

DIGITAL TRADE REGULATORY INTEGRATION

COUNTRY PROFILE

Kenya



United Nations
Economic Commission for Africa



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 Kenya.

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

Fixed and mobile interconnectivity is required under the Kenya Information and Communications Act of 1998, as revised in 2020.² Firms are regulated by the Communication Authority of Kenya, which also regulates prices for both fixed and mobile communications. The authority issues invitations to tender for fixed connections. The

Kenya Information and Communications Act contains no provisions on vertical separation. The National Broadband Strategy for Kenya 2018–2023 contains provisions on net neutrality.³ It requires internet traffic management to be based on objective technical considerations rather than commercial considerations and to be tailored to achieving a legitimate network management purpose. One firm, Safaricom, is dominant in the fixed, mobile termination and mobile origin market segment, with 64 per cent of market share. There are no current restrictions on use of communications services in Kenya.

Under the Data Protection Act of 2019,⁴ data may be transferred abroad on a case-by-case basis, subject to the approval of the data controller or data processor. The act also provides for the cross-border transfer of personal data when certain safeguards are in place and empowers the data commissioner to require certain data to be stored locally.

² <https://dfsobservatory.com/sites/default/files/Kenya-Information-and-Communication-Act-1998.pdf>.

³ <https://www.ca.go.ke/wp-content/uploads/2020/08/National-Broadband-Strategy-2018-2023.pdf>.

⁴ <http://kenyalaw.org:8181/exist/kenyalaw/actview.xql?actid=No.%2024%20of%202019>.

Electronic transactions

There are no discriminatory conditions for licences to engage in e-commerce in Kenya. No licence or authorization is required to engage in e-commerce, apart from the ordinary business registration licence. The Kenya Revenue Authority provides for on-line tax registration and declaration to both resident and non-resident foreign providers. Kenya is not, however, party to the United Nations Convention on the Use of Electronic Communications in International Contracts or the United Nations Convention on Contracts for the International Sale of Goods, but it is a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights. Kenyan legislation also explicitly protects confidential information and the use of electronic signatures with equivalent legal validity to handwritten signatures. It also provides dispute resolution mechanisms.

Payment systems

Payments are governed by the National Payment System Act of 2011⁵ and are regulated by the Central Bank of Kenya. There is no discriminatory access to payment settlement methods. The Central Bank of Kenya is in the process of aligning its national payment security standards to international standards, and its payment systems comply with ISO 20022, the international standard for electronic data interchange between financial institutions. There are no restrictions on internet banking or insurance.

Intellectual property rights

Kenya is a member of the World Intellectual Property Organization (WIPO) and a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Protocol Relating to the Madrid Agreement concerning the International Registration of Marks. Kenya is also party to the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. There is thus no discriminatory treatment for the protection of copyright and related rights. Exceptions are the protection of traditional knowledge and traditional cultural expression and access by persons with disabilities to works that are protected by copyright and related rights. Artworks generated by artificial intelligence are recognized. The Copyright Board is required to keep a register of copyright works and provides safe harbour to Internet service providers, which exempts them from liability for copyright infringement, subject to specified conditions. Judicial and administrative enforcement measures and remedies are available under the Copyrights Act No. 12 of 2001⁶, as amended by the Copyright (Amendment) Act of 2019⁷.

Other barriers affecting trade in digitally enabled services

There is no requirement in Kenyan law to use locally produced software or computer equipment, but foreign nationals wishing to work in Kenya in this field are required to obtain a work permit. Work permits are

⁵ [https://www.centralbank.go.ke/images/docs/legislation/NATIONAL%20PAYMENT%20SYSTEM%20ACT%20\(No%2039%20of%202011\)%20\(2\).pdf](https://www.centralbank.go.ke/images/docs/legislation/NATIONAL%20PAYMENT%20SYSTEM%20ACT%20(No%2039%20of%202011)%20(2).pdf).

