services or Mode 2 (consumption abroad)? If these services are classified as Mode 1, then any African WTO member that has made commitments to open up a given service sector to Mode 1 delivery has agreed to open up that sector to digital trade in that service, subject to the limitations listed in its GATS schedule. In some African countries, such as Ghana and Kenya, where the share of services supplied through Mode 1 is as high as 60% (Banga and Raga, forthcoming), this can have significant revenue implications. Moreover, there is an issue around which sectoral commitments are more appropriate within services (audio-visual, value-addition or basic telecommunication under GATS), as well as the classification of new and emerging digital services (Wu, 2017). We discuss e-commerce definitions and potential revenue implications of these definitions further in Section 4.2.

To avoid taking an explicit position on the ongoing debate on classification of e-commerce products, several regional trade agreements (RTAs) – particularly those with the US – include e-commerce rules under a separate chapter (Willemyns, 2020). Analysing 56 notified RTAs that have an article on definitions in their e-commerce chapter, Monteiro and Teh (2017) note that only four provide for an *explicit* definition of e-commerce. None of them refers verbatim to the definition used in the WTO's e-commerce work programme, where e-commerce is understood to mean 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'. In some S–S trade agreements, such as the RTA between Mexico and Panama, e-commerce is taken to mean any agreement, transaction or exchange of information with commercial purposes in which the parties interact using the internet or other information and telecommunication technologies (ICTs). Alternatively, in the RTA between the Eurasian Economic Union (EAEU) and Viet Nam, e-commerce refers to trade with the use of electronic technologies, which is defined as a combination of software and hardware that provides interaction between the persons of the parties using an electronic document. Interestingly, the RTA between the US and Morocco includes a definition of e-commerce that is relatively similar to the one used in the WTO's work programme on e-commerce.

**Scope of the e-commerce chapter:** Clarity on the definition of e-commerce can enable a better understanding of the breadth of e-commerce issues to be dealt with by the E-Commerce protocol. African negotiators need to define which issues they will tackle as part of the E-Commerce Protocol, and which issues can be effectively dealt under different protocols of the AfCFTA. E-commerce is enabled, and is

affected by, issues being negotiated in different chapters, including trade facilitation, online payments, postal infrastructure, competition, intellectual property (IP), etc. E-commerce-related provisions and commitments have been taken in trade agreements under three main categories (Ebrahimi, 2017); (i) market access: customs duties, treatment of digital products, cross-border information flows, electronic supply of services; (ii) rules and regulations: consumer protection, protection of personal information, unsolicited commercial e-mails, domestic electronic transactions frameworks; and (iii) facilitation: paperless trade administration, cooperation, transparency, electronic authentication.

Different approaches have been taken in existing S–S trade agreements in defining the scope of the e-commerce chapter:

- **Explicitly defining the scope of e-commerce:** The RTA between Costa Rica and Colombia includes a specific provision stating that the e-commerce chapter applies to measures affecting e-commerce (Monteiro and Teh, 2017). Alternatively, the RTA between the EAEU and Viet Nam incorporates a provision stipulating that the e-commerce shall apply to trade with the use of electronic technologies and to the use of electronic documents in trade between the parties by means of digital signatures and a trusted third party (*ibid.*).
- **Implicitly defining the scope of e-commerce:** One approach is inclusion of an article entitled ‘definitions’ providing the definition of specific terms related to e-commerce. For example, in the RTA between Mexico and Panama, e-commerce means any agreement, transaction or exchange of information with commercial purposes in which the parties interact using the internet or other ICTs.

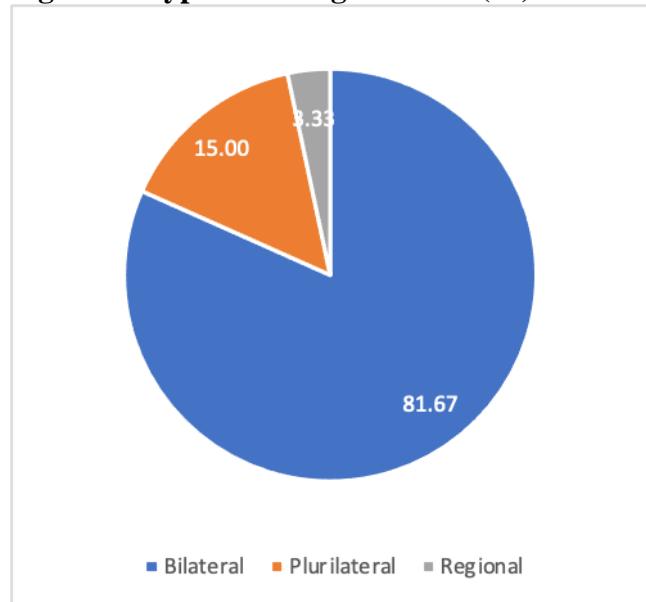
**Depth of negotiations:** RTAs, like the WTO agreements, are usually comprehensive, covering chapters on goods, sanitary and technical standards, services, IP protection, dispute resolution and general exceptions, as well as development-related or capacity-building or cooperation provisions. Some provisions in these agreements are binding obligations, often subject to dispute resolution, and use language like ‘Parties shall...’, ‘must’ or ‘shall take appropriate measures’, followed by the specific obligations mandated by the agreement. Other chapters or provisions are ‘softer’, usually with language that signifies large flexibilities, like ‘subject to Parties’ domestic laws and regulations’ (Pasadilla, 2020). Small developing countries have shown a clear preference for facilitation provisions such as cooperation in S–S RTAs, which are soft commitments, around paperless trade and transparency (Gaitan, G., 2020). ‘Soft’ commitments are those that are not enforceable by the parties. These include ‘best effort’ provisions like those ‘recognising the importance of’, ‘working towards’ or ‘promoting’ a certain objective. Cooperation provisions are considered non-binding unless the treaty makes explicit an obligation to cooperate in certain areas, within a specific frame and time. A recent example is that of the e-commerce chapter in the Regional Comprehensive Economic Partnership (RCEP) agreement<sup>6</sup>, which is not enforceable by state-state dispute settlement (Kelsey, 2020). Any agreement to allow enforcement in the future, during what is understood to be a five-yearly general review, will only bind those RCEP Parties that agree (*ibid.*).

<sup>6</sup> 15 countries are party to the RCEP agreement; Australia, Brunei Darussalam, Cambodia, Indonesia, Japan, the Republic of Korea, the Lao People’s Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand and Viet Nam.

