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E-COMMERCE IN BRAZIL:
Where we are in terms of regulatory practices

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E-COMMERCE IN BRAZIL:
Where we are in terms of regulatory practices

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Resumo: O crescimento exponencial do comércio eletrônico não foi acompanhado por práticas regulatórias uniformes no cenário internacional: somente em 2019 a OMC se dispôs a negociar um acordo sobre o tema, enquanto países já tem regulado a economia digital através de acordos bilaterais e por suas próprias políticas de regulação interna. Nesse sentido, o artigo procura abordar como o Brasil tem se posicionado nas negociações na OMC para o futuro acordo, como dimensionar suas práticas regulatórias domésticas que impactam o comércio eletrônico. Por fim, o artigo procura comparar a regulação interna brasileira com a atuação do MERCOSUL, que possui Grupos de Trabalho destinados à negociação de políticas sobre a economia digital. Essa análise faz-se importante dado que o país é o principal consumidor de e-commerce na América Latina, como um dos Membros da OMC mais ativos nas negociações sobre comércio eletrônico.

Palavras-chave*:* OMC, MERCOSUL, comércio eletrônico, regulação.

Abstract: The exponential growth of e-commerce was not accompanied by uniform regulatory practices in the international scenario: it was only by 2019 that the WTO reunited Members to start negotiations for a future agreement on the topic, while countries had already been ruling digital trade through bilateral agreements and by domestic regulatory policies. Accordingly, this working-paper addresses how Brazil has been positioning itself in WTO negotiations on the subject and gives a dimension on the country´s domestic regulatory practices that impact e-commerce. Lastly, it compares Brazil's internal regulation to MERCOSUR's practices, as the trade bloc already provides Working Groups destined to the negotiations of digital economy policies between its Members. This analysis is relevant due to Brazi1's role as the main e-commerce consumer in Latin America, and due to its active participation in the negotiations for e-commerce at WTO.

Key-words*:* WTO, MERCOSUR, e-commerce, regulation.

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Introduction

This paper describes the main aspects of Brazil's current regulatory framework for e-commerce. On an international level, the discussion on how to regulate electronic commercial transactions has also reached the World Trade Organization (WTO), where not only Brazil but a numerous group of Members have already submitted their proposals for further negotiations. In order to guide the topics covered by the Brazilian regulation on e-commerce, these proposals are briefly introduced in the next section. This overview will hopefully be relevant for future negotiations in order to enhance Brazil's regulatory framework and its convergence in the ambit of MERCOSUR[4].

The discussions on e-commerce at WTO started in 1998, with the creation of a Work Programme to examine all trade-related issues relating to global electronic commerce during the Second Ministerial Conference[5]. Although the Work Programme contributed to the inclusion of such an agenda in the Organization, discussions have not advanced towards negotiations to constitute WTO´s framework of agreements. The lack of negotiation at multilateral level has led this task to be treated under e-commerce chapters in some free trade agreements[6]. In 2017 - during the 11th WTO Ministerial Conference - a group of Members decided to initiate exploratory work on negotiating e-commerce[7]. During the World Economic Forum Annual Meeting in 2019, a Joint Statement concluded by 76 countries confirmed their intent to commence negotiations seeking to achieve high standard outcomes with a participation of as many WTO Members as possible[8]. Up to now, about 15 Members have launched proposals on rules for e-commerce at the WTO.

Regarding MERCOSUR, the States Parties have yet to adopt a common policy for digital regulation. On that account, it is important to consider mechanisms of regulatory convergence in this area, especially because digital trade has increased consistently, and convergent rules may lead to the reduction of costs and foster job creation in general. It would be fair to assume that MERCOSUR leaders have great interest in achieving such results.

Although MERCOSUR does not have a broad common regulation on digital trade, Resolution GMC n. 24/2001 created the Working Subgroup on Electronic Commerce (SGT13). This subgroup shall work on the extra-regional relations with but not limited to the Europe Union and the World Trade Organization (WTO). In terms of intra-regional relations, it shall work on determining priority issues on the subject. It is also recognized the relevance of the private sector participation in these discussions to assist the work developed under SGT13 whenever necessary.

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[4] Mercosur is a regional integration process, initially established by Argentina, Brazil, Paraguay and Uruguay, and later joined by Venezuela which is suspended in all the rights and obligations in accordance with the provisions of the Protocol of Ushuaia.

[5] This declaration is found in the document WT/MIN(98)/DEC/2.

[6] Countries have been filling the gap signing bilateral or regional free trade agreements (FTAs). For example, bilateral agreements signed by the USA along with other countries or regional agreements such as TPP, CPTPP and USMCA.

[7] Members of WTO stated in WT/MIN(17)/60 that they "share the goal of advancing electronic commerce work in the WTO in order to better harness these opportunities". They also declared "we, as a group, will initiate exploratory work together toward future WTO negotiations on trade related aspects of electronic commerce. Participation will be open to all WTO Members and will be without prejudice to participants' positions on future negotiations."

[8] The document has been circulated as WT/L/1056.

From its creation, SGT13 reconvened every year up to 2010. After this period, the Subgroup had only two meetings: in 2017 and then in 2018. It must be observed that, while in previous years, when States Parties reconvened three to four times a year, more progress was achieved. Between 2004 and 2006, Resolutions on consumer access to information, efficacy of electronic contracts and e-signatures were published. Although meetings have decreased over time, in 2017, the Subgroup met again proposing negotiations for a future Protocol on E-commerce[9], which would encompass not only e-signatures and electronic authentication methods (previously regulated), but also the concept of data localization, unsolicited electronic messages, data protection, transfer of data for commercial purposes and consumer protection. SGT13 has not yet published any resolutions in the years following 2017 ‘s meeting.

In July 2017, however, representatives from the States Parties agreed on creating a Group for the Digital Agenda, which would embody discussions on topics related to the digital economy and update work done in SGT13[10]. By now, the Group has only discussed plans of action, which shall be implemented from 2020, including themes regarding digital infrastructure and connectivity, safety and reliability in the digital sphere, digital economy, digital skills, e-government, regulatory aspects, coordination in international and regional forums and measurement of indicators.

In summary, this paper will address Brazil’s multifaceted regulation on e-commerce based on topics and areas it has proposed contributions at the international level. This assignment helps to understand not only where Brazil is in terms of regulatory practices in the field, comparing to the foregoing discussion on the international scene, but also, how could it contribute to further discussions in the ambit of MERCOSUR. In light of this context and to better meet the goal of this paper, the text is subdivided into a few sections. First, it brings a brief description of the market in Brazil and Argentina as both countries represent the biggest *players* among MERCOSUR States Parties. Subsequently, it summarizes the content of the proposals submitted by Brazil to the WTO, clarifying its position in the Organization. Additionally, a description of Brazil’s main domestic regulation on e-commerce is given according to what the country has submitted at the WTO. Finally, the paper addresses a possible contribution from Brazil regarding MERCOSUR and WTO discussions on the field.

Understanding E-commerce and the Brazilian market

Although WTO’s 1998 Declaration on its Work Programme defined “e-commerce” as production, distribution, marketing, sale or delivery of goods and services by electronic means, it must be highlighted that there is still no consensus on what the term exactly encompasses. Narrower definitions would consider e-commerce as those transactions involving digital goods or services. Broader definitions, on the other hand, would also include commercial transactions of physical goods or services in which the parties sign the contract using digital platforms. Since digital transactions have gained a larger scope, this paper will consider e-commerce in its broader definition.

[9] Information collected from the delegations’ conference minutes: MERCOSUL/GMC/SUBGRUPO DE TRABALHO Nº 13/ATA Nº 01/17

[10] As observed in States Parties’ intentions in MERCOSUR/GAD/ACTA Nº 01/18.

Broadly, e-commerce transactions could also be classified on 5 different modes depending on the means of the delivery and the activities that fall under each of them[11]. As CIURIAK and PTASHKINA explain, e-commerce transactions can occur from digital to real or from real to real. In other words, digital to real transactions encompass products and services delivered completely digitally, while real to real transactions have a digital platform as an intermediary that supports an operation dependent on third parties[12].

