

TRAINING AND RESEARCH INITIATIVE ON THE REGULATION AND INTEGRATION OF DIGITAL TRADE IN AFRICA

COUNTRY PROFILE

Togo



INTRODUCTION

Digital trade and cross-border data transfer are becoming an increasingly important part of commercial transactions between countries. In Africa, the development of digital trade still faces challenges linked not only to technological infrastructures, but also and above all to appropriate regulation. In Togo, e-commerce is an emerging sector. Although there are still a number of obstacles to be overcome in order to facilitate its development, the sector benefits from a relatively favorable national context that could accelerate the necessary reforms. In order to help African countries meet these challenges and promote digital trade on the continent, the African Trade Policy Centre (ATPC) of the United Nations Economic Commission for Africa (UNECA) has set up the Training and Research Initiative on the Regulatory Integration of Digital Trade in Africa. This initiative consists of setting up two databases on the regulatory integration of digital trade in each of the countries concerned. The first covers restrictions on trade in digital services based on the Digital Services Trade

Restrictiveness Index (DSTRI) developed by the Organization for Economic Cooperation and Development (OECD). The second concerns measures relating to the integration of digital trade.

The objectives of the initiative are to:

- (i) Collect and make available to African states information on regional integration and the regulation of digital trade with a view to assisting member states in the area of digital trade (including the AfCFTA phase III negotiations on e-commerce);
- (ii) Collect information that would enable the addition of a “digital trade” component in the future edition of the African Regional Integration Index (ARII);
- (iii) Collect adequate information that would enable the addition of African countries to the Digital Services Trade Restrictiveness Index (DSTI) of the Organization for Economic Cooperation and Development (OECD).

This very useful information will enable African policy-makers to identify regulatory restrictions to the development of digital

trade and to design policies that promote the integration of digital trade in Africa.

Following the success of the first phase of this initiative, which covered 11 African countries, the ECA has launched a second phase covering 17¹ countries, including Togo.

The purpose of this document is therefore to present the main results obtained during the collection of data on the various measures relating to the regulation of trade in digital services and the integration of digital trade for Togo.

¹ Botswana, Burundi, Congo, Democratic Republic of Congo, Egypt, Eswatini, Ethiopia, Gambia, Liberia, Lesotho, Madagascar, Mozambique, Namibia, Rwanda, Senegal, Sierra Leone and Togo.

LEGAL AND REGULATORY FRAMEWORK OF DIGITAL TRADE IN TOGO

One of the key aspects of the development of trade in digital services, apart from any other considerations other than coherent policies and strategies, is the provision by States of a favorable and appropriate legal and regulatory environment. The regulatory framework for Togo includes:

The Law on electronic communications (LCE): applies to the various activities of the electronic communications sector on Togolese territory and aims essentially, among other things, to gradually open up an open and competitive market for electronic communications networks and services in the interests of users.

The Law on the Information Society in Togo (LOSITO): ensures the establishment of fundamental legal principles, including access to ICTs, freedom of participation in the information society, access to education and training in the use of cyberspace, and the protection and security of information.

The Law on electronic transactions (LTE) and its implementing decree: define the conditions for trade in digital services, the legal recognition of certificates and electronic signatures from third countries, and the security of websites. The decree also sets out the conditions under which online service providers may operate.

The universal service decree: Decree no. 2018-070/PR of 18 April 2018 on the universal electronic communications service taken in application of the LCE aims to ensure the availability of basic electronic communications services to any legal or natural person residing on Togolese national territory regardless of their geographical area of residence.

The law on cybersecurity and the fight against cybercrime: responds to Togo's need for a legal and institutional framework to protect its cyberspace in the face of the meteoric rise in cyber delinquency and cybercrime around the world.

The law on the protection of personal data: which provides effective protection for the fundamental rights and freedoms of individuals with regard to the processing of their personal data in Togo. This law led to the creation of the Instance de Protection des Données à Caractère Personnel (IPD-CP), the national personal data protection authority, which is still not operational.