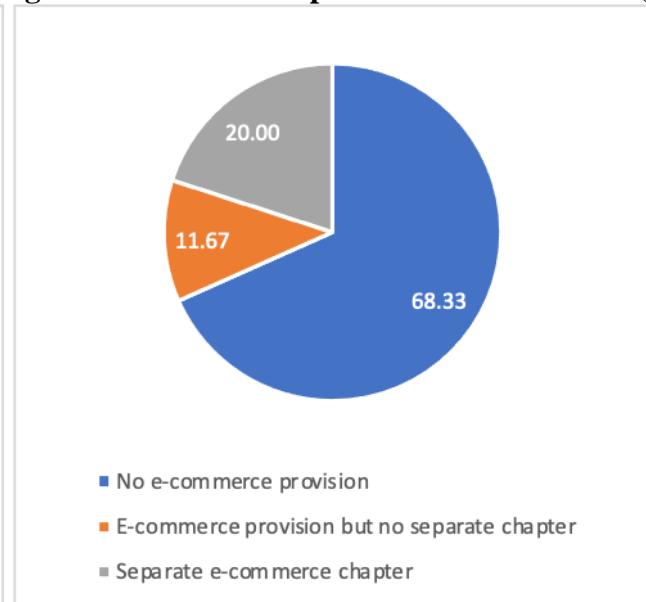
## 4 The E-Commerce Protocol and AfCFTA: lessons from South–South trade agreements

Of the 60 S–S PTAs covered by the TAPED dataset, a majority (82%) are bilateral trade agreements (Figure 2). Only a minority of these agreements (32%) include provisions on e-commerce (Figure 3). Around 11% have an e-commerce provision only under other relevant chapters on goods and services (such as the Chile–Thailand RTA, the Malaysia–Turkey RTA, and the China–Georgia RTA) and 20% have a dedicated chapter on e-commerce. Interestingly, as Figure 4 suggests, the importance of digital trade provisions in S–S trade agreements has evolved over time, in terms of both the share of trade agreements with an e-commerce chapter and the average number of words in the e-commerce chapter. In the next few sections, we look at specific e-commerce provisions in S–S trade agreements, and their implications, under four categories; a) data protection and privacy; b) disciplines on cross-border data flows and storage; c) electronic trade facilitation; and d) digital business taxation. These categories are selected on the basis of their pertinence to ongoing negotiating proposals.

**Figure 2: Type of S–S agreements (%)**



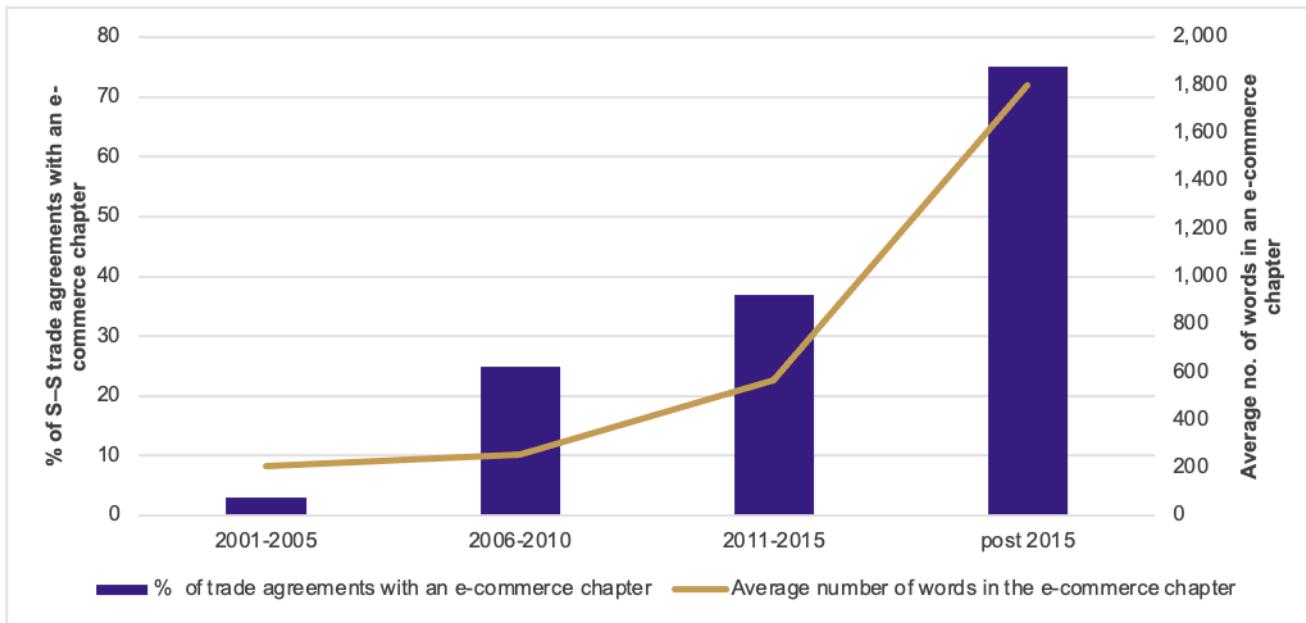
**Figure 3: E-commerce provisions in S–S PTAs (%)**



Source: Author, constructed from TAPED.

Notes: Number of S–S trade agreements = 60.

**Figure 4: Evolution of digital trade provisions in S–S trade agreements**



Source: Authors, using TAPED

#### 4.1 Data protection and privacy

Inclusion of personal data protection measures in trade agreements has in some cases been driven by concerns around privacy of individuals, such as in the case of EU’s General Data Protection Regulation (GDPR) and India’s proposed data protection law. This is to enable people to retain control over their personal information. In other cases, such as China, data protection regimes are driven by national security concerns. While laws aimed at data privacy may have some implications for safeguarding individuals against data based economic exploitation, these may no longer be enough as the digital economy’s mainstay shifts from targeted advertisements – for which personal data is key – to data-based intelligent management of sector-wide activities, based on anonymised and aggregated data (Singh, 2019). This latter type of data currently has no legal protection ownership rules.

