

DATA PROTECTION:
INTERNATIONAL INFLUENCE IN AFRICA

COTTIER/GREENLEAF

Methodology

- *First set of tables* comparing the different “African relevant” international DP instruments (published in Greenleaf/Cottier, International and regional commitments in African data privacy law, Computer Law & Security Review 44 (2022))
- *Second set of tables* comparing the 35 African DP laws currently in force (to be published in 2023)
- *Both comparative analyses are based on 38 different entries (standard DP features), ranging from 1st generation standards (1981 -), 2nd gen. standards (1995 -), 3rd gen. standards (GDPR and CoE 108 +) to 3rd gen. standards (GDPR only)*
- Warning: textual comparison

Standard features of DP legislations

1st generation: e.g. Collection (limited, lawful, fair means), Data quality (relevant, accurate, up-to-date), Purpose specification by time of collection, Notice of purpose/rights, Uses limited to purposes specified, Security through reasonable safeguards, Right of access and Right of correction.

2nd generation: e.g. Destruction or anonymisation after purpose completed, Additional protections for sensitive data, Legitimate bases for processing defined, Right to object to processing, Adequacy principle for transborder data flows, Independent DPAs, Limits on automated decision making.

3rd generation I: e.g. Data protection by design/default, Demonstrable accountability, Data breach notification, Stronger consent requirements, Extra protection for biometric and genetic data, Strong powers of DPAs, Right to be forgotten.

3rd generation II (GDPR only): e.g. Mandatory impact assessments, Extra-territorial jurisdiction, Right to data portability, Mandatory data protection officers, Maximum fines based on annual turnovers.

Example of First set of Tables (Comparison of international instruments)

Table 1: 1st Generation standards (1981-) implemented in African instruments

I	1 st Generation standards	C108 1981	ECOWAS 2010	SADC 2013	AU 2014	GDPR 2016
1.01	Collection – limited (not excessive), lawful (for legitimate purposes) and by fair means	C108 5(a), (c)	24	12	–	GDPR 5(1)(a)
1.02	Data quality – relevant, accurate, up-to-date	C108 5(c)(d)	26	11(1)	13(4)	GDPR 5(1)(d)
1.03	Purpose specification by time of collection	C108 5(b)	25(1)	13	–	GDPR 5(1)(b)
1.04	Notice of purpose/rights [assumed implied, but not explicit until EU Directive]	C108 5(b) C108+ 8	–	21(1)	15	GDPR 13, 14
1.05	Uses limited (including disclosures) to purposes specified or compatible	C108 5(b)	25(1)	13(1)	13(3)(a)	GDPR 5(1)(b)
1.06	Security through reasonable safeguards	C108 7	28; 43	24	13(6);20; 21	GDPR 5(1)(f), 32
1.07	Openness re personal data practices (not limited to data subjects)	C108 8(a)	–	–	–	GDPR 14(5)(b)

