



**Asia-Pacific
Economic Cooperation**

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Session: 5

Future Development of E-Commerce Norms

Submitted by: White & Case LLP



**Free Trade Area of Asia-Pacific Capacity
Building Workshop on E-Commerce Elements
in Free Trade Agreements and Regional Trade
Agreements
Seoul, Korea
17-18 September 2019**

Future Development of E-Commerce Norms

FTAAP Capacity Building Workshop on E-commerce
Elements in FTAs/RTAs

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18 September 2019



**Asia-Pacific
Economic Cooperation**

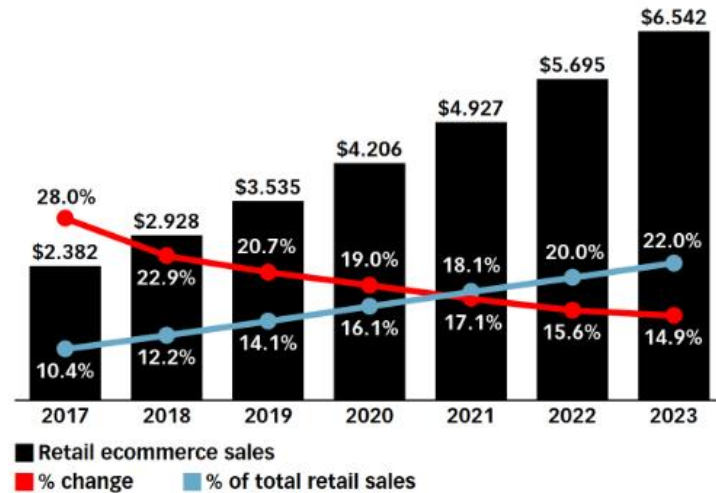
Agenda

- Why looking ahead matters? – The growing importance of E-commerce norms
- Where do we stand ? – Brief history of the development of E-commerce norms
- Where do we go ? – Foreseeable developments of E-commerce norms

The growing importance of E-commerce norms

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Retail Ecommerce Sales Worldwide, 2017-2023
trillions, % change and % of total retail sales



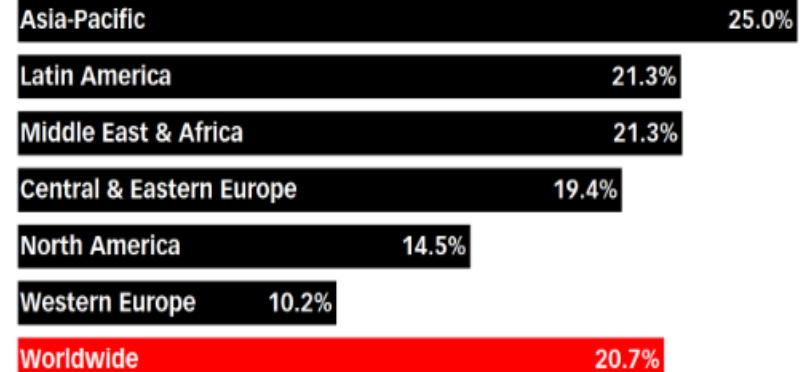
Note: includes products or services ordered using the internet via any device, regardless of the method of payment or fulfillment; excludes travel and event tickets, payments such as bill pay, taxes or money transfers, food services and drinking place sales, gambling and other vice good sales
 Source: eMarketer, May 2019

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www.eMarketer.com

Retail Ecommerce Sales Growth Worldwide, by Region, 2019

% change



Note: includes products or services ordered using the internet via any device, regardless of the method of payment or fulfillment; excludes travel and event tickets, payments such as bill pay, taxes or money transfers, food services and drinking place sales, gambling and other vice good sales
 Source: eMarketer, May 2019

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Brief history of the development of E-commerce norms

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- 1998 : WTO Work Programme on e-commerce and moratorium on customs duties
- Around 2000 – today: apparition and expansion of e-commerce norms in national regimes and FTAs/RTAs

Major FTAs between APEC Members with E-commerce Chapter

FTA's	Signed
Singapore - NZ	November 2000
Singapore - Australia	February 2003
US - Singapore	May 2003
US - Australia	May 2004
Australia - Thailand	July 2004
US - Korea	June 2007
ASEAN – Australia - NZ	February 2009
Australia - Korea	April 2014
Japan - Australia	November 2014
China - Australia	June 2015
CPTPP	March 2018

- 25 January 2019: 76 WTO Members commence WTO negotiations on trade-related aspects of electronic commerce



Foreseeable developments of E-commerce norms

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- 90 per cent of global trade represented
 - Presence of both China and the United States
 - Participation of a wide range of developing countries and LDCs

The importance of developing a framework for the negotiations

- First step of any negotiations: defining the objectives (took 4 years and 3 declarations in the Doha round)
- No specific objectives were listed in the 26-January joint statement despite a statement of intention to “commence WTO negotiations on trade-related aspects of electronic commerce” and “seek to achieve a high standard outcome that builds on existing WTO agreements and frameworks”
- Digital trade is implicating a wide range of issues
- Deep schisms exist amongst the current crop of participants on what to address and how to address it

Confidence to treat e-commerce within existing WTO legal framework in 1998

- Nothing fundamentally new: e-commerce defined as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”
- WTO-traditional issues identified in relation to e-commerce in 1998 such as MFN, national treatment, transparency, market access, rules of origin, valuation, protection of IP rights
- Different councils mandated the examine the treatment of electronic commerce *within* WTO existing legal framework
 - Council for Trade in Services: **GATS** discipline considered relevant for: (a) the provision of Internet access services themselves ; (b) the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of digitised information flows; (c) the use of the Internet as a channel for distribution services, by which goods and service are purchased over the net but delivered to the consumer subsequently in non-electronic form.
 - Council for Trade in Goods: **GATT** discipline considered relevant for: (a) electronically conducted transactions combined with physical delivery of goods; (b) trade in goods related to electronic commerce (e.g. computers);
 - Council for TRIPs: **TRIPS** discipline considered relevant for: (a) protection and enforcement of copyright and related rights; (b) protection and enforcement of trademarks.

