COVID-19 pushes digital solutions and deepens digital divides: What role for African digital trade law?

By:

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Many governments, including those in Africa, have adopted travel restrictions and physical-distancing policies to reduce the spread of the coronavirus (Covid-19). These are most important for urban areas where population is dense. As a result, consumers, companies, organisations and individuals are increasingly exploring digital solutions to continue at least some economic and social activity remotely, but which, due to a gap in digital readiness, cannot be used by all, in particular not by those in the Least Developed Countries (LDCs). This state of affairs raises the questions of how to bridge the divide and facilitate physically-distant work and what significant and constructive role could digital trade law play in Africa?

Trade related digital solutions in times of physical distancing

This crisis is unfolding in a digital landscape with 3.2 billion smartphone users, 4.1 billion internet users, 54% of internet penetration and a global internet protocol traffic (a proxy for data flows) of 100,000 GB per second.[1] It happens at a time where digital technologies are increasingly used to enable new and more efficient processes for the production of goods and provision of services (Industry 4.0). The fundamental idea of this trend is connecting machinery to the Internet, which encompasses technologies such as 3D printing, the Internet of Things, artificial intelligence (AI), cognitive computing, cloud computing, cyber-physical systems and big data analytics. Such technologies allow consumers, companies and governments to shift their behaviour and continue some of the economic and social activity remotely during the lock down situation.

The practice of teleworking, namely working from home or remotely using digital technologies to offer its service or to remain in touch with the employer, has skyrocketed. Online meetings, online teaching, online conferences, online interviews, online concerts or online theatre plays are conducted via the likes of Microsoft Teams, Skype, Zoom, Cisco's Webex, WeChat or Ding Took. As an example, the numbers for using Microsoft software for online collaboration increased by 40% in only one week in March.[2] Greater reliance on such online work applications creates an increased interest in cloud solutions for storing and analysing the data created, renting space from tech companies such as Amazon Web Services, Microsoft, Tencent or Alibaba. In addition, consumers are shifting to online shopping over physical retail and service provision, where possible. To cope with the surge in demand, e-commerce companies had to hire more staff. Amazon US, for example, has reportedly been hiring an additional 100,000 warehouse workers.[3] Perhaps unsurprisingly, and thirdly, also the demand for streaming services (e.g. for movies, music and news) has surged, with service providers such as Netflix, HBO, you tube or Spotify gaining huge new audiences. These trends and shifts accelerate supply chain and consumer path digitalisation as well astechnological innovation. In all this, differences in digital readiness nonetheless hinder the ability of large parts of the world to take advantage of these technologies.

Capacities and challenges in digital readiness in Africa

While African states initially lagged behind in the adopting of new technology and the migrating of commerce modes to the new digital forms, there has been some progress in the past several years. As an example, East Africa has led the world in advancing fintech innovation, namely applications that cover mobile banking and payment services, replacing face-to-face interactions between customer and banker. E-commerce platforms have grown too, in number and trade volume in a relatively short amount of time (e.g. Mall of Africa, Jumia Group, Marketplace Africa, Ways to Cap and takealot), with still a huge amount of untapped potential. Where no such platform exists yet, like in Senegal, the Minister has invited stakeholders to propose solutions to foster home delivery of food, hygiene and health products, including plans to create a platform to federate SMEs with digital delivery capacity to support the distribution of essential goods. Other investments in tech start-ups relate to cleantech, software as service, transporttech, recruitment, agritech and analytics.[4] Using and developing such technologies has increased the amount of companies that operate primarily through digital channels. This has not only facilitated the shift to physically-distant work, but has also provided African companies with the skills to develop digital health solutions for collecting data on symptoms, trace outbreaks, map geospatial data with ground-truthed data and analyse collected data by collaborations of data scientists and AI. The Nigerian company Lifebank , for example, has built on their experience with blood banks and created a digital inventory to track the availability of ventilators and respirators in hospitals. The Kenyan Health Ministry uses Safiri Smart Service (powered by the Kenya's largest telecom operator Safaricom), a mobile based service developed for notifiable infectious diseases such as Ebola and Cholera, to monitor and track the rate of infections and disseminate health information. Safaricom also implemented a fee-waiver on the east African mobile-money product, M-Pesa, to increase cashless payment and reduce the use of physical money as vector for transmissions.[5] For the same reason, Ghana launched a Universal Quick Response Code and Proxy Pay, allowing customers to instruct payments by identifying beneficiaries with a range of non-IBAN identifiers, such as a telephone number, e-mail address or vehicle registration number. The South African Department of Health uses a WhatsApp based helpline (HealthAlert) to disseminate promptly health information.

