

A man with a beard and glasses, wearing a blue cap and a blue t-shirt, is working in a warehouse. He is holding a laptop and looking at the screen. He has a blue lanyard around his neck. The background is a blurred warehouse setting with some equipment and lights.

**Chapter 11**

# **Convergence on e-commerce: the case of Argentina, Brazil and MERCOSUR**

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## Abstract

E-commerce is growing rapidly in Argentina and Brazil, and in both countries the share of the population participating in e-commerce transactions exceeds the Latin American average. Both countries have established a legal framework for data protection, regulation of the internet, consumer protection, taxation of e-commerce, and contracts and e-signatures. Argentina and Brazil also have submitted proposals for negotiations over the treatment of e-commerce transactions in WTO Agreements, and included e-commerce provisions in free trade agreements (FTAs). However, different approaches to internal regulation of e-commerce and differences in positions in international negotiations indicate diverging regulatory approaches that will increase legal uncertainty and thus constrain investments and market expansion in the sector. An exception is the regulation of data protection, where both countries are following principles laid out in the European Union's General Data Protection Regulation (GDPR). Further negotiations between the two countries over regulatory convergence for e-commerce could best be undertaken through the Southern Common Market (MERCOSUR).

*\* The contents of this chapter are the sole responsibility of the authors and are not meant to represent the position or opinions of the WTO or its members.*

## Introduction

The World Trade Organization (WTO) estimates that, in 2016, global e-commerce sales equalled around US\$ 27.7 billion a year (WTO, 2018a, p. 21). Retail e-commerce is around 10 per cent of global retail and is expected to continue growing at double digit rates (SWS Consulting, 2018). Although there is already a set of agreed definitions of what constitutes e-commerce, including its types, main characteristics and problems, and prospects of its measurement, many different approaches are being taken towards its regulation. In fact, e-commerce challenges both domestic and international rules, and it touches different legal dimensions such as data protection, taxation and intellectual property, among others.

At the multilateral level, key issues under negotiation include e-signatures, (free) flow of data across borders, source code disclosure and the destiny of the moratorium on e-commerce customs duties. Different questions have emerged and challenged policymakers: should countries have the flexibility to restrict cross-border data flows? Should the protection of national security and privacy justify exceptions to the free flow of data? To what extent could a country command or interfere in services provided by local servers?

In Latin America, Argentina and Brazil are in a process of intense socioeconomic policy transformation both at the domestic and international levels. Accordingly, MERCOSUR is being reconfigured so as to open itself to negotiate new FTAs, such as MERCOSUR-Canada, revitalizing old

ones, such as MERCOSUR-European Union, and reinforcing the region by converging with the Pacific Alliance.

This chapter reviews the Argentinean and Brazilian e-commerce regulatory frameworks both separately and as part of MERCOSUR. WTO initiatives on e-commerce negotiations are also discussed in order to examine the countries' positions and contributions at the multilateral level. However, the main concern here is to introduce the challenges to enhance policy regulatory coherence between the two countries.

In order to address those issues, this chapter examines: (i) the B2C retail market for Argentina and Brazil; (ii) both countries' main regulatory frameworks for e-commerce; (iii) both countries' proposals at the multilateral debate, more specifically, internally in the WTO space; (iv) an overview of MERCOSUR's approach towards ongoing FTA negotiations; and, finally, (v) the prospects and challenges Argentina and Brazil share in improving the regulatory environment in order to strengthen e-commerce.

### Characterizing the retail e-markets in Argentina and Brazil

E-commerce transactions can occur either as business-to-business (B2B), business-to-consumer (B2C), consumer-to-consumer (C2C) or consumer-to-business (C2B). Examples of B2C companies include Amazon, Dell, Intel and Mercado Libre. Benefits of B2C e-commerce transactions include better customer service and pricing flexibility, the removal of intermediaries, the enhancement of companies' reputation and the broader reach of the products. Moreover, among the several modes used for e-commerce transactions,<sup>1</sup>

it is relevant to distinguish between electronic transactions that occur completely through digital means and those that only rely on digital intermediation.

Although Argentina and Brazil have shown investments in different modes of e-commerce transactions, B2C is still the most representative category in both countries' markets. In 2017, Brazil's e-commerce sales reached US\$ 17.4 billion with 10 per cent annual growth while Argentina achieved US\$ 7.3 billion with 35 per cent annual growth, amounting to a gross domestic product (GDP) share of 0.92 per cent and 1.1 per cent, respectively.

Increases in internet penetration have supported the strong growth of e-commerce in the two countries. Argentina has the highest rate of constant internet users in Latin America (around 71 per cent of its population) and Brazil's internet penetration is around 61 per cent, compared to 59 per cent on average in the region. In addition, both Argentina and Brazil lead the table of active paying customers or accounts (Argentina, 38 per cent; Brazil 37, per cent) (Ecommerce Foundation, 2018).<sup>2</sup>

In addition, the number of digital buyers of goods and services in Brazil was estimated at around 80 million in 2019, which represents 74 per cent of the Brazilian population. For Argentina, the number for 2019 will be around

35.2 million, or almost 80 per cent of the population (Statista, 2019). By now, 54 per cent of all Brazilian internet users have at least once bought goods via online B2C platforms, while in Argentina, due to a higher internet dissemination among its population, this rate is 90 per cent (ABCOMM, 2018).