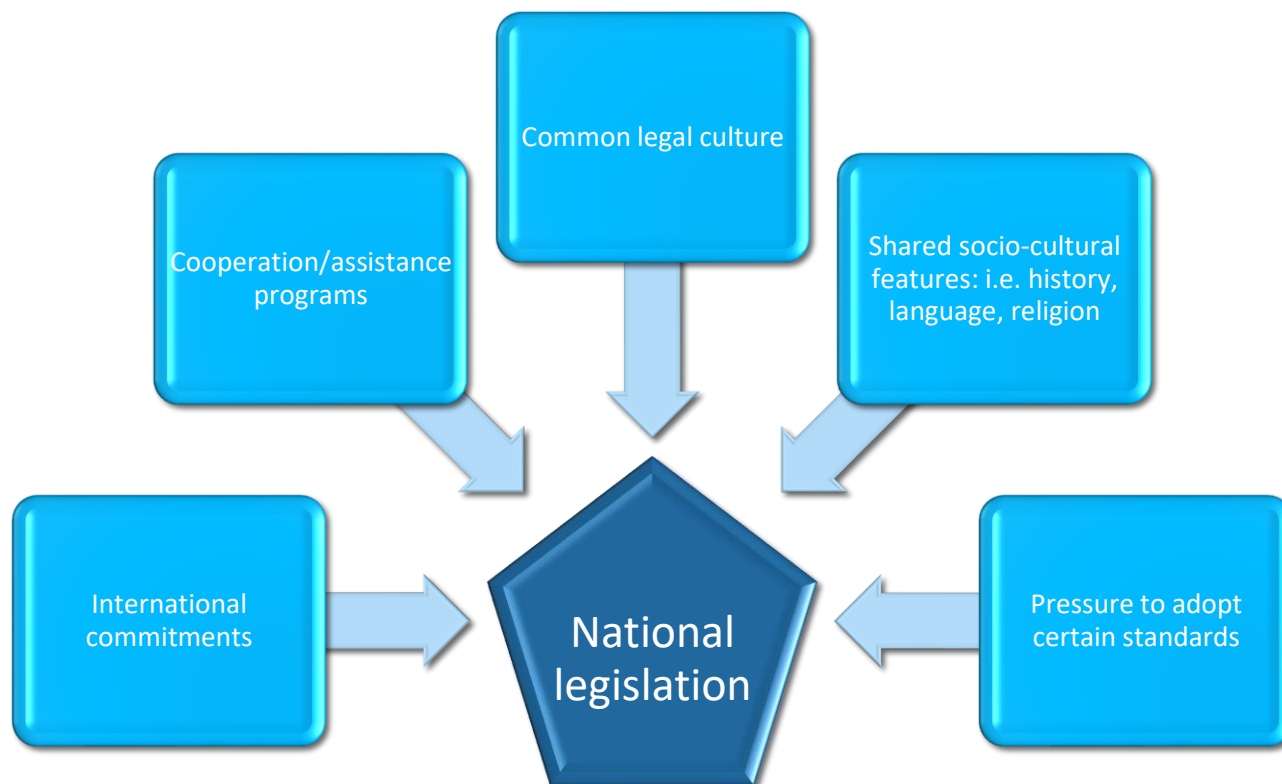
Example of Second set of Tables (Comparison of national instruments)



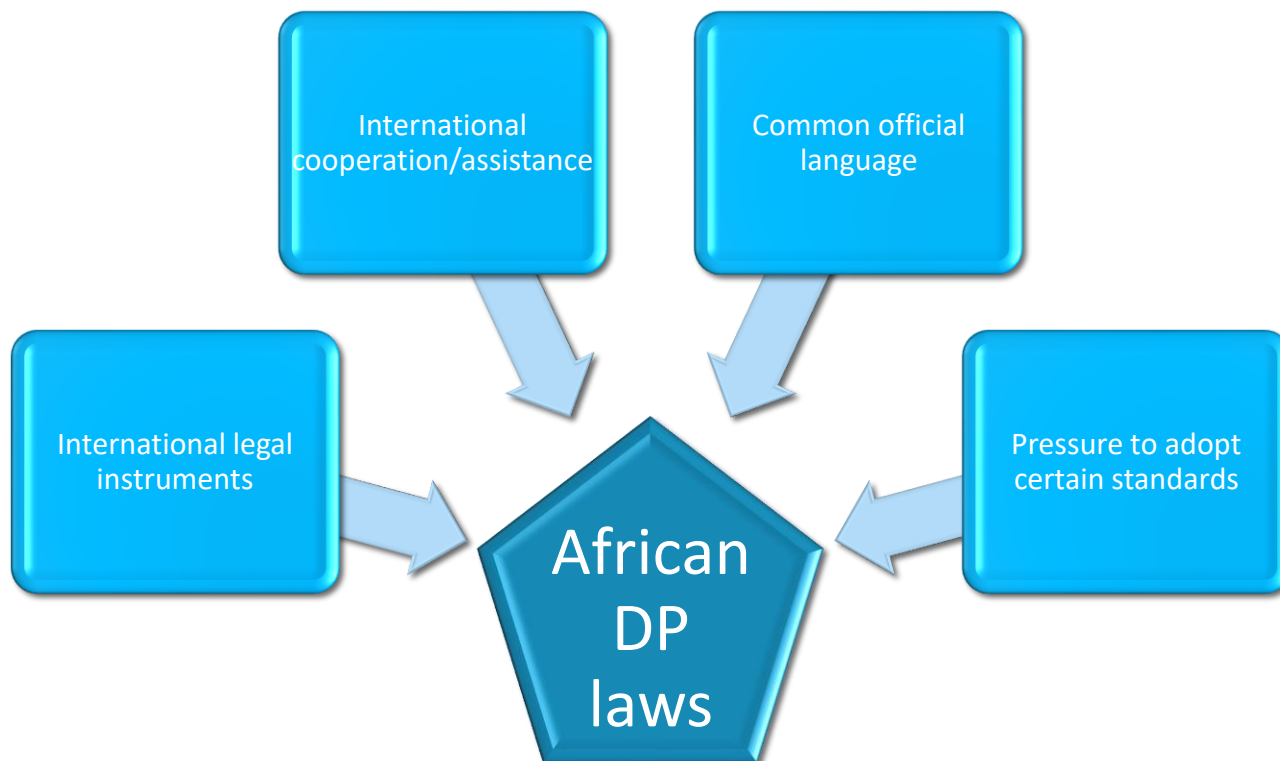
Table 1: 1st Generation standards (1981-) implemented in African instruments & data privacy laws