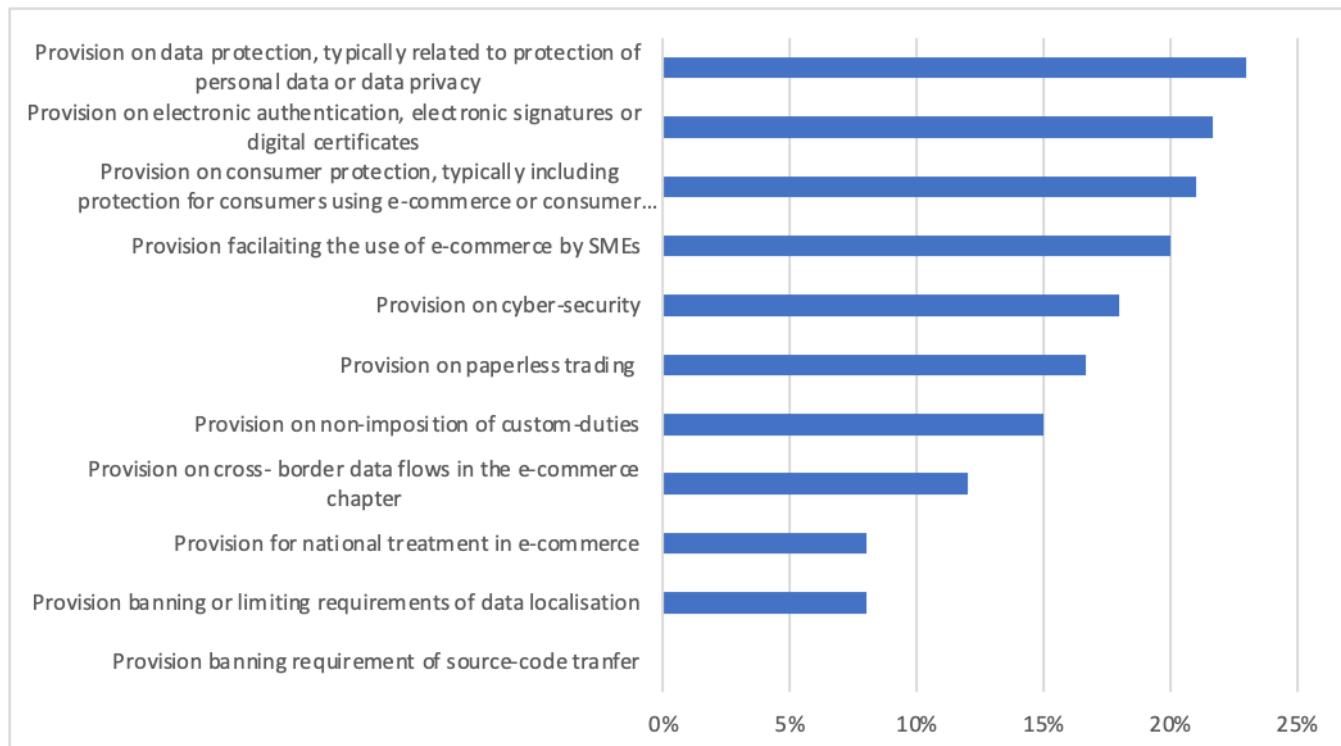
The most common digital trade provisions in existing S–S trade agreements is that related to data protection and privacy, featuring in 23% of the agreements (Figure 5), followed by electronic trade facilitation (22%) and consumer protection (21%). Of the 60 S–S trade agreements, 23% include a provision on data protection, typically related to requiring signatory countries to ensure legal protection of personal data or data privacy of any kind; 7% of these include soft commitments – that is, those that are not enforceable by another party; less than 2% include hard commitments (Figure 6); and 15% include mixed commitments i.e. both soft and hard commitments or “allowing” for something that is not explicitly implemented in the text. An example of mixed commitment on data protection is under the - Brazil- Chile FTA, which includes cooperation activities on data protection through sharing information and experiences on regulations, laws and programs on data protection.

The AfCFTA does not yet include any specific provisions in the area of data protection or privacy, other than in the Protocol on Trade in Services which merely reiterates the general exception of the GATS that commitments in trade in services shall not prevent signatories from adopting measures in relation to national laws on data protection and privacy. However, according to the United Nations Conference on

Trade and Development (UNCTAD) Global Cyberlaw Tracker,<sup>7</sup> only 27 African countries out of 54 currently have national legislations on data protection and privacy; nine have draft legislation and 13 countries have no legislation yet.

Africa's delay in implementing personal data protection, data privacy and cyber-security regulations could prove to be an advantage for harmonisation. Establishing common principles and frameworks for African countries in these areas through the AfCFTA could help ensure a relatively harmonised regulatory regime for African firms before divergent regulations become entrenched. Basic principles on data protection and cyber-security are already established in the African Union (AU) Convention on Cyber Security and Personal Data Protection. Article 14(6)(a) of the Convention prohibits the transfer of personal data to non-member states unless 'the state ensures an adequate level of protection of the privacy, freedom, and fundamental rights of persons whose data are being or are likely to be processed'. Recognising the importance of harmonisation of data protection and privacy frameworks across African countries, to facilitate e-commerce, the African Union Digital Transformation Strategy (AUDTS) 2020–2030 aimed to bring the Convention on Cyber Security and Personal Data Protection into force by 2020 and for all member states to adopt a complete set of legislation covering e-transactions, data protection and privacy, cybercrime and consumer protection. However, as of June 2020, only eight countries had ratified the convention<sup>8</sup>. The African Union Convention on Cyber Security and Personal Data Protection 2014<sup>9</sup> also makes it a goal for African data protection authorities (DPAs) to set up cooperation mechanisms among themselves and with others, but does not formally establish such a grouping or a formal mechanism for such cooperation.

**Figure 5: Digital trade provisions in S–S trade agreements (% of agreements)**



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

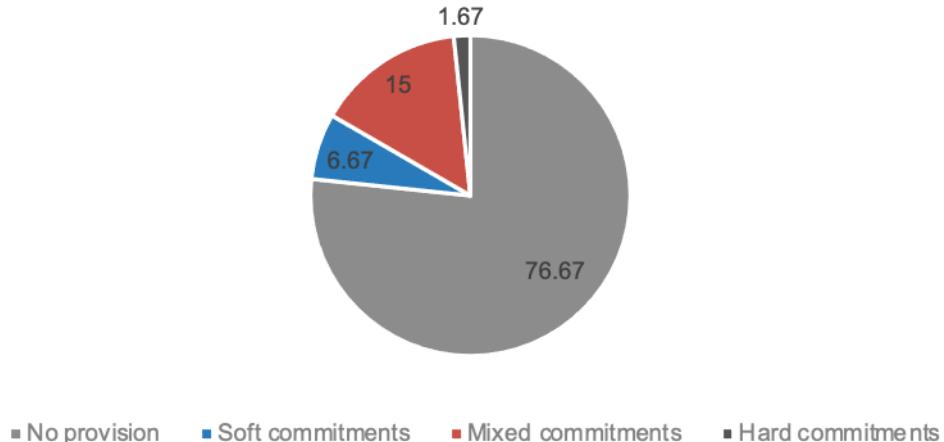
<sup>7</sup> <https://unctad.org/page/cyberlaw-tracker-country-detail>

<sup>8</sup> <https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION.pdf>

<sup>9</sup> <https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection>

Source: Authors, using TAPED.

**Figure 6: Commitments on data protection in S-S trade agreements (% of agreements)**



Note: Soft commitments are those that are not enforceable by parties. Hard commitments oblige a party to comply with a provision or a principle and are enforceable by another party. ‘Mixed’ commitments are for cases when a treaty has both soft and hard commitments in the same coding line.

Source: Authors, using TAPED.

While a majority of African data privacy laws address the appointment of a DPA, no DPAs have yet been appointed in 15 of the 32 countries with data privacy laws; Seychelles, Angola, Chad, Equatorial Guinea, Madagascar, Guinea (Conakry), Mauritania, Niger, Algeria, Botswana, Togo, Kenya, Uganda, Congo-Brazzaville and Egypt (Greenleaf and Cottier, 2020). Failure to appoint a DPA in due time has been most common in Africa compared to other regions, in part owing to the large number of recent African laws. The lack of DPAs has repeatedly been criticised for being a major impediment to effectiveness of the data protection legislative frameworks on the continent (*ibid.*). There are also disparities in enforcement of data protection rules across countries. Some countries – such as Ghana and Mauritius – are faring better, with their DPAs enforcing data protection rules through action taken or fines issued for non-compliance with relevant personal data protection legislation (Deloitte, 2017); in other countries, such as Morocco, Nigeria, Senegal and Tunisia, the laws do not require notification of breaches (Ilori, 2020).

