

DIGITAL TRADE REGULATORY INTEGRATION

COUNTRY PROFILE

Malawi



United Nations
Economic Commission for Africa



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.¹

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 Malawi.

¹ 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.
- Other barriers affecting trade in digitally enabled services.

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.

Malawi's Communications Act of 2016 seeks to create an atmosphere of non-discrimination for internet traffic management.² A key objective laid out in the legislation is to establish a technology- and service-neutral licensing regime that recognizes the conver-

gence of telecommunication, broadcasting, and information technologies and services. Malawi's legislation requires interconnection for both mobile and fixed services and regulates the interconnection of prices, conditions and reference offers. Telecommunication service suppliers are 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 the sharing of information on interconnection, access, and infrastructure. It also requires applicable technical and price offers to be made public.

Although it is the prerogative of the Malawi Communications Regulatory Authority to conduct market analysis and determine a dominant firm in the market, the authority has not yet published a decision identifying dominant players. However, the International Telecommunication Union report of

² <https://macra.mw/download/communications-act-2016/>.

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 and Airtel Malawi Ltd and Telekom Networks Malawi Ltd as the two main mobile operators in the country.³

The dominant telecommunication service market players are required to maintain separate accounts for interconnection, access and infrastructure; cost sharing and fees; and any other business activities. Vertical separation of accounting is therefore required.

No data protection legislation governs the processing of personal data across borders apart from provisions in the Electronics Transactions and Cyber Security Act of 2016.⁴ Sections 71–74 describe how data in Malawi should be processed, the rights of data subjects, the accuracy of information, and security obligations. Section 74 addresses data security, stipulating that data controllers must implement measures to protect personal data when it is processed over a network; however, it does not specify whether the network is domestic or foreign. Additionally, Malawi has local storage requirements only for health-related data.

Electronic transactions

This pillar focuses on issues such as licensing for e-commerce activities, online tax registration and declaration for non-resident firms, conformity to international-

ly 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 license to engage in e-commerce. Provision is made for online tax declarations for non-resident digital services providers on the website of the Malawi Revenue Authority.⁵

Malawi is not a party to key conventions that promote international standardized rules on cross-border electronic contracts, such as 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. 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 TradeMarks Act of 2018 protects confidential information,⁶ while the validity and equivalence of electronic signatures to handwritten signatures are granted in Section 8 of the Electronic Transactions and Cyber Security Act of 2016.⁷

The Electronic Transactions and Cyber Security Act provides for e-commerce dispute

3 <https://www.itu.int/en/ITU-D/Statistics/Pages/publications/misr2018.aspx>.

4 <https://macra.mw/storage/2021/04/MACRA-Electronic-Transactions-Cybersecurity-Act-2016-33.pdf>.

5 <https://www.mra.mw/>.

6 <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/mw/mw032en.pdf>.

7 <https://macra.mw/storage/2021/04/MACRA-Electronic-Transactions-Cybersecurity-Act-2016-33.pdf>.

settlement through arbitration in accordance with Malawi's Arbitration Act.⁸ 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 2015,⁹ 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 of 2016.¹⁰ However, Malawi does require a commercial presence for systems operators (card issuers, mobile payment system operators and remittance processors).

No international payment security standards are specified for national payment security systems in Malawi except the Guidelines for Mobile Payment Systems issued by

the Reserve Bank of Malawi.¹¹ 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 Triple Data Encryption Standard is the minimum encryption standard at all stages of transaction processing.

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

Intellectual property rights

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

Under the Copyright Act of 2016, the use of a protected work without the consent of the right holder is limited to special cases, in line with international rules.¹²

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.

8 <https://malawilii.org/akn/mw/act/1967/26/eng%402014-12-31#:~:text=The%20authority%20of%20an%20arbitrator,by%20leave%20of%20the%20Court>.

9 <http://www.registrar.mw/policies/SDNP-dot-MW-Domain-Registration-Policy-ver-1.2a.pdf>.

