

The AfCFTA and Data Governance Frameworks in Africa



28 April
2022

9:00am Accra
11:00am Geneva
12:00pm Nairobi

Session Report

Background

UNDP, in partnership with the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Africa (ECA), the International Trade Centre (ITC) and the Trade Law Centre (tralac) hosted a session at the UNCTAD Global E-Commerce week to discuss how data could be treated in the digital trade instrument of the AfCFTA and governed coherently in all AfCFTA protocols.

Amid global discussions on the governance of international data flows, consultations and surveys with the African private sector indicate emerging concerns regarding the impact of individual country policies on firms' ability to engage in cross-border digital trade. The possibility of a continental Data Policy Framework will be an important factor in unlocking cross – border trade.

The banner features logos for eCommerce Week, UNDP, International Trade Centre, tralac, United Nations Economic Commission for Africa, and UNCTAD. The main text reads: "We'll be discussing the **AfCFTA and Data Governance Frameworks in Africa**". Below this are five circular portraits of speakers with their names and titles: Emily Mburu-Ndoria (Director, Directorate of Services Investment, Intellectual Property and Digital Trade, AfCFTA Secretariat), Francis Osifo (Co-Founder, 54Gene), Melissa Omino (Acting Director, Centre for Intellectual Property and Information Technology Law, Strathmore University), Richard Boateng (University of Ghana), and Ify Ogo (Regional Coordination Specialist (AfCFTA), UNDP). At the bottom, it says "Join us on **Thursday, 28 April 2022**".

Participation

Participants comprised representatives of governments, international institutions, regional economic communities, research

institutions, civil society, private sector organisations.

Panel Discussion

Introductory remarks: Dr. Ify Ogo, Regional Coordination Specialist (AfCFTA), UNDP

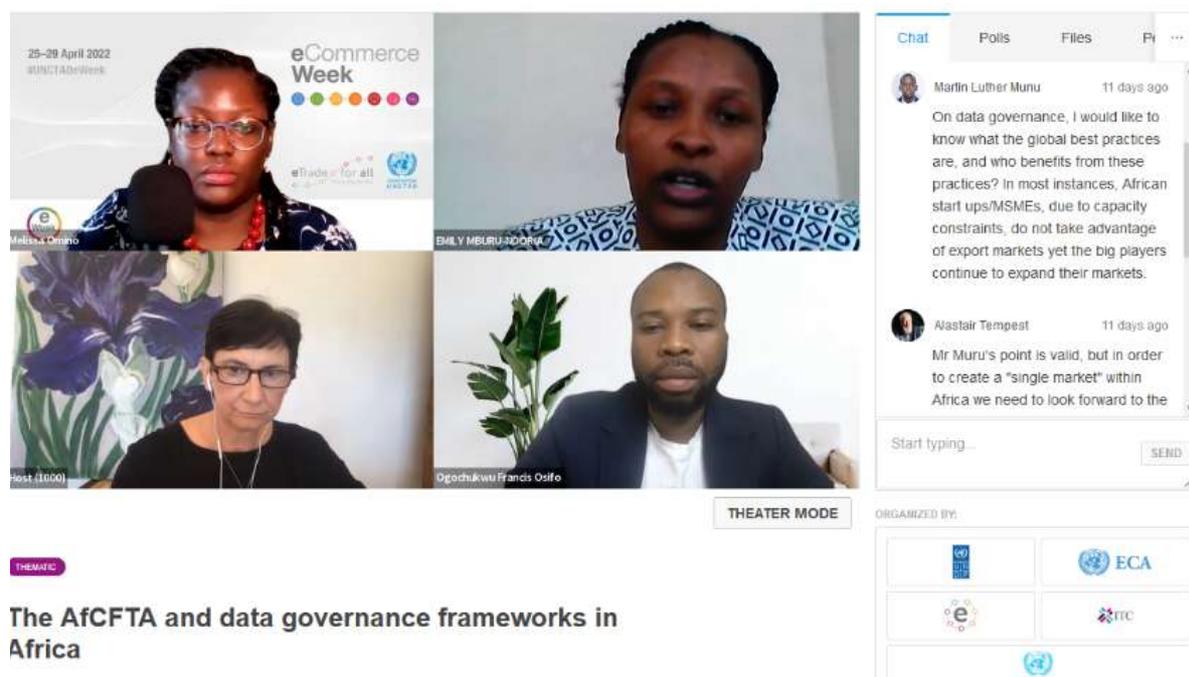
Dr Ogo kickstarted the discussion with an overview of a UNDP – led ongoing project on digital trade and the AfCFTA, which is focused on understanding the priorities and ambitions of operators for the continental market. Since

early 2022, through a continent – wide survey and complementary consultations with operators, UNDP has been asking firms of all sizes what they want to benefit from the AfCFTA.

An issue repeatedly raised in these engagements is data and its role in cross -

border digital trade. Building on these engagements with operators and other stakeholders, Dr Ogo framed the session to answer key questions that have important implications for the AfCFTA and other policy systems: what is data, what are the types of data, who are the data rule - makers and how do data – related rules affect firms as they trade and scale throughout the continent.

