



International Economic Law Clinic

**THE POTENTIAL IMPACT OF THE WTO JOINT STATEMENT
INITIATIVE ON E-COMMERCE ON KENYAN LAW & THE AfCFTA
NEGOTIATIONS ON E-COMMERCE**

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To : The Permanent Mission of the Republic of Kenya to the United Nations Office
at Geneva and Other International Organizations in Switzerland

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¹ We would like to express our fervent gratitude to our coordinators Professor Tomasz Milej, Mrs. Caroline Kago and Ms. Beatrice Ngunyi. We are also grateful to our mentor, Mrs. Jacqueline Mwangi, for her guidance and patience. We are sincerely grateful for this opportunity that has enabled us gain research skills and learn about ecommerce in the context of the WTO and AfCFTA.



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Executive Summary

Although e-commerce has become highly relevant in the national policy agenda – just to mention the digital service tax introduced recently in Kenya –, there is hardly any international legal framework governing cross-border e-commerce transactions. While customs duties are being levied on physical goods, levying of the same on digitalised products such as e-books has been banned by the WTO Declaration on Global Electronic Commerce in 1998. Being consumers of e-commerce products developed in the North, African countries keep suffering revenue losses. On the other hand, however, free trade in digital products may contribute to the rise of African e-commerce platforms. Regulation of international trade of digital products requires thus consequential political decisions.

The international legal environment and consequently the national space for political decisions are likely to change. In 2017, a group of WTO Members initiated negotiations aiming at adoption of a plurilateral WTO Agreement on e-commerce (the Joint Statement Initiative (JSI)). In 2020, the Assembly of the AfCFTA directed that an adoption of an e-commerce protocol withing the AfCFTA should be prioritised during the Phase III negotiations. E-commerce strategies have also been adopted at the level of African Regional Economic Communities.

The aim of this research paper is to assess the potential impact of the WTO JSI on e-commerce on Kenyan legislation and AfCFTA negotiations. It will be divided into four sections. The first section will outline Kenya's obligations as a WTO Joint Statement member once negotiations are completed. The second section will identify the pieces of Kenyan legislation that are likely to be impacted once the WTO Plurilateral Agreement on E-commerce is signed. In addition, an assessment of the consequences and changes that may be required following the agreement's entry into force will be carried out. The third section will evaluate the regulatory or policy space that Kenya will have after the agreement is ratified. The fourth section will provide an assessment of Kenya's regulatory space upon adoption of the WTO Plurilateral Agreement. Finally, a comparison will be made between the current wording of the WTO Plurilateral Agreement and the ongoing discussions surrounding the AfCFTA Protocol on Ecommerce before concluding the paper.



Definition of Terms

Data localization - the collection, processing and storage of data within a country's borders.

Data Transfer- the transmission or copying of electronic data/ information from one location to another.

E commerce - the production, distribution, marketing, sale or delivery of goods and services by electronic means

Electronic signature - means data in electronic form that is in, affixed to, or logically associated with an electronic data message that may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message.

WTO Joint Statement Initiative – A [joint statement](#) made by [71 WTO members](#) after the 11th Ministerial Conference to initiate exploratory work towards future WTO negotiations on trade-related aspects of e-commerce. This working document contains their intention to commence these negotiations.



1. Introduction

An e-commerce transaction can be defined as “the sale or purchase of products or services over computer networks using mechanisms specifically intended for receiving or placing orders.”² E-commerce encompasses a broad range of transactions carried out via mobile phones and other devices such as personal computers and tablets, with purchases frequently conducted through the use of applications and platforms.³ Over the years, its rapid expansion has drawn attention to the impact it will have on promoting trade, economic growth and development.⁴ Electronic commerce and the internet are intended to boost trade by lowering the cost of gathering and processing information from distant markets, creating global access to specific goods and services, and making it possible to send goods and services that previously required physical delivery over the internet.⁵

Within the global market, the use of electronic means and the internet in commerce has been seen to make the process of initiating trade with other countries a lot easier, faster, and less expensive.⁶ This has increased the need for various countries to initiate agreements in order to facilitate easier, transparent, and clear trade interactions among themselves. An example of such an agreement is the WTO Joint Statement Initiative. It is a consolidated text on e-commerce that seeks to bring member states together through multiple proposals on various aspects of e-commerce in order to promote economic growth and trade opportunities.⁷

Among the issues under consideration within the Initiative are how member states will enable e-commerce by maintaining a legal framework that will govern electronic transactions, issues on openness within e-commerce such as cross-border transfer of information, increase of trust and confidence within e-commerce, cross-cutting issues such as domestic regulation transparency and cyber-security, telecommunication, and

² United Nations Conference on Trade and Development, ‘Consumer protection in electronic commerce’, 2017, 2

³ United Nations Conference on Trade and Development, ‘Consumer protection in electronic commerce’, 2

⁴ United Nations, ‘Electronic commerce, international trade and employment: review of the issues’, Economic Commission for Latin America and the Caribbean, Washington, LC/WAS/R, 2002, 2.

⁵ United Nations, Electronic commerce, international trade and employment: review of the issues, 4.

⁶ Nuray Terzia, ‘The impact of e-commerce on international trade and employment’ 7th International Strategic Management Conference, Turkey, 2011, 746.

⁷ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 82.



easier market access, among others.⁸ Moreover, the negotiations between the various member states are guided by certain principles embodied in the Joint Statement Initiative to ensure that its goals are met. These include clarity, transparency, and predictability in the domestic frameworks of the parties, innovation and competition, increased participation in digital trade by micro, small, medium-sized enterprises, avoiding barriers to digital trade, and avoiding measures that impede electronic commerce.⁹

Kenya, as a member party, will be required to comply with the agreement's obligations upon its implementation. This could result in changes to Kenyan legislation as well as to the various agreements and initiatives to which Kenya is a party, such as the African Continental Free Trade Area Protocol on E-Commerce.

