



The Evolution of Digital Trade in Africa:

Analysis and Legal Effects of The AfCFTA Protocol on Digital Trade

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Introduction

With the slew of emerging technologies in international trade and transactions, Africa is experiencing a digital evolution which spans across borders, redefining e-commerce and cross-border trade. This evolution is expanding cross-border economic integration in Africa, and it is particularly reflected in the adoption of the AfCFTA Protocol on Digital Trade (“the Protocol”). The Protocol, adopted in February 2024 by the States Parties to the African Continental Free Trade Agreement,¹ serves as the framework for the Pan-African approach to boost digital trade in Africa. It aims to unify the systems of governance and the protection of digital trade and innovation in Africa.

The Protocol also seeks to harmonise and enhance established systems such as digital payments, intellectual property protection, data protection and cybersecurity. However, although the Protocol has been adopted, the annexes to the Protocol which provide sector-specific regulations, are still under negotiation.²

This article aims to analyse the legal and regulatory implications of the Protocol, particularly its significance to founders and investors in Africa under the Protocol. The article will also identify possible legal issues and uncertainties for founders/investors in the application of the Protocol, and the role of lawyers in the implementation of the Protocol and the navigation of the possible issues and uncertainties.

1 International Institute for Sustainable Development, *The AfCFTA Digital Protocol*, <<https://www.iisd.org/articles/policy-analysis/afcfta-digital-protocol>> accessed 13 July 2025

2 Tralac, *Scope and Details of the Annexes to the AfCFTA Protocol on Digital Trade*, (Tralac Annual Conference, 2024) <<https://www.tralac.org/documents/events/tralac/5394-2024-annual-conference-note-scope-details-of-annexes-to-the-afcfta-protocol-on-digital-trade/file.html>> accessed 18 July 2025

What is Digital Trade?

According to the International Monetary Fund (IMF), Digital Trade refers to all cross-border transactions, digitally ordered (i.e., cross-border e-commerce), digitally facilitated (by platforms), or digitally delivered (through online payment services like Fintech).³

However, unlike under the IMF definition, digital trade under the Protocol, is not limited to cross-border transactions alone. The Protocol defines “Digital Trade” as digitally enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve natural and juridical persons.⁴ Thus, digital trade also applies to entities within the same jurisdiction under the Protocol.

Digital trade is sometimes used interchangeably with e-commerce; however, it extends beyond the traditional definition of e-commerce. While e-commerce focuses on the purchase of goods and services, digital trade accounts for the purchase and sale of goods and services online, as well as non-traditional, non-monetary type transactions, such as the delivery of free services in exchange for user data.⁵ It also incorporates digital platforms, financial technology, cloud services and online infrastructure that support businesses.

3 International Monetary Fund and the Organisation for Economic Co-operation and Development, 'Towards a Handbook on Measuring Digital Trade: Status Update', (International Monetary Fund, October 2018) <<https://www.imf.org/external/pubs/ft/bop/2018/pdf/18-07.pdf>> accessed 17 July 2025

4 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 1

5 Wolfgang Alschmer, E-Commerce or Digital Trade? Why the Difference Should Matter to Lawyers, <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4321743_code1758638.pdf?abstractid=4321743&mirid=1> accessed 10, October 2025

Overview of The AfCFTA Protocol on Digital Trade

The Protocol consists of 52 Articles, divided into 11 parts. It adopts the model of the Digital Trade Agreements established by the 2018 Comprehensive and Progressive Agreement for Pacific Partnership (CPTPP).⁶ The Protocol not only provides extensively for the facilitation of digital trade but also establishes regulatory frameworks to improve trust in digital transactions as well as customer security.

The Protocol is supported by eight annexes, which provide operational details for key sectors. They provide for the following:

- a. Rules of Origin for digital products/services.
- b. Digital identities.
- c. Cross-border data transfers.
- d. Cross-border digital payments.
- e. Legitimate and Public Interest Reasons for Disclosure of Source Code.
- f. Online safety and security.
- g. Emerging and Advanced Technologies.
- h. Financial Technology (FinTech) Regulatory Standards.

Based on the structure of international trade agreements, the Protocol remains legally incomplete and unenforceable without the implementation of the annexes. The annexes upon their approval will detail the rules and procedure for the implementation of the Protocol. It is hoped that with the full negotiation and agreement of the annexes, the Protocol will be primed to serve as Africa's pre-eminent and standardised instrument regulating harmonised digital trade rules across the African continent.