I	1 st Generation standards	African instruments	ECOWAS (11/15)	SADC (10/14)	ECCAS & EAC (8/15)	N & NE AFRICA (4/12)	TTL (353/56)	
1.09	<i>Correction – individual right of correction</i>	ECOWASAct, AUConv, SADCModel	Benin, Burkina Faso, Ivory Coast, Guinea (Conakry), Mali, Mauritania, Niger, Nigeria, Senegal, Togo, Cape Verde, Ghana	Angola, Botswana, Lesotho, Mauritius, South Africa, Zimbabwe	Madagascarr, eSwatini, Malawi, Seychelles. Zambia,	Chad, Congo (Braz.), Gabon, (Equatorial)), Rwanda, Sao Tome, Kenya, Uganda	Algeria, Morocco, Tunisia, Egypt	35
1.08	<i>Access – individual right of access</i>	ECOWASAct, AUConv, SADCModel	Benin, Burkina Faso, Ivory Coast, Guinea (Conakry), Mali, Mauritania, Niger, Senegal, Togo, Cape Verde, Ghana, Nigeria	Angola, Botswana, Lesotho, Malawi, South Africa, Zimbabwe	Madagascar, eSwatini, Malawi, South Africa, Zambia,	Chad, Congo (Braz.), Gabon, (Equatorial), Rwanda, Sao Tome, Kenya, Uganda	Algeria, Morocco, Tunisia, Egypt	34
1.06	<i>Security through reasonable safeguards</i>	ECOWASAct, AUConv, SADCModel	Benin, Burkina Faso, Ivory Coast, Guinea (Conakry), Mali, Mauritania, Niger, Senegal, Togo, Cape Verde, Ghana, Nigeria	Angola, Botswana, Lesotho, Malawi, Seychelles. South Africa, Zimbabwe	Madagascar, eSwatini, Malawi, South Africa, Zambia,	Chad, Congo (Braz.), Gabon, (Equatorial), Rwanda, Sao Tome, Uganda	Algeria, Morocco, Tunisia, Egypt	33
1.01	<i>Collection – limited (not excessive), lawful (for legitimate purposes) and by fair means</i>	ECOWASAct, SADCModel	Benin, Burkina Faso, Ivory Coast, Guinea (Conakry), Mali, Mauritania, Niger, Senegal, Togo, Cape Verde, Ghana, Nigeria	Angola, Botswana, Lesotho, Malawi, Mauritius, Seychelles. South Africa, Zimbabwe	Madagascar, Lesotho, Mauritius, South Africa, Zambia,	Chad, Congo (Braz.), Gabon, (Equatorial), Rwanda, Sao Tome, Uganda	Algeria, Morocco, Tunisia	32

Sources of international influence on national legislation in general



Sources of international influence on DP laws of African countries



Binding international instruments relevant for African countries (1)

In force:

CoE Data protection Convention 108 (and 108+) (so far sole binding “global” instrument)

- art. 23 (27) Accession by non CoE member states /art. 25 (29) No reservation
- 5 African States are parties: Mauritius, Senegal, Tunisia, Cape Verde, Morocco
- Conventional Committee: Burkina Faso, Gabon, Ghana and Sao Tome admitted as observers
- 108+: Mauritius

Supplementary Act on Personal Data Protection within ECOWAS (2011)

- Still four ECOWAS Parties have no DP law (Gambia, Guinea-Bissau, Liberia and Sierra Leone)
- Directly applicable?

