

CROSS-BORDER DATA FLOWS: OILING THE WHEEL OF THE AFRICAN DIGITAL ECONOMY





Victoria Oloni

Solicitor, DETAIL Commercial Solicitors

- Young Privacy Professional, International Association of Privacy Professionals (IAPP);
- Member, Nigeria Bar Association.

TABLE OF CONTENTS

- The African Digital Economy and Cross Border Data Flows
- Challenges to Cross-border data flows in Africa
 - Data Localization
 - Legal framework in Ghana, Kenya, Nigeria, Rwanda and South Africa
 - Justification for Data Localisation
 - The Impacts of Data Localisation on the Data Economy
- Recommendations
- Roadmap for Cross-Border Data Flows



THE AFRICAN DIGITAL ECONOMY

\$712 Billion

E-commerce

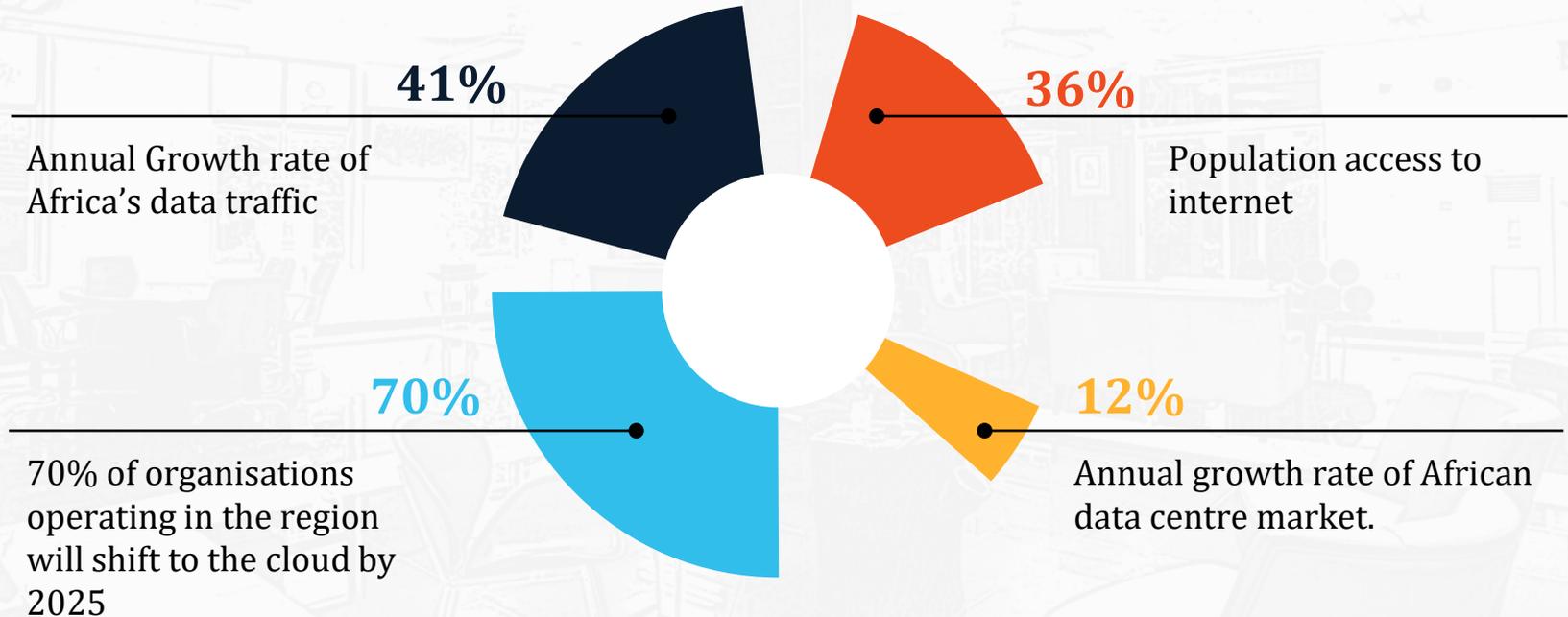
By 2050, e-commerce is expected to add \$712 billion to Africa's economy, raising the sector contribution to the continent's GDP to 8.5%

\$600 Billion

AfCFTA

With the ratification of the Africa Continental Free Trade Area, the possibility of new markets offer tantalizing new avenues for tech start-ups and e-businesses and a combined GDP of over \$600 billion.

STATUS REPORT



- The flow of cross-border data is extremely central given that data is the lifeblood of economic and social interactions (OECD,2020) and excessively stringent limitations on data flows can have negative effects by limiting production, trade and innovation.
- A 2016 McKinsey study noted that cross-border data flows have raised global Gross Domestic Product (GDP) by approximately USD 2.8 trillion in 2014 (i.e., by 3%).
- The rapid digitalization of the economy and datafication of the society have prompted governments in Africa and Africa as a whole to adopt different approaches wide-ranging regulations on cross-border data flows.

APPROACHES TO CROSS-BORDER DATA TRANSFER

Open Transfer Approach (American Approach)

- mostly regulated by private standards.
- no prior mandatory requirements.

Conditional Transfer Approach

Nigeria, Kenya, South Africa

- regulated by regulatory safeguards.
- requires consent and adequacy findings for personal data transfer.

Limited Transfer Approach i.e data localization

Rwanda telecommunications licence

- broad requirement to use domestic servers
- Wide restrictions on cross border data transfers.

APPROACHES TO CROSS-BORDER DATA TRANSFER

According to a 2021 GSMA report, there is about a 50-50 split between African countries that have adopted some sort of data flow restrictions and those that have not. Concretely, 26 African countries have no cross-border data flow restrictions; 26 have adopted conditional flow regimes (in other words, they permit cross-border data flows subject to contractual safeguards, prior authorisation, or adequacy decisions by authorities); and two African countries have no prior restrictions for data transfers but ex-post accountability for data exporters.

POLICY FRAMEWORK

- The AU Data Policy Framework 2022
- The Digital Transformation Strategy for Africa (2020-2030)
- The Africa Continental Free Trade Agreement (AfCFTA)
- African Union Convention on Cyber Security and Personal Data Protection
- Declaration on Internet Governance and Development of Africa's Digital Economy 2018 (DIGDADE)
- Policy and Regulatory Initiative for Digital Africa (PRIDA)
- The Interoperability framework on Digital ID,
- The African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention),
- The Personal Data Protection Guidelines for Africa

African Union Convention on Cyber Security and Personal Data Protection 2014 (Malabo Convention)

- It details the basic principles and guidelines on safeguarding data. Signatories to the convention are obligated to establish domestic policy measures that conform to the guidelines set out in the convention, to curtail and mitigate occurrences of cybercrime and privacy violations.
- The Malabo Convention follows the conditional transfer approach, with transfer of personal data being permissible following an adequacy determination, and consent of the data subject.
- Not in force because the benchmark of fifteen (15) countries required to ratify the convention has not been met.

The AU Data Policy Framework 2022

- Endorsed by AU Executive Council in February 2022
- The Framework presents a common vision, principles, strategic priorities and key recommendations and arising actions to guide member states through the formulations of policy in their domestic context, as well as recommendations to strengthen cooperation among countries and promote intra-Africa flows of data.
- Through this framework, African countries agree to put in place the needed mechanisms and regulations to cooperatively enable data to flow across Africa and pave the way to the achievement of the Digital Single Market.
- The Framework's guiding principles are cooperation, integration, fairness and inclusiveness, trust safety and accountability, sovereignty, comprehensive and forward-looking, integrity and justice.

Key Points and Recommendations

- Localisation needs to be evaluated against potential harm to human rights.
- Cross-border provisions for cloud computing services and data centres, such as data privacy, security, and restrictions on where data are housed (localisation requirements), need to be decided in consideration of broader economic development priorities.
- DPAs are encouraged to adopt international and regional cooperation practices taking note of different stages of implementation and enforcement across the Member States.
- Risk assessment and multi-stakeholder engagement should be used to design data localisation solutions in policy by drafters, which includes civil society participation.



**CHALLENGES TO CROSS-
BORDER DATA FLOWS IN
AFRICA**

DATA LOCALIZATION

“Data about people in Africa should remain in Africa and African states should have the autonomy to decide for themselves how to regulate their digital infrastructure and how to plan their digital futures. In brief: African states need to realize and own their digital sovereignty. “

Why?

JUSTIFICATIONS FOR DATA LOCALIZATION

1

National Security

2

Foreign Surveillance/Espionage

3

Tackling Cybercrime

4

Economic Development and Competitive Advantage

e.g Nigeria Guidelines for Nigerian Content Development , SA's s draft National Policy on Data and Cloud of 20211

5

Data Protection reasons e.g Zambia and Kenya



GHANA

Data Protection Act 2012

There are no specific provisions in the Act on the cross-border transfer of personal data.

On 10th August 2022, Ghana became the flagship country for the data governance initiative when the Minister of Digitalisation and Communication from Ghana and DG Lacina Koné launched the African Data Governance, working group.

During the launch, Lacina Koné opined that; "We need to maximize the value of data through its circulation between organizations and across borders to build a single digital market and support the adoption of data governance frameworks and strategies"





KENYA

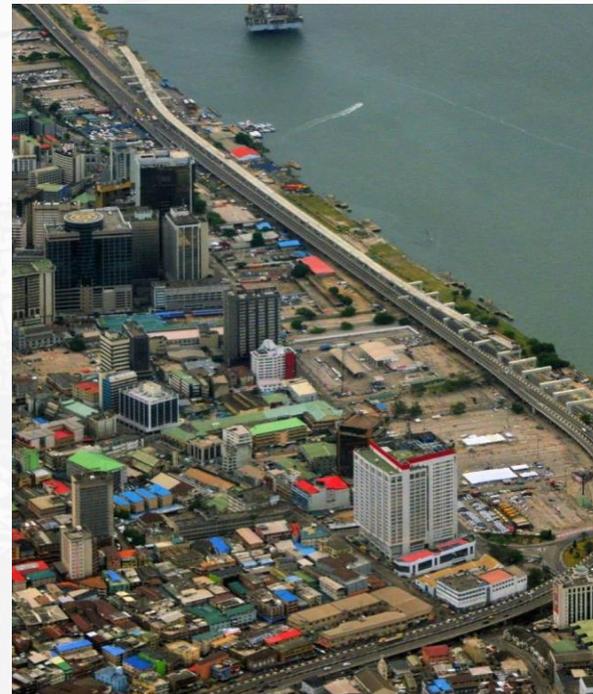
The Data Protection Act, 2019 (Articles 48-50)

- A data controller or data processor may transfer personal data to another country only where certain conditions are met. (proof of appropriate safeguards, performance of contractual obligations, public interest, vital interest, legitimate interest).
- Processing of sensitive data outside Kenya requires the data subject consent in addition to the appropriate safeguards.
- The Cabinet Secretary may prescribe, based on grounds of strategic interests of the state or protection of revenue, certain nature of processing that shall only be effected through a server or a data center located in Kenya.



The Nigerian Data Protection Regulation 2019, Draft Data Protection Bill 2020, National Cloud Computing Policy Version 1.2 August 2019, NITDA Guidelines for Nigerian Content Development in Information and Communication Technology (ICT) 2013

- A data controller/processor may transfer personal data to another country only where certain conditions are met.
- Classified or National security information must reside only on-premise of the public institutions or collocated or in a cloud within Nigeria;
- Confidential, routine government business data and secret, sensitive government and citizen data must reside primarily in a cloud framework within Nigeria;
- Data and information management companies to host all sovereign Data in Nigeria;
- All ICT Companies to host all subscriber and consumer Data in Nigeria

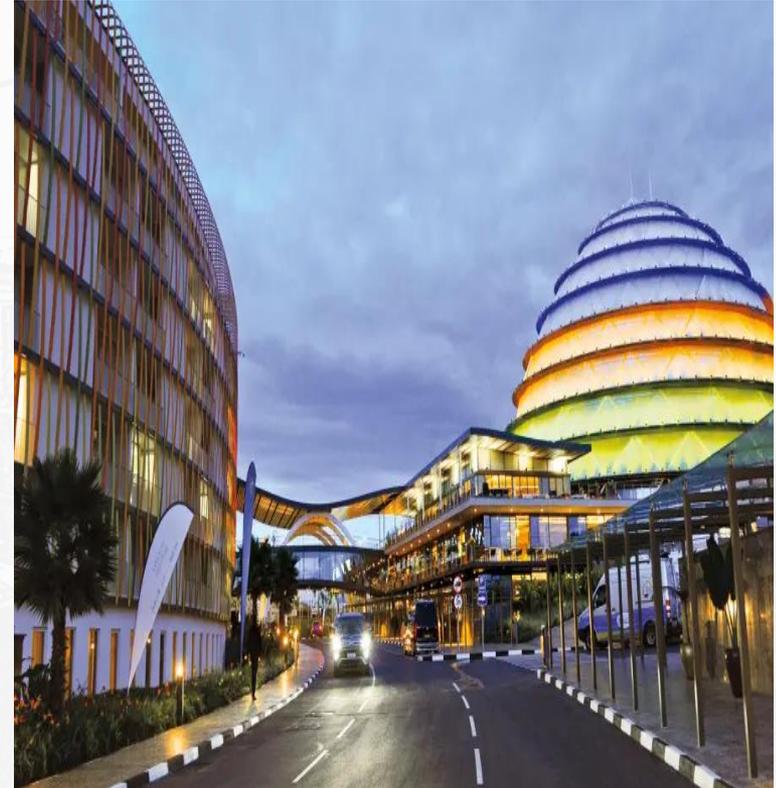




RWANDA

Law N° 058/2021 OF 13/10/2021 Relating to the Protection of Personal Data and Privacy (Article 48-50)

- A data controller/processor may transfer personal data to another country only where certain conditions are met. (authorization from the supervisory authority, data subject consent, performance of contract, vital interest, compelling legitimate interest, performance of international instruments ratified by Rwanda);
- The supervisory authority, in order to protect the rights and freedoms of the data subject, may prohibit or suspend the transfer of personal data outside Rwanda;
- The storage of personal data outside Rwanda is only permitted if the data controller or the data processor holds a valid registration certificate authorising him or her to store personal data outside Rwanda, which is issued by the supervisory authority.





SOUTH AFRICA

Protection of Personal Information Act 2013, National Data and Cloud Policy (GG No. 44389)

- No data localisation or residency requirements in POPIA but apportions rights to the data subject and obligates data controllers to ensure that, when personal data is being transferred across borders, the recipient country provides an adequate level of protection to that data;
- All data classified/identified as critical information infrastructure shall be processed and stored within the borders of South Africa;
- Cross-border transfer of citizen data shall only be carried out in adherence with POPIA, the provisions of the Constitution, and in compliance with international best practise;
- A copy of the data transferred data must be stored in South Africa for the purposes of law enforcement.



THE IMPACTS OF DATA LOCALISATION ON THE DATA ECONOMY

In 2019, Badran and Tufail published an economic impact assessment of data localisation in Egypt, Kenya, Mauritius, Morocco, and South Africa and found the following:

- Overall estimates indicate that cross-border data transfer restrictions would result in a real GDP decline for all the countries studied.
- All the countries would experience increases in production costs and a decline in income due to increases in prices of goods

THE IMPACTS OF DATA LOCALISATION ON THE DATA ECONOMY

1

Economic Impact

2

Organisational Cost

3

Data Security

4

The Structure of the internet

5

Global Trade

6

Financial Services



RECOMMENDATIONS

AFRICAN DATA GOVERNANCE APPROACH

Developing robust, balanced strategy and relevant regulatory frameworks on cross-border data flow is one of the most critical policy challenges in the digital economy cooperation and collaboration among African countries. In developing this strategy, it is important to take the following into consideration:

- a) promoting an agile framework to allow for innovation and experimentation;
- b) ensuring accountability of all stakeholders within the data lifecycle;
- c) establishing standards for data accuracy and quality;

It is important that the African data governance approach is not too watered down or drastic from acceptable standards because Africa can not as a continent function in isolation and the approach should be able to encourage and facilitate cross-border data flows beyond Africa..

ROADMAP FOR CROSS BORDER DATA FLOWS

Allow data to flow by default



Prioritize cybersecurity



Prioritize connectivity, technical interoperability, data portability and data governance



Establish a level of data protection



Continental accountability



Future-proof the policy environment

Thank you



Detail Commercial Solicitors is distinct as Nigeria's first commercial solicitor firm to specialize exclusively in non-courtroom practice.

Contact Victoria

Phone Number

 +234(0) 9058585033

Email Address

 victoria@detailsolicitors.com

Website

 www.detailsolicitors.com

 Detail Commercial Solicitors

 Detail Solicitors  Detail Nigeria