

CHAPTER 19

DIGITAL TRADE

Chapter I

General Provisions

Article 19.1

Scope

1. This Title shall apply to trade enabled by telecommunications or other information and communication technologies.
2. The provisions in this Title shall not apply to audio-visual services.

Article 19.1 bis

Right to regulate

The Parties affirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment, including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.

Article 19.2

Definitions

1. The definitions included in article 10.1 of the title on investment liberalization and/or trade in services apply to this title.
 - a. The definition of 'public telecommunications service' in Article 16.2(i) of the Telecommunications Chapter applies to this Chapter.

2. For the purpose of this Chapter:

- a) 'consumer' means any natural person, or juridical person if provided for in the laws and regulations of a Party, using or requesting a public telecommunications service for other than professional purposes;
 - b) 'direct marketing communication' means any form of commercial advertising by which a natural or legal person communicates marketing messages directly to end-users via a public telecommunications service and, for the purpose of this agreement, covers at least electronic mail, text and multimedia messages;
 - c) 'electronic authentication' means a process that enables to confirm:
 - i. the electronic identification of a natural or juridical person, or
 - ii. the origin and integrity of data in electronic form;
 - d) 'electronic seal' means data in electronic form used by a legal person which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity;
 - e) 'electronic signature' means data in electronic form which is attached to or logically associated with other electronic data and fulfils the following requirements:
 - i. it is used by a natural person to agree on the electronic data to which it relates;
 - ii. it is linked to the electronic data to which it relates in such a way that any subsequent alteration in the data is detectable;
 - f) 'electronic trust services' means an electronic service consisting of the creation, verification, validation of electronic signatures, electronic seals, electronic time stamps, electronic registered delivery, website authentication and certificates related to those services;
 - g) 'end-user' means any natural or legal person using or requesting a public telecommunications service, either as a consumer or, if provided for in the laws and regulations of a Party, for trade, business or professional purposes;
3. For the purposes of this agreement, "personal data" means any information relating to an identified or identifiable natural person.

Article 19.3

Exceptions

Nothing in this Title prevents Parties from adopting or maintaining measures in accordance with [insert references to general exceptions, security exception and prudential carve-out] for the public interest reasons set out therein.

[This Article may be moved to a horizontal title that applies to the entire FTA.]

Chapter II

Data flows and personal data protection

Article 19.4

Cross-border data flows: prohibition of data localisation

The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by:

- a) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of the Party;
- b) requiring the localisation of data in the Party's territory for storage or processing;
- c) prohibiting storage or processing in the territory of the other Party;
- d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Party's territory or upon localisation requirements in the Party's territory.

Article 19.5

Protection of personal data and privacy

1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
2. Each Party may adopt and maintain the measures it deems appropriate to ensure the protection of personal data and privacy, including the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective measures.
3. For greater certainty, the Investment Court System does not apply to the provisions in Articles 19.4 and 19.5.

Chapter III

Specific Provisions

Article 19.6

Customs duties on electronic transmissions

No Party shall impose customs duties on electronic transmissions between a person of one Party and a person of the other Party.

Article 19.7

No prior authorisation

1. A Party shall not require prior authorisation solely on the ground that a service is provided online¹ or adopt or maintain any other requirement having equivalent effect.
2. Paragraph 1 does not apply to telecommunications services, broadcasting services, gambling services, legal representation services, nor to services of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority.

Article 19.8

Conclusion of contracts by electronic means

1. The Parties shall ensure that their legal systems allow contracts to be concluded by electronic means and that the legal requirements for contractual processes neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effect and validity for having been made by electronic means.
2. For the purposes of this Agreement, the obligation set out in paragraph 1 does not apply to broadcasting services, gambling services, legal representation services, to services of notaries or equivalent professions involving a direct and specific connection with the exercise of public authority, and to contracts that establish or transfer rights in real estate, contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, contracts of suretyship granted and or collateral securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession.

¹ A service is provided online when it is provided by electronic means and without the parties being simultaneously present.

