

# DIGITAL TRADE REGULATORY INTEGRATION

## COUNTRY PROFILE

### **Lesotho**





# INTRODUCTION

The African Trade Policy Centre of the United Nations Economic Commission for Africa (ECA) has embarked on a Digital Trade Regulatory Integration (DTRI) initiative with four primary objectives:

- Provide information on digital services trade regulations that could facilitate the negotiation and implementation of the African Continental Free Trade Area (AfCFTA) Protocol on Digital Trade.
- Inform the development of a digital trade integration index that could become a component of the Africa Regional Integration Index.<sup>1</sup>
- Inform the addition of African countries to the Digital Services Trade Restrictiveness Index (Digital STRI), as developed by the Organisation for Economic Co-operation and Development.
- Offer a solid basis for further analytical work by ECA and others on digital trade.

The DTRI initiative researches the legal and regulatory environment associated with digital trade and will help African countries bet-

ter understand and address barriers to the growth and development of digital trade and e-commerce. Addressing the issues DTRI identifies will help promote digital trade and e-commerce and make it a more plausible choice for commercial transactions between businesses and consumers.

This country profile is based on observations from two datasets developed from the DTRI initiative. The first includes information on restrictions to digital services trade from 2014 to 2021 and is modelled after the Digital STRI. The second covers measures related to digital trade integration, beginning with the effective date of each measure, and reflects the latest available information. The legal and regulatory measures researched are categorized into policy areas in both digital services trade restrictions and digital trade integration, and the results are presented in the corresponding section of the profile. Where policy areas overlap, the profile presents results only once, to the extent possible.

This country profile presents the key findings for Lesotho.

<sup>1</sup> See <https://arii.uneca.org/>.

# RESTRICTIVENESS OF THE REGULATORY REGIME FOR DIGITAL SERVICES TRADE



To assess the degree of restrictiveness among digital services trade in Botswana, an in-depth review of policies, legislation and regulations on digital services trade restrictions was conducted under the five pillars of the Digital STRI:

- Infrastructure and connectivity.
- Electronic transactions.
- Payment systems.
- Intellectual property rights.
- Other barriers affecting trade in digitally enabled services.

## **Infrastructure and connectivity**

The infrastructure and connectivity pillar covers laws and policies related to communications infrastructure that are essential to digital trade: interconnection, vertical separation, any dominant firm in the market and cross-border data flows.

In Lesotho, interconnection for both mobile and fixed telecommunications services is mandated under Sections 27–32 of the

Communications Act No. 4 of 2012<sup>2</sup> and Sections 28–31 of the administrative rules of 2016.<sup>3</sup> The law provides the Lesotho Communications Authority (LCA) with powers to regulate interconnection; access and infrastructure sharing; and the prices, terms and conditions of interconnection agreements. To incentivize participation, the law also allows telecommunications service providers to negotiate an interconnection agreement's prices, terms and conditions, and duration. The law further states that if the negotiating parties fail to conclude an interconnection agreement within 90 days, either party can request the LCA to resolve the dispute. Should the LCA fail to broker a voluntary agreement after 60 days of dispute resolution, it shall issue a final decision settling unresolved issues.

Vertical separation is mandated in Lesotho. The Communications Act stipulates competition safeguards, including rules that require dominant players to offer services on an unbundled basis, separately account for costs and revenues related to specific services, establish separate corporate affil-

<sup>2</sup> [https://www.lca.org.ls/wp-content/uploads/2020/04/Communications\\_Act\\_2012.pdf](https://www.lca.org.ls/wp-content/uploads/2020/04/Communications_Act_2012.pdf).

<sup>3</sup> <https://lca.org.ls/download/lesotho-communications-authority-administrative-rules-2016/?wpdmdl=926&masterkey=5a9568f3bea84>.

iates, provide specific services, disclose information about infrastructure or services to other licensees and refrain from engaging in cross-subsidization or discrimination in favour of an affiliate. Lesotho's laws do not explicitly mandate non-discriminatory internet traffic management, although Section 3 of the ICT Policy of 2008<sup>4</sup> recognizes the importance of adopting a transparent, non-discriminatory and competitively neutral universal service regime.

