The AfCFTA's Digital Trade Rules are Not Fit for Africa

By:

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African heads of state are slated to meet this weekend for the 37th Ordinary Session of the Assembly of the African Union and they could be prompted to make an unforced error that could weigh heavily in the continent's plans to promote digital industrialization and the bridging of the digital divide.

There is no doubt that African leaders must leverage the African Continental Free Trade Area (AfCFTA) to promote the Digital Transformation Strategy for Africa (2020-2030), harness digital technologies to boost intra-African trade and investment, generate sustainable and inclusive economic growth, encourage the safe and responsible adoption of emerging and advanced technologies, and more. The recently leaked draft text for an AfCFTA digital trade protocol dated February includes such important goals among the stated objectives of the highly awaited digital trade regional framework.

Yet the AfCFTA Digital Protocol will hinder not help the realization of these goals. Some of the key elements of the negotiated text – particularly the

commitments to allow unfettered movement of data and special secrecy guarantees for software would erect barriers to fulfilling the foregoing goals. Precisely for these reasons, last year, the U.S. government captured the world's attention by announcing that it was updating its approach to digital trade rules and abandoning many of these key provisions that have now found their way into the AfCFTA Digital Protocol. While the regulatory needs of U.S. policymakers are different from those of their African counterparts, it is worth understanding the reasons that led to such an important policy change. Under these rules, African countries could be found liable for enacting rules to scrutinize social media algorithms to protect children from harmful content. These rules go beyond current global protections of intellectual property rights in several ways. In effect, governments are giving up their regulatory authority to protect their citizens in the digital age, at a time when the United States and the European Union are going in exactly the opposite direction.

The U.S. policy makers abandoned the problematic provisions that are now part of the AfCFTA Digital Protocol for a number of additional reasons. First, they were fed up with Big Tech firms market power abuses and are determined to reign them in. Among the most salient digital policy priorities in the U.S. are online privacy and civil rights, competition rules for digital markets, AI oversight, and even protections for workers in the gig economy. Policymakers realized how the digital trade rules that had been pushed by tech interests in the past would would be inconsistent with these priorities.

Second, the rules on data transfers and storage that the U.S. recently rejected, but that are now proposed for African countries, basically guarantee tech firms almost absolute control of data, including personal and sensitive information. Under these rules, countries are banned from adopting policies regulating international data flows or requiring that certain types of data must be stored domestically.

Third, what is worse, the version of the rules that has been embraced by African negotiators guarantee free movement of data for any firm incorporated in an African country. So, for instance, if Google – or Tiktok's patent company Bytedance – incorporated in say, Kenya, neither Kenya nor any other AfCFTA country could impede the transfer of Africans' personal data to the United States or China. This is so because the cross-border data transfers rule gives

broad rights to companies, regardless of their “true” national origin.

Fourth, the proposed AfCFTA digital protocol incorporates a term that would grant near absolute secrecy rights to software firms, beyond anything provided by any intellectual property regime in the world. Such term would essentially ban government access to software’s code through which algorithms are deployed, save the most exceptional cases. It is a major concern that such secrecy guarantees would prevent goverments from having access to the detailed information about the algorithms behind AI tools. The effect of these absolute secrecy rights is that they would neuter African countries ability enact rules to regulate AI, like those recently adopted by the European Union. Further, these rules would prevent African governments discretion to promote tech transfer by requiring firms that want to enter into the 1.3 billion people AfCFTA market so that they could share their techonology with African startups and entrepreneurs.

We must not forget that the notion of restricting governments ability to regulate the data economy was borne in the United States. Starting in the 2010s, the largest online platforms, often through their myriad lobbying associations and front groups, commenced lobbying to capture trade negotiations to insert binding trade-agreement terms that would lock in the low-road global regulation model they prefer. The companies’ goal was to lock in their outsized power and preempt efforts to regulate the digital economy in the public interest.

The U.S. government has finally accepted that trade policy is not a tool to be wielded to favor its powerful economic interests to the detriment of people both in the United States but abroad as well. It is therefore especially surprising that just when the US has abandoned these Big-Tech designed ruels, Africa would take the noose and willingly put it around its neck.

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