CoE108/108+

Setting the stage for universal standards

ACCESSION NON CoE MEMBERS

23 (27) After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consulting the Parties to this Convention and obtaining their unanimous agreement, and in light of the opinion prepared by the Convention Committee in accordance with Article 23.e, invite any State not a member of the Council of Europe or an international organisation to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

NO RESERVATION

25 (29) No reservation may be made in respect of the provisions of this Convention

Binding international instruments relevant for African countries (2)

Not yet in force:

AU Convention 2014 on cybersecurity and data protection (Malabo Convention)

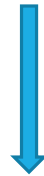
- 15 ratification needed, so far only 13 (Angola, Senegal, Mauritius, Guinea (Conakry), Ghana, Mozambique, Namibia, Rwanda, Congo, Zambia, Togo, Niger and Cape Verde)
- Supplemented by **2018 Personal Data Protection Guidelines** (non binding)

Common language

- Favors copy and paste legislative work
- Francophone African countries have established independent DPA commissions (modelled on the French CNIL)
- *Association francophone des autorités de protection des données personnelles (AFAPDP)*
 - network sharing best practices and expertise
 - e.g. establishment of the DPA of Madagascar (August 2022)

Example of copy and paste Interconnection of data files

Art. 28 Senegal



Art. 29 Mauritania, art. 393 Benin, art. 29 Guinea-Conakry, art. 27 Congo Brazz., art 41 Burkina Faso, art. 90 Gabon and art. 19 Algeria

« L'interconnexion des fichiers n'est autorisée que si elle n'entraîne aucune discrimination ou réduction des droits, libertés et garanties pour les personnes concernées ».

International assistance and cooperation

LEGAL FRAMEWORK

- *HIPSSA model laws (ITU, EU experts)*

- SADC Model Law on Data Protection (2012)
- ECCAS / CEMAC model laws (2013)

- *CoE assistance programs*

- e.g. Gambia

IMPLEMENTATION

- *CoE/EU assistance programs*

- GLACY +
- SUD/SOUTH IV

- *Selective cooperation programs*

- e.g. expertise provided by the Moroccan DPA to the newly established DPA of Rwanda (MoU 14.07.2022)

Pressure from abroad

By way of

- Adequacy requisite for transborder data flows
- Extraterritoriality clauses

Long arm of the GDR

ADEQUACY CLAUSE

45. “A transfer of personal data to a third country or an international organization may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection.”

