

DIGITAL TRADE REGULATORY INTEGRATION

COUNTRY PROFILE

Malawi



INTRODUCTION

The present country profile is based on observations from data sets on digital trade regulatory restrictiveness. Two data sets were developed, one modelled on the Organisation for Economic Co-operation and Development digital services trade restrictiveness index, and the other on measures related to digital trade integration. The period of study for the former was 2014–2020 and, for the latter, from the time the measures were effective.

Regulatory measures affecting digital trade are categorized into different pillars for both the digital services trade restrictiveness in-

dex and digital trade integration. The report is therefore presented in two parts, each corresponding to one of the data sets. Information on indicators common to both data sets, such as measures on payment systems, data protection law and international treaties concerning e-commerce, is not repeated.

Overall, about one fifth of the measures examined regulating digital trade in Malawi were found to be restrictive, mainly because of limited or no scope of coverage on critical aspects of some measures.

REGULATORY ENVIRONMENT BASED ON DIGITAL SERVICES TRADE RESTRICTIVENESS INDEX INDICATORS

Infrastructure and connectivity

This pillar covers measures on communications infrastructure essential to engaging in digital trade, policies on interconnection, vertical separation, dominant firm in the market and cross-border data flows.

In Malawi, non-discriminatory Internet traffic management through technology and service-neutral licensing regimes is one of the key objectives of the Communications Act. Interconnection is required for mobile and fixed services, along with prices and conditions, and reference offers. Telecommunications service suppliers are therefore required to respond favourably to reasonable requests from other suppliers for network interconnection. Should parties to a network interconnection negotiation fail to agree on the terms and conditions of interconnection within two months, the Malawi Communications Regulatory Authority may order the interconnection.

The Communications Act requires information on interconnection, access and infra-

structure sharing, and applicable technical and price offers to be made public.

It is the prerogative of the Malawi Communications Regulatory Authority to conduct market analysis and determine a dominant firm in the market in Malawi. The Authority has not, as yet, published a decision identifying dominant players. Nevertheless, the International Telecommunication Union report of 2018 identifies Malawi Telecommunications Limited as a dominant player in fixed lines (with a 95 per cent market share of main lines) and the upstream transmission services market. In mobile services, the report identifies Airtel Malawi Limited and Telekom Networks Malawi Limited as the two main mobile operators in the country.

The dominant telecommunications service market players are required to maintain a separate account for interconnection, access and infrastructure, sharing costs and fees, and any other business activities. Vertical separation in a form of accounting separation is therefore required.

Regarding cross-border data flows, there is no data protection legislation in Malawi,

apart from provisions in the Electronics and Cyber Security Act governing the processing of personal data. Only in health sector policy is there a local storage requirement for health-related data.

Electronic transactions

This pillar focuses on issues such as licences for e-commerce activities, online tax registration and declaration for non-resident firms, conformity to internationally accepted rules on electronic contracts, measures affecting the use of electronic authentication (such as electronic signature), and the availability of dispute settlement mechanisms.

The regulatory framework in Malawi does not require a separate licence to engage in e-commerce. Provision is made for online tax declaration for non-resident digital services providers on the website of the Malawi Revenue Authority.

Malawi is not a party to key conventions that promote international standardized rules on cross-border electronic contracts, namely the United Nations Convention on the Use of Electronic Communications in International Contracts or the United Nations Convention on Contracts for the International Sale of Goods. Nonetheless, the country adopted the Model Law on Electronic Commerce of the United Nations Commission on International Trade Law in 2016. This implies that domestic regulations on electronic contracts in Malawi comply only to some extent with international standardized rules.

The Trade Marks Act of Malawi protects confidential information, while the validity and equivalence of electronic signatures to

handwritten signatures is granted under the Electronic Transactions and Cyber Security Act.

The Electronic Transactions and Cyber Security Act provides for e-commerce dispute settlement through arbitration in accordance with the Arbitration Act. Civil court and alternative dispute resolution mechanisms are also possible. Disputes specific to domain names are resolved through arbitration according to the Sustainable Development Networking Programme.mw Domain Registration Policy of 2015, with the High Court of Malawi retaining exclusive jurisdiction. Domain name dispute resolution is in line with the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers.

Payment systems

This pillar captures measures that affect payments made through electronic means. It includes measures on access to payment methods, the adoption of international security standards for domestic payment transactions and other restrictions on Internet banking.

Access to payment methods in Malawi is non-discriminatory and is guided by the Payment Systems Act. There is, however, a restriction in the form of a commercial presence requirement for systems operators, namely card issuers, mobile payment system operators and remittance processors.

There are no specified reference international payment security standards for national payment security systems in Malawi except the Guidelines for Mobile Payment Systems. Mobile payment solutions for

mobile payment services are required to adhere to ISO 8583 and to be encrypted end-to-end. The overall security framework should ensure that the minimum encryption standard is Triple Data Encryption Standard at all stages of transaction processing.

There are no limits on Internet banking, but restrictions are placed on mobile payment services, for which transaction value limits and balance limits for merchants are pegged at 100,000,000 Malawi kwacha per day.

Intellectual property rights

This pillar concerns domestic policies on the protection of intellectual property rights accorded to foreigners under copyrights and trademarks, and enforcement mechanisms to address infringements, including those occurring online.

Under the Copyright Act of Malawi, the use of a protected work without the right holder's consent is limited to special cases, in line with international rules.

Malawi is a party to international protocols such as the Protocol Relating to the Madrid Agreement concerning the International Registration of Marks and the Banjul Protocol on Marks, which are recognized in domestic law. There is no discrimination against foreign firms regarding trademark registration and protection.