2. Obligations of Member States as Enshrined in the WTO Joint Statement Initiative on Electronic Commerce

As mentioned earlier, the WTO Joint Statement Initiative (JSI) is a consolidated text on e-commerce that seeks to bring member states together through multiple proposals on various aspects of e-commerce in order to promote economic growth and trade opportunities.¹⁰ It seeks to level the playing field of its member states by agreeing on a set of common rules that shall apply to all the members and that run across a range of multiple electronic commerce issues such as promoting openness and trust in e-commerce, enabling e-commerce and enabling markets for e-commerce among others.¹¹

The JSI enshrines certain core obligations, all of which are centred on promoting e-commerce among member parties. The first obligation towards its members is to encourage them to take steps to facilitate e-commerce by maintaining a legal framework that governs electronic transactions. This framework is expected to be consistent with the JSI principles and not to impede electronic transactions. Furthermore, the legislation

⁸ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021.

⁹ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021.

¹⁰ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 82.

¹¹ Geneva Trade Platform, 'Joint Initiative Statement on Electronic Commerce' <https://wtoplurilaterals.info/plural_initiative/ecommerce/#:~:text=The%20WTO%20E%2Dcommerce%20Joint,WTO%20Ministerial%20Conference%20in%202017.> on 15 July 2022.



should reduce the regulatory burden on e-commerce and promote industry-led electronic commerce development.¹² Electronic authentication and e-signatures, electronic contracts and invoicing, and electronic payment systems are a few of the issues highlighted by the JSI as requiring consideration.¹³ The Initiative also addresses the facilitation of digital trade through paperless trading, the imposition of a *de minimis* value below which countries shall not collect customs duties or taxes on shipments, and the encouragement of members to adjust their trade policies in a flexible manner to promote improvements and adapt to emerging trade trends.¹⁴

Second, the Initiative encourages its members to promote openness in electronic commerce by avoiding digital product discrimination and permitting the cross-border electronic transfer of information, including personal information, where the activity is for the conduct of a covered person's business.¹⁵ Furthermore, the Initiative emphasises the importance of consumer protection by requiring members to protect online consumers in the same way that offline consumers are protected. Party states are also expected to preserve consumer privacy by safeguarding personal information in order to foster online trust.¹⁶ Fourthly, under cross-cutting issues, the JSI encourages members to facilitate transparency by ensuring electronic availability of trade-related information; domestic regulation; cooperation and cooperation mechanism.¹⁷ Kenya as a member state of the ongoing negotiations, shall be necessitated to build upon the obligations of the JSI. The next section shall attempt to discuss the legislations that may be affected in Kenya upon conclusion of the negotiations.

¹² WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 5.

¹³ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 6-9.

¹⁴ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 10-15.

¹⁵ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 22, 26

¹⁶ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 42.

¹⁷ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 51-56.



3. Kenyan Legislation Likely to be Affected by the WTO Joint Statement Initiative on E-Commerce and the Implications on Kenyan Legislation

3.1 Intellectual Property Rights

The scope of intellectual property rights such as copyrights and patents affect how e-commerce evolves. The creative industries are adapting their business methods and embracing technology to exploit digital opportunities, while guarding against new risks. Legislative efforts have been made to ensure effective protection and enforcement of rights in the digital era. In this respect, we have the Copyright Act, the Industrial Property Act and the Trademark Act as the key legislations. Even though the Copyright Act affords protection where an infringement has occurred,¹⁸ the law has not been able to cope with intellectual property works being digitized at an incredible pace. For example, one can send millions of unauthorized copies of artistic work all over the world at the touch of a button.¹⁹ The nature of digital technology encourages copying of digitized intellectual property works, virtually and instantaneously.

The intellectual property laws do not explicitly cover technological advancements. For instance, the Industrial Property Act²⁰ anticipates receipt of industrial designs presented in the form of ‘drawings, photographs or other graphic representations’ but does not specifically cite electronic formats. It is hence not clear as to whether it falls within the broad scope of ‘other graphic representation.’ This can prove to be a challenge especially since the Joint Statement Initiative leverages on the electronic platform. It is essential that this aspect is captured in the regulatory space.

3.2 Consumer Protection Act

Over a period of time, the growth of e-commerce, the increase in online consumers and the challenges unique to them that are not common in traditional commercial transactions has necessitated the need to adapt regulatory frameworks to provide online protection.²¹ Section C of the Joint Statement Initiative recognises the importance of consumer protection by including certain stipulations. First, member states are expected to pass legislation against spam, which is defined as any misleading, fraudulent, or

¹⁸ Section 38 of the *Copyright Act, 2001*

¹⁹ “Intellectual Property on the Internet, A survey of issues. [Copyrights and Related Issues],” <http://ecommerce.wipo.int/survey/> accessed on 06th May 2022.