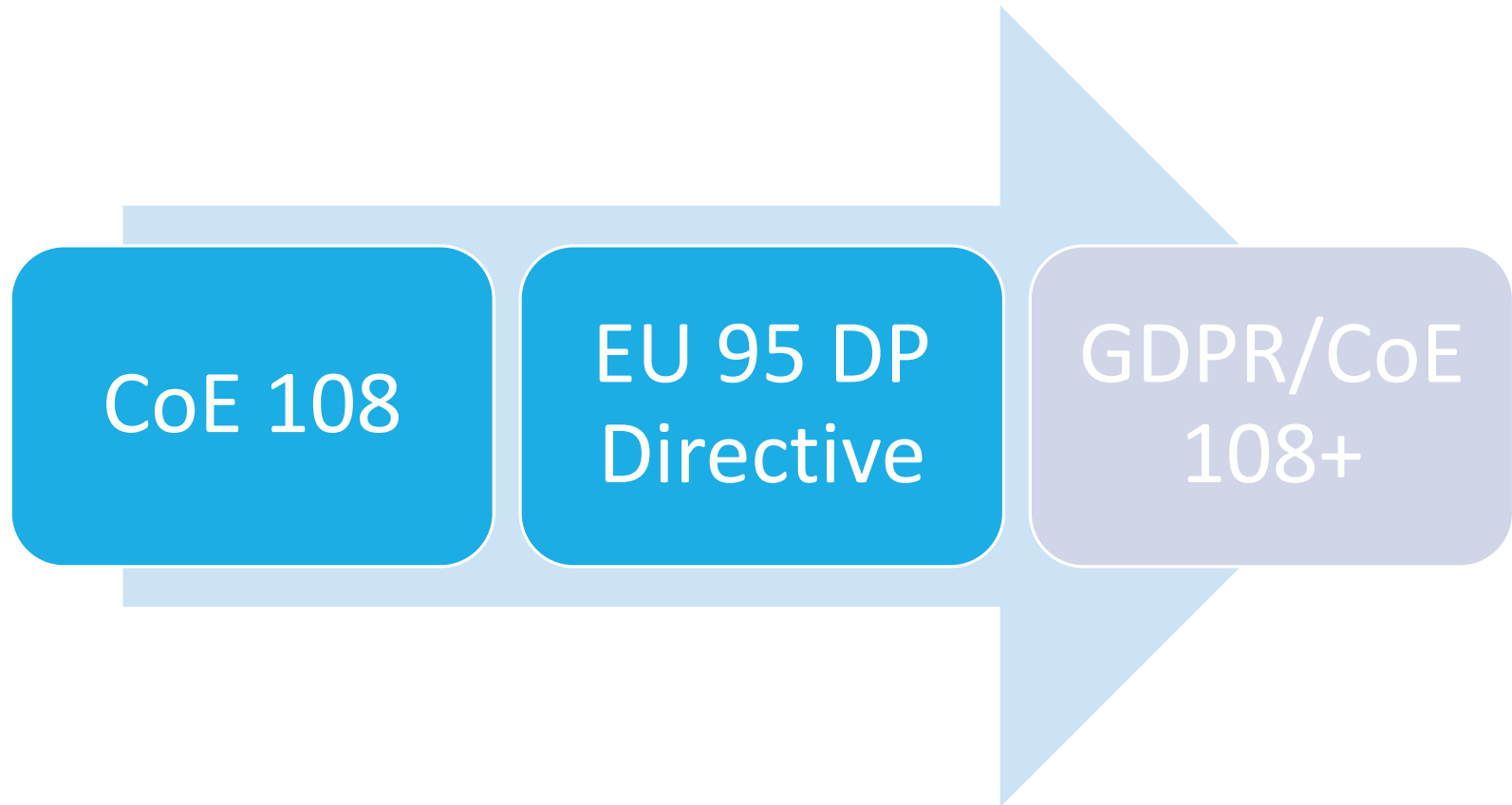
EXTRATERRITORIALITY CLAUSE

3 (2) “This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

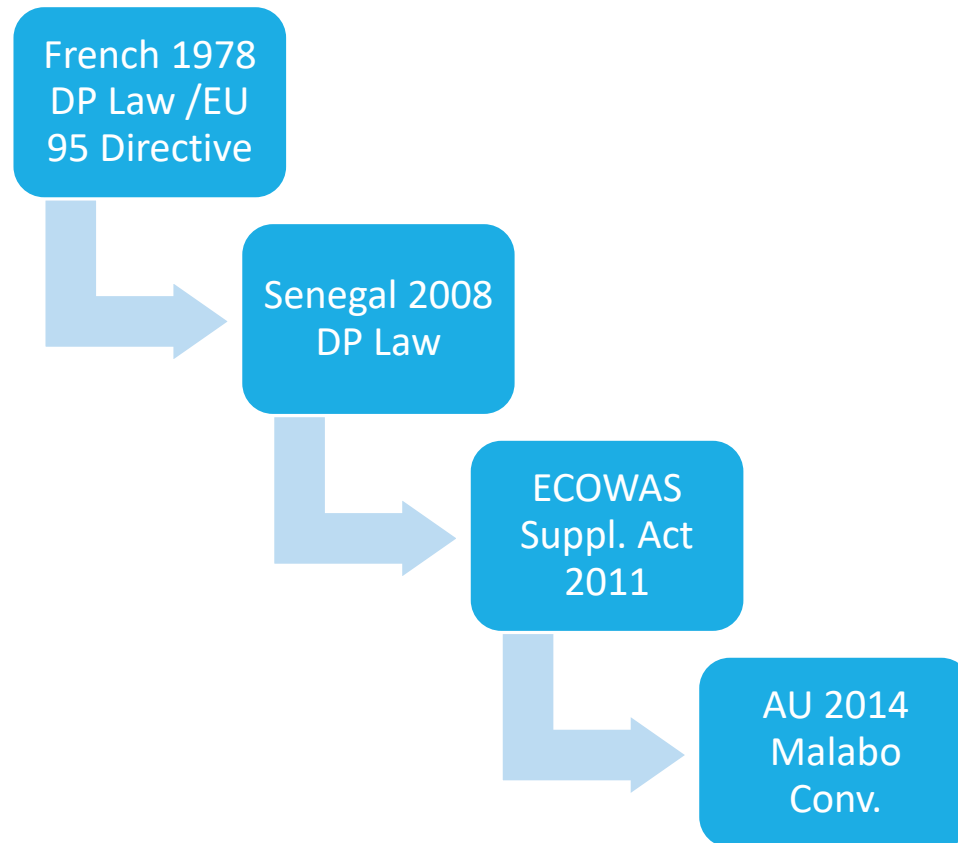
(b) the monitoring of their behaviour as far as their behaviour takes place within the Union”.