Malawi is a party to the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related

Aspects of Intellectual Property Rights and the Universal Copyright Convention. Malawi has not ratified other treaties such as the World Intellectual Property Organization (WIPO) Copyright Treaty or the WIPO Performances and Phonograms Treaty. Protection of foreign rights holders may be limited to rights covered by conventions recognized in law.

Administrative or judicial remedies are available for intellectual property infringements under both the Copyright Act and the Trade Marks Act. Remedies include damages, injunction, seizure and account of profits. Criminal penalties include fines and imprisonment.

In addition to the foregoing, other regulatory measures that can affect digitally enabled services in Malawi include the mandatory declaration of technical characteristics of means of encryption and the source code of software used by encryption service providers.

There is, however, no arbitrary interference in online services by government authorities, except on grounds of national security, morality and misleading advertising, among others.

Redress for anticompetitive business practices in Malawi can be sought under the Competition Act. In the communications sector, it can also be sought from the Malawi Communications Regulatory Authority under the Communications Act of 2016.

REGULATORY ENVIRONMENT BASED ON DIGITAL TRADE INTEGRATION INDICATORS

Foreign investment in sectors relevant to digital trade

There are restrictions on foreign equity shareholding in electronic communications. Under the Communications Act of 2016, at least 20 per cent of shares must be held locally. Section 104 of the Act reserves the entire ownership of content services for Malawian citizens, although enforcement of the provision has been reserved. In addition, the Companies Act requires at least one director of a company to be a permanent resident of Malawi.

The screening criteria for investment in Malawi are not transparent. Section 8 (1) (a) of the Investment and Export Promotion Act of 2012, which established the Malawi Investment and Trade Centre, empowers its Board to issue investment certificates on “such terms and conditions as it thinks fit”. However, the investment policy generally grants foreign investors freedom to invest in any sector of the economy in Malawi, with no restriction on ownership.

Domestic data policies

There is neither a comprehensive data protection framework in Malawi nor a requirement to perform a data protection impact assessment or have a data protection officer. There is a required data retention period of at least seven years, however.

The Internet in Malawi is used moderately to sell goods and services to consumers, with a Networked Readiness Index score on business-to-consumer transactions of 3.1 on a scale of 1 to 7.

Intermediary liability and content access

The law in Malawi provides a conditional safe harbour for intermediary service providers, subject to the expeditious removal of unlawful content when it comes to their knowledge or upon receiving a takedown notice. They are generally not required to monitor user activity, however.

Although the law does not permit the Government to arbitrarily access or block commercial web content in Malawi, fears were

reported in a 2019 survey conducted by Freedom House that the Government is able to abuse the “protecting public order and national security” provision in the Electronic Transactions and Cyber Security Act to implement full or partial Internet shut-downs.

Online sales and transactions

Regulations on taxation do not provide for a de minimis rule on goods. This implies that even the smallest parcels purchased online are not exempted from duties and taxes.

CONCLUSION AND RECOMMENDATIONS

Most regulatory measures are not restrictive to the digital services trade restrictiveness index and digital trade integration. The regulatory environment improved in 2016 with the enactment of the Electronic Transactions and Cyber Security Act and the Communications Act, which facilitate the promotion of non-restrictive access to infrastructure and connectivity, and a conducive e-commerce and electronic transactions operating environment. The payment systems and intellectual property rights protection in digital services trade are non-discriminatory, while there is an open cross-border data flow regime, except for health sector data.

Restrictive measures do exist in some digital trade-related regulations, however. First, the scope of coverage and protection is limited, as Malawi is not a signatory to United Nations conventions that promote international standardized rules on cross-border electronic contracts, nor is it a party to WIPO treaties that seek to protect foreign rights holders in a digital environment. Second, the Malawi Communications Regulatory Authority is unable to enforce the obligations of dominant market players in the telecommunications sector in the absence

of the declaration of a dominant firm. Third, restrictive provisions are prevalent in the law itself and include: the requirement for encryption service providers to declare the means of encryption and the source code of software used to the Malawi Communications Regulatory Authority; the cap on foreign equity shareholding in the electronic communications sector at 80 per cent; and the limits on transaction values for mobile payment systems. Additional problems are: the lack of transparency in screening foreign investment in Malawi; the lack of a de minimis rule on goods; and the lack of precisely prescribed international payment security standards for payment systems other than mobile payment solutions.

In the light of the above, it is recommended that the Government consider identifying and signing international treaties relevant to digital trade, including:

- The United Nations Convention on the Use of Electronic Communications in International Contracts and the United Nations Convention on Contracts for the International Sale of Goods. These agreements aim to

facilitate fairness and the validity of cross-border electronic contracts.

- The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. This would signal the commitment of the Government to the protection of rights holders in the digital environment.

In addition, the Government and the relevant agencies and authorities should work towards strengthening the domestic regulatory framework for digital trade by:

- Developing data protection legislation to regulate cross-border data flows
- Developing regulations for the Communications Act to guide the determination of dominant market players
- Developing predictable and detailed screening criteria for foreign investment
- Amending the Taxation Act to incorporate a de minimis rule on goods
- Adopting international payment security standards in payment systems regulations and policies to instil trust in users of the systems

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The country profile is part of the training and research initiative on digital trade regulatory integration in Africa, launched by the Economic Commission for Africa towards the end of 2020 to collect specific data on digital trade regulations and integration. Malawi was selected as one of the pilot countries for the initiative