²⁰ Act No. 3 of 2001

²¹ United Nations Conference on Trade and Development, ‘Consumer protection in electronic commerce’ 2



deceptive commercial activity that may cause harm to, or may threaten to harm, consumers participating in internet commerce.²² Additionally, party states are expected to preserve consumer privacy by safeguarding personal information in order to foster online trust and to increase consumer access to and awareness of consumer redress or recourse mechanisms, especially for consumers engaging in cross-border transactions. Finally, member states are encouraged to promote business trust through source coding.²³

As a result, as a party to the continuing effort, Kenya would be obliged to fulfil its obligations under the prescribed clauses, including ensuring that consumer protection measures satisfy the initiative's criteria. Kenya's own legislation likely to be affected by the JSI is the Consumer Protection Act that obtains its force of action from Article 46 of the Constitution of Kenya.²⁴ The Act was enacted to safeguard consumers, to prohibit unfair trade practises in consumer transactions, and to address concerns connected with and incidental to those objectives. Since the Act does not distinguish between online and offline protection, it can be assumed that the Act covers both.²⁵ Regarding e-commerce, the Act makes a small mention by defining what an internet agreement under section 2.²⁶

However, it is silent on other critical areas of online consumer protection. For example, the Act makes no mention of the security dangers consumers face when making payments online or the fact that consumer data can be accessed by unauthorised third parties without the consumer's knowledge or consent.²⁷ Similarly, since consumers, be it the country itself or individuals, will be dealing with international transactions, the Act is silent on jurisdictional issues, particularly where consumers may be confused about the protections afforded by a seller's jurisdiction, the remedies available in the event of a dispute, and the enforcement of consumer awards, cross-border fraud, and the growing availability online of unsafe products that have been banned or recalled

²² WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 42.

²³ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 42.

²⁴ Article 46, *Constitution of Kenya*, 2010.

²⁵ *Consumer Protection Act*, 2012.

²⁶ Section 2, *Consumer Protection Act*, 2012.

²⁷ United Nations Conference on Trade and Development, 'Consumer protection in electronic commerce' 14.



from the offline marketplace.²⁸ As a result, the lack of clarity and ambiguity entrenched in the local legislative framework with regard to online consumer protection necessitates the need for revisions to address these crucial matters.

3.3 Competition Act

Throughout the world, competition laws seek to preserve and promote market competition by prohibiting businesses from engaging in anti-competitive behaviour. Today, such laws are a critical component of the global economy's legal and institutional framework. Whereas decades ago, anti-competitive behaviour was primarily viewed as a domestic phenomenon, many aspects of competition law enforcement now have a significant international component. The widespread incorporation of competition policy disciplines in regional and bilateral trade agreements demonstrates a clear recognition of the importance of competition policy for trade liberalisation and market integration by a diverse set of economies worldwide.²⁹

The JSI has made reference to competitive laws in section E. It requires parties to maintain appropriate safeguards to prevent suppliers of telecommunications networks or services who, individually or collectively, are a major supplier from engaging in or continuing anti-competitive practises such as anti-competitive cross-subsidisation or the use of information obtained from competitors for anti-competitive purposes.³⁰ In Kenya, the primary piece of competition legislation likely to be affected is the *Competition Act (2010)*. The Act's primary objective is to promote and protect competition in the national economy and to safeguard consumers against unfair and deceptive market products.³¹ Additionally, the Act establishes two dual organs that serve as the primary institutional bodies responsible for overseeing competition matters in Kenya, namely the Competition Authority and the Tribunal, and prescribes the two bodies' respective powers and functions.³²

²⁸ United Nations Conference on Trade and Development, 'Consumer protection in electronic commerce' 14.

²⁹ Organisation for Economic Co-operation and Development, 'Competition policy, trade and the global economy: an overview of existing WTO elements, commitments in regional trade agreements, some current challenges and issues for reflection', 2019, 5

³⁰ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 61.

³¹ *Competition Act (2010)*

³² Part II and VII, *Competition Act (2010)*.



In terms of e-commerce, section 7 of the Competition Act establishes the Competition Authority of Kenya, tasked with the responsibility of protecting consumers from unfair and misleading market conduct.³³ This is likely to be true for both online and offline consumers. Additionally, section 70-A empowers the Authority to investigate and impose administrative remedies for violations of consumer rights, regardless of whether the violation occurred online or offline.³⁴ Additionally, Part VIC of the *Kenya Information and Communications Act* contains express provisions prohibiting anti-competitive behaviour in the market sphere.³⁵

Although Kenya has competition legislation, these laws do not expressly address the issue of e-commerce and its implications for competition law. The dynamics of e-commerce are significantly different than those of more traditional markets.³⁶ Notable characteristics include the emergence of dominant online platform operators operating across multiple product segments, the growing importance of data collection and exploitation, and the use of algorithmic competition mechanisms.³⁷ The growth of e-commerce has the potential to increase competition in retail markets, significantly increase consumer choice, and stimulate and facilitate product distribution innovation.

However, certain dynamics may also motivate or facilitate economic operators to engage in anticompetitive coordinated and unilateral behaviour, as evidenced by the increasing level of antitrust enforcement in e-commerce markets.³⁸ For example, in the competition sphere, there is a possibility that exploitative concerns may arise in e-commerce markets, such as price discrimination, excessive pricing, or slotting allowances.³⁹ This calls for the need to amend the relevant legislations to cater to the specific elements of e-commerce.

³³ Section 7, *Competition Act* (2010).

³⁴ Section 70-A, *Competition Act* (2010).

³⁵ Part VIC, *Kenya Information and Communications Act* (2012).

³⁶ Organisation for Economic Co-operation and Development, 'Implications of e-commerce for competition policy', 2019, 7.

³⁷ Organisation for Economic Co-operation and Development, 'Implications of e-commerce for competition policy', 7.

³⁸ Organisation for Economic Co-operation and Development, 'Implications of e-commerce for competition policy', 7.

³⁹ Organisation for Economic Co-operation and Development, 'Implications of e-commerce for competition policy', 46.



Finally, it should be noted that, while Kenya intends to fulfil its obligations under the JSI by ensuring that proper competition policies are in place to regulate e-commerce markets, issues such as the country's implementation capacity and regulatory friction remain a concern. Concerning the second point, Kenya is a member of both the EAC and ECOWAS, each of which has its own set of competition policies. As things stand, one of the issues is the ongoing struggle to determine jurisdiction when a dispute arises and a conflict of laws exists. As a result, once the negotiations are completed, Kenya must find a way to consolidate all of its ratified laws in order to ensure harmony.⁴⁰

3.4 Data Protection

3.4.1 The Joint Statement Initiative on Data Protection

3.4.1.1 Flow of information-cross boarder data flows

The Joint Statement Initiative requires parties to adopt safeguards to protect personal data and privacy. There ought to be adoption and application of rules for the cross-border transfer of personal data.