Regional economic blocs (RECs) could play an important role in data protection and the enforcement of rules, particularly in harmonizing laws and pooling resources to help with enforcement in less capacitated countries. The Southern African Development Community (SADC) Model Law<sup>10</sup> establishes principles of data processing that include data minimisation, accuracy, storage limitations, lawfulness and fairness, purpose limitation and accountability. Both SADC and the Economic Community of West African States (ECOWAS) mandates member states to create a DPA to address data breaches and enforcement. A Supplementary Act on Personal Data Protection within ECOWAS (2010) to the ECOWAS Treaty, adopted by the ECOWAS member states, establishes the content required of a data privacy law in each ECOWAS member state, including the composition of a DPA. This is the only binding regional/international data protection agreement yet in force in Africa (Greenleaf and Cottier, 2020). The AfCFTA E-Commerce Protocol could facilitate the creation of regional DPAs by addressing challenges related to their independence, financial constraints, lack of institutional capacity and others (Ilori, 2020).

<sup>10</sup> [https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc\\_model\\_law\\_data\\_protection.pdf](https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_data_protection.pdf)

Such an approach would be particularly useful and realistic for small economies such as Liberia, Malawi and Sierra Leone that might otherwise struggle to finance well-resourced DPAs.

## 4.2 Disciples on cross-border data flows and data storage

Provisions on cross-border data flows or data storage typically aim to prohibit restrictions on the flow of data across borders. Depending on the exact formulation of such a rule, this could include preventing laws that require permission or consent to be given by users for the transfer of their data, laws that require copies of data to be stored locally, laws that require data to be ‘processed’ locally, or outright bans on such data transfers.<sup>11</sup> The proponents of such provisions are keen to ensure that their companies can access and process the data of citizens in other countries without hindrance, as well as make use of foreign companies to provide services for data processing, should they so choose. They assert that restrictions on data transfers needlessly increase compliance costs for cross-border e-commerce businesses. Other countries argue that such provisions erode their legitimate capacity to restrict flows of their citizens’ data for reasons of data security, government surveillance, or to try to encourage foreign companies to set up data centres or processing operations locally for economic reasons.

Only 12% (seven of 60) of S–S trade agreements have an e-commerce chapter with provisions for cross-border data flows (Figure 5). Of these seven, the Central America–Mexico FTA and the Colombia–Costa Rica FTA have only soft commitments on data flows; here the parties emphasise regulatory cooperation to maintain cross-border flows of information and affirm the importance of working ‘*to maintain cross-border flows of information as an essential element to promote a dynamic environment for electronic commerce*’. Language emphasising regulatory cooperation to maintain cross-border flows of information can be found in a number of recent Latin American FTAs, especially those involving Colombia. Examples include the Costa Rica–Colombia FTA, the Chile–Colombia FTA and the Colombia–Northern Triangle FTA (Wu, 2017).

It is very uncommon for S–S trade agreements to include a ban on data localisation (Figure 5). Such provisions were popularized in the proposals of US negotiators ahead of the 11th WTO ministerial meeting in 2017 as a means, particularly, of pressurizing countries like China and Russia that impose restrictions requiring the data of their citizens to be hosted nationally. However, countries of the global South seem to regard bans on data localisation requirements as unnecessarily eroding their policy space in a fluid regulatory area. Of 60 S–S trade agreements, only 8% currently have a provision banning data localisation requirements, while 92% have no such provision. Of the five agreements that do have provisions banning data localisation requirements, the Argentina–Chile FTA has only soft commitments; it recognises ‘*the importance of not requiring a person of the other party to use or locate the computer facilities in the territory of that party, as a condition for conducting business in that territory*’, and pledges to undertake to exchange good practices and current regulatory frameworks regarding location of servers.

This is an important finding for African countries, particularly those interested in building their domestic digital industry and local data centre markets. AUDTS highlights that a very large share of the IT content consumed in Africa currently comes from outside the continent, and that data centres are the type of digital infrastructure that will allow the development of a local digital industry. Africa currently accounts for less than 1% of total available global data centre capacity, according to data from Xalam Analytics, despite

<sup>11</sup> For example, the Korea Personal Information Protection Act targets data leaving the country and requires companies to obtain consent from ‘data subjects’ (ie, the individuals associated with the particular datasets) prior to exporting that data, as well as details about who receives the data, the purpose, the period for which the data will be retained, and the specific personal information provided.

being home to about 17% of the world's population (Munshi, 2020). A mere six major commercial data centres are located in East Africa (five in Kenya and one in Tanzania), out of some 4,124 co-locations reported globally.<sup>12</sup> The largest is the East Africa Data Centre, a carrier-neutral facility, built by a subsidiary of Liquid Telecom. As a whole, continental efforts need to be directed towards building capacity for data collection, storage and processing.

Currently in Africa, 17 countries have some form of restrictions related to data privacy (Deloitte, 2017), but only Nigeria has an established data localisation law, under the National Information Technology Development Agency Data Protection Regulation 2019, requiring local storage of consumer, government and subscription data, as well as local processing of sales data and ATM transactions data.<sup>13</sup> Section 50 of the Data Protection Act of 2019 in Kenya provides that 'the Cabinet Secretary may 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'. Moreover, a sectoral approach is clear; there is a requirement that health data should not be stored outside Kenyan territory. In Rwanda, the concept of data sovereignty has been at the core of the government's National Data Revolution Policy and requires that national data be hosted locally. In South Africa, the Protection of Personal Information Act came into effect in July 2020, which regulates the transfer of personal information about a data subject to a third party in a foreign country under a number of conditions.<sup>14</sup>

Given the differences in development and status of data governance frameworks across African countries, a regional approach within the AfCFTA may be more effective. Banga et al.'s (2021) survey of African businesses shows there is significant interest by the African private sector in developing and selling on regional e-commerce platforms and in intra-regional data-sharing, but there is need to build capacity on the use of data for competitive advantage, as well as better clarity on terms and conditions for data-sharing. Important gender differences also emerge from the study in terms of e-commerce and data use. Among female-owned enterprises, 50% of respondents want intra-REC data-sharing; the other 50% either do not want intra-REC sharing or are not sure about it; among male-owned enterprises, 70% want intra-REC data-sharing. Sharing data at the regional level can be more productive for African countries within the regional blocs, given the economies in scalability (UNCTAD, 2018). This will allow pooling of regional data and digital capacities and the use of existing digital infrastructure within the region to process the regional data. The creation of a regional market would also generate substantial cost savings by creating economies of scale that make investment in regional data centres that support online services, including cloud hosting, more financially viable (World Bank, 2018). Some efforts are already underway; the Northern Corridor Integration Projects has a working group on inter-governmental data-sharing. Through this initiative, Kenya, Rwanda and Uganda have reportedly agreed to harmonise the related regulatory framework, enabling data-sharing on common terms (*ibid*). South Sudan is in the process of developing similar regulation. This framework defines both which data can be shared and what protocols must be followed. It will, for example, allow for the integration of national ID and sim card registration databases (*ibid*).