According to these classifications, Mode 1 refers to activities in which goods and services are delivered from digital to real (aligned with the strict definition of e-commerce above explained). Modes 2, 3 and 4 describe activities in which goods and services are delivered from real to real, but part of the transaction happens through digital platforms, including the signing of the contract (aligned with the broader definition of e-commerce above explained). Finally, Mode 5 describes the capitalization of data flows, in which companies monetize personal data generated by its users.

Table 1 – Modes of e-commerce

Mode	Description	General examples	Brazilian and Argentine examples
Mode 1	delivered from "digital to real"	Netflix, WhatsApp or Skype, Web search, online advertising	Globo Play, Cine.AR
Mode 2	delivered from "real to real", with digital intermediation, specifically including business to consumer (B2C*) and business to business (B2B) transactions	Amazon online shop and travel services, such as hotel bookings and flight reservations	MercadoLibre, Netshoes, B2WDigital, Garbarino, Makro, FoodService, Fastshop, Pontofrio
Mode 3	delivered from "real to real", with digital intermediation, specifically including consumer to consumer (C2C*)	eBay, Uber, Airbnb	MercadoLibre, Argofy, Enjoei.com, EasyTaxi
Mode 4	delivered from "real to real", with digital intermediation, including consumer to business (C2B*)	Fivver and Upwork (which are platform-based providers where a natural person provides services to business)	Workana, 99Freelas, Nearjob
Mode 5	the capitalization of data flows	Personal data used by Facebook and Google and data generated over the Internet of Things	Serasa Experian

Information collected from Ciurak and Ptashkina, 2018. *In the original paper (CIURIAK, PTASHKINA, 2018), the terms used are business-to-household (B2H), household-to-household (H2H) and household-to-business (H2B). In this paper, in order to provide better coherence with the other sections, the term *consumer* replaces the original term *household*. Therefore, the following terms are used: business-to-consumer (B2C), consumer-to-consumer (C2C) and consumer-to-business (C2B).

Table 1(above) shows a brief definition of these modes with a few examples of *players* in the Brazilian and Argentine markets, together, the States Parties of MERCOSUR with the biggest share of consumption and sales inside the bloc.

Accordingly, Mode 1 represents digital products that are either downloaded, accessed through *streaming*, or accessed on the *cloud*. In this specific category, the Brazilian and Argentine markets have already shown some development, especially on *streaming*

[11] CIURAK, Dan and PTASHKINA, Maria (2018) "The Digital Transformation and the Transformation of International Trade". RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB).

[12] *Ibid*

video services. Although Brazil still lacks on appropriate regulation for *streaming* services, giants like *Netflix* are gradually facing competition from domestic platforms such as the Brazilian *streaming* service *Globoplay*. In Argentina, the government launched *Cine.ar*, a *Netflix*-like platform gaining considerable ground in the market, with the goal to promote national audiovisual productions with a minimum cost to its population (around USD 1 per movie).

Furthermore, prior to examining Modes 2 and 3, it is relevant to point out that *Amazon* and *eBay* are both online retailing shops but belonging to different modes due to the role played by the provider of goods. While *Amazon* is the main direct provider of goods and has a network of warehouses to store them, *eBay* is better understood as an auction house, functioning as an intermediary enabling the sale of goods between third-party buyers and sellers. Even after *Amazon* authorized third-party sellers, it has still been a common practice of the company to keep their products in-house.

In respect to Mode 2, both countries share a profitable market concerning B2C e-commerce, although there is still room for improvement for the B2B sector. For the first category, 54 percent of all Brazilian internet users have at least once bought goods via online B2C platforms, while in Argentina, due to wider internet dissemination among its population, this rate rises to 90 percent[13]. Although multi-brand platform *Amazon* is greatly disseminated in those countries, both Brazil and Argentina present domestic companies as key competitors in the B2C market[14].

From a Brazilian standpoint, for instance, the top 50 biggest companies in Brazilian e-commerce account for 75.89 percent of the entire Brazilian e-commerce from which only four companies showed a decline in sales in 2017. To illustrate, Table 2 below shows the top 15 companies in Brazilian e-commerce, their e-commerce revenue, gross revenue and their respective e-commerce rates in total revenue from sales:

[13] ABCOMM, Interview for Ecommerce Foundation, 2018, CACE, "Estudio Anual de Comercio Electrónico", 2018.

[14] According to SBVC´s "Ranking 70 Maiores Empresas do E-commerce Brasileiro 2017", which lists the top 70 businesses in Brazilian e-commerce for 2017, Brazilian company *B2W Digital* is the leading seller in Brazil when it comes to e-commerce revenues in the country. According to the Ecommerce Foundation (2018), Argentinean company *Garbarino* was considered the top B2C e-commerce platform in Argentina among local competitors, albeit *Amazon* in Argentina is still the leading company in the sector, followed by Brazilian *Netshoes*.

Table 2 – Top 15 companies in Brazilian e-commerce by revenue (2017)

2017´s Ranking	Company	Brand/Domain Name	E-commerce Revenue (2017)	Gross Revenue (2017)	E-commerce rates in total sales (2017)
1	B2W Digital	Americanas.com, Submarino, Shoptime and SouBarato. B2W Marketplace (Americanas. com Marketplace, Submarino Marketplace e Shoptime Marketplace), BIT Services: Sieve, Site Blindado, Sky Hub, B Seller, Admatic and InfoPrice. B2W Fulfillment: LET'S, Direct, BFF B2W Fulfillment and B2W Entrega. Payment Services: Ame Digital, Submarino Finance e Digital Finance.	R$8.763.600.000,00	R$8.763.600.000,00	100%
2	Via Varejo	Casas Bahia.com, PontoFrio.com, Cdiscount.com, Barateiro.com, Extra.com	R$4.849.000.000,00	R$29.122.000.000,00	16,7%
3	Magazine Luiza	Magazineluiza.com.br	R$4.353.615.616,00	R$14.321.104.000,00	30,40%
4	Walmart Brasil	Walmart.com.br	R$3.000.000.000,00	R$28.187.051.659,00	10,6%
5	Grupo Netshoes	Netshoes.com.br, zattini.com.br	R$2.600.000.000,00	R$2.600.000.000,00	100%
6	Máquina de Vendas	Ricardoeletro.com.br, Insinuante. com.br, Citylar.com.br, Salfer. com.br, Eletroshopping.com.br	R$2.280.000.000,00	R$6.000.000.000,00	38,0%
7	Carrefour	Carrefour.com	R$1.752.750.900,00	R$49.653.000.000,00	3,5%
8	GFG LatAm - Dafiti	Dafiti.com.br, Kanui.com.br, Tricae.com.br	R$1.100.000.000,00	R$1.100.000.000,00	100%
9	Saraiva	Saraiva.com.br; Siciliano.com.br	R$708.153.000,00	R$1.883.326.000,00	37,6%
10	Privalia	privalia.com	R$500.000.000,00	R$500.000.000,00	100%
11	Lojas Colombo	Colombo.com.br	R$450.612.369,90	R$1.468.271.000,00	30,7%
12	Grupo Herval	taqi.com.br, lojaiplace.com.br	R$418.950.000,00	R$2.793.000.000,00	15,0%
13	Amazon	amazon.com.br	R$410.000.000,00	R$410.000.000,00	100%
14	Wine.com	wine.com.br, wbeer.com.br	R$400.000.000,00	R$400.000.000,00	100%
15	Madeira Madeira	MadeiraMadeira.com.br	R$350.000.000,00	R$350.000.000,00	100,0%

Source: SBVC (2017).

However, it is important to highlight that although *B2W Digital* leads the top 15 companies in the Brazilian market for e-commerce, its business solely consists of providing a marketplace for businesses, which justifies why other ranked companies do not have such great representation in e-commerce sales (as illustrated above the B2W's rate is 100 percent). For instance, *Via Varejo* showed a 16.7 percent share of e-commerce revenue sales when compared to its gross revenue. *Walmart Brasil*, a multinational department store, had only 10.6 per cent share of its e-commerce revenue sales when compared to its gross revenue. Finally, *Carrefour*'s share of e-commerce revenue sales compared to its gross revenue was of only 3.5 per cent. In summary, Table 2 suggests that there is room for companies to increase their e-commerce sales share.

