

DIGITAL TRADE REGULATORY INTEGRATION

COUNTRY PROFILE

Eswatini



INTRODUCTION

The African Trade Policy Centre of the United Nations Economic Commission for Africa (ECA) has embarked on a Digital Trade Regulatory Integration (DTRI) initiative with four primary objectives:

- Provide information on digital services trade regulations that could facilitate the negotiation and implementation of the African Continental Free Trade Area (AfCFTA) Protocol on Digital Trade.
- Inform the development of a digital trade integration index that could become a component of the Africa Regional Integration Index.¹
- Inform the addition of African countries to the Digital Services Trade Restrictiveness Index (Digital STRI), as developed by the Organisation for Economic Co-operation and Development.
- Offer a solid basis for further analytical work by ECA and others on digital trade.

The DTRI initiative researches the legal and regulatory environment associated with digital trade and will help African countries bet-

ter understand and address barriers to the growth and development of digital trade and e-commerce. Addressing the issues DTRI identifies will help promote digital trade and e-commerce and make it a more plausible choice for commercial transactions between businesses and consumers.

This country profile is based on observations from two datasets developed from the DTRI initiative. The first includes information on restrictions to digital services trade from 2014 to 2021 and is modelled after the Digital STRI. The second covers measures related to digital trade integration, beginning with the effective date of each measure, and reflects the latest available information. The legal and regulatory measures researched are categorized into policy areas in both digital services trade restrictions and digital trade integration, and the results are presented in the corresponding section of the profile. Where policy areas overlap, the profile presents results only once, to the extent possible.

This country profile presents the key findings for Eswatini.

¹ See <https://arii.uneca.org/>.

RESTRICTIVENESS OF THE REGULATORY REGIME FOR DIGITAL SERVICES TRADE

To assess the degree of restrictiveness among digital services trade in Botswana, an in-depth review of policies, legislation and regulations on digital services trade restrictions was conducted under the five pillars of the Digital STRI:

- Infrastructure and connectivity.
- Electronic transactions.
- Payment systems.
- Intellectual property rights.
- Other barriers affecting trade in digitally enabled services.

Infrastructure and connectivity

Infrastructure and connectivity are considered the basis and main enabler of digital services trade. In Eswatini, infrastructure connectivity is restricted, through monopoly,² by the Eswatini Post and Telecommunications Corporation's (EPTC). EPTC controls fixed-line telephone services and provides critical infrastructure for mobile services

providers. Until 2013, when the Eswatini Communication Commission (ECC) was established as the telecommunications regulator,³ EPTC acted as both the service provider and regulator, which created conflict between EPTC and mobile service provider Eswatini MTN. This conflict had an impact on service delivery in the telephone communications sector. Similarly, until 2018, Eswatini MTN was the only mobile telephone service provider in the country, which led to high mobile telephone service costs due to lack of competition.

In Eswatini, mobile services providers do not have the right to provide interconnection and access services, which is the exclusive purview of ECC.⁴ However, when an application for interconnection made to ECC is granted, ECC must provide access within a reasonable period. Interconnection prices, rates and conditions are subject to ECC's regulatory control, and licensees must make public specific information such as accounting information, technical speci-

2 <http://swazimet.gov.sz/Regulator/Post%20and%20Telecommunications%20Corporation%20Act%201983.pdf>.

3 <https://www.esccom.org.sz/legislation/SwazilandCommunicationsCommissionAct.pdf>.

4 Per the Electronic Communications Regulations of 2016 (<https://www.esccom.org.sz/regulations/The-Electronic-CommunicationsInterconnection-Regulations-2016.pdf>).

cations, and terms and conditions for supply and use.⁵

Dominant and vertically integrated firms are obligated by law to observe accounting separation for specific activities related to interconnection and access. Vertical separation is also required by law.⁶

ECC is legally mandated to monitor market behaviour and conduct necessary market analysis to determine whether there is a dominant player in the market. Following an analysis of the telecommunications market in 2017, ECC declared that EPTC is a dominant player in fixed-line telephone services and Eswatini MTN is a dominant player in mobile telephone services.

Electronic transactions

The electronic transactions pillar focuses primarily on conditions for licensees to engage in e-commerce, online tax registration and declaration, the rules governing cross-border transactions, the protection of confidential information and any dispute resolution mechanism for disputes arising from cross-border digital trade.

This research initiative revealed no discrimination against foreign suppliers engaged in e-commerce. No separate licensing is required for foreign suppliers, and they are subject to the same procedures for register-

ing a company as local suppliers. Online tax registration and declaration are available for non-resident foreign providers without discrimination relative to nationals. However, Eswatini is not a signatory to the UN Convention on the Use of Electronic Communications in International Contracts or the UN Convention on Contracts for International Sale of Goods.