The AfCFTA E-Commerce Protocol can therefore build on existing principles under the AU Convention on Cyber Security and Personal Data Protection on enabling free movement of data within regions, consistent with REC member states' interest in protecting privacy and ensuring security, supporting a single global internet, cooperation on cyber-security, protection of personal information of consumers and protection against fraud, and defining commonly agreed-upon principles and rules. Moreover, sector-specific policies on data may be explored within the AfCFTA if, for instance, regulators want to retain

<sup>12</sup> <https://www.datacentermap.com/>

<sup>13</sup> <https://nlipw.com/wp-content/uploads/Guidelines-for-Nigerian-Content-Development-in-Information-and-Communications-Technology-ICT.pdf>

<sup>14</sup> <https://www.lexology.com/library/detail.aspx?g=4b47ea3c-618c-43ba-b2d6-c748c4ee8d9b>

control of data pertaining to critical sectors (Banga et al., 2021). Analysis of S–S trade agreements reveals that 12 of the 60 agreements include specific national security exceptions, which are either part of the e-commerce or digital trade chapter; or part of a general chapter or section on exceptions explicitly applicable to an e-commerce or digital trade chapter; or part of a general chapter or section on exceptions implicitly applicable to an e-commerce or digital trade chapter or provisions. Moreover, seven of the 60 agreements also include a provision excluding digital financial instruments as digital products.

### 4.3 Electronic trade facilitation

Electronic trade facilitation provisions are measures that aim to use digitalization or automation to make trade easier, faster and simpler. Such provisions tend to be less controversial in trade negotiations (MacLeod, 2017) and include measures such as ensuring that states recognise the legal validity of e-signatures and e-authentication, support paperless trading, adopt electronic rules of origin or establish customs electronic single windows.

As per Figure 5, provisions on electronic authentication, electronic signatures and digital certificates are the second most common provision in S–S trade agreements. A further analysis of electronic trade facilitation in Figure 7 reveals that, of the 60 S–S trade agreements, 25% recognise the importance of promoting e-commerce, while 21% actually include a provision on electronic authentication, electronic signature or digital certificates. Of the latter set of agreements, only two have hard commitments on electronic trade facilitation. The remaining ones have soft or mixed commitments. In some of these agreements, a positive obligation is taken ‘(i) to determine the appropriate authentication technologies and implementation models, without limiting their recognition and implementation models; and (ii) to have the opportunity to prove in court that their electronic transactions comply with any legal requirements’.<sup>15</sup> Some also require certain performance standards for electronic signatures, or methods of authentication for sensitive transactions or communications through certification by an authority or a supplier of certification services accredited under the party’s regulations.<sup>16</sup> Interestingly, 20% of S–S trade agreements include targeted provisions for small and medium enterprises (SMEs).

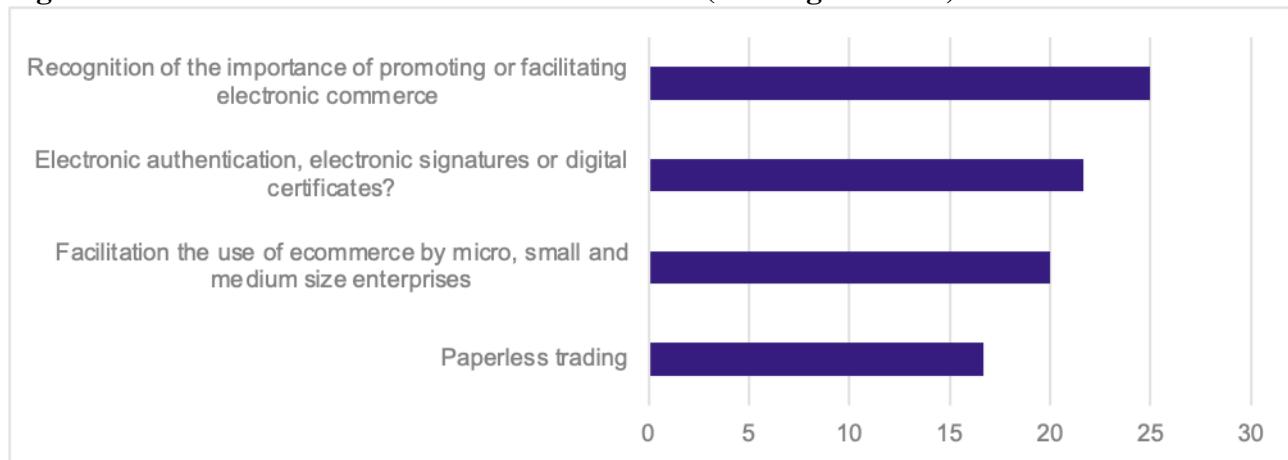
Harmonised laws on electronic trade and digital signatures also emerge as a critical area for boosting intra-regional e-commerce in Banga et al.’s (2021) survey of and interviews with African businesses. According to the UNCTAD Global Cyberlaw Tracker 2020, only 33 out of 54 African countries currently have formal e-transaction legislation; six have draft legislation and six have no legislation. Among the key principles advanced by this category of laws are technology neutrality, non-discrimination of electronic communications and functional equivalence. The adoption of e-transaction laws also generally requires a national certification authority.

When considering which laws to adopt in the area of electronic trade facilitation, the AfCFTA can explore options going beyond electronic signatures to incorporate other important contractual terms, such as time and place of dispatch and receipt, acknowledgement of receipt, party location and use of automated message systems (UNECA et al., 2019). Similarly, e-transactions laws in the AfCFTA should 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. The AfCFTA should provide specific provisions to address challenges facing SMEs, including through electronic trade facilitation.

<sup>15</sup> Chile–Thailand FTA, Art. 11.7(e)

<sup>16</sup> Brazil–Chile FTA, Art. 10.6.3; Argentina–Chile FTA, Art. 11.3.3

**Figure 7: Electronic trade facilitation in S-S PTAs (% of agreements)**



Source: Authors, using TAPED

The AfCFTA should further aim to adopt a single common digital certificate of origin (CoO) system as a standard platform that can easily be accessed by all exporters and administrative agencies in state parties. Here, experiences of regional blocs, particularly the Common Market for East and Southern Africa (COMESA), ECOWAS and SADC, provide important insights into the design and implementation of such a system. SADC launched an electronic certificate of origin (eCoO) pilot regionally in May 2020, aimed at harmonising the process of automation for registration, issuance and transmission of the CoO (Desiderio Consultants, 2020a). This also includes several security features such as optical watermarking technology (to distinguish between original and copies of CoOs issued), digital rubber stamps of the competent authority and signatures of authorised officials, microprint (to deter unauthorised reproduction of the CoO), a 2-D barcode encrypt and decrypt system (to ensure data integrity), public key infrastructure technology (to ensure data security and authenticity) and printer control language (to control the printing of only one original CoO) (*ibid.*). The regional framework builds on national modules of eCoO in Botswana, Eswatini, Malawi, Mauritius, Namibia, Tanzania and Zambia. Mauritius is the only SADC country to have completely developed its eCoO facility, and now awaits online exchange with the rest of the SADC FTA member states. COMESA is also piloting its eCoO under the Digital Free Trade Area, with the aim of such certificates becoming a precondition for accessing preferential customs duties rates when imported in another country that is member of the same free trade area to which the country where goods are originating is part (Desiderio Consultants, 2020b).