3.4.1.2 Public access to data

Data ought to be available to the public in order to foster economic development, social development, competitiveness and also innovation. Such data should also be made available to interested stakeholders such as investors. Open internet access for digital trade should also be provided in line with GAT annex on Telecommunications.⁴¹

3.4.2 The Data Protection Act

Kenya is seen to have taken steps towards fostering ecommerce through the Data protection Act where the right to privacy of citizen's data is encompassed. Through the Act, it is seen that Kenyan legislators foresaw a situation where data will need to be protected as it flows across countries. In this light therefore, it can therefore be concluded that the Data Protection Act (DPA) of Kenya seeks to promote transparency

⁴⁰ Odongo Ombis W, 'Selected key aspects and challenges facing competition law in Kenya: Procedural and substantive concerns, abuse of dominance in the telecommunications sector (Airtel Ltd v Safaricom PLC) and regionalization of competition law in Kenya' Master Thesis in International Commercial Law, University of Kent, Canterbury UK, 2019, 45.

⁴¹ General Agreement on Trade in Services, Annex on Telecommunications, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 359 (GATT Secretariat 1994), 33 I.L.M. 44, 73 (1994) [hereinafter GATS, Annex on Telecommunications].



as provided for under the principles in the JSI. The Act has equally established the Office of the Data Commissioner that acts as the in-charge and monitors data compliance in accordance with the Act.

Nevertheless, more effort has to be put towards securing personal data so as to breach trust between data subjects and state parties of the Joint Statement Initiative on e-commerce. Article 25 of the Data Protection Act provides for the principles and obligations of personal data protection whereby the personal data of a data subject ought to be processed in accordance with the right to privacy. Article 31 of the Constitution of Kenya provides for the right to privacy where information relating to their private affairs or family ought not to be unnecessarily revealed. Comprehensive explanation ought to be given when data concerning family and personal affairs is processed or shared. Personal data also needs to be processed in a lawful and transparent manner. The data also needs to be collected for explicit, specified and legitimate purposes. Also, in cases where data is to be transferred outside Kenya, there ought to be provided enough data protection safeguards or consent from the data subject.

Following from Section 25 of the DPA, it is important to highlight the fact that protection of data is a key factor to consider when it comes to e-commerce. The assurance that their right to privacy will be protected promotes e-commerce.

Section 48 of the DPA further provides for transfer of personal data outside of Kenya. There are conditions which ought to be met before such data is transferred outside Kenya. These include; proof from the data commissioner that there are appropriate safeguards which have been put in place to ensure the protection and security of personal data. The other condition which ought to be met is that the transfer of data need be necessary for the execution of a contract or if it is a matter of public interest that such data is transferred outside the country. Any infringement of the right to privacy of citizen's data by corporations will attract sanctions as penalty fines where the victim will be entitled to compensation.

3.5 The Computer Misuse and Cyber Crimes Act



This Act criminalizes cybercrimes which occur in the internet space. It seeks to protect confidentiality and integrity of data as well as computer systems.⁴² Section 3 of the Cyber Misuse and Cybercrimes Act goes ahead to provide for protection of the right to privacy, freedom of expression and also for access to information as required by the Constitution. The Act criminalizes acts such as unauthorised interception of data in computer systems.⁴³ Section 17 of the Cyber Misuse and Cybercrimes Act also speaks to the crime of unauthorized access of data, computer fraud, fraudulent use of electronic data as well as interception of electronic messages and money transfers. This Act is likely be affected by the Joint Statement Initiative since it fails to capture cybercrimes that navigate around the concept of ecommerce. A lot of its legislation revolves around the general use of computer systems and data and this will be subject to change upon the evolution of ecommerce. Many new crimes will emerge in the cyberspace and thus it will require that the act is subjected to changes.

4. An Assessment of Kenya’s Regulatory Space upon Adoption of the WTO Plurilateral Agreement

4.1 What is Policy Space?

Policy space can be defined as the freedom and ability of a government to identify and pursue the most appropriate mix of economic and social policies to achieve equitable and sustainable development that is best suited to its particular national context. It outlines a country’s options for developing its own national development strategy as well as its interactions with the global economy and markets.⁴⁴ The concept is supported by three principles of international law: the sovereignty and equality of states, the right to development, and the principle of special treatment for developing countries.⁴⁵

The concept of policy space is usually crucial to countries, especially developing countries as policy is utilised to promote development.⁴⁶ This is because a robust and flexible policy space allows developing countries to choose the best mix of policies for

⁴² Section 3, Cyber Misuse and Cybercrimes Act, 2018

⁴³ Section 17, Cyber Misuse and cybercrimes Act, 2018

⁴⁴Jackson R, ‘The purpose of policy space for developing and developed countries in a changing global economic system’ Centre of Development Studies University of Cambridge, 2021, 2.

⁴⁵ Jackson R, ‘The purpose of policy space for developing and developed countries in a changing global economic system’ Centre of Development Studies University of Cambridge, 2021, 2.