The Communications Act mandates that the LCA conduct annual market analyses to identify dominant firms in each communications service market based on the criteria set forth in the law. The LCA's last publication on dominant players was in 2017, in the State of ICT in Lesotho report.<sup>5</sup> The report identified Vodacom Lesotho as the dominant player in mobile network market, with a 76.4 per cent market share, and Econet Telecom Lesotho as the dominant player in the fixed telephones market.

The Data Protection Act of 2011<sup>6</sup> does not explicitly allow the free cross-border transfer of personal data. The data controller is permitted to transfer personal information abroad when the laws of the destination country are substantially similar to the information protection principles of Lesotho or when one of the other conditions prescribed in the law are met (for example, the data subject consents to the transfer or the transfer is necessary for the performance of a contract between the data subject and data controller). Private sector safeguards,

such as binding corporate rules, may also be implemented.

## Electronic transactions

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

In Lesotho, licensing of e-commerce activities is not a separate legal requirement from ordinary business licensing. For tax purposes, the law requires that non-resident foreigners maintain a local representative or agent in Lesotho.<sup>7</sup>

Lesotho is a party only to the United Nations Convention on Contracts for International Sales of Goods. However, the country is not a party to several key conventions that promote international standardized rules on cross-border electronic contracts, including the United Nations Convention on the Use of Electronic Communications in International Contracts, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures and Model Law on Electronic Commerce. Lesotho's status relative to these key international conventions implies that domestic regulations on electronic contracts comply to only a limited extent with international standardized rules.

4 [https://www.gov.ls/wp-content/uploads/2019/02/Final\\_Communications\\_Policy\\_Document.pdf](https://www.gov.ls/wp-content/uploads/2019/02/Final_Communications_Policy_Document.pdf).

5 <https://lca.org.ls/wp-content/uploads/filr/2333/State%20of%20ICT%20in%20Lesotho%20Demand%20Site%20Indicators%20-%20Singles%20-%2002.2018.pdf>.

6 [http://www.nic.ls/lsnic/community/policies/Data\\_Protection\\_Act\\_2011\\_Lesotho.pdf](http://www.nic.ls/lsnic/community/policies/Data_Protection_Act_2011_Lesotho.pdf).

7 <https://www.lra.org.ls/sites/default/files/2020-02/Taxation%20of%20Foreign%20Nationals.pdf>.

Lesotho does not have a law that explicitly protects confidential information or a law recognizing electronic signatures, though there is a pending bill to that effect. The country has no specific law on cross-border digital trade settlement, but regular judicial channels can be invoked. In the case of disputes relating to domain names, the Lesotho Network Information Center is the statutory body handling disputes related to “.ls” domain names. If mediation fails, the Domain Registration Policy<sup>8</sup> also stipulates that the dispute can be resolved under the Uniform Dispute Resolution Policy of the Internet Corporation of Assigned Names and Numbers.

## Payment systems

The payment system pillar covers measures that affect electronic payments. It includes measures regarding access to payment methods, the adoption of international security standards for domestic payment transactions and other restrictions on internet banking and insurance.

Access to payment settlement methods in Lesotho is non-discriminatory, as guided by the Payment Systems Act of 2014<sup>9</sup> and related Regulations.<sup>10</sup> All issuers of electronic payment instruments are required to obtain a licence or authorization from the Central Bank of Lesotho and are required to have a registered office in Lesotho.

The laws in Lesotho do not cite specific international payment security standards. However, the policy states that the Central Bank shall require the national payment system

to conform to international standards and best practices. These international standards and best practices are complemented by the guidance provided by the Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions on central bank financial market infrastructures and cyber risk.

There are no restrictions in the Payment Systems Act or related regulations applicable to internet banking and insurance in Lesotho.

## Intellectual property rights

This pillar looks at how domestic intellectual property laws (copyrights and trademarks) treat foreigners in Lesotho. It also considers whether enforcement mechanisms exist that address infringements of intellectual property, including online.

Lesotho is a party to the Madrid Union (Madrid Agreement and Protocol) and the International Trademark System, which is domesticated through the Industrial Property Regulations.<sup>11</sup> As such, the law in Lesotho does not discriminate against foreign firms on trademark registration and protection.