Article 19.9

Electronic trust services and electronic authentication

1. A Party shall not deny the legal effect and admissibility as evidence in legal proceedings of an electronic trust services and electronic authentication service on the basis that it is in electronic form.
2. Neither Party shall adopt or maintain measures that would:
 - a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic authentication methods for their transaction; or
 - b) prevent parties to an electronic transaction from having the opportunity to prove to judicial and administrative authorities that their electronic transaction complies with any legal requirements with respect to electronic trust services and electronic authentication.
3. Notwithstanding paragraph 2, a Party may require that for a particular category of transactions, the method of authentication or trust service is certified by an authority accredited in accordance with its law or meets certain performance standards which shall be objective, transparent and non-discriminatory and shall only relate to the specific characteristics of the category of transactions concerned.

Article 19.10

Online consumer trust

1. Recognising the importance of enhancing consumer trust in digital trade, each Party shall adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including but not limited to measures that:
 - a) proscribe fraudulent and deceptive commercial practices;
 - b) require suppliers of goods and services to act in good faith and abide by fair commercial practices, including through the prohibition of charging consumers for unsolicited goods and services;
 - c) require suppliers of goods or services to provide consumers with clear and thorough information regarding their identity and contact details^[1], as well as regarding the goods or services, the transaction and the applicable consumer rights; and
 - d) grant consumers access to redress to claim their rights, including a right to remedies in cases where goods or services are paid and not delivered or provided as agreed.

^[1] In the case of intermediary service suppliers, this also includes the identity and contact details of the actual supplier of the good or the service.

2. The Parties recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to electronic commerce in order to enhance consumer trust.

Article 19.11

Unsolicited direct marketing communications

1. Each Party shall ensure that end-users are effectively protected against unsolicited direct marketing communications.
2. Each Party shall adopt or maintain effective measures regarding unsolicited direct marketing communications that:
 - a) require suppliers of unsolicited direct marketing communications to ensure that recipients are able to prevent ongoing reception of those communications; or
 - b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive direct marketing communications.
3. Each Party shall ensure that direct marketing communications are clearly identifiable as such, clearly disclose on whose behalf they are made and contain the necessary information to enable end-users to request cessation free of charge and at any moment.

Article 19.12

Prohibition of mandatory transfer of or access to source code

1. No Party may require the transfer of, or access to, source code of software owned by a juridical or natural person of the other Party.
2. For greater certainty:
 - a) the general exception, security exception and prudential carve-out can apply to measures of a Party adopted or maintained in the context of a certification procedure;
 - b) paragraph 1 does not apply to the voluntary transfer of or granting of access to source code on a commercial basis by a person of the other Party, for instance in the context of a public procurement transaction or a freely negotiated contract;
 - c) nothing in paragraph 1 prevents a person of a Party from licencing its software on a free and open source basis.
3. Nothing in this Article shall affect:

- a) requirements by a court, administrative tribunal or, by a competition authority to remedy a violation of competition laws;
- b) protection and enforcement of intellectual property rights; and
- c) the right of a Party to take measures in accordance with Article 21.3 [security and general exceptions of the Public Procurement Title].

Article 19.13

Cooperation on regulatory issues with regard to digital trade

1. The parties shall maintain a dialogue on regulatory issues raised by digital trade, which shall inter alia address the following issues:
 - the recognition and facilitation of interoperable cross-border electronic trust and authentication services;
 - the treatment of direct marketing communications;
 - the protection of consumers in the ambit of digital trade; and
 - any other issue relevant for the development of digital trade.
2. Such cooperation shall focus on exchange of information on the Parties' respective legislation on these issues as well as on the implementation of such legislation.
3. For greater certainty, this provision shall not apply to a Party's rules and safeguards for the protection of personal data and privacy, including on cross-border data transfers of personal data.

Article 19.14

Review

The Parties shall review the implementation of this Title at the request of either Party, particularly in the light of relevant changes affecting digital trade that might arise from new business models or technologies.