

Chapter 11

Telecommunications

Article 11.1: Definitions

For the purposes of this Chapter:

- (a) **cost-oriented** means based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services;
- (b) **dialing parity** means the ability of an end-user to use an equal number of digits to access a like public telecommunications service, regardless of the public telecommunications service supplier chosen by such end-user and in a way that involves no unreasonable dialing delays;
- (c) **end-user** means a final consumer of or subscriber to a public telecommunications service, including a service supplier other than a supplier of public telecommunications services;
- (d) **essential facilities** means facilities of a public telecommunications network or service that:
 - (i) are exclusively or predominantly provided by a single or limited number of suppliers, and
 - (ii) cannot feasibly be economically or technically substituted in order to provide a service;
- (e) **interconnection** means linking with suppliers providing public telecommunications networks or services in order to allow the users of one supplier to communicate with the users of another supplier and to access services provided by another supplier;
- (f) **leased circuit** means telecommunications facilities between two or more designated points that are set aside for the dedicated use of, or availability to, a particular customer or other users;
- (g) **major supplier** means a supplier or suppliers which alone or together have the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for public telecommunications networks or services as a result of control over essential facilities or use of its position in the market;
- (h) **network element** means a facility or equipment used in supplying a public telecommunications service, including features, functions, and capabilities provided by means of such a facility or equipment, which may include local loop, sub loops and line sharing;

- (i) **non-discriminatory** means treatment no less favourable than that accorded to any other user of like public telecommunications networks or services in like circumstances;
- (j) **number portability** means the ability of end-users to retain existing telephone numbers when switching between suppliers of like public telecommunications networks or services;
- (k) **physical co-location** means physical access to space in order to install, maintain or repair equipment at premises owned or controlled and used by a major supplier to supply public telecommunications networks or services;
- (l) **public telecommunications network** means the telecommunications infrastructure which a Party requires to be used to provide telecommunications services;
- (m) **public telecommunications service** means any telecommunications service which a Party requires to be offered to the public generally. Such services may include, *inter alia*, telephone and data transmission typically involving customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information;
- (n) **regulatory decisions** means decisions by regulators made pursuant to authority conferred under domestic law including in relation to:
 - (i) the making of rules for the telecommunications industry excluding legislation and statutory rules;
 - (ii) the approval of terms and conditions, standards and codes to apply in the telecommunications industry;
 - (iii) the adjudication or other resolution of disputes between suppliers of public telecommunications networks or services; and
 - (iv) licensing;
- (o) **telecommunications** means the transmission and reception of signals by any electromagnetic means;
- (p) **telecommunications regulatory body** means any body or bodies responsible for the regulation of telecommunications; and
- (q) **user** means an end-user or a supplier of public telecommunications networks or services.

Article 11.2: Scope and Coverage

1. This Chapter applies to:

- (a) measures adopted or maintained by a Party relating to access to and use of public telecommunications networks and services;
 - (b) measures adopted or maintained by a Party relating to suppliers of public telecommunications networks and services;
 - (c) measures adopted or maintained by a Party relating to the conduct of major suppliers; and
 - (d) other measures relating to public telecommunication networks or services.
2. In the event of any inconsistency between this Chapter and another Chapter, this Chapter shall prevail to the extent of the inconsistency.
3. Except to ensure that enterprises operating broadcast stations and cable systems have continued access to and use of public telecommunications networks and services, this Chapter does not apply to measures that a Party adopts or maintains relating to broadcast or cable distribution of radio or television programming.
4. Nothing in this Chapter shall be construed as:
- (a) requiring a Party to compel any enterprise to establish, construct, acquire, lease, operate, or provide telecommunications networks or services where such networks or services are not offered to the public generally;
 - (b) requiring a Party to compel any enterprise exclusively engaged in the broadcast or cable distribution of radio or television programming to make available its broadcast or cable facilities as a public telecommunications network; or
 - (c) preventing a Party from prohibiting persons operating private networks from using their networks to provide public telecommunications networks or services to third persons.

Section A

Access To and Use of Public Telecommunications Networks or Services

Article 11.3: Access and Use

1. Each Party shall ensure that enterprises of the other Party have access to and use of any public telecommunications network or service, including leased circuits, offered in its territory or across its borders on a timely basis and on terms and conditions that are reasonable and non-discriminatory such as those set out in paragraphs 2 to 6.
2. Each Party shall ensure that such enterprises are permitted to:

- (a) purchase or lease, and attach terminal or other equipment that interfaces with, a public telecommunications network;
- (b) provide services to individual or multiple end-users over leased or owned circuits;
- (c) connect owned or leased circuits with public telecommunications networks and services in the territory, or across the borders, of that Party, or with circuits leased or owned by another enterprise;
- (d) perform switching, signaling, processing, and conversion functions; and
- (e) use operating protocols of their choice.