The country’s protection of copyrights and related rights is discriminatory in that Lesotho has not ratified the World Intellectual Property Organization (WIPO) Copyright Treaty or the WIPO Performances and Phonograms Treaty. It has been a party to the Berne Convention for the Protection of Literary and Artistic Works since September 28, 1989 and the Agreement on Trade-Re-

8 [http://mail-hosting.nic.ls/lsnic/community/policies/domain\\_name\\_registration\\_policy\\_v1.0.0.pdf](http://mail-hosting.nic.ls/lsnic/community/policies/domain_name_registration_policy_v1.0.0.pdf).

9 <https://www.centralbank.org.ls/images/Legislation/NPS/Payment-Systems-Act-2014.pdf>.

10 [https://www.centralbank.org.ls/images/Legislation/NPS/PAYMENT\\_SYSTEM\\_REGULATIONS\\_2017.pdf](https://www.centralbank.org.ls/images/Legislation/NPS/PAYMENT_SYSTEM_REGULATIONS_2017.pdf).

11 <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/ls/ls002en.pdf>.

lated Aspects of Intellectual Property Rights (TRIPS) since May 31, 1995. Thus, the protection of foreign copyright holders is limited to the recognized conventions under Lesotho's laws. The Copyright Order of 1989<sup>12</sup> includes exceptions to infringement that allow uses of copyright material without permission under several conditions.<sup>13</sup>

In cases of infringement of intellectual property rights, the Lesotho Copyright Order and Industrial Property Order of 1989<sup>14</sup> state that intellectual property rights owners may take the claim to a competent court and seek damages. Lesotho's laws also provide provisional measures by which the competent court may grant an interdict to prevent the infringement or prohibit the infringement's continuation. Criminal enforcement proceedings and penalties are available as remedies as part of intellectual property rights enforcement. A person convicted of copyright infringement is liable to be fined, imprisoned or both, with the pen-

alty based on the gravity of the crime. Fines range from M1,000 (US\$66) to M12,000 (US\$796), and prison sentences range from three months to five years. A person convicted of a crime under provisions of the Industrial Property Order is liable to a fine of M10,000 (US\$663) or imprisonment for a term of 10 years, or both.

Other barriers affecting trade in digitally enabled services

Although Lesotho does not have a law that requires firms to have a local presence to provide cross-border services, for tax purposes any foreign company that generates revenue in Lesotho must have physical representation.

The country does not have a competition law or policy. However, Section 28 of the Penal Code covers offenses by companies in general.<sup>15</sup>

12 <https://www.aripo.org/wp-content/uploads/2018/12/Lesotho-Copyright-Act.pdf>.

13 Conditions include the following: for purposes of education; use by way of illustration in an original work of an author or authors (provided that the extent of such use is compatible with fair practice); use of expressions of folklore for creating an original work of an author or authors inspired by folklore; and incidental use of expressions of folklore, including use of an expression of folklore for the purpose of reporting on a current event by means of photography, broadcasting or sound or visual recording (provided that the extent of such use is justified by the informatory purposes) and use of objects containing the expressions of folklore that are permanently located in a place where they can be viewed by the public if the use consists of including their image in a photograph, in film or in television broadcast.

14 <https://wipo.int/edocs/lexdocs/laws/en/ls/ls001en.pdf>.

15 <https://wipo.int/edocs/lexdocs/laws/en/ls/ls022en.pdf>.

# INDICATORS OF DIGITAL TRADE INTEGRATION

This section discusses measures related to the level of digital trade integration in Lesotho. The regulatory regime of digital trade integration was assessed under 11 pillars:

- Tariff and trade defence on measures applied to intraregional imports of information and communications technology (ICT) goods.
- Public procurement of digital goods and services.
- Foreign direct investment for digital trade.
- Intellectual property rights.
- Telecommunications infrastructure and competition.
- Cross-border data policies.
- Domestic data policies.
- Intermediary liability and content access.
- Quantitative trade restrictions.
- Standards.
- Online sales and transactions.

Since the findings for some of these pillars are discussed in the previous section on

Digital STRI, to the extent possible, a duplicative discussion is avoided in this section.

