



Note

Electronic Commerce Provisions in the United States-Mexico-Canada Agreement (USMCA)

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Summary

The United States-Mexico-Canada Agreement (USMCA) was signed in November 2018 at the G20 Leaders' Summit in Buenos Aires. Out of the thirty-four chapters in the agreement, Chapter 19, titled "Digital Trade," is specifically dedicated to electronic commerce provisions. This note examines the provisions included in the digital trade chapter of the agreement, and compares them to the issues discussed in the plurilateral electronic commerce negotiations in the WTO.

Introduction

The United States-Mexico-Canada Agreement (USMCA) was signed in November 2018 at the G20 Leaders' Summit in Buenos Aires.¹ Out of the thirty-four chapters in the agreement, Chapter 19, titled "Digital Trade," is specifically dedicated to electronic commerce provisions. This note examines the provisions included in the digital trade chapter of the agreement and compares them to the issues discussed in the plurilateral electronic commerce negotiations in the WTO.

Electronic Commerce Issues in the USMCA

The digital trade provisions listed in the articles of the USMCA Chapter 19 are as follows: customs duties, non-discriminatory treatment of digital products, domestic electronic transactions framework, electronic authentication and electronic signatures, online consumer protection, personal information protection, paperless trading, "access to and use of the internet," "cross-border transfer of information by electronic means," computing facilities' location, unsolicited commercial electronic communications, cooperation, cybersecurity, source code, interactive computer services, and open government data.²

The USMCA uses the phrase 'digital trade' as opposed to 'electronic commerce'.

Comparison of USMCA and WTO Joint Statement E-commerce Issues

Out of the three USMCA parties, Canada and the United States have submitted text proposals for the e-commerce Joint Statement at the WTO. The topics focused on in both the USMCA digital trade articles and the text proposals from the United States and Canada were nearly identical, both in content and language used.

Access to internet was not emphasised in the text proposal from the United States, but it was present in the text proposal from Canada.

In its WTO joint statement e-commerce negotiation text proposal, Canada focused on the issues of access to internet, customs duties, and electronic authentication and signatures. In a concept note to joint statement members, Canada also discussed the presence of topics such as consumer protection, personal information protection, unsolicited commercial electronic communications, and cooperation in text proposals from other WTO members. They stated that it is not necessarily required for members to implement these kinds of laws in a specifically online context if they already have equivalent regulations for commerce as a whole.³ The other categories of issues in the USMCA which Canada did not include in its text proposal were all present in some way in the United States text proposal.

Most notably, issues of infrastructure and development were not included in the USMCA digital trade chapter.

¹ <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>

² USMCA text

https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19_Digital_Trade.pdf

³ INF/ECOM/29

Additional Issues

Cooperation was added as a separate category in the USMCA, while neither the United States nor Canada added it as a subsection in their text proposals to the WTO. Paperless trading was not present as its own category in the text proposals, although overlapping with the sections on electronic authentication and signatures that were present in both countries' text proposals. However, there was an entire article dedicated to paperless trading in the USMCA. Similarly, unsolicited commercial electronic messages were not discussed in the United States or Canada text proposals, but this issue had its own article in the USMCA.

The issue of interactive computer services, although mentioned by the U.S. in its WTO text proposal under the joint statement negotiations, was not taken up by other delegations, including Canada, but was an important point in the USMCA. Article 19.17 of the USMCA stated that interactive computer services were “vital to the growth of digital trade” and that parties should not “impose liability on a supplier or user of an interactive computer service” in cases of restricting material deemed harmful or restricting access to persons deemed harmful.⁴

The article noted that its provisions shall not be applied to questions of intellectual property or criminal law enforcement. The issue of open government data was also emphasized more in the USMCA and the United States' communications to the WTO plurilateral negotiations framework than in text proposals from other members.

Comparative Table

In Table 1 below, we compare electronic commerce provisions in the USMCA with parties' text proposals in the context of the WTO Joint Statement on E-Commerce. Provisions are categorised into: (i) market access; (ii) rules and regulation; and (iii) facilitation.

⁴ USMCA Article 19.17

Table 1: Electronic Commerce Issues in the USMCA and the WTO text proposals

USMCA text		Canada WTO Text Proposal ⁵	United States WTO Text proposal ⁶
MARKET ACCESS			
Customs duties	<ul style="list-style-type: none"> “No party shall impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically”⁷ 	<ul style="list-style-type: none"> No imposition on custom duties for electronically transmitted digital products Members may have internal fees on digital products 	<ul style="list-style-type: none"> No customs duties should be imposed on electronic transmissions
Digital products	<ul style="list-style-type: none"> Digital products “created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party” shall not be accorded less favourable treatment (not applicable in the cases of government loans, grants, or subsidies)⁸ 		<ul style="list-style-type: none"> Digital products shall not be given less favourable treatment (not applicable in cases of subsidies such as government-supported loans or insurance)
Cross-border information transfer	<ul style="list-style-type: none"> “No party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means” if it is for business of a covered person However, parties may restrict cross-border information transfer if needed “to achieve a legitimate public policy objective”⁹ 		<ul style="list-style-type: none"> “No party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means” if it is for business of a covered person¹⁰
Data Localisation	<ul style="list-style-type: none"> “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory”¹¹ 		<ul style="list-style-type: none"> “No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory”¹² No requirements regarding the locations of financial services computing facilities