3. Each Party shall ensure that enterprises of the other Party may use public telecommunications networks and services for the movement of information in its territory or across its borders and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party or any WTO Member.

4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to:

- (a) ensure the security and confidentiality of messages; or
- (b) protect the privacy of personal data of end users of public telecommunications networks or services,

subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks or services, other than as necessary to:

- (a) safeguard the public service responsibilities of suppliers of public telecommunications networks or services, in particular their ability to make their networks or services available to the public generally; or
- (b) protect the technical integrity of public telecommunications networks or services.

6. Provided that they satisfy the criteria set out in paragraph 5, conditions for access to and use of public telecommunications networks and services may include:

- (a) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

- (b) requirements, where necessary, for the inter-operability of such services;
- (c) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks; and
- (d) notification, registration and licensing which, if adopted or maintained, are transparent and applications processed without undue delay.

Section B

Suppliers of Public Telecommunications Networks or Services

Article 11.4: Interconnection

1. Each Party shall ensure suppliers of public telecommunications networks or services in its territory provide, directly or indirectly, interconnection with the suppliers of public telecommunications networks or services of the other Party.
2. In carrying out paragraph 1, each Party shall ensure that suppliers of public telecommunications networks or services in its territory take reasonable steps to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications networks or services and only use such information for the purpose of providing those services.

Article 11.5: Number Portability

Each Party shall ensure that suppliers of public telecommunications networks or services in its territory provide number portability, to the extent technically and economically feasible, in a reasonable period of time and on terms and conditions that are reasonable and non-discriminatory.

Article 11.6: Dialing Parity and Access to Telephone Numbers

Each Party shall ensure that:

- (a) its telecommunication regulatory body has the authority to require that suppliers of public telecommunications services in its territory provide dialing parity within the same category of service to suppliers of public telecommunications services of the other Party; and
- (b) suppliers of public telecommunications services of the other Party are afforded non-discriminatory access to telephone numbers.

Article 11.7: Submarine Cable Systems

Each Party shall ensure reasonable and non-discriminatory treatment for access to submarine cable systems (including landing facilities) in its territory, where a supplier is authorised to operate a submarine cable system as a public telecommunications service.

Section C

Conduct of Major Suppliers of Public Telecommunications Networks and Services

Article 11.8: Major Supplier Competitive Safeguards

Each Party shall maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices, including in particular:

- (a) engaging in anti-competitive cross-subsidisation;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available, on a timely basis, to suppliers of public telecommunications networks or services, technical information about essential facilities and commercially relevant information that are necessary for them to provide services.

Article 11.9: Treatment by Major Suppliers

Each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications networks and services of the other Party treatment no less favourable than such major suppliers accord in like circumstances to their subsidiaries, their affiliates or non-affiliated service suppliers regarding:

- (a) the availability, provisioning, rates, or quality of like public telecommunications networks or services; and
- (b) the availability of technical interfaces necessary for interconnection.

Article 11.10: Interconnection with Major Suppliers ¹¹⁻¹

General Terms and Conditions

1. Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities and equipment of suppliers of public telecommunications networks or services of the other Party:
 - (a) at any technically feasible point in the major supplier's network;
 - (b) under non-discriminatory terms, conditions (including technical standards and specifications), and rates¹¹⁻²;
 - (c) of a quality no less favourable than that provided by such major suppliers for their own like services, for like services of non-affiliated service suppliers, or for like service of their subsidiaries or other affiliates;
 - (d) in a timely fashion, on terms, conditions (including technical standards and specifications), and cost-oriented rates¹¹⁻³ that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that suppliers seeking interconnection need not pay for network components or facilities that they do not require for the service to be provided; and
 - (e) on request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

Options for Interconnecting with Major Suppliers

2. Each Party shall ensure that suppliers of public telecommunications networks or services of the other Party may interconnect their facilities and equipment with those of major suppliers in its territory pursuant to at least one of the following options¹¹⁻⁴:
 - (a) a reference interconnection offer or another standard interconnection offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications networks or services;

¹¹⁻¹Australia's interconnection regime provides access on terms and conditions which are fair and reasonable to all parties and which do not unfairly discriminate between users. Access rights are guaranteed by legislation and the terms and conditions of access are established primarily through processes of commercial negotiation or by reference to access undertakings given by suppliers of public telecommunications networks or services which may draw upon an industry code of practice. Any code of practice and each supplier's undertaking will be subject to approval by the regulator.