⁴⁶ Overseas Development Institute, ‘Policy space: Are WTO rules preventing development?’, 2007, 1.



achieving sustainable and equitable development given their unique national circumstances. The argument reflects the notion that states should be able to weigh the benefits of participation in the global economy against the loss of policy flexibility that often accompanies international laws and agreements.⁴⁷

However, as global connection between states increases, integration of international agreements and conventions have been seen to have an effect on the policy space of the impacted states. For instance, a key concern is that developing countries are losing their policy space due to the limits of international laws as a result of the integration of international agreements. Since they are bound by international regulations, this tends to limit the space that they have in promoting their national interests over international obligations thus slowing down the effectiveness of their development programmes.⁴⁸

For instance, integrating domestic regulation with international policies system as stipulated in different multilateral or bilateral agreement, even if the symmetries are balanced, may be detrimental to a country's autonomy over its policies. This is because control is constrained by foreign acts and conditions that alter the policy environment of the country.⁴⁹ Changes in the international financial market, for instance, can necessitate a level of a country's interest rate, can compel a country's interest rate to be necessary in relative terms but inappropriate in absolute terms. Similarly, conditions tied to international financial aids might restrict a nation's ability to choose its own public expenditures.⁵⁰

As a signatory to the Joint Initiative Statement, Kenya's policy space is anticipated to be affected once the discussions conclude. As a result, this section will seek to evaluate the impact of the implementation of the WTO Plurilateral Agreement on Kenya's policy space.

⁴⁷ Bhumika Muchhala 'The Policy Space Debate: Does a Globalized and Multilateral Economy Constrain Development Policies?' Woodrow Wilson International Center For Scholars, 2007, 1.

⁴⁸ Overseas Development Institute, 'Policy space: Are WTO rules preventing development?', 2007, 2.

⁴⁹ Irene Fedrigo, Shahribanu Habibova, Fanni Terézia Somhegyi, 'The Problem of Shrinking Policy Space', ResearchGate, 2018, 6.

⁵⁰ Irene Fedrigo, Shahribanu Habibova, Fanni Terézia Somhegyi, 'The Problem of Shrinking Policy Space', ResearchGate, 2018, 6.



4.1.1 Policy Space with Regards to Consumer Protection Laws and Competition Laws

As previously mentioned, the JSI encourages its member states to establish laws that afford online consumers the same level of protection as consumers who engage in other forms of transactions.⁵¹ On the other hand, international trade agreements may limit a country's policy space by imposing rules that cannot be circumvented or encouraging member states to use certain regulations as model laws.⁵² This, according to a reading of the Initiative, is not the case. It is therefore reasonable to anticipate that Kenya will have the flexibility to enact online consumer protection laws that reflect the interests that it seeks to achieve in terms of e-commerce development.

The same holds true for Kenya's competition legislation. Member parties are required by the JSI to maintain necessary measures to prevent suppliers of telecommunications networks from engaging in or continuing to engage in anticompetitive practises.⁵³ Regarding competition legislation, the Initiative imposes neither hard laws nor regulations to be utilised as models by its member states. Kenya already has a Competition Act, but modifications are necessary to reflect e-commerce safeguards. Therefore, the absence of stringent rules affords Kenya greater flexibility in enacting laws pertaining to this field.

4.1.2 Policy Space with Regards to Data Protection

The protection of data when it comes to e-commerce has yet to be fully ascertained in Kenya. The reason for this is that the Data Protection Act fails to directly address issues of data in relation to ecommerce. The Data Protection Act as regards ecommerce still requires a lot of regulatory frameworks by legislative agencies in order to protect the right to privacy as provided under Article 31 of the Kenyan Constitution. The concept of accepting cookies online allows for software to collect personal data from Kenyan citizens. Their names, age, earnings and also interests are captured and this data can be misused by various corporations that transact online. The gap which Kenya is yet to fill is that it needs to allow for the Data Protection Act to incorporate as well as promote

⁵¹ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 42.

⁵² Jackson R, 'The purpose of policy space for developing and developed countries in a changing global economic system' Centre of Development Studies University of Cambridge, 2021, 2

⁵³ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 61.



user awareness so that Kenyans are made aware of how their data needs to be protected online. As ecommerce takes root, it is important for policies to be passed in an aimed to protect the right to privacy as enshrined under the Constitution of Kenya, 2010.

4.1.3 Policy Space with Regards to Digital Taxation in Kenya

Digital taxation is a new concept which has emerged in Kenya as a result of the wide usage of mobile phones thus facilitating e-commerce. The key challenge facing digital taxation is the question of jurisdiction.⁵⁴ It proves difficult when the question of non-resident companies arises. Normally, a lot of taxation benefits exist in the host state since manufacturing, marketing and distribution take place there. E-commerce on the other hand brings a shift to the market jurisdiction.⁵⁵ It is difficult to determine where economic activities took place and also their value for taxation purposes.⁵⁶ Many host states will be left without a method of gaining tax from e-commerce. The income tax of non-resident companies which conduct online trading will fail to be taxed and a proposal has been made to Kenya to create a standard tax rate for such companies as France has done.⁵⁷

Since digital transaction transcend across borders, it is important for Kenya to set out how taxation is to be done to avoid challenges of tax shifting especially when it comes to non-resident companies. Well thought out international agreements will help minimize the risk of interfering with cross border trade⁵⁸. This is because of the fact that digital spaces transverse borders and the fact that they lack a well-defined territory, this tasks Kenya to coming up with legislation that caters for e-commerce.