Ambitious agenda: Cross-Cutting Issues Identified by WTO Members in 2001

- **Classification of the content of certain electronic transmissions (from which WTO-traditional issues would be resolved under existing Agreements)**
- **Development-related issues, including:**
 - participation of developing countries in e-commerce;
 - access to infrastructure and technology; transfer of technology;
 - capacity-building; technical assistance;
 - access to developed and developing countries' markets for developing countries;
 - promoting the use of information technology;
 - how to ensure that e-commerce benefits developed and developing countries;
 - movement of natural persons.

Ambitious agenda: Cross-Cutting Issues Identified by WTO Members in 2001

- **Fiscal implications of e-commerce**
- **Relationship (and possible substitution effects) between e-commerce and traditional forms of commerce**
- **Imposition of custom duties on electronic transmissions**
- **Competition, including:**
 - on development of e-commerce due to the concentration of market power;
 - competition and domestic regulations;
 - competition and intellectual property rights.
- **Jurisdiction and applicable law/ other legal issues**

WTO ambition stopped by classification issues

- ❑ How to classify (good or services) products which can be delivered both in tangible form and in electronic form via Internet download such as mp3 music files, e-books, or downloaded movies?
- ❑ Non-discrimination discipline at the center of the debate:
 - ❑ Different obligations triggered depending on the agreement:
 - GATT = unconditional MFN and national treatment (+ prohibition of quantitative restrictions)
 - GATS = MFN, national treatment (+ market access) conditioned by discretionary commitments
 - ❑ Opposite interests. E.g.
 - US: competitive software industries = desire to classify e-commerce as a “good” to trigger the general principle of non-discriminatory obligation
 - EU: sensitive need of cultural protection such as audio-visual industry = desire to classify e-commerce as a “service” which each Member has a discretion to make reservation on the commitment
- ❑ Additional issues entering the debate: risk that software downloaded over the internet, resulting in a series of interactions between customer and vendor, would not be a “like” product. Need for special discussion on “like products” in this context.

Emergence of new key issues, addressed mainly through soft obligations

- **E-contracts and e-signature**, to facilitate the conclusion of contracts by electronic means
- **Protection of end users**, to ensure protection against unsolicited direct marketing communications
- These issues arose years ago but States are still learning how to regulate them:
 - Most EU FTAs do not contain sections dedicated to these issues but instead mention them in the “cooperation” section as issues on which further discussion is necessary (e.g. CETA Article 16.6; EU – Korea FTA Article 7.49).
 - Some obligatory language is however found in most recent agreements. E.g. EU – Japan EPA, Article 8.76 on the conclusion of contract by electronically:
 - Party shall not adopt or maintain measures regulating electronic transactions that: (a) deny the legal effect, validity or enforceability of a contract, solely on the grounds that it is concluded by electronic means; or (b) otherwise create obstacles to the use of contracts concluded by electronic means

Most recent issues creating schisms among Members

- Recent issues (not dealt with in the CETA, EU and Canadian officials having just begun to hear about it when e-commerce chapter was completed in 2012!) include:
 - **Data flows & data localization**
 - Data as an important raw material for digital businesses vs privacy, data security and government surveillance
 - First addressed in the CPTPP
 - **Requirements on the transfer of or access to software source code, as a condition of market access**
 - First addressed in the CPTPP
 - Included in the recent EU – Japan EPA (Article, 8.73)
 - **Free and open Internet**

Which issues to select for the ongoing negotiations at the WTO?

- Specific provisions with obligatory language already proposed while objectives not defined
- Proposals for the objectives of the negotiations tabled. The EU for example tabled initial negotiating proposals for a broad set of rules and commitments that would:
 - Guarantee the validity of e-contracts and e-signatures
 - Strengthen consumer consumers' trust in the on-line environment
 - Adopt measures to effectively combat spam
 - Tackle barriers that prevent cross-border sales today
 - Address forced data localization requirements, while ensuring protection of personal data
 - Prohibit mandatory source code disclosure requirements
 - Permanently ban customs duties on electronic transmissions
 - Adhere to the principle of open internet access
 - Upgrade existing WTO disciplines on telecommunication services to ensure that they are fit to support today's vibrant internet ecosystem that is the main enabler of e-commerce
 - Improve market access commitments in telecommunication and computer related services

The importance to institutionalize e-commerce

- Diversity of issues dealt with and approaches in FTAs/RTAs → States are still learning how to regulate in this domain
- An essential step in learning = generating information and discussing it
- No existing requirement to:
 - notify the limitations they place on the location of computing facilities or restrictions they place on data flows
 - explain implementation of their privacy rules in a way that could be discussed in a committee
- Necessity of the establishment of a Secretariat that could draw on notifications as well as a specific committee to discuss any concern not fitting existing WTO legal framework

Conclusion

Questions?

Thank you

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