However, a point of contention here could be the technological neutrality of e-signatures. Some 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. On the other hand, some countries in ECOWAS have enacted technology-specific legislation based on e-signatures, such as public key infrastructure, to increase reliability of e-signatures.

#### 4.4 Digital business taxation

A continental approach to taxing the digital economy in Africa needs to be based on cooperation and specific principles for taxing transactions. There needs to be certainty in how a tax applies, effective tax administration and a balanced approached 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. Harmonisation of rules for taxation emerged as the most critical regulation for boosting cross-border e-commerce in Banga et al.'s (2021) survey in African countries.

In today's digital age, many digital business models do not require a physical presence in countries where they sell, reaching customers through remote sales and service platforms instead. This 'remote' participation in the domestic economy enabled by digital means, without a taxable physical presence, is often seen as the key issue in the digital tax debate (OECD- BEPS, 2019). Global digital firms can easily transfer their intangible assets (e.g. data or IP) across tax jurisdictions, exacerbating tax base erosion. This has rendered existing international taxation frameworks, based on physical presence, less effective. The OECD's BEPS debates have focused primarily on the use of complex and sophisticated legal structures to avoid tax classification as a Permanent Establishment but the challenges faced by African countries differ from those facing countries in the Global North. For African countries, the digitalisation of the tax base is itself the challenge (Rukundo, 2020), in addition to limited capacities to address administrative challenges.

The AfCFTA could provide a guiding framework for applying indirect tax to digitally traded goods. Examples emerge from across the continent. In response to the recommendations made by the Davis Committee, South Africa amended its VAT Act in 2014 to better capture the digital economy and foreign and local digital suppliers. The amendments require 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 1 million rand. In 2019, Kenya and Nigeria also introduced legislation to apply taxes on certain types of transactions through electronic channels or the platforms through which transactions occur (Ogo, 2020). Data localisation has emerged as another potential way to ensure enterprises with real interests but only a virtual presence in each country can be made to pay taxes that reflect the revenues of the economic activities they undertake within these countries (Mayer, 2018).

In trade negotiations, the specific digital taxation focus has been on 'digital customs duties' and principles around most-favoured nation (MFN) and national treatment. In this context, MFN would bind a state so that it doesn't discriminate in its treatment of e-commerce originating from different exporter countries while national treatment would extent that treatment to prevent discrimination between domestic and imported forms of e-commerce.

Only five of the 60 S–S trade agreements provide for MFN treatment in e-commerce, and this is in their e-commerce chapter. Of the five agreements that do, the Chile–Brazil FTA has soft commitments.<sup>17</sup> While a ban on custom duties on electronic transmissions is one of the most common provisions found in PTAs with digital trade rules (Burri and Polanco, 2020), only 15% of the S–S trade agreements have such a provision. Of the 60 agreements, only nine have commitments on non-imposition of custom duties on electronic transmissions. In eight of these, the ban extends only to customs duties, fees or other charges on or in connection with the importation or exportation of digital products but not to internal taxes, fees or other charges, provided they are imposed in a manner consistent with the agreement.

If broad definition of ET is taken – that is, all services that can be supplied cross-border via online channels (Mode 1) – the protection given by African countries to some of their domestic services sectors under the GATS may also be lost. Using the most conservative estimates and narrowest definition of ET (as digitisable products), UNCTAD (2019, 2020) has estimated that no customs duties on ET can lead to substantial tariff revenue loss to the developing countries, which will rise continuously as more and more products are digitalised<sup>18</sup>. The potential tariff revenue loss to sub-Saharan African countries is twice that to the WTO high-income countries.<sup>19</sup> As technology improves, many more physical goods will feasibly be transmitted digitally. This would mean that more and more non-agricultural market access (NAMA)

<sup>17</sup> In Africa, the US–Morocco agreement, commits parties to non-discriminatory treatment.

<sup>18</sup> [https://www.wto.org/english/tratop\\_e/com\\_e/com\\_webinar\\_13jul2020\\_e/banga.pdf](https://www.wto.org/english/tratop_e/com_e/com_webinar_13jul2020_e/banga.pdf)

<sup>19</sup> [https://unctad.org/system/files/official-document/ser-rp-2019d1\\_en.pdf](https://unctad.org/system/files/official-document/ser-rp-2019d1_en.pdf)

tariff lines will be able to circumvent duties, threatening to disregard members' GATT and GATS schedules (South Centre and ATPC, 2017). For instance, while some African countries have put limitations in GATS on architectural service suppliers, under these new rules the domestic markets would be completely open (*ibid.*).

## 4.5 Cross-cutting issues

In addition to the above-mentioned e-commerce-specific issues, e-commerce is affected by a range of cross-cutting issues, which are being negotiated under different protocols under the AfCFTA, such as commitments under trade in services negotiations, particularly in financial and telecommunications services as well as computer-related services, as well as negotiations under the Trade in Goods, IP and Investment Protocols.

### 4.5.1 Increasing market concentration

Under the Competition Protocol in the Phase 2 AfCFTA negotiations, deliberations are being made over whether to create a superseding continental competition authority (such as in the regional authority COMESA) or a cooperation framework on competition policy without a suprenational enforcement institution (such as in the case of SADC). In either case, Phase 2 negotiations under the Competition Protocol need to go beyond addressing standard competition issues (such as anticompetitive agreements, cartels, abuse of dominance and merger control) and extend to competition challenges within the context of a platformised digitalised economy, such as use of artificial intelligence, data fusion, app-based transactions, algorithmic business intelligence and other digital platforms (UNECA et al., 2019).

The US and China together account for 90% of the market capitalisation value of the world's 70 largest digital platforms, with Africa and Latin America together accounting for only 1% (Andreoni and Roberts, 2020). Currently, most African countries lack policies regarding the control and use of data, increasing the risk of their data being controlled by whoever gathers and stores data and then has exclusive and unlimited rights to it. Using the power of Big Data, e-commerce giants have emerged as critical intermediaries integrating across business lines and slowly taking over essential infrastructure on which competitors depend (Khan, 2016). For example, Amazon increasingly controls the infrastructure of online commerce through its massive Amazon Marketplace, which it uses as a laboratory to sell and test sales of new goods. The Marketplace allows it to force independent merchants to use its site, to both sell goods as a retailer and host sales by other retailers, and to gather massive amounts of data on other merchants, giving it a tremendous competitive advantage (Khan, 2016). Competition can therefore no longer be measured primarily through pricing and output, since it runs the risk of ignoring the adverse effects of predatory pricing and how integration across business lines can be anticompetitive (*ibid.*).