## Public procurement

Lesotho procurement laws and policies<sup>16</sup> do not exclude foreign firms from public procurement of digital goods and services and do not impose restrictions on source codes, encryption or trade secrets. However, the laws grant a margin of preference to companies with a certain percentage of shares owned by Lesotho nationals. For example, a 15 per cent margin of preference is awarded to a business in Lesotho where there is a majority of local shareholders (51 per cent or above), a 10 per cent margin to a business owned 30–50 per cent by Lesotho nationals and a 5 per cent margin to a business owned 10–30 per cent by Lesotho nationals. In addition, the country's procurement regulations give a 10 per cent margin of preference to companies that supply goods of Lesotho origin and to tenderers who use

<sup>16</sup> This is governed by two sets of policy, the Public Procurement Regulations of 2007 ([http://www.finance.gov.ls/documents/laws%20and%20regulations/PUBLIC\\_PROCUREMENT\\_REGULATIONS\\_2007.pdf](http://www.finance.gov.ls/documents/laws%20and%20regulations/PUBLIC_PROCUREMENT_REGULATIONS_2007.pdf)) and the Public Procurement Policy of 2018 (<http://www.finance.gov.ls/documents/laws%20and%20regulations/FINAL%20PROCUREMENT%20POLICY%20%2019%20APRIL%202018.pdf>).



a large amount of locally produced goods, materials and services. The regulations also grant a 10 per cent margin of preference to tenderers who propose to perform at least 50 per cent of the contract in Lesotho. The regulations grant this margin by stipulating the establishment of necessary businesses and through the use and capacity development of Basotho staff. To obtain preference, tenderers can also sub-contract at least 50 percent of a contract to one or more Basotho Businesses.

To respond to public procurement tenders, entities must first register as legal entities, apply for trading licenses and register with the Lesotho Revenue Authority for tax purposes. Finally, Lesotho is not a signatory to the World Trade Organization's Agreement on Government Procurement.

### Foreign direct investment

Lesotho does not have a law restricting foreign shareholding in sectors relevant to digital trade. There are no joint venture requirements, except that a foreign investor must register with the One-Stop Business Facilitation Centre to start a joint venture or acquire a license to operate in Lesotho.<sup>17</sup> In addition, joint ventures are required to have a minimum foreign equity capital outlay of US\$50,000 in cash or kind, and agency establishments must have authority to negotiate and conclude contracts on behalf of their foreign parent companies. However, there is a restriction regarding the national residency of members of the board of directors and

managers. Section 11(3f) of the Companies Act of 2011<sup>18</sup> requires companies to provide names and addresses of one or more persons residing in Lesotho with authority to act on behalf of the company, while Section of 17(b) of the Companies Regulations of 2012<sup>19</sup> makes it mandatory for the company to have a company secretary resident in Lesotho. Furthermore, Lesotho does not have a formal investment screening mechanism, but it is reported that the government routinely screens foreign direct investment to check that it is consistent with the country's national interests.

### Domestic data policies

Personal data in Lesotho is regulated under the Data Protection Act of 2012<sup>20</sup>; however, no law regulates cybercrime as the Computer Crime and Cybercrime Bill is still pending. Section 58 of the Data Protection Act obligates every data controller to appoint one or more data protection officers. Conducting a data protection impact assessment is not an explicit requirement of the Data Protection Act, but it is an implied requirement under Section 20 of the act. Section 20 sets out a reciprocal security obligation on both data controllers and their data processors to secure data in their possession or control by adopting appropriate, reasonable, technical and organizational measures to prevent the loss, damage or unauthorized destruction of data, unlawful access to data or unauthorized processing of data. However, Section 19 of the Data Protection Act requires personal information to be retained only as

17 [https://www.wto.org/english/tratop\\_e/tpr\\_e/s222-02\\_e.doc](https://www.wto.org/english/tratop_e/tpr_e/s222-02_e.doc).

18 <https://wipo.lex-res.wipo.int/edocs/lexdocs/laws/en/ls/ls020en.pdf>.

19 <http://www.obfc.org.ls/legislation/COMPANIES%20REGS%202012%20PRINTING%2024.4.2012%20FINAL.pdf>.