Moving to B2B e-commerce, investment would be of great interest to both countries in order to expand the sector general revenue figures. Differently from the United States,

which has already reached USD 1 trillion in sales in 2018 from which B2C accounts for half of such expenditure[15], online B2B sales are far from reaching the majority of e-commerce revenue in Brazil and Argentina. Although the market of both countries has not seen considerable investment in the B2B e-commerce, Brazilian and Argentine top retail selling companies have already started to expand their extant B2C businesses with B2B platforms[16]. Therefore, it is possible to argue that the creation and development of this market have been linked to the intent of these B2C companies to expand, showing great room for new companies to initiate and explore their businesses coming directly from this sector.

In Mode 3, both markets rely mostly on giant Argentine company *MercadoLibre*, leading company in C2C revenue and in number of visitors[17]. Other smaller companies have also developed similar services showing profitable attainments[18]. The scenario is even more promising when looking at sharing economy applications. *Uber*, for instance, has a strong position in both countries. The innovation of creating platforms that only intermediates the communication between passengers and eventual drivers has influenced Brazilian and Argentine market in creating their own national service providers. *EasyTaxi*, a Brazilian company, connects passengers not only to autonomous *Uber*-like drivers, but also to registered taxi drivers[19]. The application also extended its services to Argentina, where it has become a key competitor to *Uber* as well.

In Mode 4, C2B businesses are mostly bound by international enterprise investment initiatives in both countries. Differently from C2C, through C2B e-commerce, the individual is paid for the work provided to companies over an online platform. Such service can be provided as participating in polls/surveys, with or without remuneration, and in any other types of services. *Upwork*, for instance, is a global work platform known for providing around 40 million jobs every year which has presence in the Brazilian and Argentine markets[20]. In this respect, both Brazil and Argentina have gradually seen investment through the creation of similar domestic platforms[21].

As described in Table 1, Mode 5 covers capitalization of data flows, which means the process of commercialization of data collected over internet use. When assembled, the value of the data increases, creating an interesting market for those businesses processing individuals' data mostly for marketing purposes. In this sense, *Google* and *Facebook* have become primary data sources, accurately profiling individuals' preferences and habits, though the validity of users' consent to such activities has been widely

[15] FORRESTER, "Forrester Analytics: B2B eCommerce Forecast, 2018 to 2023 (US)," Susan Wu, John Bruno and Sanjeev Kumar, 2018.

[16] In Brazil, companies like *Makro*, *FoodService*, *FastShop*, *B2W*, and *Ponto Frio* are now B2C and B2B e-commerce businesses. As for Argentina, Latin America's biggest e-commerce retailing company, Argentine *MercadoLibre*, finally expanded its B2C/C2C platform to B2B activities in 2017.

[17] ECOMMERCE FOUNDATION, "América Latina: Informe sobre comercio eletrónico", 2018.

[18] Argentine *Argofy* connects sellers and buyers of agricultural machinery and equipment. In Brazil, an example of a growing business inspired in *Ebay* is *Enjoei.com*, an online platform which enables a communication channel between sellers of unwanted goods and consumers.

[19] Besides *EasyTaxi*, *99Taxi* also represented a promising Brazilian C2C company in the sharing economy sector. In 2018, the company was acquired by Chinese *Didi Chuxing*, one of the biggest mobile applications for transport services in the world.

[20] SUOMINEN, K. "Fueling Digital Trade in Mercosur: A regulatory Roadmap", 2018

[21] In Brazil, *99Freelas* and *Nearjob* provide platforms for freelancers to connect with companies to provide for temporary jobs in executing remote projects. In Argentina, *Workana* provides an online marketplace for all Latin America.

questioned. Thereby, such data are of keen interest to Brazilian and Argentine e-commerce businesses, considering the amount of data from domestic consumers these sources provide.

Overall, as described in this section, e-commerce transactions characteristics depend on the means of delivery and it can occur as either business-to-business (B2B), business-to-consumer (B2C), consumer-to-consumer (C2C) or consumer-to-business (C2B). This section provided some examples of up-and-coming companies operating in the Brazilian and Argentine market, where both countries have room to increase the volume of investment and transactions in digital trade in the near future. Taking this into account and considering the vivid and growing market in the digital sphere, stable and sound regulations are necessary, which will be subject of discussion in the following sections.

Brazil's proposals at the WTO

Electronic Commerce has been under discussion at the WTO for some years. As of May 2019, about 19 Members had sent proposals for negotiating a plurilateral agreement on e-commerce. Most of the proposals are concerned with topics related to the regulation of customs duties, data protection, international transfer of data, e-signatures, consumer protection, unsolicited commercial messages and Internet Service Providers (ISPs) liabilities.

Thus, in order to determine areas of concern for regulating e-commerce internally, it's important to observe Brazil's position in the subject at the WTO. In respect to the joint initiative for negotiating an agreement for e-commerce, Brazil has submitted four documents by itself so far covering more specific issues related to digital trade[22]. In its latest communiqué[23], Brazil suggests specific rules on the following topics: (i) electronic contracts, signature and digital certification; (ii) unsolicited commercial communication; (iii) taxation; (iv) competition; (v) consumer protection; (vi) cross-border transfer of information by electronic means; (vii) personal data protection and (viii) cybersecurity.

Regarding electronic contracts, Brazil proposes that e-signatures shall not have their authenticity questioned solely based on their electronic format, and that WTO Members should not impose measures that would prohibit parties from determining the appropriate electronic method to conclude their transactions or measures that would prevent them from having the opportunity to prove the validity of their contracts to administrative and judicial authorities. Nevertheless, Members can require methods of authentication under certified authorities (for instance, by evaluating the performance of standards for special categories of electronic transactions).

As for unsolicited commercial messages, Brazil reinforces that direct marketing communication shall be clearly identifiable and transparent and it also suggests that such communication shall only reach consumers when these have given their previous consent. Such ruling can be exempted in the case a message is sent to previous

[22] INF/ECOM/3, first circulated as JOB/GC/176; INF/ECOM/16, first circulated as JOB/GC/200; INF/ECOM/17, first circulated as JOB/GC/203 and INF/ECOM/27.

[23] Circulated as INF/ECOM/27.

consumers and when the content of such communication is related to the product or service previously provided.

In respect to taxation, Brazil follows WTO's Declaration on Global Electronic Commerce[24] by suggesting that customs duties shall not be levied in electronic transactions, unless if consistent with other obligations in the Agreement/Reference Paper. In any manner, Brazil suggests that Members are entitled to collect taxes from digital trade on revenue and profit generated in the country, even if electronic platforms or suppliers do not have a commercial presence in their territory[25].

As for competition, Brazil only addresses that Members shall ensure that online platforms do not restrict competition, either in the market where they are dominant or in separate markets, including upstream markets. Also, it reinforces that Members shall ensure that online platforms do not give arbitrary or unjustifiable discriminatory advantages to their own services, products or apps.

In the field of consumer protection, Brazil suggests that Members shall establish measures protecting consumers from misleading and fraudulent commercial practices in the digital environment, including (i) consumers' right to clear information regarding the service and its provider (ii) traders' obligation to act in good faith and to abide by honest market practices, answering consumers' queries, (iii) prohibition of charging consumers for services not requested or for delivery time not authorized by the consumer and (iv) available remedies for services not provided as agreed. It also suggests that Members shall promote "out-of-court" mechanisms to solve conflicts related to e-transactions (not hindering individuals' access to courts).

Regarding the cross-border transfer of information by electronic means, Brazil proposes that the transfer shall be allowed when such transmission is for performing the business activity of those processing such information. Notwithstanding, Brazil considers that Members should be allowed to have their own regulatory requirements on such transfers. Moreover, Brazil suggests that exceptions for the free cross-border transfer of information are eligible in order to implement measures to achieve a legitimate public policy objective. Such measures shall not be applied in a manner which would constitute means of arbitrary or unjustifiable discrimination or a disguised restriction to the transfer of information and to international trade.