4.1.4 Policy Space with Regards to Cyber Security

There exist legislations already set out under the Cyber Misuse and Cyber Crimes Act that seek to protect people's personal space. The Act criminalizes cybercrimes and this ensures the protection of data. This shows that Kenya has already taken progressive steps that will be able to sustain e-commerce in the instance that the JSI comes into operation. However, there exists policy space for legislators to have a key focus on cybercrimes relating to e-commerce. A lot more on the jurisdiction of courts to listen

⁵⁴ UN Committee of Experts on International Cooperation in Tax Matters 2018

⁵⁵ OECD (2014), "Broader tax challenges raised by the digital economy", nAddressing the Tax Challenges of the Digital Economy, OECD Publishing, Paris

⁵⁶ ibid

⁵⁷ Kenya Revenue Authority, "Taxing the Digital Economy in Kenya" Policy Brief, September 2020

⁵⁸ Mukora A.et al,(2020)



to such offences has to be legislated in order to avoid instances where there is conflict on which state party will handle the matter since cyberspace transcends across borders

4.1.5 Policy space around Intellectual Property Rights

Examining the intellectual property system through the lens of localisation provides a unique theoretical framework that justifies the need to preserve the freedom available to states under the intellectual property system. The policy space in the intellectual property system is the space where flexible and optional rules are contained in international agreements. These flexibilities permit states to adapt rules to suit their local circumstances. It is within this space that states can adapt the globalizing waves flowing from e-commerce.⁵⁹

Many intellectual property treaties contain policy spaces that states can utilize to adapt the rules to fit their local circumstances. Moreover, despite the fact that the WTO's TRIPS Agreement⁶⁰ contains certain minimum standards which narrows the policy space available to states, it does not completely harmonize the rules regarding the protection and enforcement of intellectual property rights. States can therefore utilize this policy space to achieve certain objectives at the national level. Generally speaking, the policy space in intellectual property law is broad enough for Kenya to address pressing local issues such as facilitating access to medicines and regulating the use of trademarks and geographical indications in order to protect public health.

Even though the WTO's TRIPS Agreement⁶¹ with its minimum standards does narrow down the policy space available to states,⁶² it does not completely eliminate the policy space available to states under international intellectual property law. Moreover, the WTO's dispute settlement system has played a crucial role in preserving the policy space available to states under international intellectual property law. The jurisprudence emerging from both the WTO's dispute settlement system with regard to issues involving intellectual property rights over the last 25 years, has evolved. The more recent decisions in cases involving trademarks, geographical indications, and the

⁵⁹ Ken Shadle, "Policy Space for Development in the WTO and Beyond: The Case of Intellectual Property Rights" (2005) GDAE Working Paper No. 05-06.

⁶⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

⁶¹ which entered into force in 1995.

⁶² Article 41- 61 of the TRIPS Agreement.



enforcement of intellectual property rights indicate a shift towards adopting approaches that respect and preserve the policy space available to states under intellectual property law.⁶³

With the JSI in place it seems likely that Kenya shall have the leeway to regulate the computing facilities of the interactive computer services, regulate the behavior of users within its locality⁶⁴ and adopt measures addressing liability for intellectual property infringement and the protection and enforcement of IPRs. The text of the JSI recognizes that even though policies may be put in place by computer service providers, there is need to regulate and protect users from the inappropriate behaviour of other users.⁶⁵ This duty ultimately lies with the member states.

4.2 Conclusion

In conclusion, Kenya has a lot of policy space to legislate on when it comes to the whole question of e-commerce under the JSI. The whole concept of data protection in matters ecommerce is yet to be fully handled under the Data Protection Act as shown above. Also issues under the Law of Contract are yet to be catered for. The concept of electronic signatures has not been incorporated into the Law of Contract and thus a lot of policy space exists in that regard. Also, in matters to do with competition Law, there exists policy space since the Competition Act does not speak to ecommerce. It will only be helpful upon the incorporation of the JSI that modifications are made to reflect the requirements of the JSI on ecommerce safeguards.⁶⁶

5. A Comparison between the Current Text of the WTO Joint Statement Initiative with the Ongoing Discussions Regarding the AfCFTA Protocol on E-Commerce

This part compares the current text of the WTO Joint Statement Initiative with the ongoing AfCFTA negotiations on e-commerce. It will identify the similarities as well as differences in policy objectives of both sides as well as give the possible reasoning and recommendations for some of the objectives. The areas discussed include electronic

⁶³ See the Panel Report, *China – Intellectual Property Rights (2009)*, para. 7.179 & 7.180; Appellate Body Report, *US – Section 211 Appropriations Act (2002)*, para. 205.

⁶⁴ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 25

⁶⁵ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 25

⁶⁶ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021



contracts, advertising, payments, signatures as well as cross-cutting issues like cyber security and protection of personal data.

Although there is no comprehensive negotiation document on the AfCFTA e-commerce protocol, the e-commerce agenda is captured in the African Union Convention on Cybersecurity and Personal Data Protection (2014) and the African Union Digital Transformation Strategy (2020-2030). The Convention sets out standards, principles and actions to be taken by AU member States in the areas of e-commerce, electronic contracts, personal data protection, electronic advertising, and security of electronic transactions.⁶⁷ Similarly, the Strategy presents policy objectives related to e-commerce including the creation of a continental digital single market aligned with the AfCFTA; the emergence of an enabling regulatory framework for e-commerce at continental level; the creation of a single African Payments Area; and solutions to challenges such as parcel delivery and payments.⁶⁸

5.1 E-contracts

The JSI does not go into the particulars of electronic contracts.⁶⁹ It simply states that the legal validity of an electronic contract shall not be denied solely on the ground that it is in made electronically. These contracts include those made by automated message response.

AfCFTA on the other hand goes into particulars.⁷⁰ First is the consent needed from both parties to conclude a contract by electronic means. Secondly, it provides for the availability of the contractual conditions in forms that can be conserved or reproduced.⁷¹ This is unlike the automated message contracts whose terms and conditions are solely in the hands of the service provider and the recipient need only to click accept and they are bound by the contract. They would not again have access to those terms which makes the terms prone to manipulation by the holder. This is the same with the mobile loan contracts which the subjects never get to see them until they are informed, they have breached their obligations.

⁶⁷ AU Convention on Cyber Security and Personal Data Protection, 2014.

⁶⁸ AU Convention on Cyber Security and Personal Data Protection, 2014.

⁶⁹ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, Section A (3)

⁷⁰ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 5.