This gradual assimilation into the digital economy contributes to reducing the

digital divide between African countries as a whole with the rest of the world, but widens the digital gap amongst African countries, and within each state, with large portions of the various national populations on the continent still being offline and excluded from the digital economy. This is mainly due to cost of access and lack of expertise and technology know-how. The majority of Sub-Saharan countries have costs far in excess to the global average, with all but 6 of the 35 countries in the region sitting in the most expensive half of the 206 compared countries. Eritrea charges residential users an average of $2,666 per month for fixed-line broadband, and is the most expensive in the world. Mauritania $659, Burundi $284 and Equatorial Guinea $259 join Eritrea as the most expensive countries in the region, and all sit among the 10 most expensive countries in the world. In some African countries, there is not even information on prices available (e.g. Burkina Faso, Central African Republic, Chad, Congo, DRC, Guinea, North Sudan, Sierra Leone, South Sudan, Uganda, Western Sahara and Zambia). The picture is not much different when it comes to the average broadband speed, with most of the slowest countries being on the African continent. Consequently, internet penetration is very low in these countries. This explains the limited connectivity in rural African areas, as compared to urban areas and why, in general, LDCs lag behind the most in digital readiness. Only one in 5 people in LDCs use the internet and in most developing countries well below 5% of the population currently buy goods or services online.[6] The gaps and barriers range from Information and Communication Technologies (ICT) infrastructure and payment solution to the level of technological literacy, language and legal frameworks that need to be overcome to enable individuals and businesses to engage fully in the digital economy.[7]

Lack of internet access at home limits the possibilities of benefitting from financial platforms[8] or of students to be connected if schools are closed and revert to remote teaching. Moreover, insufficient quality of broadband services might hamper the ability to use teleconferencing tools or streaming services. It would be, for example, interesting to find out whether the decline in African teams' (20/19 to 14) and countries' (10/9 to 7) participation in this year's John H. Jackson WTO Moot Court Competition is attributable to the required (due to COVID-19) change for the All American, Asian Pacific and African Rounds to a virtual competition, using Microsoft teams. In the Final of the African Round, the

Respondent team lost 3 times internet connection. Nowhere else is the digital divide more stark than in Africa, with ICTs development moving at a globally competitive pace in Cairo, Nairobi, Lagos and Cape Town.

Bridging the divide and facilitating physical-distant work/opportunities

The concept of digital inclusion refers to social inclusion that ensures the individual's ability to access and use ICT for purposes of participating in, and benefitting from, today's growing knowledge and information society. It is moving towards the Industry 4.0 landscape. What is needed to bridge the digital gap and to ensure that all Africans can tap into the potential offered by accelerated supply chain digitalisation and consumer path digitalisation in most developed and some African countries are investments in ICT infrastructure to improve connectivity and release pressure on networks due increased streaming and other demands, but also investments in physical infrastructure such as railway and roads to facilitate transport of digitally ordered products as well as the improvement of digital skills. While these are longer-term endeavours, for the short-term, the conditions for physically-distant work could be improved and awareness for opportunity raised. This could be accomplished in several ways.

Improving conditions for physically-distant work

First, classifying internet services as an essential service would reduce disruptions on internet platforms or when teleworking during a lockdown situation. Secondly, coordinating with telecom operators and adopting regulations that enable them to increase Internet speeds and reliability, while preventing distortionary price increases, potentially even reducing prices on fixed broadband services, would reduce internet service congestion. Thirdly, using high altitude balloons that create an aerial wireless network with up to 4G coverage (so called Loon Balloons) would rapidly improve internet coverage especially in rural and remote areas and tackle the Covid-19 impact on productivity. This was done by Kenya in March 2020. Fourthly, expanding access to computers and educational material would allow more people to shift to digital solutions. Fortunately, computers and laptops face relatively low import tariffs in Africa, ranging from 0 to 10% and averaging 3.4%. While almost all big publishers of e-books have provided access worldwide to

thousands of books, including textbooks, this is only partial and could be expanded.'

Raising awareness of opportunities

Government employment agencies could partner with digital service platforms to publicise (their) digital work opportunities such as home schooling, entrepreneurial coaching, data cleaning and labelling (e.g. for Amazon Mechanical Turk), web developing and marketing (e.g. for Freelancer and Upwork) or software developing (e.g. for Andela, who trains especially Africans before employing remotely in big tech worldwide). Of course, for some digital platforms, the shift in behaviour due to social distancing is rather detrimental. Examples are ride hailing platforms such us uber, lyft, didi chuxing and bolt, or property rental service platforms such as safari.com, booking.com and Airbnb. This presents an opportunity for relevant regulators to win long-term commitments to social inclusion in exchange for short-term support.