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Both countries also have firms that are major players in the B2C e-commerce market. The Argentina-based digital marketplace Mercado Libre is Latin America's most popular platform – with 56.3 million unique desktop visitors during May 2018. Amazon sites took a distant second place with 22.4 million visitors, followed by

sites owned by Brazil-based B2W Digital (16.1 million) and Alibaba (11.8 million). eBay rounded out the top five retail sites in Latin America, with 9.5 million visitors (Ceurvels, 2018).

Many e-commerce experts argue that Mercado Libre's success in Latin America relates to its know-how of regional culture in a wide sense – including business culture. Among possible explanations, Mercado Libre “offers technological and commercial solutions that address the distinctive cultural and geographic challenges of operating an online-commerce platform in Latin America” (Mercado Libre, 2018) and also that it “knows the idiosyncrasies of the culture, for now at least, this offers it a clear advantage over Amazon” (Duberstein, 2018).

In turn, the Brazilian giant B2W group is the largest online retailer in Brazil and the sixth largest retailer in the country. Operating in several different fields of e-commerce, the companies under its umbrella include Americanas.com, Submarino and Shoptime. In 2016, B2W increased its gross merchandise value (GMV) by 10.6 per cent to US\$ 4.04 billion, an increase of almost US\$ 386,000 in absolute terms. Alone, B2W accounts for 26.2 per cent (B2W, 2017) of the entire Brazilian e-commerce market (UNIDO, 2017).

It is important to highlight that, due to emerging e-commerce markets in countries where a significant share of the population does not own a credit card or even a bank account, companies have developed alternative payment types. In Argentina and Mexico, some online retailers offer cash on delivery (COD) as an option, while in Brazil, the *boleto bancário* (a printable, bar-coded invoice that can be paid online or offline) plays a similar role (UNIDO, 2017).

The main payment method chosen by Brazilian consumers in 2018 was credit card, because they can take advantage of instalment payments (Ebit, 2019). In Argentina, 77 per cent of payments are made through credit cards, 18 per cent in cash, 1 per cent by debit cards and 4 per cent by other methods such as bank transfers and digital wallets. Payment in multiple instalments is also common in Argentina: 70 per cent of shoppers used an instalment plan in their last e-commerce purchase, according to a 2018 CACE Report (Worldline, 2019).

As for consumer tastes and habits in B2C e-commerce, the top-selling

segments by order in Brazil for 2017 were fashion and accessories (14.2 per cent), followed by health and cosmetics (12 per cent) and household appliances (10.8 per cent). However, the top-selling segments by financial volume were telephones (21.2 per cent), followed by household appliances (19.3 per cent) and electronic devices (10 per cent) (SBVC, 2018).

In Argentina, CACE estimates that in 2018 the leading segments were tickets and tourism (28 per cent) and electronics (18 per cent). Measured by billing, the top five leading products were international air tickets, hotels, domestic air tickets, TV and tourism packages (CACE, 2018).

### **Regulatory framework**

Functioning infrastructure services and an appropriate regulatory structure are important for the development of e-commerce. Relevant infrastructure services would encompass a structure guaranteeing access to internet, broadband quality, logistics (including customs and postal services) and payment systems. The regulatory structure should include a framework of rules on e-contracts, taxation, and consumer and data protection, among other areas. This section explores those topics that are relevant to regulatory concerns.

### **Contracts and e-signatures**

Provisional Measure no. 2,200-2/2001 created the Brazilian Public Key Infrastructure (ICP-Brasil) with the plan of ensuring legal recognition of the authenticity, integrity and validity of electronic documents, as well as the performance of secure electronic commercial transactions. This is known as digital signature, once the authentication procedure

is done under ICP-Brasil accreditation chain and is based on ICP-Brasil method of certification.

The Management Committee of ICP-Brasil is responsible for setting out the rules on the offering of electronic certification services. Documents issued using certificates approved by ICP-Brasil are presumed authentic and true, unless proved otherwise. However, documents certified by other means, or not certified, are still valid, but they are not presumed authentic.

In Argentina, the Civil and Commercial Code (CCC) regulates contracts and acknowledges the possibility of using digital means to create and sign them. Both electronic and digital signatures are regulated through the Digital Signature Law (DSL), Law no. 25,506/2001.

The Law defines two forms of signatures. First, there are e-signatures, understood as a set of data linked with other electronic data used by signatories to prove their identity. However, an e-signature does not have the enforceability of a signed document, as it lacks the requirements to be recognized as a digital signature. Therefore, anyone who is questioned about the validity of an electronically signed document bears the burden of proving its authenticity. Second, the Law defines digital signatures as the result of the application of a mathematical procedure that requires information known only to the signatory. A digital signature must be verified by a third party, including administrative authorities, and has a stricter legal framework under the DSL. Unlike with e-signatures, digital signatures are

sufficient when handwritten signatures are required by law, as long as they are accompanied by a digital certificate permitted by a state-approved certifying authority.