Moderated by Trudi Hartzenberg, Executive Director, Trade Law Centre (tralac), panellists were Ms. Emily Mburu-Ndoria, Director, Trade in Services, Investment, IPR and Digital Trade, AfCFTA Secretariat; Mr. Francis Ogochukwu Osifo, Vice President, Engineering, 54gene; Dr Melissa Omino, Acting Director, Center for Intellectual Property and Information Technology Law, Strathmore University, and; Professor Richard Boateng, University of Ghana Business School.



Ms. Emily Mburu – Ndoria, Director Services, Investment, Intellectual Property Rights and Digital Trade, AfCFTA Secretariat – The AfCFTA, Digital Trade and Data Governance.

Ms Mburu – Ndoria stated that the mandate to negotiate e – commerce and digital trade rules in the AfCFTA emanates from a Decision of Heads of State in January 2020. She further stated that the UNDP – led project will be instrumental in forging the AfCFTA Protocol on Digital Trade.

She also discussed the practicalities of the forthcoming Protocol on Digital Trade. Firstly, not many African countries have experience with negotiating digital trade and e –

commerce. However, this creates an opportunity for Africa to develop a product accounting for her different dimensions.

Also, E – Commerce should have been part of the third phase of AfCFTA negotiations. However, because of the pandemic it was brought forward to Phase 2. Additionally, the mandate was expanded to Digital Trade, to ensure that digital products are included in the scope of the AfCFTA.

Additionally, AfCFTA negotiations on digital trade will occur virtually, and are to be concluded by September 2022. The Council of Ministers of Trade has already established a Committee on Digital Trade.

Further, exploratory and preparatory work is ongoing – involving UNDP and UNCTAD, to highlight key issues to be included in the negotiations, including data protection, data governance and data localisation.

Finally, a situational analysis is ongoing to ensure that the digital trade negotiation agenda/scope is clear. A guidance note for negotiations is also being prepared by the AfCFTA Secretariat, covering block chain, SME protection/growth/scale, as well as e – governance and other related issues. Regional stakeholder consultations led by the AfCFTA Secretariat will soon commence to ensure stakeholders are involved in the process.

Mr. Francis Ogochukwu Osifo, Co – Founder and Vice President of Engineering, 54gene – How does data influence how tech firms scale and operate across African markets? Where does compliance with data regulation create an unnecessary burden?

The criticality of data for business, especially to understand market realities was emphasised by Mr Osifo. He highlighted two main data – related challenges experienced by African businesses; 1. availability of data and 2. limited engagement of regulators. In cases where regulation is absent, there is a compounded challenge as obligations for businesses are not clear. He further pointed to the delicate tension between innovation and regulation. In real terms, innovation is usually far ahead of regulation. The solution therefore is to align incentives and practices to work for all stakeholders.

He highlighted tangible actions to address the tensions between innovation and regulation:

- Innovators should, where possible collaborate with regulators – by providing regular updates and communicating impact of their innovations on the ecosystem. Similarly, regulators need to engage with innovators – by creating

communities to understand practices and impact. Low engagement between regulators and innovators can lead to businesses being shut down.

- The Pan – African Payments and Settlement Platform (PAPSS) presents a good example of engagement between regulators and the private sector. Resolution of the frictions in payments and logistics will transform intra – African trade.

Dr. Melissa Omino, Acting Director, Centre for Intellectual Property and Information Technology Law, Strathmore University – How can AfCFTA build on existing frameworks?

The most immediate view of a seeming need for harmonisation of data regulation on the African continent was posited by Dr. Omino, who highlighted the resultant implication that standards will then be imposed on those countries that do not yet have data rules.

However, she noted there is variance in approaches to data regulation. In fact, there might not be sufficient acquis on data regulation to forge a continental approach. A tough question to be considered is whether harmonisation is the right priority for Africa. Similarly, it is necessary to interrogate the suitability of global approaches for Africans. Another key question is the outstanding definition of data governance/data justice – and whether such a definition required.

A missing middle lens is necessary; beyond i. policies/frameworks and ii. ground rules covering processors and subjects, towards multi – stakeholder and multi – sectoral approaches, to avoid data silos – all while having the data subject as the focus.

Beyond regulation, Dr Omino highlighted that data is not an abstract issue, but should be viewed through the lens of the data subject – the person. Other issues to be considered are cross – border data flows, as well as source

code and algorithm disclosure, especially as African countries are data exporters and less importers. Importantly, the data question is not confined to the digital trade protocol, but cuts across all other protocols. Dialogues with stakeholders are necessary to build a model of data governance in Africa and understand various facets of the issues. Further, Africa needs data champions and revolutionaries who embrace the new realities of commerce and data nexus, and who do not lose sight of rights of the data subject.

The overarching issue put forward by Dr Omino is for African countries to settle the ambition of what is to be achieved through data regulation? The answer to this should be based on the reality of Africans being data exporters, and to deploy the use of data towards African development.