The AfCFTA's role in facilitating digital trade

The (forced) changes in behaviour relating to physical distancing measures are likely to have lasting effects, with organisations, companies and individuals only partly reverting to previously used methods. The acceleration of technological innovation will presumably improve the user-friendliness of various digital solutions, resulting in users becoming accustomed to relying on them. While this is advantageous for the reduction of GHG-emissions and the environment at large, beyond Covid-19, Africa's future economic growth will need to increasingly tap into emerging digital opportunities; opportunities that are not confined to a states' territory. This heightens the need to regulate cross-border digital trade, with the existing rules for the digital economy being insufficient, and those that do exist (e.g. the moratorium on customs duties on e-transmissions) being fragile.

While there are plurilateral discussions amongst 76 WTO-Members (including Nigeria) taking place, these have not currently achieved consensus or a 2/3 majority as required for a plurilateral agreement to be incorporated either in annex 4 or as an amendment to Annex 1 of the Marrakesh Agreement. Nor are they likely to. South Africa, for example, is expected to object. Apart from

insisting to conclude the Doha Round first, it suspects that by contemplating as standards existing rules, for example between the US and the EU, in the TPPA and in the TISA, little consideration will be given to the needs of development and African countries.[9]

At the African regional level, the Continental Free Trade Area (AfCFTA) can only realise its claimed potential for the digital sector, if and when current discussions around an additional AfCFTA-protocol with specific provisions on cross border e-commerce are expanded to focus more broadly on cross border digital trade. Such an approachwould not only capture the sale of consumer products via the Internet and digitally supplied services (e.g. streaming, internet banking, cloud computing, digital productions (e.g. digital cinematography, 3D printing-design), ride-hailing), but also data flows that enable global value chains, services that enable smart manufacturing, digital content not stored on a physical carriers (e.g. software, audio, audio-visual and other recorded information data files), and numerous other platforms and applications.

The creation of a continental digital market, where also those countries that have not yet (fully) assimilated in the digital economy benefit in terms of economic growth, requires liberalising digital trade while accommodating the digital gap (instead of enhancing it) and providing domestic regulatory scope for domestic platforms. At least two factors deserve special attention: the extreme market dominance of, and high level of concentration by, some big techs and different speeds at which African countries assimilate.

Firstly, most digital solutions are offered or supported by a small number of mega-digital platforms, mainly originating in the US and China. The top seven already account for two-thirds of the value of the world’s digital platforms.[10] The combined market value of amazon, apple, facebook, google and Microsoft, for example, peaked before Covid-19 at $7,5 trillion.[11] Since they benefit from network effects and from their ability to extract, control and analyse data, the acceleration of technological innovation and adoption through Covid-19 is likely to strengthen their market position. Moreover, various African tech start-ups are owned or controlled by foreign companies due to their significant investment. It is therefore of utmost importance to include competition rules in

this fast-changing market of digital trade. I have argued elsewhere that unrestricted competition facilitates market concentration and anticompetitive behaviour. This can lead to eliminated or distorted competition which frustrates the market balance at the expense of diversity of offers and smaller market participants, especially those of economically weak developed countries. While market distortions are likely to remain, competition disciplines may internalise externalities (hold companies accountable for price-fixing, even foreign undertakings) and minimize disparities of legal rules amongst its signatories. [12]

Secondly, and drawing from experiences in WTO e-commerce talks, a 'development-focused digital industrialisation' that includes special and differential treatment might have the potential to reduce the digital divide and promote social inclusion, ensuring broad-based benefits of the digital economy. The needed time for building or advancing a digital trade sector in an economically weaker developed country could be accommodated by, inter alia, including the principle of 'less than full reciprocity' in relation to commitments or the product basket approach.

Unsurprisingly, a large amount of digital trade will remain untapped without proper data protection laws, including cybersecurity. Such a regime would enhance the trust in using digital solutions in home networks that often come with fewer security defences than at the workplace. The rising incidents of coronavirus phishing scams since January 2020 illustrate the point. Notably, data localisation, the idea that developing countries' data should be used for their own citizens' and companies' development, rather than be captured by foreign companies, has become a taboo policy at international level,[13] but could play an important role when creating a continental digital market.

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[3] Ibid.

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[12] F Sucker, The international trading system and market distortions, *HYIEL 2019* (2020) ch 10, 169.

[13] Naidu.

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