

14 ELECTRONIC COMMERCE

ARTICLE 1

Definitions

1. The purposes of this Chapter are to promote electronic commerce between the Parties and to promote the wider use of electronic commerce globally.

2. For the purposes of this Chapter:

(a) “computing facilities” means computer servers and storage devices for processing or storing information for commercial use;

(b) “covered person”¹ means:

(i) a “covered investment” as defined in Article 2(c) (General Definitions) of Chapter 1 (Objectives and General Definitions);

(ii) an “investor of a Party” as defined in Article 1 (Definitions) of Chapter 8 (Investment); but does not include an investor in a financial institution; or

(iii) a “service supplier of a Party” as defined in Article 1 (Definitions) of Chapter 7 (Cross-Border Trade in Services)

but does not include a “financial institution” or a “cross-border financial service supplier of a Party” as defined in Article 1 (Definitions) of Chapter 9 (Financial Services);

(c) “customs duty” has the same meaning as Article 2(e) (General Definitions) of Chapter 1 (Objectives and General Definitions);

(d) “digital product” means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;^{2,3}

(e) “electronic authentication” means 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;

¹ For Australia, a “covered person” does not include a credit reporting body.

² For greater certainty, “digital product” does not include a digitised representation of a financial instrument, including money.

³ The definition of “digital product” should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.

- (f) “electronic transmission” or “transmitted electronically” means a transmission made using any electromagnetic means, including by photonic means;
- (g) “electronic version” of a document means a document in an electronic format prescribed by a Party, including a document sent by facsimile transmission;
- (h) “enterprise” means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation;
- (i) “measure” includes any law, regulation, procedure, requirement or practice;
- (j) “person” means a natural person or an enterprise;
- (k) “person of a Party” means a national⁴ or an enterprise of a Party;
- (l) “personal information” means any information, including data, about an identified or identifiable natural person;
- (m) “trade administration documents” means forms 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;
- (n) “TRIPS Agreement” means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, set out in Annex 1C to the WTO Agreement;⁵ and
- (o) “unsolicited commercial electronic message” means an electronic message which is sent for commercial or marketing purposes to an electronic address, without the consent of the recipient or despite the explicit rejection of the recipient, through an Internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

ARTICLE 2

⁴ For the purposes of this Chapter, a “national” means, for Australia, a natural person who is an Australian citizen as defined in the *Australian Citizenship Act 2007* as amended from time to time, or any successor legislation; for Singapore, a person who is a citizen of Singapore within the meaning of its Constitution and its domestic laws; or a permanent resident of either Party.

⁵ For greater certainty, a reference in this Agreement to the TRIPS Agreement includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

Scope

1. The Parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development.
2. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.
3. This Chapter shall not apply to:
 - (a) government procurement; or
 - (b) information held or processed by or on behalf of a Party or measures related to such information, including measures related to its collection.
4. For greater certainty, measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapters 7 (Cross-Border Trade in Services), 8 (Investment) and 9 (Financial Services), including any exceptions or non-conforming measures set out in this Agreement that are applicable to those obligations.
5. For greater certainty, the obligations contained in Articles 5 (Non-Discriminatory Treatment of Digital Products), 13 (Cross-Border Transfer of Information by Electronic Means), 15 (Location of Computing Facilities) and 19 (Source Code) are:
 - (a) subject to the relevant provisions, exceptions and non-conforming measures of Chapters 7 (Cross-Border Trade in Services), 8 (Investment) and 9 (Financial Services); and
 - (b) to be read in conjunction with any other relevant provisions in this Agreement.
6. The obligations contained in Articles 5 (Non-Discriminatory Treatment of Digital Products), 13 (Cross-Border Transfer of Information by Electronic Means) and 15 (Location of Computing Facilities) shall not apply to the non-conforming aspects of measures adopted or maintained in accordance with Article 7 (Reservations) of Chapter 7 (Cross-Border Trade in Services) and Article 11 (Reservations) of Chapter 8 (Investment).

ARTICLE 3

Transparency

1. Each Party shall promptly publish, or otherwise promptly make publicly available where publication is not practicable, all relevant measures of general application which pertain to or affect the operation of this Chapter.

2. Each Party shall respond promptly to any request by the other Party for specific information on any of its measures of general application within the meaning of paragraph 1.

ARTICLE 4

Customs Duties

1. Neither Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of a Party and a person of the other Party.

2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

ARTICLE 5

Non-Discriminatory Treatment of Digital Products

1. Neither Party shall accord less favourable treatment to a digital product created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of the other Party, or to a digital product of which the author, performer, producer, developer or owner is a person of the other Party, than it accords to other like digital products.

2. Paragraph 1 shall not apply to the extent of any inconsistency with the rights and obligations in the TRIPS Agreement or with Chapter 13 (Intellectual Property).

3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party including government-supported loans, guarantees and insurance.