10 [https://www.rbm.mw/\(S\(ydroiOvrhbOo2vbofucoaq45\)\)/PaymentSystems/](https://www.rbm.mw/(S(ydroiOvrhbOo2vbofucoaq45))/PaymentSystems/).

11 <https://comesabusinesscouncil.org/wp-content/uploads/2020/04/16-Mobile-Payments-Systems-Guidelines.pdf>.

12 <https://www.aripo.org/wp-content/uploads/2018/12/Malawi-Copyright-ACT-September-2016-1.pdf>.

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. Therefore, 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 of 2016 and the Trade Marks Act of 2016.¹³ Remedies include damages, injunction, seizure and account of profits. Criminal penalties include fines and imprisonment.

Other barriers affecting trade in digitally enabled services

Other regulatory measures that can affect digitally enabled services in Malawi include 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. Interference is permitted in exceptional cases, 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 of 1998.¹⁴ In the communications sector, it can also be sought from the Malawi Communications Regulatory Authority under the Communications Act of 2016.¹⁵

¹³ <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/mw/mw032en.pdf>.

¹⁴ <https://media.malawilii.org/files/legislation/akn-mw-act-1998-43-eng-2014-12-31.pdf>.

¹⁵ <https://macra.mw/download/communications-act-2016/>.

INDICATORS OF DIGITAL TRADE INTEGRATION



This section discusses measures related to the level of digital trade integration in Malawi. 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 communication technology 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.

Foreign direct investment

Malawi places restrictions on foreign equity shareholding in electronic communications. The Communications Act of 2016 requires that at least 20 percent of shares be held locally.¹⁶ Section 104 of the act reserves the entire ownership of content services for Malawian citizens, although enforcement of the provision has been restrained. In addition, the Companies Act of 2013 requires at least one director of a company to be a permanent resident of Malawi.¹⁷

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

¹⁶ <https://macra.mw/download/communications-act-2016/>.

¹⁷ <https://www.icam.mw/wp-content/uploads/2016/04/Companies-Act-No-15-of-2013-150dpi.pdf>.

terms and conditions as it thinks fit.”¹⁸ 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

Malawi does not have a comprehensive data protection framework or any requirements 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 is used moderately in Malawi to sell goods and services to consumers, with a 2016 Networked Readiness Index score on business-to-consumer transactions of 3.1 on a scale of 1 to 7.¹⁹

Intermediary liability and content access

The law in Malawi provides a conditional safe harbour for intermediary service pro-

viders, subject to the expeditious removal of unlawful content when brought to their attention or upon receiving a takedown notice. Intermediary service providers 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 expressed in a 2019 survey conducted by Freedom House that the government could abuse the “protecting public order and national security” provision in the Electronic Transactions and Cyber Security Act of 2016²⁰ to implement full or partial internet shutdowns.

Online sales and transactions

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

¹⁸ <https://investmentpolicy.unctad.org/investment-laws/laws/283/malawi-investment-and-export-promotion-act-2012>.

¹⁹ https://www3.weforum.org/docs/GITR2016/WEF_GITR_Full_Report.pdf (see NRI indicator 7.05, p. 133).

²⁰ <https://macra.mw/storage/2021/04/MACRA-Electronic-Transactions-Cybersecurity-Act-2016-33.pdf>.

CONCLUSION AND RECOMMENDATIONS

Many of Malawi's regulatory measures are not restrictive to digital services trade or digital trade integration. The regulatory environment has steadily improved, especially following the 2016 Electronic Transactions and Cyber Security Act and the Communications Act. These laws promote connectivity and non-restrictive access to infrastructure and create a conducive operating environment for e-commerce and electronic transactions. Malawi's laws governing payment systems and intellectual property rights are also non-discriminatory, and Malawi has an open cross-border data flow regime, except for health sector data.

Some restrictive measures do exist, however. First, the scope of coverage and protection of Malawi's laws is limited, as it 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 laws themselves. Examples 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 80 per cent cap on foreign equity shareholding in the electronic communications sector and the limits on transaction values for mobile payment systems. Additional items that impede digital trade include 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 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 government's commitment to protecting 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 instill trust in users of the systems.



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