Consumer protection: no specific regulations in Togo, but the provisions of the LTE provide a sufficient legislative and regulatory framework. An entire section of the LTE (Section 4) is devoted to the consumer's right of withdrawal, which is a fundamental guarantee in terms of consumer protection in trade in digital services.

Online content: online content is not specifically regulated in Togo. However, the LTE, the law on cybersecurity and the fight against cybercrime and law no. 2020-001 of 7 January 2020 on the Press and Communication Code in the Togolese Republic provide a fairly comprehensive legal framework for online content in Togo.

Regulation of domain names: management of the “. Tg” domain is entrusted to ARCEP in accordance with the LCE. The “. Tg” domain is now more accessible for promoting Togo internationally from the Internet, with a cost capped at 10,000 CFA francs (around €15) instead of 49,000 CFA francs (around €75) previously. Draft legislation to regulate disputes relating to the “. Tg” domain name is currently being prepared.

Measures relating to restrictions on trade in digital services: The assessment of the level of restrictions on trade in digital services in Togo is based on the OECD's Digital DSTRI model, using five pillars: (i) infrastructure and connectivity; (ii) electronic transactions; (iii) payment systems; (iv) intellectual property rights; and (v) other barriers to trade in digitally enabled services.

Infrastructure and connectivity

- In Togo, the Law on electronic communications (LCE) and the Decree on interconnection and access to electronic communications networks guarantee interconnection between operators authorized to establish an electronic communications network open to the public.
- The regulatory authority (ARCEP) is responsible for ensuring that pricing for access and interconnection, as far as operators with significant market power are concerned, is cost-based and that, where appropriate, the charges payable by the customer do not act as a disincentive.
- Operators of networks open to the public shall publish and update annually a technical and pricing offer for interconnection and, where applicable, an access offer, approved in advance by the Regulatory Authority. The interconnection catalogs are therefore

published on the websites of the main operators.

- The regulations require accounting separation for interconnection activities, the specifications of which are established by the Regulatory Authority.
- In terms of turnover, Togocom has a 63% market share and Moov Africa Togo 37%.
- There are no restrictions on the use of communication services. There is no regulatory provision for this in the Law on electronic communications. However, if the government deems that information circulating on the networks is serious and may undermine national security, it may order the Internet to be cut off.
- Articles 28 to 31 of **Law No. 2019-014 on the protection of personal data** set out the conditions for transferring personal data to a third country. These provisions do not impose restrictions, but set out the conditions for transfer with the aim of safeguarding the privacy, freedoms and fundamental rights of individuals.
- If the third country does not offer a sufficient level of protection, the Data Protection Authority may authorize the transfer at the reasoned request of the data controller, provided that the latter offers the necessary guarantees. The law makes no reference to the similarity of data protection in third countries and countries of origin.
- The regulatory framework does not specifically address the place of storage of personal data. Article 53 of the Law on the protection of personal

data deals with the obligation to retain personal data. Nor are there any regulatory provisions prohibiting the cross-border transfer of data.

In terms of infrastructure and connectivity, the market is not sufficiently free. There are only two telephone operators (Togocom and Moov Africa Togo), with Togocom having a slightly higher market share than Moov on the mobile segment and a monopoly on the fixed-line segment. In terms of Internet access provision, some private Internet service providers have recently been authorized (as of March 2018). These are TEOLIS SA and GROUP VIVENDI AFRICA (GVA). These two ISPs join the two existing ones (Togocom, CAFE Informatique & Télécommunications), bringing the total to four.

Electronic transactions

- Art. 6 of DECREE No. 2018-062/PR of 21/03/18 regulating electronic transactions and services in Togo enshrines the freedom to engage in e-commerce on national territory. However, this exercise is subject to the fulfillment of certain formalities. There is therefore no discrimination in obtaining licenses for trading in digital services.
- The Tax Code (Livre des Procédures Fiscales, LPF), which makes no reference to the location of the business (foreign or domestic), accepts remote filing and remote payment. However, it lacks precision as regards non-resident

telecommunications and e-commerce service providers.