⁷¹ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 5.



The third concerns acceptance of a contract. AfCFTA provides that one shall have time to verify details like price before accepting. It also provides that an order, acceptance of offer and receipt of acceptance shall be deemed received when the addressee can access them. Considering that the JSI does not bother going into the particulars of concluding electronic contracts, Kenya and other African countries may legislate individually or collectively through AfCFTA on the nitty-gritty of such a process to the extent that they will enhance the privacy of such transactions, security from cyber frauds while avoiding undue delays at the same time.

5.2 E-signatures

The JSI provides that a signature shall not be found to be invalid just because it is in electronic form. It also provides for non-interference of party autonomy in choosing the appropriate electronic authentication methods.⁷² Reading into this will reveal the need to allow all e-signature service providers to compete freely. This, of course, does not deny Parties from requiring authentication to meet certain standards for certain categories of transactions.

As regards signature, AfCFTA accords the same probative value to copies of contracts signed electronically as the contract itself if they can be proved they are a true copy and with the necessary certification where need be. An e-signature also has the same legal weight as a handwritten one.⁷³ What this means is that African countries are encouraged to let parties decide what methods of electronic authentication they will prefer to use and any regulations to the same should not be in a manner that is trade restrictive.

5.3 E-payments

JSI is exclusive on this issue. It recognizes the need for secure and interoperable e-payment methods. It introduces the principles of no less favourable treatment, national treatment and non-discrimination (e.g., in licensing) of e-payment services and service suppliers of like services and suppliers.⁷⁴ It also speaks to the right of establishment where states shall grant other members right to establish or expand their commercial presence in a territory including acquisition of existing enterprises. This also includes

⁷² WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, Section A (2).

⁷³ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 6.

⁷⁴ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, Section A (5).



granting access to clearance in public entities as well as financing.⁷⁵ AfCFTA, on the other hand, leaves it to the state to approve e-payment methods that may be used.⁷⁶

What implications do these provisions have on AfCFTA should they pass? Currently, Africa is lagging behind in digital trade globally. This is due to underdeveloped infrastructure in areas like broadband connectivity, access to electronic devices as well as financial institutions/payment systems. Given the multi-trillion-dollar industry that digital trade is, Africa shares only a small percentage of that.⁷⁷ Nonetheless, Africa has a great potential of growth in the e-commerce sector.⁷⁸

Now focusing on the financial services sector, the crucial part played by financial services in digital trade cannot be ignored. It offers a variety of services from savings, to loan, payment, insurance inter alia. In developing digital trade in Africa, therefore, financial institutions need to be developed and expanded. Africa was found to use mobile banking more than all developing regions combined.⁷⁹ With this overwhelming potential, and the under-developed financial infrastructure in Africa, would it be wise to open up the financial institutions sector of the economy to the world? Would this competition be fair considering the widely differing level of development of the region and other parts of the world? Certainly not. Restricting establishment of financial institutions and significantly so, would provide opportunity for growth of African owned and led financial institutions. Regional payment systems like East Africa Payment system and COMESA Regional Payment and Settlement System will also flourish. Perhaps, this will also lead to development of a continental payment system. This is in line with the principle of e-commerce in Africa that fosters homegrown e-commerce institutions.

5.4 E- advertising

There is common ground between the JSI⁸⁰ and the AfCFTA⁸¹ on commercial electronic messages. Both recognize the need to protect online consumers from

⁷⁵ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, Section A (5).

⁷⁶ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 7.

⁷⁷ The Digital Transformation Strategy for Africa (2020-2030), 26.

⁷⁸ The Digital Transformation Strategy for Africa (2020-2030), 26.

⁷⁹ The Digital Transformation Strategy for Africa (2020-2030), 26.

⁸⁰ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, Section C.

⁸¹ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 4.



unsolicited messages as well as misrepresentation through such messages. The common grounds include an advertising action shall clearly be identified as such; including the individual/body corporate on behalf of whom it is delivered, prohibition of direct marketing through messages unless the recipient has consented to it. Such messages shall contain information on which an addressee can cease receipt and without charges for the decline. Finally, AfCFTA adds that the conditions for participating in promotional competitions shall be clearly stated and easily accessible.

5.5 Personal data protection

Both texts recognize the need for protection of personal data for both privacy reasons or matters of public policy like security. They therefore require states to take such appropriate measures and legislations to ensure such. AfCFTA recognizes the primary role played by National Protection Authorities (NPA) in protection of personal data of its subjects. To this end, it outlines its roles as regard protection of data.⁸² It requires that all personal data be subject to a declaration before the NPA for its processing. It requires the NPAs to be competent in composition and functional ethics for the confidentiality of personal data. Their functions are listed as giving opinions on personal data, informing data subjects of their rights, sanctioning data controllers, authorizing processing of file, authorizing trans-border transfer of personal data inter alia.

It also provides for principles of data processing which include consent, fairness, relevance, accuracy and confidentiality.⁸³ What it says about cross-border flow of data is that a data controller shall not transfer data to an AU non-member state unless the state guarantees adequate protection of the privacy of the data and fundamental rights of persons whose data is in question. It is also noteworthy that the Convention does not expressly provide for cross border flow of personal data for the purpose of business. Neither does it prohibit transfer of data for the purposes of business. It simply states that all personal data transfer has be authorized. This disguise is a restriction to free data flows and can restrict business.

Additionally, AfCFTA provides for rights of data subjects which includes right to information on the purposes of collecting and processing data, to access the status of

⁸² AU Convention on Cyber Security and Personal Data Protection, 2014, Article 10.