Regarding data protection, Brazil suggests that Members shall adopt personal data protection laws taking into account principles and guidelines of relevant international bodies, primarily when adopting non-discriminatory measures in protecting citizens, consumers and medical patients. In doing so, Members should promote compatibility between regulatory regimes. Also, it suggests that Members shall publicize information relating to the pursuing of remedies in case of violation and on how businesses can comply with legal requirements for data protection. Regarding cybersecurity, Brazil considers that Members shall take efforts towards remedies to cybersecurity incidents,

[24] Circulated as WT/MIN(98)/DEC/2, 25 May 1998, which establishes:
"Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions. (…)"

[25] Such understanding is also reflected in provisions established in some new generation FTA's, such as TPP and CPTPP, USMCA, CETA.

by adopting risk-based approaches to avoid threats of trade-restrictive and trade-distortive outcomes.

Finally, the document also provides that any of the obligations proposed by Brazil may be exempted by measures that are (i) necessary to protect public morals or to maintain public order; (ii) necessary to ensure the equitable or effective imposition or collection of direct taxes in respect to trade through electronic means, and (iii) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the future agreement, including those relating to *a*. the prevention of deceptive and fraudulent practices, *b*. protection of the privacy of individuals regarding processing and dissemination of personal data and the protection of confidentiality of individual records and accounts and *c*. safety. Nevertheless, Brazil imposes that such measures shall not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where same conditions prevail, or a disguised restriction on trade and cross-border transfer of information by electronic means.

Moreover, Brazil emphasizes that nothing established in the proposed provisions shall be construed as:

> (i) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
> (ii) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
> a. relating to the cross-border transfer of information carried out directly or indirectly for military communication;
> b. taken in time of war or other emergency in international relations; or
> c. to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Besides Brazil's latest communiqué, which provides for most aspects of possible e-commerce regulation at the WTO, Brazil had also previously submitted a communiqué regarding specific considerations on copyright rules in the digital environment (JOB/GC/200). It is important to highlight that the document was later amended in order to add Argentina as a co-sponsor. In the communiqué, Brazil suggests topics that could enhance the scenario of copyright rules in the digital environment focusing on (i) transparency, (ii) jurisdiction and (iii) balance of rights and obligations[26].

Mostly, the document addresses the need for measures reducing the gap between royalties distributed to copyright holders and the overall digital revenue (namely, the "value gap"), a situation which was aggravated by the expansion of digital content circulated through streaming of data. The document provides information based on the US Copyright Office, which declares that only 7% of the value initially paid by the consumer is paid to the author. Accordingly, Brazil understands that the lack of

[26] The document was first circulated by Brazil as JOB/GC/200 in September 2018, and in the revision submission (JOB/GC/200/Rev.1), Argentina joined as co-sponsor. In March 2019, in the ambit of the joint initiative for negotiating an e-commerce agreement, the document was circulated as INF/ECOM/16(and with Argentina's co-sponsoring, as INF/ECOM/16/Rev.1).

transparency on how royalties are calculated, combined with the asymmetry of information between copyright holders and their distributors, hinders the ability of copyright holders to negotiate better remuneration deals. For more transparency, the document suggests that:

> "Members shall ensure that authors and performers receive on a regular basis timely, adequate and sufficient information regarding the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. The obligation shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector." (JOB/GC/200, 2018)

In respect to jurisdiction, Brazil argues that obstacles arise from the borderless character of the digital environment, which clashes with the reality that copyright is regulated by national laws, primarily since remuneration is due to credit cards (which are regulated internally). Furthermore, Brazil claims that rules under TRIPS or WIPO are not clear as to what is the applicable jurisdiction in the case of works in the digital environment. Such lack of regulation on the subject generates an international forum shopping quest for the most convenient jurisdiction thus creating an opening for the potential application of laws that are unknown to the right holder. In order to avoid such a situation, Brazil suggests that WTO Members should reaffirm the principle of territoriality of copyright and agree that the applicable legislation for such shall be the one from where content is accessed.

Finally, in respect to the balance of right holders and users of protected works, Brazil proposes that exceptions and limitations provided for the analog environment under Article 13 of TRIPS Agreement should be extended to the digital environment. This includes those cases in which protected works may be used freely and without any further authorization. For instance, the Berne Convention and the TRIPS Agreement establish that exceptions to the rights of holders are accepted when (i) restricted to certain special cases, (ii) these cases do not conflict with a normal exploitation of the work and also (iii) when they do not unreasonably harm the legitimate interests of the right holder. Such exceptions, as pointed out by Brazil, must be extended to the digital environment, broadening the scope of application since technical protection measures are mostly directed for the normal exploitation of works in the analog environments.

In sum, Brazil has been an active Member in the discussions of trade in the digital environment. Not only it has provided considerable suggestions on provisions for the future agreement in the ambit of the joint initiative, but it has also contributed to discussions on copyrights in the digital environment years before that. Although such proposals reflect Brazil's perspectives on an ideal regulatory framework for e-commerce at the international level, it is important to evaluate if such provisions are reflected in Brazil's domestic regulations in the field. Thus, the proposals and topics discussed in this section are essential to guide the description of the Brazilian regulatory framework for e-commerce, which will be analyzed next.

Brazilian Regulatory Framework

Consumer Protection

Although e-commerce already represents a great part of shares in all sales of goods and services, a reason that keeps consumers away from choosing online platforms instead of physical stores when buying, is the overall perception that cross-border online transactions are less secure and transparent, and there aren't remedies available in case of default by suppliers. In order to settle these issues, countries have been putting efforts in creating legislation promoting predictability, transparency, safety and remedies to consumers in online sales.

Accordingly, the main regulation for consumer protection in Brazil is Federal Law n. 8.078/1990 (CDC – *Código de Defesa do Consumidor*), which sets the main rules for consumer protection, standards of conduct, penalties, and liabilities for suppliers. As CDC applies for any transaction that involves a consumer relation, such a framework is also extended to the digital environment. Moreover, Brazil also provides other legal instruments aimed at consumer protection that are applied to e-commerce transactions, which are summarized in Table 3 below.

Table 3 – Main regulation for Consumer Protection in Brazil

Federal Law n. 8.078/1990 (CDC)	sets general rules for consumer protection and addresses others measures.
Federal Law n. 10.962/2004	deals with offer and means of displaying prices of products and services for the consumer.
Decree n. 5.903/2006	regulates the Federal Law n. 10.962/2004 and the Federal Law n. 8.078/1990.
Federal Law n. 12.741/2012	clarifies measures for consumers regarding article 150, § 5º, of the Federal Constitution; and amends article 6º, IV and article 106 of the Federal Law n. 8.078/1990.
Decree n. 7.962/2013	regulates the Federal Law n. 8.078/1990 regarding e-commerce.

One of the main aspects of the CDC is the legal assumption that the relation between supplier and consumer is uneven. This basic assumption considers that suppliers would have more information on the product or service provided than their customers, which justifies the understanding that consumers are seen in a disadvantaged position in comparison with suppliers. Moreover, under CDC, consumers have more flexible obligations, whereas liabilities for suppliers are more severe.

The concept of consumer is not limited to an individual, as it might encompass any legal entity purchasing or using a good or a service as an end-user if that good or service was provided by a supplier. If any of these elements is not present in the case under scrutiny, then the CDC will not apply. Instead, only Brazilian Civil Code would apply, governing the relations between private parties (see Table 4 below).

Table 4 – CDC or Civil Code?

CDC applies when	The buyer is considered an end-user, regardless if natural person or a legal entity.
Civil Code applies when	If the CDC does not apply, then the Civil Code is applied. In this case the end-user is not considered a consumer and the legal relationship is presumably balanced, being examined as an ordinary civil case.

Moreover, CDC provides definitions for *supplier*, *product* and *service*, elements that altogether compose a consumer legal relationship:

> (i) A **supplier** is any individual or legal entity, public or private, domestic or foreign, as well as depersonalized entities engaged in the activities of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products or services;
> (ii) A **product** is any movable or immovable good, material or immaterial;
> (iii) A **service** is any activity supplied in the consumer market, upon remuneration, including banking, financial, credit and insurance activities, except if under labor agreements.