6 Ibid, No.1

Legal and Regulatory Implications of the Protocol



Regulatory Harmonisation and Legal Certainty

The Protocol encourages States Parties to adopt transparent, non-discriminatory, and streamlined licensing procedures for digital payments and data sharing.⁷ It commits States Parties to acknowledge the legal personality of companies established in other member jurisdictions, provided they comply with agreed minimum registration standards.⁸

By promoting mutual recognition of licences issued by other States Parties, the Protocol lowers entry barriers and increases regulatory certainty. This mutual recognition mechanism significantly eases market entry, allowing digital platforms, and online service providers, amongst others, to scale operations without repetitive incorporation procedures in each jurisdiction.



Data Protection

The Protocol emphasises the need for data protection. Key data protection recommendations under the Protocol include:

- a. ***Legal obligations for cross-border data transfer:*** States Parties are mandated to adopt and maintain data protection laws that provide for cross-border transfer of data; establish data protection authorities and ensure cross-border cooperation.⁹ States Parties are further mandated to support data sharing through regulatory sandboxes and policies for data portability and mobility.¹⁰
- b. ***Consent for personal data:*** The Protocol establishes necessary preconditions for consent and lawful basis for the processing of personal data. Under the Protocol, States Parties must establish data protection laws that provide for consent, data collection and transfer, and other data protection policies. States Parties are also encouraged to

7 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 8; Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 9

8 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 11

9 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 21

10 Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 23

implement consumer data portability and data sharing frameworks that safeguard personal data of users.¹¹

- c. **Data localisation:** Data localisation is the practice of keeping data within the region or State it originated from, preventing such data from being transferred to another region or State for processing.

The Protocol generally prohibits data localisation requirements. Under the Protocol, State Parties cannot mandate domestic data processing and storage as a precondition for digital trade.¹² However, data localisation requirements will be allowed where they are put in place for legitimate public interests, but such requirements must be precautionary, non-discriminatory, and proportionate.



Dispute Resolution Under the Protocol

The Protocol relies on the *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes* (“*Disputes Protocol*”) for dispute resolution.¹³ However, only States Parties to AfCFTA can bring disputes under the Disputes Protocol. Thus, individuals or investors looking to lodge complaints to the Dispute Settlement Body (DSB) must liaise with their States to bring up such dispute on their behalf.

Under the Disputes Protocol, dispute settlement progresses through the following stages:

- a. **Amicable Settlement:** States Parties are obligated to first attempt consultations and other amicable means of settling disputes, such as mediation. If the dispute is unresolved after 60 days of amicable settlement, a formal complaint is lodged by an aggrieved State Party, and the dispute is referred to the DSB.¹⁴
- b. **Dispute Settlement Body:** The DSB comprises representatives from various States Parties. The DSB establishes the panel of experts who assess the dispute. The DSB can also authorise the suspension of concessions where States Parties fail to implement the Ruling of the body.

¹¹ Ibid No. 8

¹² Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 22

¹³ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 45

¹⁴ Protocol to the Agreement Establishing the African Continental Free Trade Area on Rules and Procedure on the Settlement of Disputes, Article 6

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- c. ***Panel and Expert Reports:*** The Panel established by the DSB is made up of experts who examine the claims of the parties and make their assessments. Upon assessing the dispute, the Panel issues a report to the DSB to guide the DSB in reaching a decision.
- d. ***Appeal:*** Where parties are unsatisfied by the Report of the Panel, they can appeal to an Appellate body established under the Disputes Protocol. The Appellate body consists of seven members, three of whom shall serve on a case, and its decisions are final and binding.¹⁵

¹⁵ Protocol to the Agreement Establishing the African Continental Free Trade Area on Rules and Procedure on the Settlement of Disputes, Article 20

Legal Uncertainties Under the Protocol

The Protocol, albeit a forward-thinking initiative for digital trade and cross-border transactions in Africa, contains some legal uncertainties which are highlighted below:

1. *Contractual Structuring of Cross-Border Digital Transactions:*

- a. *Governing Law:* The Protocol does not specify a single governing law for contracts. Rather, it encourages States Parties to a contract to adopt laws familiar to both parties that not only reflect aligned national regulations but also, are best adapted to the contract.¹⁶ This is somewhat vague and creates ambiguity for investors as there is problem of which State's law applies to a cross-border contract.
- b. *Jurisdiction:* Though the Protocol relies on the *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (Disputes Protocol)* for dispute resolution, there is no specific provision for jurisdiction on disputes arising from contracts between individuals and/or investors.