At the MERCOSUR level, Resolution GMC no. 22/2004 created a digital signature for certifying copies of documents issued by MERCOSUR's secretariat. MERCOSUR Resolution GMC no. 34/2006 established guidelines for mutual recognition agreements on digital signature among members. In addition, MERCOSUR Resolution GMC no. 37/2006 provides that electronic documents, electronic signatures and advanced electronic signatures in MERCOSUR documents are admitted with the same effect as signed hard copies. Finally, according to Decision 11/19, MERCOSUR members will have mutual recognition of digital certificates, including tax, customs and contract documents. However, Decision 11/19 has not entered into force since it requires at least two National Parliaments to ratify it, which has not happened yet.

### **Taxation**

In Argentina, importers of goods and services must pay the same local taxes that are levied on nationals. Such payment is due at the time of the goods and services' "entry into the country for consumption", where the value added tax (VAT) must be paid, which does not amount to a customs duty.

Accordingly, Argentinean Law 27,430/2017 establishes the application of VAT on digital services when they are used or exploited in the territory of Argentina, which is proved by the existence of: (i) the IP address of the device used by the customer or SIM card country code; (ii) the billing

address of the customer; or (iii) the bank account used for the payment and the billing address of the customer provided by the bank or by the financial institution that issues the credit or debit card with which the payment is done.

It is noteworthy that, between 2004 and 2019, the software industry in Argentina had a special tax regime for national direct taxes: it allowed companies to apply a percentage of the employers' legal contributions to the payment of national taxes and also to reduce the income tax due every fiscal year up to 60 per cent (Law 25,922/2004). At a national level, however, fiscal incentives for e-commerce, which also include incentives for software but are not limited to it, are modest; they equal only 0.0021 per cent of Argentina's GDP and remain much smaller than other fiscal incentives, for instance, those for small and medium-sized enterprises (SMEs) (0.026 per cent of the GDP) (CESSI Argentina, 2018, p. 6). In respect to tax services' exports, in January 2019 and for two years, a general tax at 12 per cent on services' exports. As for SMEs, they are exempted if their exports are less than US\$ 600,000 per year (and if they export more than US\$ 600,000 a year they pay 12 per cent over only what exceeds US\$ 600,000). The norm considers services exports any service done in Argentina and onerous that is used and/or consumed abroad (Decree 1201/18, article 3).

In Brazil, the tax on e-commerce goods differs from the tax on e-commerce services. For goods, it is a state-level tax (Tax on Operations related to the Circulation of Goods and Services of Interstate and Inter-Municipal Transportation and Communication

Services (ICMS)), while services are taxed at the municipal level (Tax on Services (ISS)).

There is also an Integrated System for Payment of Taxes and Contributions of Micro and Small Companies (Simples Nacional), which is an optional tax system that collects simultaneously municipal, state and federal taxes. It is a simpler and lower tax rate system calculated on gross revenues.

According to the United Nations Industrial Development Organization (UNIDO), taxes are among the most complex and challenging issues to resolve in Brazil: they are high and numerous, significantly increasing firms' overall costs. Duties, taxes and fees can double the original price of a product, and can vary considerably depending on product category. It is estimated that when opening a company, entrepreneurs pay 67 per cent of their profit in tax (EOS Intelligence, 2013).

## Consumer protection

Argentina and Brazil have an extensive patchwork regulation system protecting consumers' rights. Both countries have a federal law addressing consumers' rights: the Code of Consumer Defense (BCCD) in Brazil and the Law of Consumer Defense (LDC) in Argentina. These laws mainly regulate consumer protection, standards of conduct, fair practices of information disclosure, penalties and liabilities.

Under both Argentinean and Brazilian laws, the relationship between supplier and consumer is considered uneven due to the asymmetry of the product or service

provided, which places the consumer in a disadvantaged position in comparison with the supplier.

It is important to highlight that, although both countries have extensive laws protecting consumers, these laws do not have specific rules for e-commerce. Rather, the rules governing e-commerce are framed in the same way as the rules governing door-to-door sales. In Brazil, this can cause insecurity for entrepreneurs, since legal discomfort may arise from BCCD rules in case of bad faith of consumers and regarding the right of return within seven days of receipt. In Argentina, “in theory, the same protections apply to consumers on the electronic market; however, in practice, the protections can be difficult to enforce. In e-commerce, transactions are often fast-paced, increasing the possibility of deception. Issues also arise in regard to the formulation of contracts and what constitutes a legally enforceable agreement” (Stile and Fernandez, 2016).

In terms of liability, Argentina and Brazil apply strict liability when the buyer is the end-user or consumer. Argentina’s LDC establishes that, when damages arise from a risk or a defect of products or services, strict and joint liability of the whole supply chain – including anyone using a brand or trademark of the product or service – shall apply. Similarly, Brazilian law establishes that the consumer shall demonstrate only the cause-effect relation between the

damage caused and the action or omission of the supplier. And if the damage was caused by several suppliers, all of them are considered liable. A strict liability regime rebalances the legal relationship between consumers and suppliers.