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.*).

There is, therefore, a critical need to build capacity within African competition authorities (which can be continental, regional or national) in African countries to deal with the rising power of digital platforms and the changing landscape of competition. There is scope in the AfCFTA Competition Protocol to

address new challenges and the abuse of dominance using data and data-related capabilities in the digital economy, but this would require (UNECA et al., 2019; Commonwealth Secretariat, 2020):

- distinguishing predatory practices from innovation-driven price reductions
- understanding the power of network effects on competitiveness
- 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
- defining the relevant market in the context of digital apps and platforms that are increasingly penetrating across industries – for instance, classification of Uber as a taxi provider or technology service will facilitate the process of regulating it.

#### 4.5.2 Re-defining consumer rights in the digital age

Consumer protection, in particular, has emerged as an important obstacle to cross-border e-commerce in Africa: 60% of small firms in Banga et al.’s (2021) survey of 31 African businesses ranked low online trust as a primary obstacle constraining local e-commerce. Interviews with African firms reveal that low online trust among consumers is stemming from concerns around privacy of their data, cybercrime and lack of dispute resolution mechanisms (*ibid*). As per UNCTAD’s Global Cyberlaw Tracker, in 2020, only 25 out of 54 African countries have online consumer protection legislation in action, and only 23 African countries have competition laws in place as well as competition authorities to enforce those laws. Consumer rights therefore need to be strengthened, going beyond fighting hoarding and price gouging to ensuring consumers rights on the use of digital platforms and online purchases.

Interestingly, in 83% of S–S trade agreements, where there is a dispute settlement mechanism, it does **not** apply to the e-commerce provisions, including on non-discrimination and custom duties. In fact, the Chile–China FTA explicitly excludes e-commerce provisions or chapters. In general, North–South RTAs tend to have stronger interest in consumer protection than do S–S agreements (Gaitan G., 2020), and, while 21% of the S–S trade agreements in our analysis include a consumer protection regulation—typically on protection for consumers using e-commerce or consumer confidence in e-commerce, prevention of deceptive practices, and cooperation activities or recognising the importance of cooperation between respective consumer protection agencies. - **none** of them have binding commitments. The differences in enforcement of e-commerce provisions may be more political than economic; North–South trade agreements tend to have stronger dispute resolution mechanisms than S–S trade agreements, as countries in the Global South have sovereignty-based concerns or a different attitude towards institutionalisation, based on varying colonial pasts and collective identity (Allee and Elsig, 2016). For instance, in Africa, where the overwhelming majority of countries have obtained independence only in the past half-century or so, sovereignty-based concerns are expected to lead states to adopt weaker, more diplomatically based, solutions to dispute settlement (*ibid*).

The AfCFTA provides an important opportunity for a coordinated approach to competition policy across relevant national authorities (such as information regulators and competition commissions) on a range of related issues, including personal data protection, data privacy and data security. Following the approach East African Community (EAC) and COMESA, the AfCFTA Competition Protocol can seek to address consumer protection issues strictly related to competition, but with an expanded formulation that allows for deeper treatment of consumer protection.

#### 4.5.3 Technology transfer and access to source code

Many African countries have domestic laws in place and are also party to several international and regional agreements on IP. Membership by 44 AU member states of the WTO has a significant influence on how an AfCFTA IP Protocol is being designed. The WTO Agreement on Trade-Related Aspects of

Intellectual Property Rights (the TRIPS) does not provide exceptions to regional PTAs established after its coming into force (WTO, 1994) (such as the AfCFTA) so they can provide better treatment to the nationals of the members of those agreements (UNECA et al., 2019). This means that, unlike other AfCFTA Protocols, the benefits of an IP Protocol must be extended to all WTO member states. Moreover, African countries have different levels of obligations in IP treaties beyond the WTO, including participation in multilateral IP treaties and commitments arising from bilateral trade agreements.

Therefore, the approach taken by the IP Protocol in the AfCFTA negotiations is likely to be one providing a cooperation framework. It is likely to focus on norm-setting in only a few areas deemed otherwise neglected by existing international frameworks, such as traditional knowledge. It is feasible and realistic to achieve regional economic integration in IP rights, including through (i) arrangements for regional cooperation and sharing of experiences on IP rights in general; (ii) regional filing systems, usually for patents, but also for trademarks and industrial designs; and (iii) development of one substantial law or unification of laws for members of a regional organisation (UNECA et al., 2019). Regional institutions like the African Regional Intellectual Property Organization and the Pan-African Intellectual Property Organization provide for regional cooperation in the management of IP. However, at the REC level, only COMESA currently has a regional IP rights policy.<sup>20</sup> Efforts are underway at regional level to assist EAC member states to implement the TRIPS with a view to promoting copyright and cultural industries, traditional knowledge, geographical indications and technology transfer (UNECA et al., 2019).

E-commerce specific aspects of IP include source codes and algorithms and cyber theft of trade secrets. Some countries allow access to their markets on the condition that investors make technology available to local administrations or companies. This has been observed in the case of China, where a number of foreign companies, including IBM, Microsoft and Intel, are engaging with China on source code-sharing arrangements (Banga et al., 2021). Proposals banning source-code sharing requirements, likely driven by the concerns of US investors in China<sup>21</sup>, can prohibit the transfer of technology, production processes or other proprietary information. The origin of such prohibitions were proposals put forward by the US in 2016 to the WTO programme on electronic commerce<sup>22</sup>.

In their survey of 31 African businesses, Banga et al. (2021) find that 90% firms expressed the need to access digital intelligence generated by platforms using the data provided by the private sector. While access to source code from foreign firms in exchange for market access can facilitate technology transfer in Africa (Afriximbank, 2019), this approach may not be effective in African countries individually. A regional approach under the AfCFTA may be useful in negotiating access to source code for market access but this would require harmonised policies on data protection and privacy, potentially negotiated in the E-Commerce Protocol. African governments may at times also require access to source code from foreign firms for effective regulation in areas of taxation, competition law, technology transfer and government procurement, which could help protect domestic African industries against unfair practices. Currently, of the 60 S–S trade agreements, nine – all with an e-commerce chapter – contain a provision that reconciles e-commerce with IP – that is, a commitment to ‘not impair’ IP rights or to the ‘importance of protecting’ IP rights, among others – but NO agreement bans countries from requiring the transfer of, or access to, source code of software owned by a person, as a condition for the import, distribution, sale or use of such software.

#### 4.5.4 Other cross-cutting issues

<sup>20</sup> [www.ip-watch.org/weblog/wp-content/uploads/2013/05/Comesa-IP-policy-May-2013.pdf](http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/Comesa-IP-policy-May-2013.pdf)

<sup>21</sup> US–China Business Council, ‘Best practices: Intellectual property protection in China’, <https://www.uschina.org/reports/best-practices-intellectual-property-protection-china>, accessed 18 October 2017.