African international instruments and national DP laws: **A strong European flavor**



Direct influence, but also indirect influence

E.g.



The (very few) non European standards come to Africa through European channels

e.g. Data Breach Notification

(2003) *California Civil Code* (§ 1798.82)

First drafts GDPR / 33
GDPR
7(2) CoE108+

33 SADC
Benin, Cape Verde, Ghana,
Lesotho, Mauritius, South Africa,
Zambia, Zimbabwe, eSwatini,
Botswana, Chad, Congo (Braz.),
Kenya, Rwanda, Uganda, Algeria,
Egypt

Strong European influence on African wide/regional instruments

AU Malabo convention 2014, ECOWAS supplementary Act 2011, HIPSSA model laws (2012/2013) are all consistent with 1st generation and 2nd generation standards

2018 AU Guidelines are partially 3rd generation consistent (e.g. privacy by design, data minimization principle, codes of conducts)

Strong European influence on the African DP Laws

- 1st generation and 2nd generation: clear consistency
- 3rd generation I (GDPR / 108+): limited consistency
 - Who? Most recent DP laws (e.g. Kenya, Uganda, Rwanda, but also Algeria and Egypt) and most recently updated ones (e.g. Benin, Burkina Faso, Cabo Verde)
 - What? Powers of DPA to make decisions and issue sanctions, stronger consent requirements, extra protection for biometric and genetic data, data breach notification to DPAs are most common; right to be forgotten and data protection by design/default are less common.
- 3rd generation II (GDPR only): fragmented consistency
 - Here and there some elements, the most “popular” being
 - data breach notification to data subjects, data portability, fines based on annual turnover, mandatory data protection officers

Few African peculiarities

- African international instruments: -
- African national laws:
 - Registration of controllers
 - Privacy of the deceased persons
 - Publication of cases investigated
 - Wider extra-territorial application (beyond GDPR)
 - Specific regimes regulating interconnections of data files
 - *and a striking tend to stick to the cumbersome (and passé) system of DPA notification/authorization of data processing*
 - *Some DPA laws are part of IT/cybersecurity legislations (e.g. Guinea-Conakry, Benin)*

Predictable (?) evolution

Higher involvement of the AU

- Malabo convention may soon enter in force (2 ratifications missing and recent acceleration of ratifications)
- Monitoring mechanism
- Combined with 2018 DP Guidelines could be an exportable model for countries still without DP laws

More African States joining CoE 108+ (as more and more are already compliant)

- AU 108+ Party?

Political will to harmonize the laws in order to create an area with free flow of data (and fight cybercrime)

- Network of African Data Protection Authorities (NADPA) together with Smart Africa launched a large program to update and harmonize national DP legislation, and to support legislative work in countries where there is no such legislation (MoU 3.03.2022)