Finally, the regime of consumer protection was harmonized through MERCOSUR after its members adopted: (i) Resolution no. 21/04 addressing consumers’ rights to information in commercial transactions made through the internet; (ii) Resolution no. 104/05 providing that infringements occurring in internet-derived transactions will be addressed in accordance with the Consumer Protection Law; (iii) Resolution no. 45/06 addressing consumer protection and deceptive advertising; and (iv) Resolution no. 10/96

on the international jurisdiction in cases involving consumer relations.

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### **Internet regulatory framework**

Both Argentina and Brazil have enacted regulations on civil rights on the internet. The Brazilian Civil Rights Framework for the Internet (*Marco Civil da Internet*, in Portuguese), Federal Law no. 12,965/2016, sets the main rules governing net neutrality, privacy, freedom of expression and providers’ civil liability.

Argentina’s Digital Law, Federal Law no. 27,078/2014 (*Ley Argentina Digital*, in Spanish), regulates mostly net

neutrality and privacy. In Argentina, freedom of expression is defined in the Constitution as “to publish ideas in the press, without prior censorship” with the status of a fundamental right. However, Decree no. 1,279/1997 extended the meaning of “press” to the internet as well.

The Digital Law guarantees each user the right to access, use, send, receive or offer any content, application, service or protocol through the web without any restriction, discrimination, blockage or interference. Information and communications technology (ICT) service providers cannot block or restrict the use, sending or reception of any content in the transmission of information (traffic shaping), except in the event of judicial order. Internet service providers (ISPs) cannot set prices on internet access based on the content or services to be used or restrict, by their own will, the user’s right to use any software or hardware to access the internet. Jurisprudence has built case law with respect to cases in which the intermediary service providers must retire uploaded content without judiciary intervention, e.g. removing child pornography.

In Brazil, there are only two legal exceptions in which ISPs are authorized to treat data packets differently over the internet: (i) where technical requirements are essential to the adequate provision of services and applications; and (ii) for emergency services. Technical requirements are understood as measures seeking to address internet security issues, such as restricting sending massive amounts of messages (spam), stopping denial of service attacks and addressing network congestion. Possible

measures restricting net neutrality in cases of emergency services can occur to guarantee communication among and with emergency service providers, and when necessary to communicate to the population in case of a disaster, emergency or public calamity. In these scenarios, communication must be free of charge.

Both in Argentina and Brazil a provider may be held responsible and may have to take down specific content if, after receiving a specific court order, it does not remove the content (within its technical capabilities) by a set deadline. In such cases, the provider will be liable for damages. In Brazil, in the case of unauthorized content containing nudity or sex of a private nature, the content is subject only to a notice and takedown procedure, not necessarily requiring judicial order.

### **Data protection**

Argentina and Brazil are taking steps to adapt their regulations to a data protection framework inspired by the European Union’s GDPR. While Brazil has only recently created a framework for data protection, Argentina launched its first law for processing personal data in 2000 (Law no. 25,326/2000, Personal Data Protection Law (PDPL)).

In Brazil, “Lei Geral de Proteção de Dados” (LGPD), the country’s general data protection law, establishes rules on: (i) the legal bases for processing personal data, sensitive personal data and children and teens’ personal data; (ii) termination of data subjects; (iii) data subject rights; (iv) processing of personal data by public authorities; (v) accountability; (vi) international transfer of data; (vii) security and secrecy of data; (viii) good practice and

governance; (ix) administrative sanctions; and (x) other more specific rules regulating these topics. The Law has a multi-sectoral application for the private and public sectors.

LGPD and PDPL reflect a broad concept of personal data, comprising the information related to an identified or identifiable individual. Moreover, the concept of sensitive personal data is defined in both countries as a specific individual's data about racial or ethnic origin, religious belief, public opinion, union affiliation, philosophical or political organizations, and health or sex life, as well as an individual's genetic or biometric data.

Accordingly, both countries established basic rights that provide: (i) the right to access and rectify personal data; (ii) the right to amend, delete or cancel provided personal data; (iii) the right to oppose data processing; and (iv) the right to information and explanation about a particular use of personal data. The LGPD, as well as the bill in discussion in the Argentinean Congress, goes further by specifying the right to data portability, which allows not only the right to request a copy of one's data, but also to have the data provided in an interoperable format, which aims to facilitate the transfer of that data to other services, even to competitors' services.

With regard to the liability regime in Brazil, the "controller" (legal person responsible for the decisions on how data should be processed) and the "processor" (legal or natural person responsible for processing data under the controller's instructions) can be jointly liable for information security incidents, improper and unauthorized

use of the data or for non-compliance with the law. In this regard, the clear definition of the roles played by the controller and the processor under contractual terms is paramount to set the limits of liability. In addition, when no violations of LGPD are found, the liability of the processor may be limited to its contractual and information security obligations.