2. *Use of Smart Contracts and Electronic Signatures under the Protocol*

Smart Contracts are digital contracts that are stored on a blockchain and are programmed to run or execute when certain preconditions are met. They are written directly into lines of codes on a blockchain and are automatically executed when predetermined actions that have been programmed in the contract are met, without the need for intermediaries.¹⁷

The Protocol does not expressly provide for the use of smart contracts. This is a major lacuna as it creates legal uncertainty for automated cross-border transactions and may hinder blockchain adoption across African markets.

3. *Transitional Legal Risks Pending Full Implementation*

Although the Protocol has been finalised, its eight annexes which are essential

¹⁶ Protocol to the Agreement Establishing the African Continental Free Trade Area on Digital Trade, Article 9

¹⁷ Science Direct, Smart Contract <<https://www.sciencedirect.com/topics/computer-science/smart-contract>> accessed October 10, 2025

for its practical enforcement, are still under review. This interim phase exposes member states and businesses to transitional legal risks, as key regulatory details remain undefined or unenforceable.

Upon finalisation and adoption, the Annexes only become effective after ratification by at least 22 States Parties.¹⁸ After ratification, there is a five-year harmonisation period within which States Parties must update their laws to align with the Protocol and its annexes. During this period, implementation will pose legal uncertainty as there will likely be little to no clarity on the laws investors will be bound by – whether national laws alone or both national laws and the Protocol and its annexes. Also, where a State has harmonised its national laws with the Protocol and its annexes, but another State has not harmonised its laws, investors who seek to transact across these States could face possible uncertainty on the applicable law.

4. *Enforcement Risks for Data Protection*

The Protocol requires member states to implement their own data protection laws, but in the absence of harmonised regional regulatory standards, this creates a fragmented legal environment. This disparity means that businesses operating across borders may face legal consequences in one country for actions that are permissible in another, creating uncertainty and risk. Although the Protocol promotes mechanisms for cross-border complaints and dispute resolution, their success depends heavily on the capacity and reliability of national enforcement bodies, which varies widely. These inconsistencies can erode confidence in the system and limit its effectiveness. Furthermore, once the annexes are finalised, they may introduce more rigorous data protection rules, increasing the regulatory burden for companies that are not adequately prepared.

18 International Trade Administration, 'AFCFTA Digital Trade Protocol' <<https://www.trade.gov/market-intelligence/afcfta-digital-trade-protocol>> accessed 21 July 2025

The Role of Lawyers in Navigating Uncertainties and Shaping Digital Trade Policy

The Protocol presents an evolving legal and regulatory landscape where lawyers can play a pivotal role in navigating the uncertainties arising from the implementation of the Protocol. Some of the roles of lawyers include but are not limited to:

- a. Monitoring the progress of the negotiation of the annexes.
- b. Advising investors on legal and regulatory compliance with domestic laws and the anticipated annexes to the Protocol.
- c. Advising founders on auditing their digital infrastructure, cybersecurity and data protection practices to ensure alignment with domestic laws, and the provisions of the Protocol and its annexes.
- d. Advising founders on the importance of aligning their businesses with emerging digital infrastructure such as the Pan-African Payments and Settlements System, to ensure they stay ahead of emerging trends and regulations.

The role of lawyers is not only limited to navigating legal uncertainties but also includes shaping digital trade policy. States Parties are encouraged to collaborate with stakeholders, including the private sector, in developing and implementing trade-related measures.¹⁹ This opens the door for lawyers to contribute their expertise directly to the creation of laws, regulations, and technical standards that will govern cross-border e-commerce, data flows, and digital services.

Some of the ways through which lawyers can shape digital trade Policies are:

- a. *Thought leadership:* Publication of articles, policy briefs, and commentaries that clarify complex legal concepts and propose actionable reforms.
- b. *Stakeholder engagement:* Participating in policy review committees to ensure private sector realities are reflected in regulatory design.
- c. *Legislative drafting support:* Assisting governments and trade bodies in crafting national laws or regulations that align with the Protocol's objectives while protecting domestic economic interests.

¹⁹ Agreement Establishing the African Continental Free Trade Area, Article 47(2)

Significance of the Protocol to Founders and Investors

Access to a Large Unified Market

The Protocol offers founders and investors access to a market of over 1.4 billion people across 54 countries, which means access to a large pool of youths, as one-third of both the World's and the working age population are projected to be from Africa by 2075.²⁰ By unifying the digital economy across Africa, the Protocol gives businesses ready access to a significant market for their products and services, and the opportunity to hire talent to grow their business.

Companies can distribute their products and tap into unleveraged markets across borders with minimal or no tariffs. For African Countries, this means a boost in foreign direct investment, potentially by up to 111% - 159%.²¹ Small and Medium-size Enterprises (SMEs) particularly, can scale, with lower cost and reduced regulatory restrictions.