Since the concept of *consumer* and *supplier* does not depend on whether they represent a natural person or a legal entity, but on the existence of a provision of products or services to a subject which is an end-user, CDC will apply not only to B2C transactions, but to some B2B, C2C and C2B operations (thus including the operations of *99freelas*, *Upwork*, *MercadoLivre*, *Enjoei.com*, and *B2WDigital*, as mentioned in previous section). It is important to highlight, however, that in B2B transactions, legal entities may be acquiring products or services as inputs for their own provisions in which case they cannot be considered as consumers as they are not end-users. Thus, in this case, the general liability regime of Brazil's Civil Code would apply.

Additionally, the scope of liability for suppliers and the standards for consumer protection in Brazil are, in some instances, more severe than the consumer rules applicable in other jurisdictions. Consumers need only demonstrate the cause-effect relation between the damage caused and the action or omission of suppliers, which means that a strict liability regime protects consumer relations. Primarily, if any damage was caused by more than one supplier, all of them are considered jointly liable. A strict and joint liability regime would rebalance the legal relationship between consumers and suppliers. On the other hand, Brazilian Civil Code requires proof of fault, showing a liability regime not as flexible as the first.

On consumer information, the CDC determines suppliers shall provide an adequate description of the usage of products and services, which also includes the volume, weight, composition, price and possible risks. If the good presents a hidden or concealed defect, consumers have 90 days from the date in which the defect is noticed by the consumer to present a claim on this ground, also considering the reasonable lifespan of the product/service. Suppliers may also offer a contractual warranty with specific terms, which will be used by consumers in addition to the provisions of the legal warranty.

On price display for products and services, the Federal Law n. 10.962/2004 requires for e-commerce activities to disclose the spot price close to the image of the product or the description of the service, using easily readable characters with a font size not smaller

than twelve. Prices need to also be displayed in domestic currency and information on the products or services must be adequate and clear by force of Decree n. 5.903/2006.

In order to promote transparency in consumer payments, Federal Law n. 12.741/2012 establishes that all taxes paid in a commercial transaction must be listed separately on the customer's receipt. The information must be listed in reference to each good or service, separately, including individual listings of all federal, state, and local taxes. The purpose of this statute is to enhance transparency to the taxpayer.

Moreover, the CDC protects consumers against misleading or abusive advertisement. Therefore, consumers have the right to demand for exactly what was advertised. If the supplier does not meet the conditions announced, consumers may cancel the order and receive a full refund.

Consumers are also protected against breach of contract or if the supplier includes a leonine clause in it. In this case, the plaintiff may request a Brazilian Court of Law to either declare the clause null and void or to modify it. Under Brazilian Law, clauses are considered null and void when: (i) exonerating or reducing the supplier's liability for defects of any kind in the products and services; (ii) waiver of rights; (iii) transferring liability to third parties; (iv) changing the burden of proof to the detriment of the consumer; (v) determining the compulsory arbitration and (vi) establishing inequitable obligations that place the consumer at an unreasonable disadvantage, or that are incompatible with good faith or equitable practices. In case of damages (including moral damages), consumers shall be indemnified by whom sold the product or provided the service.

The CDC also aims at the protection of consumers' life, health, and safety against risks derived from practices or the use of the products or services considered as dangerous. If suppliers identify that products or services pose risks to consumers' health and safety after placing these goods in the consumer market, then suppliers must immediately inform authorities and implement a recall campaign.

Moreover, Decree n. 7.962/2013 was also created in order to regulate the CDC for e-commerce in the aspects of transparency, customer service and consumer's right to cancellation. Primarily, it requires online commercial platforms to provide the following information when operating an e-commerce business:

(i) the company name and supplier registration number, whether registered in the National Register of Individuals or in the National Registry of Legal Entities of the Ministry of Economy;
(ii) physical and electronic address and other information necessary for its location and contact;
(iii) essential features of the products or services, including risks to the health and safety of consumers, if any;
(iv) discrimination in the price of any additional or incidental expenses, such as delivery or insurance costs, and
(v) full terms and conditions of the offer, including payment methods, availability, form and term for providing of the service or the delivery or availability of the product.

Regarding regulation on unsolicited commercial communication (*spam)*, Brazil has already banned marketing messages devoid of consumers' previous consent in the telecommunications scenario, decision carried out by ANATEL, the regulatory agency in the sector, under Resolution n. 632/2014. Mobile operators aren't allowed to send commercial *spam* by themselves or third parties without the consent of their consumers. Nevertheless, ANATEL has never extended the same understanding to the online environment, where most *spam* messages are received through *emails*.

MERCOSUR AND CONSUMER PROTECTION

Although a lot of work on consumer protection has been done since 1997 through MERCOSUR's Technical Committee nº 7 (CT 7, which is the body responsible for harmonization in consumer protection standards), discussion on the topic focused on the digital environment appears only in Resolution n. 21/04 (2004). The instrument was responsible for providing guarantee to consumers on their right to information when engaging in consumer relations through online platforms. Accordingly, the Resolution requires that any supplier established in one of the States Parties must disclose on their website, in a clear, precise and easily identifiable format, information related to: (i) characteristics and all necessary information needed for the consumption of the respective good or service; (ii) all information necessary to adequately identify the supplier, especially if any controversies arise and (iii) information on the remedies available for the consumer in the case of default.

Civil Rights Framework for the Internet

In order to be a welcoming country to potential investors in e-commerce or a welcoming commercial platform to consumers, a key step to take is to guarantee safety and consumer protection in all transactions. In doing so, it is necessary to enhance and clarify more rules governing e-commerce transactions. Accordingly, Brazilian Civil Rights Framework for the Internet - Internet Bill of Rights (*Marco Civil da Internet*, in Portuguese), Federal Law n. 12.965/2016, is a legal instrument which improved safety in the digital scenario.

To that end, the Brazilian Civil Rights Framework for the Internet establishes rules on the net neutrality, privacy, freedom of expression and disposes about provider's civil liability (see Box 1 below). Copyright issues were excluded from the Internet Bill of Rights.

BOX 1 – Internet Bill of Rights: Main aspects

1. Net neutrality: the principle of net neutrality ensures that there is no discrimination in data packages sent from a given spot on the network to another spot. There are only two possible exceptions: technical requirements essential to the adequate provision of services and applications, or prioritization of emergency services. The first refers, for example, to services that need synchronous communication (VoIP and streaming) over *e-mails* and social networks. The second deals with public calamities or catastrophes, in this scenario certain online services are prioritized instead of others.

2. Log Keeping: it is mandatory that providers of connectivity services and other internet services retain user data for a year and six months respectively.

3. Providers' civil liability: the provider will only be held responsible and subsequently forced to takedown specific content if, after receiving a specific Court order, it does not remove the content within its technical capabilities and within the prescribed deadline. On the side of the provider, it is required due diligence considering its technical capability to remove content, otherwise, the provider will be alternatively liable for damages. It is important to note, however, that a website is not forbidden to remove a content considered offensive or that violates its terms of use. Therefore, the intermediary will be liable only after judicial order, unless the content relates to the ones described in Article 21[27]. In this case, unauthorized content containing nudity or sex of a private nature is subject to a notice and takedown procedure. The Internet Act provisions regarding ISP liabilities for third-party content expressly exclude copyright violations, subject that was left to be addressed by future law. Thus far, no law has been enacted covering the matter.

Data Packets Discrimination - Decree n. 8.711/2016

Decree n. 8.771/2016 provides additional rules to Brazil's Internet Bill of Rights and specifies in which circumstances the internet data package discrimination and traffic degradation are permitted. The Decree also rules on data storage and protection procedures applicable to internet and application service providers (ISPs and ASPs). Thus, transparency measures and data requests by the government authorities are also subjects treated under the Decree (see Box 2 below).

[27] Article 21. Internet application providers that make available content created by third parties will be secondarily liable for violations of privacy resulting from the disclosure - without the participants' authorization - of images, videos and other material containing nudity or sexual acts of a private nature, if, after receiving notice from the participant or the participant's legal representative, the internet application provider fails to take prompt action to remove the content from its service, subject to technical limitations of the service.