The role of the Brazilian Data Protection Authority (ANPD), created by Provisional Measure no. 869/2018, is to ensure the protection of personal data, by monitoring and applying sanctions when facing a violation of LGPD, and requesting information, whenever necessary, from the controllers and processors who carry out personal data-processing operations. To the same extent, Argentina's Agency of Access to Public Information, created by Decree no. 746/2017, functions with autonomy under the President's Chief of Staff Office. If data is obtained or transferred inconsistently with PDPL, database controllers and processors may face sanctions, including warnings, suspensions, fines, or closure or cancellation of the file, register or database, without prejudice to any applicable civil or criminal liability. Moreover, the bill in discussion in the Argentinean Congress includes requirements for notification of mandatory non-compliance.

Argentina's Congress is considering legislation to: (i) limit the concept of "data subject" to natural persons only by excluding legal entities, and revise and refine the concepts of "database", "personal data" and "sensitive data"; (ii) include accountability obligations and remove the database registration requirement; (iii) acknowledge the right

to be forgotten and of data portability; (iv) develop rules for sensitive data, background checks and minors' consent, which are more extensive than for other data; (v) establish a duty of notification of data breaches and require an impact analysis in cases where the data processor intends to treat data differently from its original purpose; and (vi) determine the duty to appoint a data protection officer in the case of sensitive data being processed as a principal activity, for public agencies or when big data activities (such as data mining and data analytics processes) are involved.

### **Argentina and Brazil at the multilateral debate**

The discussions on e-commerce at the WTO started as early as 1998, with the creation of the Work Programme on Electronic Commerce to examine all e-commerce-related issues. Although the Work Programme contributed to the consideration of e-commerce within the Organization, discussions did not lead to the creation of a WTO Agreement. As a result, e-commerce chapters were negotiated in some FTAs.<sup>3</sup>

In 2017, at the 11th WTO Ministerial Conference, a group of WTO members agreed to initiate an exploratory work committee on negotiating an e-commerce agreement.<sup>4</sup> In 2019, at the World Economic Forum, a Joint Statement concluded by 76 members confirmed their intent to start negotiations with the participation of as many WTO members as possible.<sup>5</sup>

Most of the proposals are concerned with custom duties, data protection and server localization, international

transfer of data, e-signatures, consumer protection, unsolicited commercial messages, ISPs and platforms' liabilities. The main areas of disagreement concern market access (Canada, the European Union, Japan and the United States would like to widen the extent of the WTO Information Technology Agreement (ITA) and deepen commitments on services, telecom and financial services) and the moratorium issue (China, the European Union and the United States would like to make it permanent while India and South Africa are concerned about the fiscal effect of such a moratorium).

Argentina and Brazil have engaged in the debate by submitting proposals to the General Council and by participating in two collective proposals.<sup>6</sup>

In the Communication from Argentina, Brazil and Paraguay (JOB/GC/115), the three countries proposed rules on e-signatures based on MERCOSUR Resolution GMC 37/06. In a second Joint Proposal, Argentina and Brazil (only) sought to enhance the effectiveness of copyright rules in the digital environment, focusing on: (i) transparency; (ii) jurisdiction; and (iii) the balance of rights and obligations. One main goal is to improve transparency in order to reduce asymmetries of information between intermediaries and artists, bringing to light the rules used for calculation of royalties, notably as regards modes of exploitation, revenues generated and remuneration due. To curb the practice of international forum shopping to find the most favourable jurisdiction, the countries proposed that jurisdiction be determined based on the applicable legislation from where the content is

accessed. On the balance of rights and obligations, it was proposed that Article 13 (Limitations and Exceptions) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) should be extended to the digital environment.

Argentina was part of a collective communication (with Colombia and Costa Rica) that highlighted the following topics: (i) regulatory issues, including the right to implement measures for the protection of individuals' privacy and for the security and confidentiality of information; (ii) specific commitments in e-commerce-enabling infrastructure sectors; and (iii) progress regarding the interests of developing countries and LDCs in relation to promoting connectivity and bridging the digital divide (WTO, 2018b).

Brazil, in turn, has submitted four documents covering more specific issues related to digital trade.<sup>7</sup>

First, Brazil proposed a definition of digital trade as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”. On specific issues, Brazil proposed the following topics: (i) electronic contracts, electronic signatures and digital certification; (ii) unsolicited commercial communications; (iii) taxation; (iv) competition; (v) consumer protection; (vi) cross-border transfer of information by electronic means; (vii) personal data protection; (viii) cybersecurity; (ix) copyrights; and (x) jurisdiction.

Regarding electronic contracts, electronic signatures and digital certification, Brazil suggests that these instruments should have their legal effect founded on objective methods of validation (which could be done based on performance standards certified by authorities), thus preventing their legal effect from being questioned solely due to their electronic form.

In terms of consumer protection, the focus is on rules addressing the protection of consumers from deceiving commercial practices, for which Brazil encourages the

use of alternative dispute resolution mechanisms. In addition, consumers should be able to avoid receiving unsolicited commercial messages, which means that electronic commercial messages should only be sent upon consent.

