

CHAPTER 11

ELECTRONIC COMMERCE

Article 11.1: Scope and Coverage

1. The Parties recognise:
 - (a) the economic growth and opportunities provided by electronic commerce;
 - (b) the importance of promoting consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development; and
 - (c) the value of competitive markets in electronic commerce for enhancing consumer choice and supporting the growth of small and medium enterprises (SMEs).
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;
 - (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection; or
 - (c) subsidies or grants provided by a Party including government-supported loans, guarantees and insurance, or to any conditions attached to the receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services, service consumers or service suppliers, to the extent that this Chapter applies to measures covered by Chapter 7 (Cross-Border Trade in Services), Chapter 8 (Financial Services) or Chapter 12 (Establishment and Related Provisions).
4. Articles 11.7, 11.8 and 11.15 shall not apply to credit information, or related personal information, of a natural person.
5. For greater certainty, this Chapter may apply to a measure that is also subject to Chapter 7 (Cross-Border Trade in Services), Chapter 8 (Financial Services) and Chapter 12 (Establishment and Related Provisions).
6. To the extent that such a measure is adopted or maintained pursuant to Article 7.7 (Non-Conforming Measures) of Chapter 7 (Cross-Border Trade in Services), Article 8.8 (Schedule of Specific Commitments) of Chapter 8 (Financial Services), Article 12.8

(Non-Conforming Measures) of Chapter 12 (Establishment and Related Provisions), or an exception in those Chapters, it shall not give rise to a violation of Articles 11.7, 11.8, 11.12 or 11.15.

Section A: Electronic Commerce

Article 11.2: Definitions

For the purposes of this Section:

computing facilities means computer servers and storage devices for the processing or storage of information for commercial use;

covered person means:

- (a) a covered investment as defined in Article 1.3 (General Definitions) of Chapter 1 (Initial Provisions, General Definitions and Interpretations);
- (b) an investor of a Party as defined in Article 12.1 (Definitions) of Chapter 12 (Establishment and Related Provisions); or
- (c) a service supplier of a Party as defined in Article 7.1 (Definitions) of Chapter 7 (Cross-Border Trade in Services),

but does not include:

- (a) a covered financial person as defined in Article 11.14; or
- (b) a public entity as defined in Article 8.1 (Definitions) of Chapter 8 (Financial Services);

electronic authentication means the process of establishing and subsequently verifying the identity of a party to an electronic communication or transaction or ensuring the integrity of an electronic communication;

personal information means any information, including data, relating to an identified or identifiable natural person;

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 importation or exportation of goods; and

unsolicited commercial electronic message means an electronic message which is sent for commercial purposes without the consent of the recipient or against the explicit

rejection of the recipient, using an internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

Article 11.3: Electronic Signatures and Electronic Authentication

1. Except in circumstances otherwise provided for under its laws, 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 parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
 - (b) prevent parties 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 laws.
4. The Parties shall encourage the use of interoperable electronic authentication.

Article 11.4: 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 on 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 11.5: Consumer Protection

1. The Parties recognise the importance of adopting and maintaining transparent and effective measures to protect consumers as referred to in Article 15.6 (Consumer Protection) of Chapter 15 (Competition Policy) when they engage in electronic commerce.
2. To this end, each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial practices that cause harm or potential harm to consumers engaged in online commercial activities.
3. The Parties recognise the importance of cooperation between their respective consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare¹. To this end, the Parties affirm that the cooperation sought under Article 15.6 (Consumer Protection) of Chapter 15 (Competition Policy) includes cooperation with respect to online commercial activities.

Article 11.6: 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 11.7: Movement of Information

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 in connection with 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 such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade.

¹ For Australia, this refers to agencies and other relevant bodies at the central level of government.

Article 11.8: 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 communication.
2. Neither Party shall require a covered person to use or locate computing facilities in the Party's Area as a condition for conducting business in that Area.
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 such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade.