- Togolese regulations (Law No. 2017-07 on electronic transactions and its implementing decree) do not include any provisions on cross-border trade, except for the recognition of foreign certificates and signatures (Article 88 of the Law) and the mandatory ECOWAS acts. Nor has Togo adopted the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).
- Law No. 2017-07 (Art. 79) on electronic transactions enshrines the equivalence of a secure electronic signature and a handwritten signature.
- The resolution of disputes arising from electronic commerce is taken into account by Law No. 2017-07 relating to electronic transactions in TITLE IX therein. It should be noted, however, that the regulations on electronic transactions (the Law and its implementing decree) do not explicitly refer to cross-border e-commerce.

Payment system

- There is no discrimination in access to means of payment in the WAEMU (West African Economic and Monetary Union) (Togo being a member of the WAEMU). Businesses and economic agents have access to debit cards, credit cards, Internet banking and electronic wallet services in compliance with BCEAO regulations.

- The payment security standards used in the country are those of the WAE-MU and do not explicitly require the use of international standards. Article 5 of Instruction 127-07-08 setting out the terms and conditions for the implementation of BCEAO oversight of payment systems in WAEMU Member States ensures that payment systems comply with the international norms and standards in force.
- Apart from the general prudential rules, there are no other restrictions on Internet banking or insurance services.

Intellectual property rights

- Togo is a member of the OAPI instituted by the Bangui Agreement, according to which foreigners enjoy the provisions of this Agreement and its Annexes under the same conditions as nationals. Thus, Article 25(1) of Annex III of the Bangui Agreement relating to trademarks and service marks recognizes the international protection of a trademark in accordance with the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.
- Togo has acceded to the Berne Convention; it has also ratified the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Togolese Law No. 91-12 on the protection of folklore copyright and related rights grants protection to Togolese and foreign works on its territory, pro-

vided that the country where the original copyright holder resides or is a national grants equivalent protection to the works of Togolese nationals.

- Section V (Part I) of Law no. 91-12 on the protection of folklore copyright and related rights deals with general limitations on copyright (Articles 20 to 24). Chapter V (Part II) of Law no. 91-12 deals with the limitations on the protection of related rights. These limitations are in accordance with international rules, especially as Togo has acceded to the Berne Convention and signed the WIPO treaties on copyright and related rights.
- Togolese Law No. 91-12 on the protection of folklore copyright and related rights provides for judicial, administrative and provisional measures, as well as criminal proceedings, to enforce intellectual property rights.
- Both Togolese Law No. 91-12 for the rights it protects and the Bangui Agreement provide for civil and criminal action in the event of infringement of intellectual property rights.

Other barriers to trade in digitally enabled services

- In Togo, e-commerce regulations make no mention of performance requirements for cross-border e-commerce. There is no specific obligation to use local software, encryption technology or country-specific authentication systems in online transactions, nor are

there any mandatory requirements for technology transfer (e.g. through mandatory disclosure of source code).

- Apart from content deemed illegal under the law on cybersecurity and cybercrime, and provisions to protect the dissemination of personal data, there are no other limitations provided for by law.
- There are no restrictions on online advertising. However, Article 34 of Law No. 2017-07 on electronic transactions sets out requirements for the identification of advertising by electronic means.
- There is no requirement for commercial or local presence in the various e-commerce regulatory texts (Law on electronic communications, Law on electronic transactions, Law on the protection of personal data, Investment Code). Commercial and/or local presence is therefore not a condition for cross-border trade in services.
- Law no. 99-011 on the organization of competition in Togo provides that any natural or legal person who has suffered loss as a result of an offense punishable in accordance with the provisions of this law may bring an action for damages.
- In Togo, there are no other restrictions in the various laws governing e-commerce. There is no differentiated taxation of e-commerce. Products are subject to the same taxes (e.g. VAT) as other goods.