⁵ INF/ECOM/29, INF/ECOM/30

⁶ INF/ECOM/23

⁷ USMCA Article 19.3

⁸ USMCA Article 19.4

⁹ USMCA Article 19.11

¹⁰ INF/ECOM/30 Article 8

¹¹ USMCA Article 19.12

¹² INF/ECOM/23 p. 5 Article 9

Source Code	<ul style="list-style-type: none"> • “No party shall require the transfer of, or access to, source code of software owned by a person of another Party, or to an algorithm expressed in that source code”¹³ except in cases of legal investigations or enforcement action 		<ul style="list-style-type: none"> • “No party shall require the transfer of, or access to, source code of software owned by a person of another Party, or to an algorithm expressed in that source code”¹⁴ except in cases of legal investigations or enforcement action
RULES AND REGULATIONS			
Consumer Protection	<ul style="list-style-type: none"> • Parties should establish laws against “fraudulent and deceptive commercial activities that cause harm or potential harm to consumers”¹⁵ • National consumer protection agencies should maintain cooperation 		
Domestic regulations	<ul style="list-style-type: none"> • Domestic legal frameworks should be “consistent with the principles of the <i>UNCITRAL Model Law on Electronic Commerce 1996</i>”¹⁶ • “unnecessary regulatory burden on electronic transactions” should be avoided¹⁷ • Parties should “facilitate input by interested persons in the development of its legal framework” 		<ul style="list-style-type: none"> • Parties should “avoid unnecessary regulatory burden” and “facilitate input by interested persons in the development of its legal framework”¹⁸
Unsolicited commercial electronic communication	<ul style="list-style-type: none"> • Parties should take measures to require that suppliers obtain consent from recipients of commercial electronic messages or allow recipients to opt out • Parties “shall provide recourse...against suppliers of unsolicited commercial communications” that fail to comply¹⁹ 		
Personal Information Protection	<ul style="list-style-type: none"> • Parties should establish legal frameworks for personal information protection, considering 		<ul style="list-style-type: none"> • Members should enact regulations for protection of personal information

¹³ USMCA Article 19.16

¹⁴ INF/ECOM/23 p.6 Article 12

¹⁵ USMCA 19.7

¹⁶ USMCA Article 19.5

¹⁷ Ibid

¹⁸ INF/ECOM/23 p.4

¹⁹ USMCA Article 19.13

	<p>“guidelines of relevant international bodies such as <i>APEC Privacy Framework</i> and the <i>OECD Recommendation of the Council Concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)</i>.”²⁰</p> <ul style="list-style-type: none"> • Privacy protection frameworks include: “limitation on collection, choice, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and accountability”²¹ • Parties should publish information regarding access to redress and how “an enterprise can comply with legal requirements”²² 		<ul style="list-style-type: none"> • Information regarding access to redress and how businesses comply with regulations should be publicly available • “Any restrictions on cross-border flows of personal information [should be] necessary and proportionate to the risks presented”²³
FACILITATION			
Internet access and use	<ul style="list-style-type: none"> • Parties recognize that consumers should be able to access internet network management practices, and choose what services and applications to use, “subject to reasonable network management.”²⁴ 	<ul style="list-style-type: none"> • Consumers should be able to “access and use services and applications” of their choice, “subject to reasonable network management”²⁵ 	
Electronic authentication and e-signatures	<ul style="list-style-type: none"> • Electronic signatures should not be denied legal validity • Parties shall be allowed to determine the best authentication methods and e-signatures for their transaction and should not be prevented from defending the transaction’s legality before the relevant authorities • Parties may require “certain performance standards” or “certification by an authority accredited in accordance with its law” for certain types of transactions²⁶ 	<ul style="list-style-type: none"> • Electronic signatures should not be denied legal validity • Parties should not be prevented from negotiating the best authentication methods for their transaction and should not be prevented from defending the legality of their transaction before the relevant authorities • Parties may require specific certification or performance standards for certain types of transactions 	<ul style="list-style-type: none"> • Electronic signatures should be legally accepted • Parties should be allowed to negotiate the best authentication methods for their transaction and should not be prevented from defending the legality of their transaction before the relevant authorities • Members may require certain authentication standards for specific types of transactions