⁸³ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 13.



their data, to object the processing of their data and to rectification or erasing misleading data.⁸⁴

In the same context of provision of protection of personal data, JSI on the other had envisions a situation where parties/member states are committed to ensuring cross border data flows (including personal data) to facilitate digital trade.⁸⁵ Therefore, it discourages data localization, requirements to use computing facilities approved in the territory of a state, prohibiting storing and processing data in territories of other states and making data flows conditional on using computing facilities in the state or localization of data. On the contrary, the Digital Transformation Strategy for Africa, in cognizance of the current state of development of the digital economy in Africa, leans more to data localization.⁸⁶ This is because data centres in Africa are the necessary infrastructure for the development of the digital industry. Furthermore, this localization will save on costs on internet connectivity while the reduced latency associated with localization of data will lead to effective performance. In conclusion, in as much as both texts allow for cross-border data flows and the need for states to protect personal data of its subjects, it is clear that AfCFTA first advocates for data localization and is very strict on protection of the same, with a leeway for cross-border flows, while the JSI's priority is the free-flow of data but at the same time providing for personal data protection.

5.6 Cyber security

Both texts recognize the role cyber security play in enhancing confidence in digital trade. They both urge states to come up with legislations and regulatory measures to combat cybercrimes. They also acknowledge the need for cooperation in combating cybercrime. In fact, the AfCFTA texts encourage state law to be in tandem with the international cyber security law for cooperation in implementation.⁸⁷ AfCFTA encourages the creation of cyber security culture through education, training and creating awareness. The AfCFTA text is descriptive of crimes that can be regarded as

⁸⁴ AU Convention on Cyber Security and Personal Data Protection, 2014, Article 16.

⁸⁵ WTO Electronic Commerce Negotiations, Updated Consolidated Negotiating Text, September 2021, 26.

⁸⁶ The Digital Transformation Strategy for Africa (2020-2030), 47.

⁸⁷ AU Convention on Cyber Security and Personal Data Protection, 2014, Chapter 3.



cybercrimes. They include attacks on computer systems, computerized data breaches and content-related offences like cyber security.

It also seeks to expand the scope of cybercrimes to include property offences like theft of property involving computer data. (This is illustrative of how AfCFTA wants to integrate electronic transactions into its economy.) Among the sanctions provided for cyber is criminal sanctions. It is also noteworthy that these criminal sanctions are also applicable to legal persons in terms of criminal fines. The JSI, on the other hand, recommends risk-based actions as opposed to prescriptive actions in combating cybercrime. This means risk management best practices to identify and prevent cybercrime. The AfCFTA approach to dealing with cyber security leans more to the prescriptive measures.



6. Conclusion

From the foregoing, the Kenyan law insufficiently covers e-commerce. There is however, potential to legislate on them while maximising on the opportunities for growth provided by WTO Plurilateral Agreement. Kenyan law lacks clarity on e-contracts. That is on when an offer is accepted and eventually when a contract is concluded. Until recently, it excluded wills and negotiable instruments from the scope of e-signature, which is a very important aspect of e-commerce. The positive note is that the JSI offers flexibility when it comes to e-signatures. Kenya has space to provide standard types of signatures for wills and negotiable instruments to favour its own security and e-commerce objectives.

The Business Laws (Amendment) (No.2) Act No. 1 of 2021 was recently put in place to develop the ease of doing business, more so in the execution of e-documents and contracts. Perhaps, this law might form a starting point in creating an e-commerce background in the execution of agreements and in reducing the uncertainties of when contracts are concluded in e-transactions.

When it comes to intellectual property rights, Kenyan law has a limited scope and does not cater for emerging issues in IP rights. Kenya therefore needs to expand its scope to included things like slogans, memes which may be commercialised in the current e-commerce world. The measures also need be stringent to avoid fraud by the multiple computer users.

Kenya's consumer protection law does not specifically provide for protection of online parties to transactions. What is available can only be read to include e-commerce. This poses a challenge as it may fall short in the aspects unique to e-commerce. Kenya has duty to legislate or expand the scope of that Act to include e-commerce. This is a similar case to the competition laws. Kenya has liberty and should take advantage of the provision on JSI concerning the developing countries being at liberty to legislate on localization and establishing of e-commerce infrastructure in the country as a prerequisite for conducting e-commerce in Kenya. The JSI provides that countries should not make that a must so as to allow e-commerce but the window it allows for developing countries should be exploited by Kenya to protect its start-ups from cutthroat competition and also maximize their local market share.



As regards taxation, Kenya needs to provide for clear laws as regards taxation of digital goods as well as income tax resulting from e-commerce. The legislation should broaden the tax base so as to avoid burdening the already existing institutions. Since the JSI recommends zero taxes on digital goods, Kenyan legislation has to be structured in such a way that it is not only least trade restriction but also caters for its income needs. As Kenya is a growing economy, it should maximise on its tax base, at least for the period where e-commerce is a somewhat new idea.

Data Protection laws in Kenya do not provide the extent to which personal data can be mined, safely so, for the purpose of e-commerce. The safeguards are for protection from unauthorised hands yet no sovereignty of personal data has been ceded and to what extent, or whether it should or should not. Kenya therefore needs to amend the Act to provide for same and implement an accountability system where citizens may directly sue e-commerce companies for such exploitation apart from the custodian companies. Kenya should also liaise with other countries and cooperate in its cyber security laws. Uniformity in application of such laws will curb this problem that transcends borders due to common practice and a negotiated but shared framework in place.

When it comes to AfCFTA, members countries should cooperate to ensure the economic power they cede in bilateral agreements does not affect the core goals of the Free Trade Area. The AfCFTA negotiations notably differ from those of the JSI on matters like data localization, e-payment systems and protection of personal data. Like the liberty individual developing states have to legislate, AfCFTA should adopt the same as a matter of policy so as to protect the region from economic exploitation while leveraging its youthful population and creative potential to get a place on the high table.

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