¹¹⁻²In Australia, the rate at which interconnection is provided is determined by negotiation. Both negotiating parties have recourse to the regulator which will make a decision based on transparent criteria to ensure that rates are fair and reasonable in the circumstances.

¹¹⁻³In Australia, the regulator may resolve any dispute on what costs are relevant in determining rates.

¹¹⁻⁴For Australia, these options include arbitration.

- (b) the terms and conditions of an existing interconnection agreement; or
- (c) through negotiation of a new interconnection agreement.

Public Availability of Procedures for Interconnection Negotiations

3. Each Party shall ensure that applicable procedures for interconnection negotiations with major suppliers in its territory are made publicly available.

Public Availability of Terms and Conditions for Interconnection with Major Suppliers

4. Each Party shall ensure, where interconnection is provided under paragraph 2(a), that the rates, terms, and conditions are made publicly available.

Article 11.11: Resale

Each Party¹¹⁻⁵ shall ensure that major suppliers in its territory:

- (a) offer for resale, at reasonable rates,¹¹⁻⁶ to suppliers of public telecommunications services of the other Party, public telecommunications services that such major supplier provides at retail to end users that are not suppliers of public telecommunications services; and
- (b) do not impose unreasonable or discriminatory conditions or limitations on the resale of such services.

Article 11.12: Unbundling of Network Elements

Each Party shall provide its telecommunications regulatory body with the authority to require that major suppliers in its territory provide suppliers of public telecommunications networks and services of the other Party access to network elements for the provision of public telecommunications networks or services on an unbundled basis, and on terms and conditions and at cost-oriented rates that are reasonable and non-discriminatory.

¹¹⁻⁵Australia may determine in accordance with its law and regulations which public telecommunications services must be offered for resale by major suppliers in accordance with paragraph 1, based on the need to promote competition or such other factors as the Party considers relevant.

¹¹⁻⁶For the purposes of Article 11.11(a): 1) a Party may determine reasonable rates through any methodology it considers appropriate; and 2) wholesale rates, set pursuant to a Party's law and regulations, shall be considered reasonable.

Article 11.13: Provisioning and Pricing of Leased Circuits

1. Each Party shall ensure that major suppliers in its territory provide enterprises of the other Party leased circuit services that are public telecommunications networks or services in a reasonable period of time, on terms and conditions, and at rates, that are reasonable and non-discriminatory.
2. In carrying out paragraph 1, each Party shall provide its telecommunications regulatory body the authority to require major suppliers in its territory to offer such leased circuit services that are public telecommunications networks or services to enterprises of the other Party at capacity-based, cost-oriented prices.

Article 11.14: Co-location

1. Each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications services of the other Party physical co-location of equipment necessary for interconnection or access to unbundled network elements on a timely basis and on terms, conditions and at cost-oriented rates that are reasonable and non-discriminatory.
2. Where physical co-location is not practical for technical reasons or because of space limitations, each Party shall ensure that major suppliers in its territory provide alternative solution, which may include facilitating virtual co-location, on a timely basis and on terms, conditions and at cost-oriented rates that are reasonable and non-discriminatory.
3. Each Party may determine, in accordance with its law and regulations, which premises in its territory are subject to paragraphs 1 and 2.

Article 11.15: Access to Poles, Ducts, Conduits, Transmission Towers, Underground Facilities and Rights of Way

Each Party shall maintain appropriate measures for the purpose of preventing major suppliers in its territory from denying access to poles, ducts, conduits, transmission towers, underground facilities and rights-of-way, or any other structures deemed necessary by the Party, owned or controlled by such major suppliers, to suppliers of public telecommunications networks or services of the other Party in a manner which would constitute anti-competitive practices.

Article 11.16: Denial of Access

Each Party shall ensure that any decision of the Party to deny access will be provided with a clear and detailed written explanation.

Section D

Regulatory Measures

Article 11.17: Independent Regulatory Bodies

1. Each Party shall ensure that any telecommunications regulatory body that it establishes or maintains is independent and separate from, and not accountable to, any supplier of public telecommunications networks or services. To this end, each Party shall ensure that its telecommunications regulatory bodies do not hold a financial interest or maintain an operating role in any supplier of public telecommunications networks or services.
2. Each Party shall ensure that the decisions and procedures of its telecommunications regulatory body are impartial with respect to all interested persons. To this end, each Party shall ensure that its regulatory body does not hold a financial interest in any supplier of public telecommunications networks or services, and that any financial interest that the Party holds in a supplier of a public telecommunications networks or services does not influence the decisions and procedures of its telecommunications regulatory body.
3. Each Party shall ensure that the decisions of, and procedures used by, its telecommunications regulatory bodies shall be fair and impartial and shall be made and implemented without undue delay.