<sup>22</sup> Work Programme on Electronic Commerce, Non-Paper from the United States (JOB/GC/94)

A range of cross-cutting issues are also being examined under the Trade in Goods and Trade in Services Protocols. For instance, commitments made under the GATS and the Trade in Services Agreement in the AfCFTA Protocol, which has taken a GATS+ approach, may be important for digital development and digital trade in Africa. Services and investment chapters in RTAs deal with e-commerce to the extent that they cover products that are digital or can be delivered electronically, usually under the title ‘Electronic Supply of Services’. Only eight of the 60 S–S PTAs had such a provision, with six also indicating which provisions prevail in case of inconsistency. Only four agreements have market access and national treatment MA and NT commitments for CRS: 11 on telecommunications and 6 on financial services. If commitments are made on these issues, they are usually binding.

A number of issues under the Trade in Goods Protocol also affect e-commerce. Logistical and postal competence issues, poor physical infrastructure and non-tariff barriers such as lack of clarity regarding rules of origin and of a reliable payment system, are also key challenges to cross-border e-commerce in Africa (Futi and MacLeod, 2021). The cost of logistics is high, making it difficult to ship goods across borders. As a result, most small sellers use bus companies, which tend to have a courier arm where the rates are more favourable than those of larger cross-border courier companies. Sending goods via bus companies (i.e. through informal channels) means the sellers do not pay taxes, but delivery is limited to existing bus routes (Banga et al, 2021). A major digital economy innovation is the 3D printer; spare parts and other goods can be ‘printed’ based on licences bought from the IP owner. There remain questions on where responsibility for the quality of the product rests, and what rules of origin apply. Liberalisation of capital goods and equipment critical for e-commerce under the ITA, as well as setting of *de minimis* thresholds and implied customs regimes under the Trade in Goods Protocol, can also affect the facilitation of e-commerce parcel trade. Other issues include digital trade facilitation, automated customs and digital payments, which form part of trade facilitation in Phase 1. Increasing inter-operability in payment solutions, particularly cross-border payment systems, is important for boosting intraregional trade in Africa. Some progress is already underway on this, with AUDTS recognising the importance and relevance of digital financial services within AfCFTA to facilitate greater intra-African trade. Digital regional payments systems have also emerged that reduce the cost and time associated with cross-border trade, such as the COMESA Regional Payment and Settlement System and the East African Payments System. At continent level, the African Development Bank has launched a Pan-African Payment and Settlement System to allow payments for goods and services; designed in partnership with the AU, this is intended to be the first digital payment system across the entire continent.

## 5 Conclusion: implications for the AfCFTA E-commerce Protocol

This paper has analysed existing digital trade provision in 60 S–S trade agreements, using the TAPED dataset, with the aim of drawing lessons for the AfCFTA E-commerce Protocol. A number of important policy insights have emerged.

- 32% of South–South (S–S) PTAs have digital trade provisions, of which 12% have an e-commerce provision only while 20% have separate e-commerce chapter. The importance of digital trade provisions in S–S trade agreements has evolved over time: of 40 S–S trade agreements signed between 2001–2009, only 6 (i.e. 15%) had an e-commerce provision, compared to 13 of 20 (i.e. 65%) S–S PTAs with an e-commerce provision, signed post 2009.
- South–South trade agreements on e-commerce tend to involve a lot of ‘soft’ language and ‘best endeavours’, rather than binding obligations. Several such agreements exclude chapters on e-

commerce from the coverage of the dispute settlement mechanisms of those agreements, rendering their provisions unenforceable. The result is that South-South agreements on e-commerce solidify common positions on negotiating topics while retaining policy space.

- Definitions of e-commerce range between agreements. Clarity on the definition of e-commerce in the AfCFTA protocol will enable a better understanding of the breadth of e-commerce issues to be dealt in the context of trade within the continent.
- The e-commerce topics that appears most significant to trade negotiators from the global south is that of data protection and privacy, followed by electronic trade facilitation and consumer protection. Interestingly, the African private sector also ranked regulations in these areas as most critical for boosting intra-regional e-commerce in Africa (Banga et al., 2021).
- African countries already have a common framework for these issues in the African Union Convention on Cyber Security and Personal Data Protection, however as of June 2020 only eight countries had ratified the convention (AU, 2020). The AfCFTA could employ language to encourage or require its state parties to ratify the convention.
- Enforcement of data protection and privacy remains a challenge on the continent. Drawing lessons from the ECOWAS regional data protection agreement, the AfCFTA could create a platform for cooperation between national Data Protection Authorities (DPAs) or even create regional DPAs for pooling resources, sharing best practices, and harmonising data enforcement across member states.
- There is a need for AfCFTA to prioritise capacity-building in data collection, storage and processing; it can build on the existing principles under the Convention on Cyber Security and Personal Data Protection of the AU on enabling free movement of data within regions, consistent with REC member states' interest in protecting privacy and ensuring security. Sector-specific policies on data can be included within the AfCFTA if, for instance, regulators want to retain control of data pertaining to critical sectors/interests, such as national security and finance.
- Electronic trade facilitation remains a relatively uncontroversial issue that could prove a ‘low hanging fruit’ for the AfCFTA e-commerce negotiations. The protocol can include provisions on electronic authentication, electronic signatures and digital certificates, as well as electronic certifications of origin, that aim to make cross-border trade easier, faster and more transparent for traders. However, negotiators should take care to avoid duplication with the existing protocol on trade facilitation under the AfCFTA protocol on trade in goods and consider whether further specific measures on electronic trade facilitation might not be better addressed within the trade in goods sub-committee on trade facilitation.
- There needs to be certainty in how a tax applies, effective tax administration and a balanced approached 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. More clarity is needed on the moratorium, its coverage and revenue implications. Accordingly, African countries need to conduct a deeper assessment of the revenue aspect of the zero-customs duty rule.
- When asked as to their own priorities for the e-commerce protocol, African businesses emphasize harmonized and balanced approaches to taxation. The AfCFTA protocol can provide a cooperation platform for countries to coordinate over their approaches to the taxation of cross-border e-commerce on the continent. Should negotiators be willing to go further, they could also consider positions on whether or not to prohibit customs duties on electronic transmissions between African countries, but should take care as not to risk undermining their negotiating leverage on this issue at the multilateral level where this remains highly controversial.

- The competition protocol could follow the approach of the EAC and COMESA in seeking to address consumer protection issues strictly related to competition, but with an expanded formulation, allowing for deeper treatment of Consumer Protection, in a further part of the Protocol on Consumer Protection.
- It is more feasible and realistic to achieve regional economic integration in IP rights, including through a) arrangements for regional cooperation and sharing of experiences on IP rights in general; African governments may at times also require access to source code from foreign firms for effective regulation in areas of taxation, competition law, technology transfer and government procurement, which could help protect domestic African industries against unfair practices.

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