BOX 2 – Decree n. 8.771/2016: main aspects

Net neutrality: traffic discrimination or degradation is possible only under two extraordinary circumstances: when technical requirements shall be satisfied for adequate provision of services or applications, or when emergency services need priority treatment. Decree n. 8,771/2016 listed all allowed exceptions to net neutrality. The Decree defines as technical requirements those cases related to (i) network security issues, such as the restriction on bulk messages (spam) and denial of service attacks; and (ii) administration of network congestion, such as managing alternative routes when the main route is found interrupted and in case of emergency situations. In this last hypothesis, it is possible to discriminate and degrade services that arise from communications necessities, such as those directed to service providers or among them, and those aiming to inform the population in situations of risk, disaster, emergency or state of public calamity. In all these cases, data transmission is free.

Data Request: not only is the disclosure of personal data restricted to Court orders, but also authorities must indicate the legal grounds for the request for access such data. Thus, it is also necessary that authorities state the reasons for their requests, considering that generic or nonspecific requests are not allowed. Current legislation requires annual publication by the authorities of reports containing statistics on personal data requests.

MERCOSUR AND CIVIL RIGHTS FOR THE INTERNET

Thus far, in the ambit of MERCOSUR, there are no resolutions, decisions or protocols that provide for harmonization on topics related to civil rights in the Internet.

Data Protection

Another matter of great importance to businesses on e-commerce is data protection, encompassing endeavors to delimitate and define the general principles, the data subject rights, the legal grounds for authorizing the processing of data, the liability regime applicable to controllers and processors, the amount of the fines in the case of violation of data protection rules, the procedures related to data breach notification, and more. All these topics are under deliberation when countries start discussions regarding their data protection laws. Clarifying these rules is paramount in order to protect individuals' rights and to guarantee a stable environment for investments and commercial transactions.

Accordingly, the Brazilian General Data Protection Law[28] - LGPD - approved in 2018[29]creates a new legal framework for the use of personal data in Brazil. Irrespective of the means (online and offline), the LGPD is applicable to both private and public sectors, providing a transversal and multi-sectoral application. It is important to highlight, however, that although the Brazilian legal system already awarded some data protection rights established in a patchwork legislation, until 2018 the country had never

[28] This report uses two LGPD translations made by Pereira Neto Macedo and Opice Blum's Law Firm as a basis for the writing of this section.

[29]Although the Law has already been approved by the Congress and sanctioned by the President, the law will only entry into force in 2020. In the meanwhile, companies will be able to adapt to the new legislation.

passed a general law with a broad scope of application. In other words, all legislations in Brazil, up to 2018, had addressed data protection from a sectoral application, consequently, these laws lack a holistic cover of data protection.

The LGPD, in general, applies to any processing of personal data[30]: (i) carried out in the national territory; (ii) associated with the purpose of offering goods or services in the national territory or involving the personal data of individuals located within the national territory; or (iii) the collection of personal data occurred in the national territory. As can be noted, these hypotheses encompass a broad scope of application, including those activities conducted totally outside of Brazil, but which affect or target Brazilian citizens.

There are few exceptions in which LGPD will not apply, such as in the processing of personal data (i) made by an individual for exclusively private and non-economic purposes; (ii) made exclusively for journalistic, artistic and academic purposes[31] and (iii) made exclusively for public security, national defense, safety of the country or crime investigation and punishment activities. Anonymized data - data on a data subject that cannot be identified considering the use of reasonable time, cost and technical means available at the time of the data treatment - is also outside the scope of application of the LGPD, except if the anonymity can be reversed with reasonable efforts.

The Law also refers to the processing of sensitive personal data, which is defined as personal data based on racial or ethnic origin; religious belief; public opinion; affiliation to union or religious, philosophical or political organization; data relating to the health or sex life; genetic or biometric data; whenever related to a specific individual. Such data should be treated in a special manner. Firstly, the express consent of the individual whose data has been collected is required, or, in the absence of the consent, the LGPD provides a closed and narrow list authorizing the processing of sensitive data. Secondly, under the processing of sensitive data, some procedures must be handled with additional security layers. In these cases, the LGPD highlights when additional requirements in treatment are necessary, mainly with the purpose to guarantee more protection in the processing of these kind of data.

Accordingly, the LGPD provides a list of 10 hypotheses in which it authorizes the processing of personal data. There is no prioritization among them, which means that none of them have more value or should prevail over the others[32]: For now, it is relevant to highlight the legal basis known as "legitimate interest", which authorizes the processing of data by controllers and third parties. The exception to this legal basis is in the case of prevalence of data subjects' fundamental rights and their liberties over the legitimate interests of the data controller. In addition, the rules remain strict when the

[30] Personal data is defined as information related to an individual identified or identifiable. In this case, data, isolated or aggregated to another, may allow the identification of another individual.

[31] But in this case articles 7 and 11 of the LGPD shall apply.

[32] The 10 hypotheses are: (i) when the data subject's prior consent is due; (ii) for the controller to be able to comply with legal or regulatory obligations; (iii) for the processing and shared use of data necessary for the execution of public policies by the public administration, already provided in laws and regulations; (iv) for the elaboration of reports and studies provided by research institutions, guaranteeing, whenever possible, the anonymization of personal data; (v) when necessary for the execution of contracts or their procedures in which the data subject is a party, and has requested such treatment; (vi) for the regular exercise of rights in judicial, administrative and arbitral proceedings; (vii) for the protection of life or of the physical well-being of the data subject or third parties; (viii) for protection of health, in procedure performed by healthcare professionals or agencies; (ix) when necessary to tend to the legitimate interest of the controller or third parties, except in cases in which fundamental rights of the data subject - requiring protection - prevails, and (x) for the protection of credit.

processing is based on legitimate interests. For instance, not only all the principles laid down in LGPD must be followed, but it is also necessary to process only the data strictly required for the purpose desired, to guarantee the transparency in the data processing and to be prepared for the requesting of data impact assessments that may be requested by the supervisory authority, which is subjected to the business and industrial secrets.

The LGPD also determines basic rights to the data subject, based on the premise that any natural person is the owner of their data. The rights of the data subject are built in order to protect fundamental rights, such as the right to freedom, intimacy and privacy. These rights may become a great challenge for companies attempting to implement all of them. In this regard, efforts must be made in order to create internal proceedings to guarantee the implementation of these rights. Data subjects are now empowered to have access, to rectify, to amend, to delete or cancel the personal data processed. Moreover, data subjects may oppose to the processing of their personal data. Along with these rights, data subjects are also empowered with the right to data portability, in which they can request the transfer of their data to other service providers or suppliers of product, respecting the business and industrial secrets.

Concerns on giving clear and sufficient information to data subjects are also extremely relevant. It must be ensured that data subjects are informed about the possibility of not providing consent, on the consequences of such denial and also who are the other parties whose data are shared.

With regard to the liability regime, the supervisory authority has a fundamental role in communicating Government agents to investigate violations, to keep track of compliance with the data standards demanded by the LGPD and to fine controllers in case of property, moral, individual or collective damage in violation of the LGPD. Processors are liable in case of violating the LGDP rules or by violating instructions provided by controllers. For controllers, a jointly liable regime is applied, which can be seen as an incentive for these actors to take precautions when contracting with third parties. Thus, this regime incentivizes parties to clearly define their respective roles in contracts, specifying who is assuming the role of the controller and who is assuming the role of the processor. However, depending on the case, one party may play both roles.

Under LGPD, international transfers of data are allowed to proceed based on three levels of authorization: (i) adequacy decision; (ii) other safeguards and (iii) specific authorizations. The supervisory authority is the one with the competence to determine if a country or an international organization ensure an adequate level of data protection. When doing so, a free flow area is created between the parties, which means that data can be transferred internationally without any further safeguards. The assessment shall take into account: (i) the general and sectoral rules of legislation in force; (ii) the nature of the data; (iii) general principles of protection of personal data and the rights of the data subjects; (iv) the adoption of security measures as provided in regulations; (v) the existence of legal and institutional guarantees for compliance with personal data protection rights and (vi) any other specific circumstances relating to the transfer.