Article 11.9: Protection of Personal Information

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.
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 shall publish information on the personal information protections it provides to users of electronic commerce, including how:
 - (a) individuals 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 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 Areas and explore ways to extend these or other suitable arrangements to promote compatibility between them.

Article 11.10: Paperless Trading

Each Party shall endeavour to:

- (a) make trade administration documents available to the public in electronic form; and
- (b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents except where:
 - (i) there is a legal requirement to the contrary; or
 - (ii) doing so would reduce the effectiveness of the processing of trade administration documents.

Article 11.11: Unsolicited Commercial Electronic Messages

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

- (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of such messages; or
- (b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages.

2. Each Party shall provide recourse against suppliers of unsolicited commercial electronic messages who do not comply with that Party's measures implemented pursuant to paragraph 1.

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

Article 11.12: Treatment of Source Code

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

2. For the purposes of this Article, software referred to in 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 be construed to prevent:
 - (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts;
 - (b) a Party from requiring the modification of source code of software necessary for that software to comply with its laws or regulations which are not inconsistent with this Agreement; or
 - (c) a person of a Party from licensing its software on a free and open source basis.
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 laws or practices of a Party.

Article 11.13: Cooperation

1. Recognising the global nature of electronic commerce, the Parties shall endeavour to:
 - (a) work together to assist SMEs to overcome obstacles to its use;
 - (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) participate actively in regional and multilateral fora to promote the development of electronic commerce; and
 - (d) 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.

2. The Parties recognise the importance of:
 - (a) building the capabilities of their entities responsible for computer security incident response²; and
 - (b) using existing collaboration mechanisms to cooperatively identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.
3. The Parties agree that cooperation under this Article shall be conducted in a manner compatible with their respective laws, regulations and competence.

Section B: Movement of Information and Location of Computing Facilities for Financial Services

Article 11.14: Definitions

For the purposes of this Section:

computing facilities means computer servers and storage devices for the processing or storage of information for the conduct of business but does not include computer servers or storage devices of or used to access:

- (a) financial market infrastructures;
- (b) exchanges or markets for securities or for derivatives such as futures, options and swaps; or
- (c) non-governmental bodies that exercise regulatory or supervisory authority over financial services suppliers;

covered financial person means:

- (a) a financial service supplier as defined in Article 8.1 (Definitions) of Chapter 8 (Financial Services); or
- (b) an investor in a financial service supplier as defined in Article 8.1 (Definitions) of Chapter 8 (Financial Services) that seeks to supply or is supplying a financial service in the Area of the other Party through commercial presence;

² For Australia, this refers to entities at the central level of government.

financial market infrastructures means systems in which financial services suppliers participate with other financial services suppliers, including the operator of the system, used for the purposes of:

- (a) clearing, settling or recording of payments, securities or derivatives; or
- (b) other financial transactions; and

personal information means any information, including data, relating to an identified or identifiable natural person.

Article 11.15: Movement of Information and Location of Computing Facilities for Financial Services

1. 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 financial person.

2. Neither Party shall require a covered financial person to use or locate computing facilities in the Area of the Party as a condition for conducting business in that Area, provided that the Party's financial regulatory authorities, for regulatory and supervisory purposes, have immediate, direct, complete and ongoing access to information processed or stored on computing facilities that the covered financial person uses or locates outside the Area of the Party.

3. A Party shall, to the extent practicable, provide a covered financial person with a reasonable opportunity to remediate a lack of access to information as described in paragraph 2 before the Party requires the covered financial person to use or locate computing facilities in the Area of the Party or the territory of a non-Party.

4. For greater certainty, provided that a Party's financial regulatory authorities do not have access to information as described in paragraph 2, the Party may:

- (a) subject to paragraph 3, require a covered financial person to use or locate computing facilities either in the Area of the Party or the territory of a non-Party where the Party has such access; and
- (b) adopt or maintain any other measure not inconsistent with this Agreement.

5. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 1, paragraph 2, paragraph 3 or paragraph 4 to achieve a legitimate public policy objective, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade.