



Fostering inclusive economic growth: the case of the Digital Code of Benin

Digital Pathways Paper Series

DOI: https://doi.org/10.35489/BSG-DP-WP_2021/02

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Paper 12
April 2021

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This paper is part of a series of papers on technology policy and regulation, bringing together evidence, ideas and novel research on the strengths and weaknesses of emerging practice in developing nations. The views and positions expressed in this paper are those of the author and do not represent the University of Oxford.

Citation:

Qhotsokoane, T., Kira, B. and Stewart, S. L. (2021). *Fostering inclusive economic growth: the case of the Digital Code of Benin*. Digital Pathways at Oxford Paper Series; no. 12. Oxford, United Kingdom

<https://www.bsg.ox.ac.uk/research/research-programmes/digital-pathways>

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Acknowledgements

This note was produced by Tebello Qhotsokoane and Beatriz Kira, researchers at Digital Pathways at Oxford, a research programme housed at the Blavatnik School of Government, University of Oxford, and Simphiwe Laura Stewart, doctoral student at the School of Geography and the Environment, University of Oxford. It was the outcome of extensive desk research and benefited from feedback and exchanges from a wide range of stakeholders based in Benin, including legal experts and entrepreneurs working in the technology sector. This work was supported by a grant from Omidyar Network.

Executive Summary

- Approved in 2017, the Digital Code of Benin provides a good basis for regulation of the digital economy and has strengthened rules in cybersecurity, digital infrastructure development, and affordability of mobile data.
- The Digital Code however doesn't cover key areas that are relevant to the digital economy, including competition policy, taxation of digital assets, and intellectual property rules that address the material benefits of innovation.
- Having a law in place is not the same as enforcing that law. Many provisions of the Digital Code have not been realised simply because the state is not monitoring or applying the rules, or because companies are unaware of them or do not have the capacity to comply with them.
- With regards to the substance of the Digital Code, there is a concern that the sector regulator and the Presidency have a lot of discretion over how the law is applied which creates a sense of regulatory uncertainty, which may in turn harm investor confidence:
 - actions such as the unilateral shut down of the internet by the Presidency are seen as a signal of the lack of independence and market-driven functioning in the technology sector;
 - The Digital Code's rules on data protection and privacy establish an exception, whereby the Council of Ministers can authorise the transfer of personal data to a third State or an international organisation that does not provide adequate and sufficient protection, which may undermine the goals of other sections of the Code.

Introduction

This policy note seeks to elucidate the opportunities for development in Republic of Benin's digital code, as the country attempts to become a regional example of progress in the digital sphere. The note examines the Digital Code of Benin which sets out a comprehensive set of laws and regulations aimed at providing a secure and conducive environment for digital transformation and innovation. By assessing the key strengths and opportunities for development, this policy note can also inform regional approaches to regulation of the digital economy, especially since Benin is seen as a model for the region.

Background

The Government of the Republic of Benin has ambitions to become the digital hub for West Africa.¹ In order to realise this ambition, the government has invested in digital infrastructure, widened digital services, and enacted an ambitious piece of legislation intended to support the development of the digital economy called the Digital Code (*Loi n° 2017-20 portant Code du Numérique en République du Bénin*). The Digital Code consists of 647 articles, distributed across 247 pages, which cover seven topics including: electronic communications and network services; electronic seals and writings; certification service providers; electronic commerce; protection of personal data; cybercrime and cyber security and; a set of transitional and final provisions.

In ratifying the Digital Code, Benin became one of the first African countries to develop legislation which aims to regulate the process of digital transformation in the country. The structure of the Code reflects the government's ambitions for digitalisation. A substantial part of the law is focused on establishing procedures to digitalise domestic public administration, with a series of rules related to e-government. At the same time, the Code included norms to regulate digital markets and to participate in a developed global digital economy – many of them in response to pressures from European, Asian, and North American countries.

¹ [Smart Africa, 2018](#).

Impact of the Digital Code on the digital economy

The Digital Code has contributed to setting Benin on a path to digital development as evidenced by reductions in cybercrime and improvements in the country's ranking on cyber security, the improvement in affordability of data through the institution of price ceilings for data and voice charges, and the passing of laws governing personal data governance and data privacy that may set the tone for regulation around the region.

Cybersecurity legislation to increase trust in digital services

Over the past few years Benin has steadily risen in the Global Cybersecurity Index rankings, partially owing to the formulation and passing of laws aimed at addressing cybercrime and the creation of agencies charged with bolstering standards for cybersecurity in the public and the private sector.² The Digital Code seeded the creation of a National Agency for Security and Information Systems (ANSSI) as well as a Central Office for the Suppression of Cybercrime (OCRC), thereby creating a structure for combating cybercrime and promoting cybersecurity in the country.³ The agencies' activities are carried out "under the supervision of the ministry in charge of public security" and their powers are specific to crimes relating to information technology, information and communication.

Specific provisions in the Digital Code detail how Benin law applies to offenses committed online including theft of data, impersonation, and breach of trust. Further, the law enables the Benin courts to prosecute not only crimes committed in Benin, but also extends the jurisdiction to crimes committed by citizens of Benin anywhere in the world, or affecting victims who are of Beninese citizenship at the time of the offence.

Data affordability improvements to encourage utilisation

The government of Benin has made significant efforts to keep telecommunication retail prices low. The telecommunications regulator (*Autorité de Régulation des Communications Électroniques et de la Poste du Bénin* - ARCEP) imposes price controls that prevent companies from overcharging customers. Based on analysis of service production costs on the operators' networks and an allowable profit margin to guarantee firms remain profitable, ARCEP has established a framework for voice, SMS and data service tariffs. This reform is beneficial for users as it sets price thresholds which prevent operators from overcharging consumers. The unique pricing system is put in place

² In 2017, the Global Cybersecurity Index published by the International Technology Union, ranked Benin 138th globally and 33rd regionally. By 2018 the ITU ranked Benin 8th regionally and 80th globally in terms of cybersecurity, citing their digital code and national cybersecurity strategy as key steps responsible for the improvements.

³ ANSSI is attached to the Presidency, and sets out the national cybersecurity strategy and supports implementation of the strategy across government departments. The OCRC is attached to the Republic's policy, and is involved in investigations of cybercrime and combating cybercrime at the frontlines.

to protect users against operator marketing strategies that are used to increase their profit margins. The implementation of regulation has led to lower prices in Benin relative to its neighbours Togo and Burkina Faso and the median for Sub-Saharan Africa. This has eased access to the internet for lower income groups, especially when compared to neighbouring countries. At 22 percent of monthly income, access to the internet is still comparatively more expensive in Benin than other countries in East Africa, so more needs to be done to improve affordability even further.

Indicator	Benin	Togo	Burkina Faso	Sub-Saharan Africa (median)
Monthly cost of a high usage mobile voice and data bundle, Year 2019, % of G.N.I p.c.	22%	35.2%	63.8%	25%
Monthly cost of a high usage mobile voice and data bundle, Year 2019, USD	15.93	19.07	35.09	26.10

Source: International Telecommunications Union (2019)

The Digital Code enhances the regulatory framework by establishing rights of operators and obligations regarding electronic communications activities carried out by foreign institutions, including responsibilities under regional and international conventions and agreements. Importantly, the law details the conditions for access, confidentiality and neutrality within the domestic telecommunications space, requiring operators to ensure confidentiality of the content of communications, non-discrimination and neutrality.

Setting the tone for personal data governance in the ECOWAS region

The Digital Code provides a comprehensive suite of laws and regulations governing the collection, treatment, transmission, storage, and use of personal data by individuals, the state, local authorities, and companies. These laws provide a series of data protection rights similar to regulations like the European General Data Protection Regulation (GDPR), including for example the right to object to the processing of personal data, the right to rectify personal data, and the 'right to be forgotten.'

In addition to regulating the processing and sharing of personal data domestically, the digital code includes rules regarding extraterritorial applications of the law. These laws apply to companies which offer goods or services in the Republic of Benin, whether or not the processing of data takes place in the country. The Digital Code includes detailed requirements for adequacy of the level of protection offered by third countries. In a similar way to the GDPR, Benin limits the flow of personal data beyond its borders to countries which do not meet the levels of protection set by the Digital Code.

In order to protect the rights set out in the Digital Code, the government established a new regulator charged with the protection of personal data in Benin, called the National Data Protection Authority (*Autorité de Protection des Données à caractère Personnel* – APDP.) These regulations place Benin far ahead of its neighbours and other countries in the region, and will go a long way to build consumer confidence in digital platforms and services, as well as to provide protections against malicious abuses of personal data for private gain or control.

Opportunities for further development in the Digital Code and Regulatory landscape of Benin

Areas of expansion in the existing code

While the Digital Code provides a foundation for building a regulatory environment conducive to supporting innovation and attracting investment, there are some areas where the code could be developed further as more sophisticated applications and industries emerge in the country. In particular, the lack of clear provisions regulating market competition, taxation and intellectual property in the code do not account for the specific challenges that data driven business models and platform economies bring to identifying and resolving market concentration, quantifying the value brought in and extracted by platforms for taxation and IP law that addresses the material benefits of innovation. The following areas where further attention or revision may be required were identified.

- The Digital Code does not include provisions related to competition policy in digital markets. Rather, the competition policy provisions in the law are narrowly focused on the electronic communications and telecommunications market. There is no autonomous agency that reviews transactions for competition-related concerns in Benin, which means that anti-competitive behaviours in emerging sectors like e-commerce and platform companies like ride sharing, and mergers and acquisitions between platform and application-based businesses are not provided for under the legislation. It is possible that the absence in the law results from the relative nascence of the digital economy, but going forward, it is important that the government and legislators remain abreast of developments in laws and regulation of these sectors;
- The Digital Code does not establish any specific legal framework for regulating tax duties of online businesses in Benin. Article 308 of the Code creates an obligation related to tax information for entities carrying out e-commerce activities, but the provision only entails that the goods and services provider give consumers access to information on its tax registration and a consumer's VAT obligations. The approaches to regulation of internet companies with significant economic presence in the country have taken the form of social media taxes, which these companies pass on to consumers, increasing the cost of using the internet and harming consumer welfare and prospects for innovation. These levies were scrapped following public outcry and protest, but their introduction in the first place indicates a lack of consultation and engagement in crafting government policy. It is important that Benin considers the short- and long-term trade-offs involved in designing digital taxation.⁴
- While the data protection and privacy rules in the Digital Code provide a robust approach to personal data governance, the law also establishes an exception, whereby the Council of Ministers can authorise the transfer of personal data to a third State or an international

⁴ Ndulu, B., Joseph, C. and Tryphone, K. (2021). *Fiscal Regimes and Digital Transformation in Sub-Saharan Africa*. Digital Pathways at Oxford Paper Series; no. 11. Oxford, United Kingdom

organisation that does not provide adequate and sufficient protection. This exception, depending on the legitimacy of the state to citizens and private sector actors, may be seen as undermining the data protection rights that the state enshrined in the Digital Code, thereby reducing their credence in the years of consumers. It also gives the Council considerable discretionary power to decide on data flows, undermining legal certainty.

- The IP provisions in the Digital Code do not cover the protection of immaterial assets, such as data. Data management frameworks are central to and highly relevant for widening access to the knowledge economy and ultimately the 'intangible' digital economy and the Digital Code does not address the extent to which the *material benefits* of innovation will be protected by IP law.

Wider threats to regulation of the digital economy

In addition to these limitations associated with the Digital Code itself, there are challenges of enforcement, sensitisation, and regulatory discretion that may affect the credibility of the law and further regulations put in place. The following areas of weakness were identified as needing to be addressed if Benin is to strengthen its regulatory and policy environment to support digital transformation.

- A key challenge of the Digital Code is not related to its contents, but rather to the capacity of the government to enforce the law, or to the capacity of businesses, government agencies and citizens to comply with the rules. There is very little awareness of the Digital Code and its provisions and requirements among the general population and among enterprises, even though many of these organisations partake in e-commerce or the processing of personal data.

- In a survey of 1281 individuals and 826 firms, the African School of Economics (ASE) reports that only 35.6% of individuals are aware of the existence of the Digital Code and 25.7% of those who are aware have knowledge of its contents. Their survey showed that those who use the internet for commercial purposes are more likely to know about the Digital Code and its contents, but the knowledge of the Digital Code wasn't a necessary condition for individuals or firms to join the digital economy. Approximately 44% of individuals and 39% of firms that use the internet for commercial purposes had not heard of the Digital Code. These findings also reveal that monitoring and enforcement of the law might be an issue, as companies would likely be more aware of the existence of the rules were they being properly applied.

- The Digital Code establishes detailed rules in some areas but there is also a lot of discretionary power given to the regulator and to the office of the president, allowing them to apply the law in ways that are counter to what is stated in the Code. For example, the Presidency can unilaterally issue a directive for an internet shutdown to ISOs in the country, often citing security risks for internet use as a reason. While there may be validity

to this claim, the fact that this directive is issued without due process and approval from other administrative, judiciary or legislative bodies means that it can be used to stifle free speech. These shutdowns are detrimental to the investments in, and the flourishing of, a digital economy. Another example of discretion given to the executive is the exception provided to the Council of Ministers who can authorise the transfer of personal data to a third State or an international organisation that does not provide adequate protection. This exception may deter companies from setting up their organisations because of worries about personal data security and privacy for users.

Conclusion

By ratifying the Digital Code, the government of the Republic of Benin has set an example for other resource constrained countries looking to encourage utilisation of digital platforms and to develop of robust digital economies. The Digital Code provides a comprehensive set of policies that protect citizens from cybercrime, and ensure that their right to privacy is protected on all platforms and services where citizen data is collected. However, with all the benefits that the Digital Code provides, there is still room for further development, especially around sensitisation of the Code, as well as enforcement of protections that it affords users. The Code also doesn't address issues of taxation of digital assets as well and the ways that the country looks to address new forms of anti-competitive behaviour that are arising with the proliferation of digital platforms and data driven business models. While these regulations may not be relevant for Benin's digital economy at present it is important that some consideration be made on the implication of these new business models on current regulations.