Richard Boateng, Professor, University of Ghana Business School – Is there convergence between public and private sector approaches to data governance? How can these be brought together in a coherent regime that permits enterprise, innovation and development outcomes of the AfCFTA?

Professor Boateng noted the fragmented approach to data policies of African countries, and highlighted an underlying cause of low level of policy readiness, manifested in four main areas; i. content, ii. process, iii. infrastructure and iv. a market of informed actors.

1. Content – there are general laws developed and translated into the digital space. As a result, there are loopholes, for example in cyber – crime laws. Also, maturity of these policies is low. As a result, consumers find it difficult to trust governments. As an example, in Ghana, there is an e – pharmacy policy intended to digitally integrate all pharmacies, involving data localisation requirements.

However, the data used by pharmacies are housed on cloud systems in other jurisdictions.

Additionally, there is a silo approach, as countries focus first on national, not regional interests. Recently introduced taxes on digital transactions in Ghana, Uganda and Nigeria affect cross – border digital trade. A key question is how a regional approach can be forged, which respects national interests.

2. Process – the agility/pace at which countries introduce policies and rules is slow. Also, the vehicles for implementation and enforcement are weak. Data commissions, responsible for enforcing data rules and policies are often resource constrained.

3. Infrastructure readiness – data governance is a lower priority in the face of development challenges. Digital readiness is still low, and lower still is readiness for data governance.

4. Market of informed actors – younger people – Generations X, Y and Z are using digital platforms. These groups expect greater government intervention. There is a design reality gap as governments are playing catch up focused on regulation and taxation.

In terms of regulatory priorities and cycles, Professor Boateng pointed to the era of regulation for electronic transactions, following by a period of rule – making for trust building, especially on cybercrime. As innovations increase, governments are more concerned about control, which hampers the evolution of digital markets. There is a risk that control – focused regulation can drive innovation away from Africa.

On industry standards, he noted that data focused industries create their own standards, as in the financial and health sectors. As a result, there is an urgent need for governments and industries need to coalesce – for acceptance of industry standards.

Question

A question was directed to the panel: is there a sense of the appetite of member states for cross border data flow liberalization? Are states likely to adopt a wide scope for domestic regulation like the Regional Comprehensive Economic Partnership, or a narrow scope (even prohibition of localization) akin to United States – Canada – Mexico Agreement?

Response: Ms. Emily Mburu – Ndoria, Director Services, Investment, Intellectual Property Rights and Digital Trade, AfCFTA Secretariat.

Negotiations have not yet started, and the situational analysis is ongoing. However, from discussions, it would seem there are countries that are in favour of openness, while some want restrictions. Other countries take a conditional approach, as in the approach of China and Russia. The question then is one of finding a balance between all approaches. Also, the objective of digital trade must be

considered in finding balance. Specifically, on data, key questions are whether localisation of data is to be instituted, and whether it will be beneficial. Important to note is that economic development and job creation are node stars guiding the AfCFTA process.

Also, data rules link with trade facilitation, the Protocol on Intellectual Property Rights and protection of innovation, the Protocol on Trade in Services (especially mode 1), and the Protocol on Competition Policy. Also, on the AfCFTA Protocol on Investment, it will be important to explore how the protocol ensures SMEs will invest in the digital economy.

Furthermore, there are linkages to the forthcoming Protocol on Women and Youth – who are the bulk of innovators. Another key objective would be how the AfCFTA can encourage them through a framework that encourages cross – border trade.

Recommendations

- **Innovation and Regulation:** while there is a delicate balance between national and regional level approaches to regulation, the baseline should be that innovators look to the future, to remain on the cutting edge. There should be ongoing engagement and free flow of conversation between innovators and regulators, to keep investment and innovation going. There is a need to balance and harmonise public/private concerns.
- **Data Policy and Regulation:** there needs to be agreement on key concepts. Harmonisation can only flow from agreement on data governance and data justice. Variants in the frameworks point to a need to understand why member States are slow to adopt existing frameworks. Importantly, there is a need to look at the sequence of harmonisation, instead of simply launching processes.
- **Approach to Policy – Making on Data:** data governance policies should look beyond policies and rules to be informed by Africa’s development objectives, accounting for the variance in regulatory approaches of African countries, and rooted in Africa’s realities.
- **Actions at National Level:** certain kinds of data could be made public goods to support stakeholders. Also, institutions that regulate data enterprises should be strengthened with right models and resources on how to share data.
- **Actions at Regional Level:** efforts to circumvent national politics should aim at collaborating with professional networks or associations to establish sector-specific open data platforms that encourage

knowledge-sharing, networking, and collaboration to innovate to benefit the entire continent, drawing data-related lessons from the management of the Ebola epidemic. The benefits of an active sector-specific open data platform (targeted at professionals/practitioners) include rapid data sharing, co-creation of value/solutions, visibility of solutions developed through the shared data, the prompt and informed response by regulators and government, understanding of trends and prediction of future occurrences in the industry.



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