Brazil also proposes that relevant international principles and

guidelines should be the basis for a legal framework on data protection, especially to guarantee that individuals are able to pursue remedies in case of violation of their personal data.

With respect to the cross-border transfer of information through electronic means, restrictions or conditions on such transfer could be adopted only when pursuing a legitimate policy objective. Although the definition of legitimate policy objective remains open, Brazil suggests a comprehensive list of categories, such as measures

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involving: (i) protection of public morals or public order; (ii) prevention of deceptive or fraudulent practices, or treatment regarding effects of a default on online contracts; (iii) protection of citizens', consumers' and medical patients' privacy in relation to the processing and dissemination of personal data and protection of confidentiality of individual records and accounts; (iv) ensuring safety; (v) cybersecurity; and (vi) counteraction and prevention of terrorism and violations of criminal law.

Brazil also suggests that, in order to enforce national law, access to information and data shall not be denied based on the "lack of national jurisdiction". Finally, Brazil clarifies that no customs duties shall be applied to electronic transactions, but no limitations shall be adopted on the implementation of internal charges and fees by WTO members.

## MERCOSUR

Although MERCOSUR does not have a common regulation on digital trade, Resolution GMC no. 24/2001 created the Working Subgroup on Electronic Commerce (SGT 13). SGT 13 determines priority issues to consider for intraregional relations and for external relations, particularly with, but not limited to, the European Union and the WTO.

SGT 13 met every year from its creation until 2010. It resumed meetings in 2017 and 2018. Members achieved noteworthy results when they met three or four times a year. For instance, between 2004 and 2006, Resolutions on consumer access to information, efficacy of electronic contracts and

e-signatures were adopted. Although the frequency of meetings has diminished over time, in 2017, SGT 13 resumed proposing negotiations for a future protocol, which would encompass not only e-signatures and electronic authentication methods (previously regulated), but also data localization, unsolicited electronic messages, data protection, transfer of data for commercial purposes and consumer protection. SGT 13 has not yet adopted such a Protocol.

MERCOSUR has created the Group for the Digital Agenda to advance the discussions on the digital economy and e-commerce that were initiated by SGT 13. E-commerce needs to be considered as a cross-cutting issue, as it requires the constant intervention and contribution of different ministries. The group also recognizes the great interest of the private sector, setting an open space for companies to contribute to the discussion.

In addition, in the dialogue between MERCOSUR and the Pacific Alliance, a Joint Action Plan was signed. It includes a Digital Agenda between the two blocs, promoting the exchange of information and good practices in order to develop e-commerce within the region.

Furthermore, MERCOSUR is advocating an e-commerce chapter in all its FTA negotiations, some of which include clauses already included in the Pacific Alliance and in the CPTPP.

The MERCOSUR-EU Agreement, which was concluded in 2019 but is not yet in force, includes a subsection

on e-commerce (Articles 42–51) with definitions and some principles. For instance, and taking into account that the moratorium is still being discussed at the multilateral level, the Agreement establishes that neither party shall impose custom duties on electronic transmissions between a person of one party and a person of the other party (however, it does not preclude a party from imposing internal taxes, fees or other charges on electronic transmissions, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement).

In addition, although it establishes the principle of non-prior authorizations, the Agreement provides that nothing shall prevent a party from adopting or maintaining measures inconsistent with paragraph 1 to achieve a legitimate public policy objective in accordance with: (i) its right to regulate (Article 1.4); (ii) general exception (Article 48); (iii) security exceptions (Article 49); and (iv) prudential carve-outs (Article 36).

Furthermore the Agreement foresees the obligation to ensure that contracts can be concluded by electronic means, that no party could deny the legal effect and admissibility as evidence in legal proceedings of an electronic signature and electronic authentication service solely on the basis that the service is in electronic form, that all parties shall endeavour to protect end-users effectively against unsolicited direct marketing communications (but firms are allowed to send direct marketing communications if they have consumer's contact details in the context of the sale of a product or service for their own similar products or services).

Finally, in terms of consumer protection, parties commit to adopt or maintain measures that contribute to consumer trust, including measures that proscribe fraudulent and deceptive commercial practices. Such measure shall, *inter alia*, provide for: (i) the right of consumers to have clear and thorough information regarding the service and its provider; (ii) the obligation of traders to act in good faith and abide by honest market practices, including in response to questions by consumers; (iii) a prohibition of charging consumers for services not requested or for a period of time not authorized by the consumer; and (iv) access to redress for consumers to claim their rights, including as regards their right to remedies for services paid and not provided as agreed.

## Conclusion

Argentina and Brazil have embarked on a reform process of both domestic and international regulatory policies.

As already mentioned, e-commerce has been subject of discussion in MERCOSUR SGT 13. However, the results are disappointing in terms of regulatory practices or regulatory convergence in this sector, confined to a few initiatives and documents on e-signatures and consumer protection. In order to promote and enhance regulatory convergence among its MERCOSUR members, parties initially should recognize that MERCOSUR can offer the structure necessary to expand digital trade regulations in the region to issues such as data protection, data transfer, ISP liabilities, intellectual property and domain name disputes.