²⁰ USMCA Article 19.8

²¹ USMCA Article 19.8

²² USMCA Article 19.8

²³ INF/ECOM/23 p.4

²⁴ USMCA Article 19.10

²⁵ INF/ECOM/30, Article 2

²⁶ USMCA 19.6

Paperless trading	<ul style="list-style-type: none"> • Electronic trade administration documents should be legally accepted 		
Cooperation	<ul style="list-style-type: none"> • Parties should “exchange information and share experiences on regulations, policies, enforcement and compliance” regarding personal information protection, security, authentication, and government use of technology • Parties should also “participate in regional and multilateral fora to promote development of digital trade”²⁷ • Cooperate to increase ICT access for people with disabilities 		
Open government data	<ul style="list-style-type: none"> • The government information that parties decide to make available should be “in a machine-readable and open format” that is searchable and usable²⁸ 		<ul style="list-style-type: none"> • The government information that parties decide to make available should be “in a machine-readable and open format” that is searchable and usable²⁹
Cybersecurity	<ul style="list-style-type: none"> • Members should build their capacity to respond to cybersecurity threats and “strengthen existing collaboration mechanisms”³⁰ • “Risk-based approaches” should be implemented for cybersecurity threat responses³¹ 		<ul style="list-style-type: none"> • Members should build their capacity to respond to cybersecurity threats and “strengthen existing collaboration mechanisms”³² • “Risk-based approaches” should be implemented for cybersecurity threat responses³³
SMEs	<ul style="list-style-type: none"> • Interactive computer services are important to digital trade growth, especially for SMEs 		<ul style="list-style-type: none"> • Interactive computer services should be promoted for e-commerce growth, and are important for small and medium-sized enterprises (SMEs) • Open government data is especially important for SMEs

²⁷ USMCA Article 19.14

²⁸ USMCA Article 19.18

²⁹ INF/ECOM/23

³⁰ USMCA Article 19.15

³¹ USMCA Article 19.15

³² INF/ECOM/23 p.5 Article 11

³³ INF/ECOM/23 p.5 Article 11

Annex: Definitions of Electronic Commerce Terms in USMCA

Chapter 19 on Digital Trade in the USMCA opens with a list of definitions regarding digital trade terms, which are listed in the following table. In the United States text proposal for the joint statement in WTO electronic commerce negotiations, the same definitions were proposed; however, more definitions were included in the WTO text proposal.³⁴ Canada also proposed definitions for three e-commerce terms in its WTO joint statement text proposal³⁵, all of which were the same as the definitions used in the USMCA.

Term	USMCA Definition
Algorithm	“a defined sequence of steps taken to solve a problem or obtain a result”
Computing facility	“a computer server or storage device for processing or storing information for commercial use”
Covered person	“a covered investment as defined in 1.4 (General Definitions); an investor of a Party as defined in Article 14.1 (Definitions); or a service supplier of a Party as defined in Article 15.1 (Definitions)”
Digital product	“a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. For greater certainty, digital product does not include a digitized representation of a financial instrument, including money” ³⁶
Electronic authentication	“the process or act of verifying the identity of a party to an electronic communication or transaction and ensuring the integrity of an electronic communication”
Electronic signature	“data in electronic form that is in, affixed to, or logically associated with, an electronic document or message, and that may be used to identify the signatory in relation to the electronic document or message and indicate the signatory’s approval of the information contained in the electronic document or message”
Government information	“non-proprietary information, including data, held by the central government”
Information content provider	“a person or entity that creates or develops, in whole or in part, information provided through the Internet or another interactive computer service”
Interactive computer service	“a system or service that provides or enables electronic access by multiple users to a computer server”
Personal information	“information, including data, about an identified or identifiable natural person”
Trade administration document	“a form issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods”
Unsolicited commercial electronic message	“an electronic message, which is sent to an electronic address of a person for commercial or marketing purposes without the consent of the recipient or despite the explicit rejection of the recipient”

³⁴ From INF/ECOM/23

The definitions included in the U.S. text proposal for the joint statement negotiations but not USMCA were for the following terms: “Customs duty, electronic transmission, financial institution, financial market infrastructure, financial service, financial service computing facility, financial service supplier of another party, fraudulent or deceptive commercial activities, person, service supplied in the exercise of governmental authority.” Terms defined by the USMCA but not present in the U.S. or Canada WTO text proposals were “trade administration document” and “unsolicited commercial electronic message”

³⁵ INF/ECOM/30

The terms defined by Canada were “digital products”, “electronic authentication” and “electronic signatures”

³⁶ The following note is a footnote under the definition of “digital product” in the USMCA text:

“This definition should not be understood to reflect a Party’s view that digital products are a good or are a service.”



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