4. This Article shall not apply to broadcasting.

ARTICLE 6

Domestic Electronic Transactions Framework

1. Each Party shall maintain a legal framework governing electronic transactions consistent with the principles of the *UNCITRAL Model Law on Electronic Commerce 1996* or the *United Nations Convention on the Use of Electronic Communications in International Contracts*, done at New York, November 23, 2005.

2. Each Party shall endeavour to:

- (a) avoid any unnecessary regulatory burden on electronic transactions;
and
- (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

ARTICLE 7

Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.
2. Neither Party shall adopt or maintain measures for electronic authentication that would:
 - (a) prohibit the other Party to an electronic transaction from mutually determining the appropriate authentication methods for that transaction;
or
 - (b) prevent the other Party to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.
3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.
4. The Parties shall encourage the use of interoperable electronic authentication.

ARTICLE 8

Online Consumer Protection

1. The Parties recognise the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities, when they engage in electronic commerce.
2. For the purposes of this Article, fraudulent and deceptive commercial activities refers to those fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, for example, a practice of:
 - (a) making a misrepresentation of material fact, including an implied factual misrepresentation, that causes significant detriment to the economic interests of a misled consumer;

- (b) failing to deliver products or provide services to a consumer after the consumer is charged; or
 - (c) charging or debiting a consumer's financial, telephone or other accounts without authorisation.
3. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.
4. The Parties recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare. To this end, the Parties affirm that the cooperation sought includes cooperation with respect to online commercial activities.

ARTICLE 9

Personal Information Protection

1. The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.
2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.⁶
3. Each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.
4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:
- (a) an individual can pursue remedies; and
 - (b) business can comply with any legal requirements.
5. Recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include

⁶ For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavour to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

ARTICLE 10

Paperless Trading

1. Each Party shall make publicly available, which may include through a process prescribed by that Party, electronic versions of all existing publicly available versions of trade administration documents.
2. Each Party shall accept electronic versions of its trade administration documents as the legal equivalent of paper documents except where:
 - (a) there is a domestic or international legal requirement to the contrary; or
 - (b) doing so would reduce the effectiveness of the trade administration process.
3. The Parties shall cooperate bilaterally and in international fora to enhance the acceptance of electronic versions of trade administration documents.

ARTICLE 11

Exceptions

This Chapter shall be subject to Article 16 (General Exceptions) of Chapter 7 (Cross-Border Trade in Services) and Article 19 (General Exceptions) of Chapter 8 (Investment), and to Article 2 (Security Exceptions) of Chapter 17 (Final Provisions).

ARTICLE 12

Principles on Access to and Use of the Internet for Electronic Commerce

Subject to applicable policies, laws and regulations, the Parties recognise the benefits of consumers in their territories having the ability to:

- (a) access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management;⁷

⁷ The Parties recognise that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.

- (b) connect the end-user devices of a consumer's choice to the Internet, provided that such devices do not harm the network; and
- (c) access information on the network management practices of a consumer's Internet access service supplier.

ARTICLE 13

Cross-Border Transfer of Information by Electronic Means

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

ARTICLE 14

Internet Interconnection Charge Sharing

The Parties recognise that a supplier seeking international Internet connection should be able to negotiate with suppliers of the other Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.

ARTICLE 15

Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. Neither 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.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

ARTICLE 16

Unsolicited Commercial Electronic Messages

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:

- (a) require a supplier of unsolicited commercial electronic messages to facilitate the ability of a recipient to prevent ongoing reception of those messages;
- (b) require the consent, as specified according to the laws and regulations of each Party, of a recipient to receive commercial electronic messages; or
- (c) otherwise provide for the minimisation of unsolicited commercial electronic messages.

2. Each Party shall provide recourse against a supplier of unsolicited commercial electronic messages that does not comply with the measures adopted or maintained pursuant to paragraph 1.

3. The Parties shall endeavour to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.

ARTICLE 17

Cooperation

Recognising the global nature of electronic commerce, the Parties shall endeavour to:

- (a) work together to assist small and medium-sized enterprises⁸ to overcome obstacles to its use;

⁸ Including a micro-sized enterprise.

- (b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:
 - (i) personal information protection;
 - (ii) online consumer protection, including means for consumer redress and building consumer confidence;
 - (iii) unsolicited commercial electronic messages;
 - (iv) security in electronic communications;
 - (v) authentication; and
 - (vi) e-government;
- (c) exchange information and share views on consumer access to products and services offered online between the Parties;
- (d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and
- (e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

ARTICLE 18

Cooperation on Cybersecurity Matters

The Parties recognise the importance of:

- (a) building the capabilities of their national entities responsible for computer security incident response; and
- (b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.

ARTICLE 19

Source Code

1. Neither Party shall require the transfer of, or access to, source code of software owned by a person of the other Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.

2. For the purposes of this Article, software subject to paragraph 1 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.

3. Nothing in this Article shall preclude:

- (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or
- (b) a Party from requiring the modification of source code of software necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement.

4. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorised disclosure under the law or practice of a Party.