In addition, Argentina and Brazil have presented separated contributions to the debate at the WTO, which reveals a lack of regional coordination on e-commerce regulatory initiatives, hindering regional businesses development and limiting foreign and domestic investment in a sector that has kept growing.

Furthermore, Argentina and Brazil have adopted different approaches internally, which creates a gap in terms of regulatory convergence between the two. For example, Brazil has already included specific rules related to freedom of expression and the internet service provider's civil liability in its regulation, while Argentina is still moving towards that. On net neutrality, Argentina and Brazil allow different types of exceptions: while in Brazil discrimination is possible when some condition previously predicted is found, in Argentina it can only occur with a judicial order.

On data protection, Brazil recently passed a data protection law similar to the European Union's GDPR, while Argentina passed a data protection law in 2000 and currently has a draft bill submitted to Congress, also inspired by the EU law. It appears that steps towards convergence on this topic is due to the influence of the GDPR, and not necessarily because both countries

have made joint efforts to achieve this regulatory outcome.

The build-up of individual practices and regulations for e-commerce by the two countries reveals a lack of cooperation in this field, which will constrain investments and market expansion. Companies (and small companies particularly) require legal certainty, for example, on what happens with intellectual property on the internet, intermediaries' responsibility, taxes and data protection. In the end, however, convergence may occur thanks to FTAs, such as the MERCOSUR-EU Agreement that obligated MERCOSUR members to determine their common legal "floor" and take new regulatory commitments.

The voluntary and purposeful integration of Brazilian and Argentinean regulatory norms would send a signal to investors across the globe. E-commerce is not only about physical infrastructure (internet connection and the like) but also about legal infrastructure, which is critical for both companies and consumers. Reaching a cooperation agreement to regulate e-commerce activities and related services between the two countries would also reduce costs faced by companies and consumers. MERCOSUR still seems to be the best institutional option to put this forward.

## Endnotes

- <sup>1</sup> The “5-Modes” classification is explored in Ciurak and Ptashkina (2018).
- <sup>2</sup> These percentages are about constant internet users compared to the general population and the percentage of active paying consumers.
- <sup>3</sup> These include bilateral agreements signed by the United States with other countries and regional agreements such as TPP, CPTPP and USMCA.
- <sup>4</sup> Document circulated as Work Programme on Electronic Commerce, Draft Ministerial Decision of 13 December 2017, WT/MIN(17)/W/6.
- <sup>5</sup> Document circulated as Joint Statement on Electronic Commerce, dated 25 January 2019, WT/L/1056.
- <sup>6</sup> The Communication of Brazil and Argentina was first submitted by Brazil as JOB/IP/19. In the revision submission (namely, INF/ECOM/16/Rev.1, first circulated as Joint Statement on Electronic Commerce: Electronic Commerce and Copyright, Communication from Brazil and Argentina, dated 24 September 2018, JOB/GC/200/Rev.1), Argentina joined as co-sponsor. The Communication from Argentina, Brazil and Paraguay was circulated as WTO Work Programme on Electronic Commerce: Electronic Signatures, Communication from Argentina, Brazil and Paraguay, dated 21 December 2016, JOB/GC/115.
- <sup>7</sup> Those documents include: Joint Statement on Electronic Commerce, Communication from Brazil, dated 30 April 2019, INF/ECOM/27; Exploratory Work on Electronic Commerce, Non-Paper from Brazil, dated 11 April 2018, INF/ECOM/3, first circulated as JOB/GC/176; Joint Statement on

Electronic Commerce, Communication from Brazil, dated 30 October 2018, INF/ECOM/17, first circulated as JOB/GC/203; Work Programme on Electronic Commerce, Non-Paper from Brazil, dated 20 July 2016, JOB/GC/98.

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## Comments



**MARK WU\***

In recent years, Latin America has become one of the fastest growing markets in the world for e-commerce. Argentina and Brazil, both members of the Southern Common Market (MERCOSUR), are two of the region's major engines driving the development of the regional digital economy. In 2019, the two countries collectively accounted for more than half of the region's business-to-consumer (B2C) e-commerce.<sup>1</sup> Even as their governments change and their economies experience periodic slowdowns, both countries continue to march forward digitally. One recent ranking of the top global start-up hubs crowned São Paulo, Brazil, as the top city in Latin America, with Buenos Aires, Argentina, featuring as the only other Latin American city to rank among the top 50 worldwide.<sup>2</sup>

But it is not just the remarkable e-commerce revenue growth that has garnered the envy of other emerging economies. After all, as this volume highlights, e-commerce and digital trade are expanding rapidly throughout the developing world. Rather, it is the manner through which these two countries have managed to develop digital competitiveness that has attracted the attention of others. Given their recent histories of authoritarian rule, both countries have remained sensitive to civil society's

calls to protect individual data, privacy and human rights. Neither has engaged in crude forms of digital protectionism to effectively close off their markets and build up national champions. Yet, while they have championed openness, neither has fallen squarely in line with the liberal digital trade initiatives advanced by Australia, Japan, the United States and others. Nor have they ceded their markets to American or Chinese platforms. In short, both countries have sought to engage digital trade on their own terms.