No Barriers to Cross-Border Expansion

The Protocol aims to harmonise the regulatory landscape in Africa for doing business, particularly regarding digital trade. Currently, in Africa, different countries have their respective local laws governing trade and innovations, which foreign investors and stakeholders must adhere to. The Protocol seeks to create a harmonised digital policy, giving startups and investors the opportunity to operate effectively and scale across borders, without facing the hassle of fragmented policies and regulations across jurisdictions.²² Also, the reduced tariffs under the Protocol and the African Continental Free Trade Area Agreement aim to boost digital trade across African Countries and increase market expansion for businesses.²³

20 World Bank Group, *Investing in Youth, Transforming Africa* <<https://www.worldbank.org/en/news/feature/2023/06/27/investing-in-youth-transforming-afe-africa>> accessed 20 July 2025

21 Aza Finance, *AfCFTA – Overview, Purpose and Benefits* <<https://azafinance.com/afcta-overview-purpose-and-benefits/>> accessed 16 July 2025

22 Collins Okeke and Mary-cynthia Okundaye, *Non-Tariff Barriers Under the African Continental Free Trade Area: Challenges and Opportunities in Nigeria* <[Non-Tariff Barriers Under the African Continental Free Trade Area: Challenges and Opportunities for Nigeria](#)> accessed 15 July 2025

23 Africa Union Press Release, *Powering Trade Through AfCFTA: a People-Driven Wholesome Development Agenda* <[Powering trade through AfCFTA: a People-driven wholesome Development Agenda | African Union](#)> accessed 14 July 2025

Strategic Considerations for Founders and Investors

1. *Legal Risk Audits*

Prior to starting or scaling any business, founders and investors must first understand the legal environment of the market they seek to penetrate. They must evaluate intellectual property ownership, data processing practices and other legal considerations across jurisdictions.

Whilst the Protocol promises cross-border legal harmonisation, it is important for businesses to ensure compliance with the laws of the jurisdiction they seek to transact, particularly pending the finalisation of the Annexes to the Protocol. Businesses must also comply with trade regulations, labour laws, anti-corruption laws, data protection and privacy laws as well as consumer protection laws of the prospective countries.

2. *Intellectual Property Strategy*

To succeed in the AfCFTA digital marketplace, businesses must take proactive steps to protect their intellectual property and avoid legal pitfalls. Relying solely on the Protocol's provisions is not enough, founders must ensure their trademarks, patents, and copyrights are properly registered within national systems. In addition, leveraging global protection mechanisms, such as those offered by the World Intellectual Property Organization (WIPO), can provide broader coverage and legal certainty. A well-structured IP strategy not only shields innovations but also strengthens a company's position in competitive markets. As digital trade expands across Africa, safeguarding intellectual assets becomes a strategic necessity, not just a legal formality.

3. *Policy Monitoring*

Investors and founders must proactively monitor updates on the Protocol to stay informed of policy changes, ratification timelines, etc, amongst other changes that may occur. Policy monitoring not only enables founders and investors to focus on scaling across borders but also helps them maintain updated information on the Protocol, to prevent legal issues flowing from a lack of information on a policy update or change.

4. *Structured Partnership*

Foreign founders and investors are advised to strategically collaborate with law firms in countries they seek to transact business, to successfully navigate the relevant legal and regulatory hurdles pending the finalisation of the annexes to the Protocol and after the implementation of same to ensure compliance.

Conclusion

The Protocol is significant to the advancement of Africa's digital economy. By creating a harmonised system of laws and reducing trade barriers, the Protocol creates opportunities for cross-border collaboration and investment. The Protocol not only streamlines compliance obligations but also helps to strengthen investor confidence in cross-border transactions. However, the true impact of these provisions will depend on the political will of States Parties to implement and enforce them efficiently.

As Africa embraces this new era of digital trade, Nigerian founders and investors are encouraged to seize the opportunities created by the Protocol, to lead and benefit from the continent's digital trade advancement.

Furthermore, the active participation of lawyers in the implementation of the Protocol will help ensure the legality and commercial practicability of the emerging digital trade rules, thereby reducing the gap between regulatory intent and business reality. Lawyers who develop expertise in emerging technologies and cross-jurisdictional regulations will find themselves at the forefront of advancing the discourse of digital Trade in Africa. By engaging with regulators, industry associations, and multilateral bodies, lawyers can contribute meaningfully to creating harmonised digital trade that facilitates innovation and promotes fair competition across the African Continental Free Trade Area (AfCFTA).

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