When the transfer of the data does not count with an adequacy decision, the transfer can proceed based upon other safeguards. In order to proceed with the transfer, the parties must base the activity upon specific contractual clauses; standard contractual clauses; global corporate rules; stamps, certificates and codes of conduct. The LGPD also

establishes a third kind of authorization, which includes specific authorizations applied to specific occasions. For instance, when in the face of a transfer to protect the life or physical safety of the data subject or of a third party; when the transfer is necessary for the execution of a public policy or legal attribution of public service, and more.

Moreover, in case of breach of data, the supervisory authority shall be notified in a reasonable time frame, which may determine, based on the severity of the case, if all data subjects involved shall be notified and even if it's the case to publicly address the incident. Administrative sanctions may be applied by the DPA in case of violation of LGPD and only after an administrative proceeding. Among the sanctions, LGPD establishes that notices and simple and daily fines may be applied. Fines must be limited by two percent of the company's, group's or conglomerate's turnover in Brazil in its last fiscal year, limited to a maximum of BRL 50,000,000.00 (fifty million) per infraction. Processors can also have their infraction completely publicized or have the personal data which refers to the infraction blocked or even eliminated.

In respect of the DPA, the authority was created by Law n. 13.853/2019, which amends Federal Law n. 13.709/2018 (LGPD) in order to provide for the powers entrusted to such authority, as ensuring the protection of personal data, supervising and applying sanctions in the event that the processing of data is carried out in violation of LGPD, and requesting information at any time from the controllers and processors of personal data who carry out personal data processing operations. The DPA consists of a federal public body, under the Presidency of the Republic, with guaranteed independence to act.

Law n. 13.853/2019 also outlines that the DPA will be composed of a board of five directors, who will be appointed by the President of the Republic, as well as of a National Council for the Protection of Personal Data and Privacy, which consists of 23 representatives from bodies across a number of different sectors.

MERCOSUR AND DATA PROTECTION

Work on data protection has never took actual form in the ambit of MERCOSUR. In 2010, however, SGT13 circulated between States Parties a Decision Project (MERCOSUR/CMC/P. DEC. N° 110), establishing key regulatory provisions for data protection to be implemented within the States Parties. Nevertheless, the project was never published as a binding decision.

Intellectual Property

Companies providing commercial operations through e-commerce have the same concerns of companies relying on physical stores when it comes to the protection of their brands. Accordingly, the Brazilian National Institute of Industrial Property (*Instituto Nacional de Propriedade Industrial* – INPI) is the Brazilian official governmental body responsible for: (i) trademark registration; (ii) patent grants; (iii) technology transfer and franchising contracts registration; (iv) industrial design registration; (v) geographical indications registration; (vi) software registration, and (vii) topography of integrated circuits registrations.

In Brazil, when registering a trademark in INPI, companies either operating through physical stores or through e-commerce platforms should perform a lawful and effective activity consistent with the product or service intended by the request for trademark registration, which can remain in force for ten years, a period which is renewable for identical and successive terms indefinitely, as long as the owner follows the renewal process established under the Law.

Following, protection of patents is also of keen interest to companies operating in the digital environment in order to protect their inventions. The technological environment ends up being highly competitive in terms of creating *software* and technologies for upgrading an e-commerce platform, which will influence the profit of the business. Thus, the monitoring of patented technologies (or technologies that are not yet patented), can be an interesting source of information on technological trends, helping to shape future strategies of a business. In addition, the protection of inventions by *players* in the tech industry can guarantee them the right to prevent others from taking undue advantage of their research and development efforts.

Accordingly, the application for patents in Brazil grants the applicant the temporary ownership of an invention, which includes exclusive commercialization of the new product and its respective industrial processes. In Brazil, there are (i) invention patents, which represents a solution for a specific technical problem and may be industrially manufactured or used; and (ii) utility model patents, which represents a known product with a practical purpose that is given a new form or presentation, improving its use or its manufacturing.

Table 5 – Patent Protection under the Brazilian Law

	INVENTION	**UTILITY MODEL**
Term of protection	20 years from the filing date or 10 years from the grant date (whichever is longer)	15 years from the filing date or 7 years from the grant date (whichever is longer)
Level of inventiveness	Higher	Lower

There is no confusion between definitions on patent and industrial designs. A patent grant covers technical and functional features of the object while an industrial design registration covers its aesthetic/ornamental features, such as lines and colors applied to a product, as long as it presents a new and original look to its external configuration and may be used for industrial production. The initial term of the protection is 10 years, which can be extended for up to three periods of five years (25 years in total). Renewal is not automatic and there is a fee to be paid in five year increments.

In terms of copyrights, e-commerce platforms will have protection through Brazil's Copyright Law – Law n. 9.610/1998 – of the images, videos and photographic works of their creation. Misuse may result in civil liability, as compensation for losses and in counterfeiting (non-authorized reproduction of work) in the criminal sphere, where detention or fines may be applied as penalty. Furthermore, Brazil has already provided copyright protection for *software*, as they are considered literary works. Accordingly, Law n. 9.609/1998, Brazil's Software Act, covers protection in the literal aspects of the *software*, thus encompassing its source or object code. It is important to mention that the Brazilian copyright law does not protect technical and functional aspects of a code, although there are no restrictions on protecting it by means of other industrial property

registrations. The protection of *software* does not depend on the registration of the program and lasts for fifty years as of January 1 of the year following the publication or creation of the *software*. Regarding unspecified aspects in the Software Act, what is established by Copyright Law shall be observed. Software coding can be kept in secret and only be disclosed by a court order or by request of the owner of such right.

In order to apply for IP rights in Brazil, foreign applicants shall be a resident or have a commercial presence in Brazil or even establish a duly qualified agent resident in Brazil, empowered to act as an administrative and legal representative and to receive court summons, usually an attorney.

MERCOSUR AND INTELLECTUAL PROPERTY

In the field of intellectual property, MERCOSUR adopted the Protocol on Harmonization of Intellectual Property Norms in MERCOSUR in the field of Trademarks, Indications of Source & Appellations of Origin, providing minimum protections regarding IP rights, whose States Parties must guarantee in their territories. For instance, the Protocol establishes a 10-year minimum validity for trademarks, a term which can be renewed. States Parties are also allowed to extend protection. Brazil and Argentina have not yet ratified the protocol internally, although both countries have signed a memorandum of understanding agreeing on exchanging expertise, analysis on registration requests and promoting the IP system in both territories.

Regarding protection towards copyrights, patents and utility models, MERCOSUR has not yet published any legal instruments, although both Brazil and Argentina have shown concern for copyrights and remuneration of royalties in the digital environment at the WTO (as described in the previous section).

Electronic Contracts

The legal relationship established between e-commerce suppliers and their consumers is driven through electronic contracts. Although online platforms must provide terms and conditions similar to written contracts, the signature in the online environment has a different format. Electronic signatures (e-signatures), for instance, use electronic data to ascertain the identity of the sender of an email or the purchaser of an on-line service. In its basic format, an e-signature does not require an independent official third party for certification purposes. Advanced electronic signatures (digital signatures), however, are based on electronic files - advanced digital certificates - which act like a full digital identity. The digital certificate must be issued by a trustworthy third party - official or accredited certification authority - which associates any natural person or legal entity to cryptographic keys. It ensures legal validity of any digital action using it. Thus. digital certificates are becoming a fundamental tool for e-commerce.

Accordingly, Provisional Measure n. 2.200-2/2001 created the Brazilian Public Key Infrastructure with the purpose of ensuring the authenticity, integrity and validity of electronic documents, as well as the performance of secure electronic commercial transactions. ICP-Brazil is responsible for setting out the rules on the offering of electronic certification services.

Documents issued using certificates homologated by ICP-Brazil are presumed authentic and true, unless proved otherwise. Documents certified by other means, or not certified, are still valid, but they are not presumed authentic.

MERCOSUR AND ELECTRONIC CONTRACTS

Electronic contracts are one of the few areas in which States Parties of MERCOSUR have negotiated resolutions. MERCOSUR Resolution GMC n. 22/2004 created a digital signature for certifying copies of documents issued by the MERCOSUR's secretariat. MERCOSUR Resolution GMC n. 34/2006 establishes guidelines to celebrate mutual recognition agreements on digital signature among States Parties of MERCOSUR.