MEASURES FOR THE REGIONAL INTEGRATION OF DIGITAL TRADE IN TOGO



The analysis of measures relating to the integration of digital trade is structured around eleven (11) pillars which are: (i) customs duties and trade defense measures applied to ICT imports; (ii) public procurement of digital goods and services; (iii) foreign investment in sectors relevant to digital trade; (iv) intellectual property rights; (v) telecommunications infrastructure and competition; (vi) cross-border data transfer policies; and (vii) digital trade policies; (vi) cross-border data transfer policies; (vii) national data use policies; (viii) liability of intermediaries and access to content; (ix) quantitative restrictions on trade; (x) standards; and (xi) online sales and transactions.

Customs duties and trade defense measures applied to ICT imports

- The customs duties effectively applied from Togo to the rest of the African re-

gion (average tariff rate on ICT goods) are less than 10%.

- The coverage rate of zero customs duties on ICT products imported from other African economies is between 30% and 70%.
- Togo is not a signatory to the 1996 WTO Information Technology Agreement (ITA) and its 2015 extension.

Public procurement of digital goods and services

- There are no restrictions or requirements concerning foreign investors. Art. 3 of Decree No. 2009 - 277 /PR on the Public Procurement and Public Service Delegation Code, the contracting authorities prohibit any measure or provision based on the nationality of candidates that could discriminate against nationals of Member States of any regional organization to which the Togolese Republic is a party or of a country that has ratified an interna-

tional treaty or convention that the Togolese Republic has also ratified and that affects the regulation of public procurement.

- There are no restrictions or requirements for foreign companies to disclose patents, source codes or trade secrets in order to win tenders.
- Foreign companies are not discriminated against with regard to price preferences for local content or CRLs applied in public procurement of digital goods and services.
- Togo is not a signatory to the Government Procurement Agreement (GPA), nor is it an observer member.

tion to be of Togolese nationality. It is not clear whether these restrictions also apply to online services.

- There is no policy requiring foreign investors to enter into a joint venture agreement of any kind before entering the Togolese market.
- Apart from the licensing requirements for telecommunications investments, there are no other controls. These investments are simply made in accordance with the specifications defined by the telecommunications regulatory authority. These specifications are defined in the same way for national and foreign investors.

Foreign investment in sectors relevant to digital trade

- There is no systematic legal restriction on foreign capital in the telecoms sector, or on FDI into the country, but there are public companies in the telecoms sector with limited private participation. TogoCom was a 100% state-owned company, but since 2019 (decree no. 2019-142/PR), the state has opened up 51% of the company's capital to the private sector. This operation saw AGOU Holding (a foreign multinational) take a 51% stake. The only restriction concerns the press and communication, where at least 51% of the share capital must be held by nationals and 80% of the staff must be Togolese. The Press Code also requires the director of a radio or television sta-

Intellectual property rights

- Togo's patent application procedure complies with the Patent Cooperation Treaty, which it has signed and ratified. There are therefore no restrictions on the patent application procedure.
- Law No. 91-12 on the protection of folklore copyright and related rights deals with general limitations on copyright (Articles 20 to 24). These limitations are made in accordance with international rules, especially as the country has acceded to the Berne Convention and signed the WIPO treaties on copyright and related rights.
- Law no. 91-12 on the protection of copyright and related rights provides for legal proceedings and penalties in the event of infringement of copyright and related rights. The Bangui Agree-

ment provides for legal action in the event of infringement of intellectual property rights relating to each type of property covered.

- What may be regarded as a constraint is the obligation imposed by the Law on electronic communications on encryption service providers to comply with lawful interception orders (art. 94). Refusal to provide secret decryption codes to government agencies is punishable by a fine of between USD 3,544 and USD 14,178. However, Article 628 of Law no. 2015-10 on the new Penal Code refers to the criminal offense of disclosing information relating to a company's business secrets.

is necessary under specific conditions. In addition, under Article 30, the data protection authority may authorize the transfer of data if the data controller offers sufficient guarantees with regard to the protection of the privacy, fundamental rights and freedoms of the data subjects and the exercise of the corresponding rights.

- Togo has signed but not ratified the African Union Convention on Cybersecurity and the Protection of Personal Data. On 30 June 2021, the National Assembly announced that it had passed the bill authorizing ratification of the Convention.