⁶ <https://eregulations.invest.go.ke/media/The%20Kenya%20Communications%20Regulations,%202001.pdf>

⁷ <https://copyright.go.ke/sites/default/files/downloads/COPYRIGHT%20ACT%20REVISED%202019.pdf>

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generally only granted in instances where the employer can prove that doing so would be beneficial to Kenya and that there is no suitable Kenyan applicant. Kenya imposes some limitations on downloading and streaming that can affect cross border digital trade. Limitations concern the morality of the content; for example, content on homosexuality cannot be aired on national television, but such content is available on other platforms, such as Netflix and YouTube, without restriction. The Government of Kenya also requires 30 per cent of content aired by television and radio stations to

be local. There are no restrictions on online advertising, and commercial presence is not required to provide cross-border services. The Competition Act⁸ gives firms avenues for seeking redress for business malpractice. The Finance Act of 2020⁹ amended the Income Tax Act¹⁰ by introducing a digital tax to be levied on income derived from services or which accrue in Kenya through a digital marketplace. The amendment of the 2018 Finance Act¹¹ increased the tax on telephone and Internet data from 10 per cent to 15 per cent.

8 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202010>
9 http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2020/TheFinanceAct_No.8of2020.pdf
10 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20470>
11 <https://www.kra.go.ke/images/publications/Finance-Act-2018.pdf>

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 communication technology (ICT) goods.
- 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 du-

plicative discussion is avoided in this section.

Foreign direct investment

The maximum permitted foreign equity share for investment in sectors relevant to digital trade is a minority stake of between 1 per cent and 50 per cent. There are no restrictions on engaging in joint ventures to invest or operate in sectors relevant to digital trade. There are no requirements based on nationality or residency for members of boards of directors or managers in sectors related to digital trade. There is no undue screening of investment and acquisitions in these sectors.

Cross-border data policies

The Data Protection Act of 2019¹² governs cross-border data policies in Kenya. Under the Act, data may be transferred abroad on a case-by-case basis subject to the approval of the data controller or data processor. The Act also provides for the cross-border transfer of personal data where certain

¹² <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019>

safeguards are in place and empowers the data commissioner to require certain data to be stored locally. Kenya is not a signatory to the Asia-Pacific Economic Cooperation Cross-Border Privacy Rules System.

Domestic data policies

Domestic data policies are regulated by the Data Protection Act of 2019¹³. The Act requires data controllers and processors to process data lawfully and to minimize the collection of data; it restricts the further processing of data; it requires data controllers and processors to ensure data quality and to establish and maintain security safeguards to protect personal data. The Act requires any person who acts as a data controller or data processor to be registered with the data commissioner. Once the office of the data commissioner is established, organizations meeting the definition of a controller or processor will need to register as such and renew their registration every three years.

Intermediary liability and content access

An intermediary liability framework is in place, but the scope of liability is limited as it only covers copyright. There is no blocking or filtering of commercial web content or discriminatory use of licensing schemes for Internet service providers and applications, including strict licenses on news providers and other digital service providers.

Online sales and transactions

There are no restrictions on online sales, including on delivery; nor are there restrictions on e-payment, credit cards or other forms of online payment services. The use of an electronic signature with equivalent legal validity to a handwritten signature is provided for by law. There are no restrictions on domain names, such as the registration of a local domain name, the requirement for electronic retail or a physical presence requirement for the registration of a local domain name. The legal framework provides consumer protection for online purchases.

¹³ <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019>

CONCLUSION AND RECOMMENDATIONS

With considerations to the findings from research on Digital Services Trade Restrictions and Digital Trade Integration in Kenya, the following recommendations should be taken into consideration:

- With the advent of the technology-driven fourth industrial revolution, it is important that barriers to effective digital trade be identified and that policy interventions be put in place by Governments.
- The coronavirus disease (COVID-19) pandemic has moved most trade online and aspects of security, data integrity and safeguards must therefore be taken into consideration. One example is the new Data Protection Act, which is timely but has yet to be fully implemented.
- Consumer protection laws also need to take into account the new, mainly digital, trading environment. Furthermore, some new legislation, such as the Digital Tax Act, which provides for a tax on digital transactions, may threaten the progressive nature of digital trade in Kenya, especially in the light of the high cost of Internet access, above all in rural areas. The increased tax on telephone and Internet data from 10 per cent to 15 per cent makes Internet access even more expensive and therefore more difficult to obtain.
- Payment systems also need to be aligned to international standards to provide security to users. Kenya is nonetheless a digitally open country with limited restrictions on Internet access, data sharing and filtering, while safeguards have been put in place to ensure that consumers, intellectual property rights and data are protected.



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