Finally, MERCOSUR Resolution GMC n. 37/2006 recognizes legal effect for electronic and digital signatures, although its provisions do not apply to aspects relating to the conclusion or validity of legal instruments where formal requirements are laid down in national laws. It also points out that electronic contracts made with the public sector may provide greater complexity regarding requirements for e-signatures. It also establishes that e-signatures meet handwriting requirements, thus having the same effect as written documents in different state parties. Nevertheless, the validity of the document is on discretion of the parties, being their burden of proof to demonstrate the validity of the signature.

To be recognized as an advanced electronic signature (digital signature), it is required information only known to the signatory. Moreover, the signature is linked to other data in a manner that any subsequent change in the data is detectable. The signatory can maintain the signature under his/her sole control. Differently from simple e-signatures, digital signatures may be verified by third parties. Such certification authorities are liable under Article 8 of the Resolution.

The Resolution also addresses the need for Protection of Personal Data. Express consent is required for certification service providers to collect data to the extent necessary, which must be directly related to the person to which such data refer.

Customs Duties and Internal Taxation

Goods and services are not only subject to customs when imported, but also to internal taxation in Brazil. In the ambit of MERCOSUR, however, it is important to highlight that Brazil is the only State Party which does not apply VAT for goods and services. In Brazil, ICMS - Imposto sobre Circulação de Mercadorias e Serviços/Tax over the Circulation of Goods and Services - is the tax applied to any goods and services being sold within the jurisdiction of the Federal States. Through Covenant (Convênio) ICMS 106/2017, the application of ICMS was also extended do digital goods.

For services, ISS - Imposto Sobre Serviços/ "Tax Over Services" - is due. The ISS is a tax which falls within the jurisdiction of Municipalities and covers the services provided by companies, corporations, or by autonomous professionals, so long as the operation is neither within the jurisdiction of the Federation nor the Federal State. Thus, the ISS will

be collected in the municipality in which the foreign service was provided[33]. Such tax is also cumulative, in the sense that, the higher the number of companies that participate in the production chain, the higher the tax burden for the final customer.

When moving to the field of electronic goods and services, discussions are on the taxation over *streaming*, cloud, software and *e-books*. According to WTO's Global Declaration on Electronic Commerce, customs duties shall not be levied on electronic transmissions, where Brazil has been adherent. Nevertheless, as other countries, Brazil provides internal taxation for both digital services and goods, through ISS and ICMS respectively.

Regarding *streaming*, the discussion was on whether such commercial activities from *Netflix, AmazonVideo, Spotify, Globoplay* and others should be subject to internal taxation. The dilemma was if the activities provided by such companies should be understood as a good being sold (where ICMS would apply), location of digital goods (where ISS does not apply) or services. In the field of *streaming*, through Covenant (Convênio) ISS 157/2016, the list for services in which ISS shall apply was extended in item 1.09 of Complementary Law 116/2003, establishing the taxation over the "Provision, without permanent cessation, of audio, video, image and text content via the Internet, respecting the immunity of books, newspapers and periodicals".

Furthermore, there was also discussion on the levy of ICMS in the digital environment in businesses directed to the selling of *e-books* - like Amazon. The Constitution provides taxation immunity for books, newspapers, periodicals and the paper destined to their impression. Nevertheless, it left space to interpretation whether *e-books* could also receive such immunity, where most of Federal States understood that such treatment was reserved to books in paper. However, in early 2017 Brazil's Supreme Court understood that the format of *e-books* was not fundamental to deny the immunity, deciding that the treatment was to be extended to the digital environment.

In the respect of the commercialization of *software*, Brazil's Superior Court of Justice understood that depending on the terms of the sale, it could be considered a good or a service, where ICMS or ISS would apply. Accordingly, "off-the-shelf *software*", that is, *software* that are ready-made and available for sale to the general public, are understood as digital merchandise, where ICMS will apply. Taxation is different for *software* developed specifically for one user or client - "custom *software*" - or for *software* which are ready-made as "off-the-shelf *software*" but include possible modules for alterations and adaptations - "customizable *software*". In these cases, where the company will provide a tailor-made *software* or will provide adaptation and customization in the sold *software*, it shall be considered a service, where ISS will apply. Accordingly, operations involving *cloud* storage - which are also *softwares* - are also understood as services within the definition of item 1.05 in the exhaustive list of Complementary Law 116/2003, providing the application of ISS to "licensing or assignment of right of use of computing programs".

It is important to highlight, however, that since discussion remains on whether some digital commercial transactions are goods or services, not rarely it results in double taxation. Due to the different competencies of each tax system, it may occur that, for a

[33] For services provided by national companies, the tax will be collected in the municipality where the provider of services is settled or in the absence of a physical facility, in the residing place of the provider.

certain commercial operation, Federal States end up levying ICMS while Municipalities will levy ISS.

MERCOSUR AND CUSTOMS DUTIES AND INTERNAL TAXATION

There has been no further discussion in the ambit of MERCOSUR on the application of duties or internal taxation for e-commerce. In 2002, States Parties discussed the possibility of implementing a value-added tax (VAT) for all Parties' operations on e-commerce in either retail of goods or for the provision of services, as the European Union had previously done. This could help lessen the results of double taxation observed in Brazil due to the different competencies linked to ICMS or ISS. However, dialogues on the topic have not progressed in the ambit of MERCOSUR.

Conclusion

Brazil has a potential robust market in the field of e-commerce which tends only to grow in the future. It already has big national *players* in different sectors and modes of transactions. Such dimension requires stable, predictable and safe regulatory practices.

Accordingly, Brazil provides a solid regulatory framework for e-commerce, which only requires some refinement: In terms of consumer protection, Brazil's Consumer Defense Code ensures several guarantees and flexible obligations for consumers, which were expressly extended to consumer relations in the digital environment through Decree n. 7.962 in 2013. As for cybersecurity and data protection, although its adaptation and legislative innovation was more recent than other MERCOSUR States Parties[34], Brazil provides sound regulations, guaranteeing severe penalties in case of data violation. In the field of intellectual property, although Brazil has already made a few adaptations in terms of copyrights for the digital environment (as for the protection of *software*), more efforts must be made in such sector, in order to encompass issues the country itself has addressed at the international level (relating to the "value gap" of royalties paid for authors in the digital environment). For e-contracts and e-signatures, Brazil has provided legal validity and addressed legal requirements still in 2001. Finally regarding customs and internal taxations, the country follows WTO's understanding for not charging customs duties in electronic transactions. Internally, Brazil imposes different tax systems for goods and services, and has already adapted them for *streaming*, *cloud*, *software*, and other sectors of innovation in the digital environment.

In the international scene, Brazil has been an active Member in the negotiations for an e-commerce agreement at the WTO, but also in general discussions regarding the digital economy. Between all MERCOSUR States Parties, it is the country that has been more integrated in discussions: Although Argentina, Paraguay and Uruguay have committed to engage in negotiations for a future agreement for e-commerce in the WTO, Brazil was the only country that submitted proposals following the joint statements celebrated in Buenos Aires and Davos. Furthermore, before such commitments, Brazil had already suggested topics of discussion starting in 2016. It is important to highlight the keen

[34] Especially in the area of data protection, Brazil was the last country within MERCOSUR States Parties to provide a specific legislation for the subject. However, as it reflects most of EU GDPR's provisions (recognizably an innovative and auspicious regulation), Brazil's LGPD sets appropriate rules for data privacy.

interest of Brazil in the discussions, as being the only MERCOSUR Member that has proposed and shared communications on the topic individually, while the remaining States Parties worked in different groups.

It could be argued that the lack of harmonization within the group in the multilateral system could be a reflection of what occurs in the regional level. Within the trade bloc, discussions in the field of e-commerce have not advanced as far as would be ideal, and only now, through the Digital Agenda group, they seem to be in an action-planning stage. Thus, given the contribution Brazil has provided at the WTO and having a solid regulatory framework internally, Brazil could be the leading State Party in discussions for harmonizing regulatory practices in e-commerce in MERCOSUR, especially when observing the interconnectivity of Latin American businesses in the sector (take Argentina and Brazil as an example). Such task becomes extremely significant, especially in a time where MERCOSUR returns as an active negotiator in the international environment.

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