No legal framework protects trade secrets in Eswatini except for those provided in individual employment contracts or similar agreements between parties. Consumer Protection Regulations⁷ and the Domain Name Administration Regulations⁸ provide a legal framework for settling disputes arising from cross-border digital trade. However, a comprehensive dispute settlement framework is still needed for cross-border digital trade as the current provisions are found in sector specific laws and not as a complete, consolidated set of rules.

Payment systems

National payment systems in Eswatini are consistent with internationally recognized standards. Financial institutions are legally required to adhere to the internationally recognized electronic magnetic verification specifications for payment systems, and there is no discrimination in accessing payment settlement methods.⁹ Every customer who has a bank account in any financial in-

5 Per Section 14 of the Electronic Communications Regulation of 2016 (<https://www.esccom.org.sz/regulations/The-Electronic-CommunicationsInterconnection-Regulations-2016.pdf>) and Section 26 of the Swaziland Electronic Communications Act of 2013 (<https://www.esccom.org.sz/legislation/SwazilandElectronicCommunicationsAct.pdf>).

6 Per the Swaziland Electronic Communications Act of 2013 (<https://www.esccom.org.sz/legislation/SwazilandElectronicCommunicationsAct.pdf>).

7 https://www.esccom.org.sz/consumers/Consumer_Protection_Regulations.pdf.

8 <https://www.esccom.org.sz/regulations/The-Electronic-CommunicationDomain-Name-Administration-Regulations-2016.pdf>.

9 <https://www.centralbank.org.sz/national-payment-systems/>.

stitution has access to all the internet banking facilities and services that the bank can provide. Financial institutions have an obligation to seek the approval of the Central Bank of Eswatini to provide those services.¹⁰ The Central Bank regulates the banking activities of all financial institutions in the country.

Intellectual property rights

Until very recently, the intellectual property law regime was very weak, as was enforcement of intellectual property laws. The Copyright and Neighbouring Rights Act,¹¹ which came into force in August 2021, provides for limitations on the use of intellectual property and permits laws that are consistent with international standards. Eswatini has not ratified the World Intellectual Property Organization (WIPO) Copyright Treaty or the WIPO Performances and Phonograms Treaty.

The Intellectual Property Tribunal Act of 2018¹² provides for judicial remedies for the infringement of intellectual property rights. It enjoys the same jurisdictional powers in civil matters as the High Court. The Copyright Act of 2018 and the Trademark Act¹³ provide for criminal sanctions for violations prescribed under the acts. There is no discrimination against foreign firms in trademark registration and protection. Eswatini is a party to the Madrid Agreement and its protocols, the Berne Convention on the Protection of Literary and Artistic Works and the World Trade

Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property.

Other barriers affecting trade in digitally enabled services

This pillar focuses on any other barriers that might restrict cross-border digital trade services, such as measures related to performance requirements and restrictions on downloading, streaming and online advertising. The research revealed no provisions in the reviewed laws that restricted these services. Online advertising related to trade that is accurate and with lawful content is not restricted. Similarly, there are no restrictions on downloading and streaming under the Electronic Communication Act of 2013.¹⁴

Commercial presence in the country is not required to provide cross-border services. However, the 2016 Domain Name Administration Regulations¹⁵ require local presence to register domain names in the country. With respect to restrictions of competition in specific markets, the Competition Act of 2007¹⁶ provides remedies for firms that might be affected by the conduct of other firms in a market. The Competition Bill of 2020¹⁷ will strengthen this position once the Competition Tribunal is in place, which will provide a specialized adjudication process for all complaints of anticompetitive conduct of firms.

10 <https://www.centralbank.org.sz/national-payment-systems/>.

11 <https://www.aripo.org/wp-content/uploads/2019/12/Eswatini-Copyright-Act.pdf>.

12 <https://www.aripo.org/wp-content/uploads/2018/12/Intellectual-Property-Tribunal-Act-NO.18-of-2018.pdf>.

13 <https://www.aripo.org/wp-content/uploads/2018/12/trademarkact1981.pdf>.

14 <https://www.esccom.org.sz/legislation/SwazilandElectronicCommunicationsAct.pdf>.

15 <https://www.esccom.org.sz/regulations/The-Electronic-CommunicationDomain-Name-Administration-Regulations-2016.pdf>.

16 <https://www.esccom.org.sz/regulations/The-Electronic-CommunicationDomain-Name-Administration-Regulations-2016.pdf>.