At first glance, this gambit may appear to be paying off. Mercado Libre, based in Argentina, is the region's most popular e-commerce site. In Brazil, homegrown B2W is another leading e-commerce marketplace. Whereas e-commerce in much of the rest of the world is dominated by the likes of Alibaba, Amazon, eBay or one of their locally backed companies, Argentina and Brazil have both proven that it is possible for governments to cultivate the right conditions for domestic technology start-ups to acquire competitiveness in cross-border e-commerce and digital trade.

In their chapter, Professors Thorstensen and Delich make three important contributions towards

*\* The contents of this commentary are the sole responsibility of the author and are not meant to represent the position or opinions of the WTO or its members.*

helping us understand the development of e-commerce in Argentina and Brazil. They are worth highlighting, especially for other developing countries.

First, they emphasize the importance of robust regulatory reform. Both countries implemented a series of laws and regulatory frameworks to facilitate online transactions. In so doing, they provided reassurances to companies and consumers alike. What both sides of a transaction require are certainty over rules concerning nuts and bolts issues such as taxation, digital signatures, use of personal data, returns, etc. Simply investing in physical infrastructure by laying cables and building cellular networks to support e-commerce, while a necessary precondition, is insufficient. Governments must also invest in adapting their laws and institutions to fit the digital era.

Second, Professors Thorstensen and Delich highlight the role of participation in external processes in influencing internal developments. Argentine and Brazilian policies are shaped through policymakers' involvement in debates in international organizations as well as through their negotiations of free trade agreements (FTAs), most notably with the European Union. As was true of their experiences in other domains of global governance (e.g. anti-corruption, WTO dispute settlement), Argentina and Brazil both

benefited from knowledge derived through engagement with their counterparts in advanced economies.

Third, although MERCOSUR constitutes a vital component of Argentina's and Brazil's trade and economic policies, neither turned to MERCOSUR as the key forum for developing their policies. Instead, they pushed domestic regulatory reforms on their own terms, without necessarily seeking regional harmonization. While this may have allowed government officials to operate more in accord with Silicon Valley's

mantra to "move fast and break things", Professors Thorstensen and Delich express a valid concern that this lack of regional coordination may hurt both countries in the longer run. In their closing paragraph, they speculate that the lack of a single digital market in MERCOSUR will prevent regional firms from acquiring the scale economies necessary to become competitive globally.

**"Argentina and Brazil have both proven that it is possible for governments to cultivate the right conditions for domestic technology startups to acquire competitiveness in cross-border e-commerce and digital trade."**

This raises the question of whether Argentina and Brazil are bound

to continue as success stories. Certainly, unlike many other parts of Latin America, they have succeeded in creating e-commerce platforms and technology ecosystems. Mercado Libre and B2W are rightly celebrated as examples of how homegrown firms can beat out global giants by better catering to local needs. Despite these successes, however, are these

countries nevertheless teetering on the edge of the digital version of a “middle income” trap?

Indeed, there are worrying signs that both countries may be losing ground relative to other parts of the developing world. Between 2014 and 2019, Brazil dropped 26 spots in the UNCTAD B2C E-commerce Index rankings to 74th place. Argentina declined even more, falling 36 spots to 85th place. Not only has China overtaken both countries, but so too have India, Thailand and Viet Nam.<sup>9</sup> Just as the industrial goods and electronics value chains eventually gravitated towards Asia, the same phenomenon may be also happening for digital.

Of course, the digital competition is just beginning. The vital lesson to be drawn from MERCOSUR, however, may well be the same one the region taught us in the late 20th century for industrial goods. In the end, investing in legal reform and active participation in multilateral institutions can only get a developing country so far. In order to compete against advanced economies and emerging Asian giants, developing countries elsewhere will need to invest heavily in human capital, stabilize macroeconomic conditions and achieve regional scale economies. Whether Argentina, Brazil or MERCOSUR has learned the lessons of its past remains to be seen. But the region must step up quickly if it is to remain competitive in a rapidly digitizing world.

## Endnotes

- <sup>1</sup> The other major engine of e-commerce growth is Mexico. For more details, see Caroline Zepeda, The Thriving Brazilian E-Commerce Market, Contxto, available at: <https://www.contxto.com/en/technology/the-thriving-brazilian-e-commerce-market/>
- <sup>2</sup> See StartUp Blink Ecosystem Ranking Report 2019, available at: <https://report.startupblink.com/>
- <sup>3</sup> Compare UNCTAD, UNCTAD B2C E-commerce Index 2019, UNCTAD Technical Notes on ICT for Development No. 14, pp. 7–10, available at: [https://unctad.org/en/PublicationsLibrary/tn\\_unctad\\_ict4d14\\_en.pdf](https://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d14_en.pdf) with UNCTAD, Information Economy Report 2015, pp. 100-103, available at: [https://unctad.org/en/PublicationsLibrary/ier2015\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ier2015_en.pdf)