20 [http://www.nic.ls/lsnic/community/policies/Data\\_Protection\\_Act\\_2011\\_Lesotho.pdf](http://www.nic.ls/lsnic/community/policies/Data_Protection_Act_2011_Lesotho.pdf).

long as needed for legal claims or legitimate business purposes or as otherwise provided by law. The same applies to business information. Section 48 of the Value Added Tax Act and the guide for keeping records and accounts require maintaining or retaining records or accounts for as long as they remain material in the administration of the act.

### **Intermediary liability and content access**

Lesotho does not have a legal framework that provides a safe harbour for intermediaries. However, Section 9 of the Lesotho Communications (Subscriber Identity Module and Mobile Device Registration) Regulations proposed in 2021<sup>21</sup> allows the LCA to hand over private communications between citizens to security agencies without consent or court approval. The country has

proposed rules (Lesotho Communications Authority [Internet Broadcasting] Rules of 2020) that would require a person with at least 100 followers to register with the LCA by providing identity documents, proof of residence or place of business and show the ability to comply with the country broadcasting rules of 2004.<sup>22</sup> Lesotho does not have any law or regulation that gives government the authority to block or filter web content.

### **Online sales and transactions**

Lesotho does not have a de minimis rule on taxes and customs duties except for gifted articles that enter the country through the airport with a value of up to M5,000 (US\$300). This implies that even the smallest parcels purchased online are not exempted from duties and taxes.

<sup>21</sup><https://lca.org.ls/wp-content/uploads/2021/08/LESOTHO-COMMUNICATIONS-AUTHORITY-SIM-CARD-AND-DEVICE-REGISTRATION-JUL2021.pdf>.

<sup>22</sup> <https://lca.org.ls/wp-content/uploads/2020/10/SOCIAL-MEDIA-RULES-2020-DRAFT-V3-250820.pdf>.

# CONCLUSION AND RECOMMENDATIONS

Regulatory measures in Lesotho are not very restrictive, but some areas need to be improved to facilitate digital trade. The country is not a party to several key conventions that promote international standardized rules on cross border electronic contracts: United Nations Convention on the Use of Electronic Communications in International Contracts, the UNCITRAL Model Law on Electronic Signatures and the Model Law on Electronic Commerce. No law explicitly protects confidential information or legally recognizes electronic signatures. Further, public procurement laws, while not excluding foreigners, favour Lesotho nationals, goods and services, which are assigned a preference margin.

National payment security system laws are not explicit about the international standards to which the country subscribes. The country is not a party to the WIPO Copyright Treaty or the WIPO Performances and Phonograms Treaty, which seek to protect foreign rights holders in the digital environment. The country's data retention laws are unfavourable, as they do not state how long data must be stored. Two proposed laws would facilitate access private information without the owner's consent or court ap-

proval. The country has no competition law or policy, which means that there are no remedies for companies that engage in anticompetitive behaviour. Finally, there is a lack of transparency in screening foreign investment in Lesotho and no de minimis rule on digital goods or services.

Based on the findings of this profile, the following measures are recommended to strengthen the domestic regulatory framework for digital trade in Lesotho:

- Consider signing and ratifying international treaties significant to digital trade:
  - United Nations Convention on the Use of Electronic Communications in International Contracts (2005), the UNCITRAL Model Law on Electronic Signatures (2001) and the UNCITRAL Model Law on Electronic Commerce (1996). These agreements aim at facilitating fairness and validity in cross-border electronic contracts.
  - WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. This would signal the Government's commitment to protect-

- ing rights holders in the digital environment.
- Develop competition policy and law.
  - Develop a law that explicitly protects confidential information and data retention to give companies and individuals certainty around their data privacy.
  - Expedite the gazetting of the electronic transactions and electronic commerce bill into law so that electronic signatures are recognized in the country.
- Expedite the gazetting of the computer crime and cybercrime bill into law to address cybercrimes.
  - Develop a predictable and detailed screening criterion for foreign investment.
  - Review the need for and establish a more comprehensive de minimis rule incorporating other goods and services and eliminating barriers to prosperous digital trade.
  - Incorporate international payment security standards in the country's payment systems laws and regulations to instil trust in users of the systems.