17 As of this writing, the Competition Bill of 2020 is still being drafted.

INDICATORS OF DIGITAL TRADE INTEGRATION

This section discusses measures related to the level of digital trade integration in Botswana. The regulatory regime of digital trade integration was assessed under 11 pillars:

- Tariff and trade defence on measures applied to intraregional imports of information and communications technology (ICT)
- Public procurement of digital goods and services.
- Foreign direct investment for digital trade.
- Intellectual property rights.
- Telecommunications infrastructure and competition.
- Cross-border data policies.
- Domestic data policies.
- Intermediary liability and content access.
- Quantitative trade restrictions.
- Standards.
- Online sales and transactions.

Since the findings for some of these pillars are discussed in the previous section on Digital STRI, to the extent possible, a duplicative discussion is avoided in this section.

Even though Eswatini is not a party to the WTO Information Technology Agreement and the UN Convention on the Use of Electronic Communications in International Contracts, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce or the UNCITRAL Model Law on Electronic Signatures, this research revealed nothing in the domestic laws that restricts digital trade integration in a substantial way.

Domestic data policies

The country currently has no comprehensive data protection framework, but rather there are data protection provisions in various sector-specific acts and regulations. Several proposed laws that are at the pending bill stage need to be enacted to provide a more comprehensive framework for the regulation and protection of data flows, electronic transactions and cyber activities in general.

Online sales and transactions

Eswatini has a legal framework that regulates consumer protection and e-signatures. The Electronic Records (Evidence)

Act of 2009¹⁸ and the Customs and Excise (Amendment) Act of 2016¹⁹ establish the legal order for the use and validity of e-signatures, while the Consumer Protection Act and Regulations provide a framework for the protection of consumer rights and consumer personal information. However, there are currently no laws regulating online transactions, though the Electronic Transactions Bill of 2020,²⁰ which as of this writing was pending Parliamentary debate and approval, may be introduced. As a consequence, on-

line purchases are not adequately regulated, especially with regard to payment of taxes and duties and the de minimis rule.

Digital tax laws are needed to address taxation of online purchases and the threshold for the de minimis rule. The Eswatini Revenue Authority has already identified this gap in the laws and has engaged the Ministry of Finance to make a proposal for the enactment of the needed laws.

18 https://en.unesco.org/creativity/sites/creativity/files/qpr/electronic_communications_act_eswatini16521.pdf.

19 An online copy of this law is not available.

20 As of this writing, this is in draft form.

CONCLUSION AND RECOMMENDATIONS

The digital regulatory regime in Eswatini is not overly restrictive. Recent laws and regulations in the telecommunications sector have improved digital service regulation, especially the Electronic Communication Act,²¹ the Communications Commission Act of 2013²² and accompanying regulations. This has provided market participants with a clear framework for engaging with other providers of similar services and with consumers. In addition, there is now an independent regulator that monitors the sector, makes appropriate recommendations and intervenes when needed.

Similarly, with the installation of an independent regulator, the service provision landscape has become healthier compared with when EPTC was both service provider and regulator. Laws that protect personal data—Data Protection Bill of 2020, Electronic Transaction Bill of 2020 and Computer Crime and Cyber Crime Bill of 2020—have also made the regulatory framework more effective by ensuring that the treatment of personal information and cross-border data flows is in line with international standards.

The tax laws do not adequately address on-line sales and transactions with regard to the de minimis rule. This means that every item bought online is subject to taxes and duties. This is an area in which the taxation framework needs improvement.

Based on the research findings, it is recommended that the government of Eswatini undertake the following steps to strengthen the country's digital trade regulatory framework:

- Ratify the key WIPO treaties for more effective enforcement and protection of intellectual property rights in the country.
- Hasten promulgation of the three pending pieces of legislation aimed at protecting personal data, regulating electronic transactions, criminalizing unlawful cyber activities and regulating cross-border data flows. This will strengthen the digital trade-enabling framework in the country.
- Review and revise tax laws so that they create an effective regulatory

21 <https://www.esccom.org.sz/legislation/SwazilandElectronicCommunicationsAct.pdf>.

22 <https://www.esccom.org.sz/legislation/SwazilandElectronicCommunicationsAct.pdf>.

mechanism for online transaction that facilitate trade.

- Incorporate the de minimis rule in tax laws, stipulating a threshold for taxes and duties payable for goods bought online so that online transactions below a specific amount can be completed duty and tax free. Currently, even
- very small online sale transactions are subject to taxes and duties.
- Fast track enactment of the Competition Bill to allow firms access to a more comprehensive dispute resolution mechanism, which will be facilitated by the establishment of the Competition Tribunal.



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