Cross-border data transfer policies

- In Togo, there are no restrictions on data localization (no requirement for local storage and/or local processing, including infrastructure requirements). The regulations do not prohibit data transfers, but provide a framework for them. There is therefore a conditional regime for the transfer of data flows. Article 28 of Law 2019-014 on the protection of personal data clearly states that data may only be transferred if the third country ensures an adequate level of privacy protection. Article 29 admits a transfer of data provided that the transfer is one-off, not massive and that the data subject has expressly consented to its transfer or if the transfer

National policies on data use

- Togo has a framework for the protection of personal data (Law no. 2019-014 on the protection of personal data), but certain provisions of this framework impose constraints on digital commerce.
- Chapter VI of Law no. 2019-014 on the protection of personal data provides a framework for the appointment of personal data protection correspondents. Data controllers are required to appoint a personal data protection correspondent. Similarly, Article 53 of Law no. 2019-014 on the protection of personal data requires companies not to retain data beyond the period necessary for the purposes for which it was collected. Failure to comply with this provision exposes the offender to

the penalties set out in article 89 of the same law.

- According to Article 95 of the Togolese Law on electronic communications 2012, providers of encryption services are required to keep for one year the content and data that can identify any person who has used their services, and to provide the technical means to identify such users. Service providers are required to make this data available on request to the examining magistrate, the Prime Minister, the Minister for the Economy and Finance, the Minister for Defense, the Minister for Justice and the Minister for Security.
- Article 63 of Act No. 2017-07 on electronic transactions requires service providers to hold and retain, for at least one year, data that can identify any person who has contributed to the creation of the content or one of the contents of the services they offer

Online sales and transactions

- Togo has not adopted the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). Togo has signed the UNCITRAL model law

on electronic commerce, but has not signed the model law on electronic signatures. Togo has no specific consumer protection law, but Section 2 of the Law on electronic transactions 2017 (Articles 24 to 31) deals with consumer protection in e-commerce.

- It should be noted that the customs administration does not apply the de minimis regime.
- The regulations of the West African Monetary Union (WAMU) authorize the use of all means of payment in e-commerce provided that they are secure according to the technological standards in force at the time of the transaction and adapted to the type of transaction. However, it sets the maximum amount of electronic money assets to be held. E-money assets held by a single customer identified with an issuing institution may not exceed FCFA 2 million (approximately USD 3,500), unless expressly authorized by the Central Bank.
- Apart from the restriction on foreign ownership in the media, there are no other restrictions on online sales, deliveries or advertising. Nor are there any obstacles or restrictions in the service agreement for a “.tg” domain.

CONCLUSIONS AND RECOMMENDATIONS



The information gathered on measures relating to restrictions on trade in digital services, on the one hand, and measures relating to the regional integration of digital trade, on the other, shows that Togo's regulations do not restrict digital trade.

Togo does not impose quantitative restrictions on imports of ICT goods and digital services from the region. There is no import ban on digital goods and services; there is no local content requirement for the commercial market; there are no export restrictions on ICT goods and digital services. Togo has not issued any technical standards that could constitute a trade restriction for goods and services in the digital economy. Analysis of the legal and regulatory framework for digital trade shows that this framework is gradually being fleshed out to provide a legal and regulatory basis favorable to digital trade. It should be noted, however, that more needs to be done in terms of infrastructure and connectivity to improve the liberalization of digital trade in services.

With regard to the regional integration of digital trade, regulation must be less restrictive with regard to national policy on data use, online sales and transactions, and customs duties and trade defense measures applied to ICT imports.

In order to improve Togo's integration into digital trade, we recommend:

- That Togo accede to the relevant international instruments, in particular that it adopt the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005); and that it sign the UNCITRAL Model Law on Electronic Signatures;
- That Togo signs the WTO's Information Technology Agreement (ITA) to make its ICT trade even more transparent and predictable
- That Togo review the conditions of the national data use policy to lift restrictions on the storage and availability of encryption codes.

- That Togo encourage other operators to enter the telecommunications market (telephony and Internet access providers)

This country profile was prepared by GOLO Yao Nukunu, Ph. D., University of Lomé (Togo).