Article 11.18: Flexibility in the Choice of Technology

Neither Party may prevent suppliers of public telecommunications networks or services from choosing the technologies they wish to use to supply their services, including packet-based services and commercial mobile wireless services, subject to requirements necessary to satisfy legitimate public policy interests, including protection of the technical integrity of public telecommunications networks and services.

Article 11.19: Universal Service

Each Party shall administer any universal service obligation that it maintains in a transparent, non-discriminatory, and competitively neutral manner and shall ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined.

Article 11.20: Licensing Process

1. When a Party requires a supplier of public telecommunications networks or services to have a licence, the Party shall make publicly available:

- (a) all the licensing criteria and procedures it applies, including any standard terms and conditions of the licence;
 - (b) the time it normally requires to reach a decision concerning an application for a licence; and
 - (c) the terms and conditions of individual licences.
2. Each Party shall ensure that, on request, an applicant receives the reasons for the denial of a licence.
3. Each Party shall ensure that licensing requirements for suppliers of telecommunications networks or services of the other Party are applied in a way that is not more burdensome than necessary.

Article 11.21: Allocation and Use of Scarce Telecommunications Resources

1. Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers, and rights of way, in an objective, timely, transparent, and non-discriminatory manner.
2. Each Party shall make publicly available the current state of allocated frequency bands but shall not be required to provide detailed identification of frequencies assigned for specific government uses.
3. For greater clarity, measures regarding the allocation and assignment of spectrum and regarding frequency management are not measures that are *per se* inconsistent with Article 9.5 (Market Access – Cross-Border Trade in Services Chapter), which is applied to Chapter 10 (Investment) through Article 9.2.2 (Scope and Coverage – Cross-Border Trade in Services Chapter). Accordingly, each Party retains the right to establish and apply its spectrum and frequency management policies, which may limit the number of suppliers of public telecommunications networks or services, provided that it does so in a manner that is consistent with this Agreement. Each Party also retains the right to allocate frequency bands taking into account current and future needs.
4. When making a spectrum allocation for non-governmental telecommunications networks or services, each Party shall endeavour to rely on an open and transparent public comment process that considers the overall public interest. Each Party shall endeavour to rely generally on market-based approaches in assigning spectrum for terrestrial non-governmental telecommunications networks or services.

Article 11.22: Enforcement

1. Each Party shall provide its relevant regulatory body with the authority to enforce compliance with the Party's measures relating to the obligations set out in Articles 11.3 to 11.15 and Articles 11.20 to 11.23.

2. Such authority to enforce compliance shall include the ability to impose, or seek from administrative or judicial bodies, effective sanctions, which may include financial penalties, or the modification, suspension, and revocation of licences.

Article 11.23: Resolution of Telecommunications Disputes and Appeal Processes

Each Party shall ensure that:

Recourse to a telecommunications regulatory body

- (a) enterprises of the other Party may seek timely review by a telecommunications regulatory body or other relevant body to resolve disputes regarding the Party's measures relating to a matter set out in Articles 11.3 to 11.15 and Articles 11.20 to 11.23;
- (b) suppliers of public telecommunications networks or services of the other Party that have requested interconnection with a major supplier in its territory may have recourse, within a reasonable and publicly available period of time after the supplier requests interconnection, to a national telecommunications regulatory body or other relevant body to resolve disputes regarding the terms, conditions, and rates for interconnection with such major supplier;

Judicial review

- (c) any enterprise that is aggrieved or whose interests are adversely affected by a determination or decision of the Party's telecommunications regulatory body may obtain judicial review of such determination or decision by an impartial and independent judicial authority; and
- (d) the making of an application for judicial review shall not have the effect of delaying the coming into operation of the telecommunications regulatory body's decision or determination, or of suspending the operation of the decision or determination, unless otherwise determined by the relevant judicial body.

Article 11.24: Transparency

Further to Chapter 19 (Transparency), each Party shall ensure that:

- (a) regulatory decisions, including the basis for such decisions, of its telecommunications regulatory body are promptly published or otherwise made available to all interested persons;
- (b) its measures relating to public telecommunications networks or services are made publicly available, including:

- (i) tariffs and other terms and conditions of service;
- (ii) requirements for judicial review following a regulatory decision;
- (iii) specifications of technical interfaces;
- (iv) conditions for attaching terminal or other equipment to public telecommunications networks;
- (v) notification, permit, registration, or licensing requirements, if any; and
- (vi) measures of bodies responsible for preparing, amending, and adopting standards-related measures affecting access and use.

Article 11.25: Industry Participation

Each Party shall facilitate consultation with suppliers of public telecommunications networks or services of the other Party operating in its territory in the development of telecommunications policy, regulations and standards in a manner that is open to any participant in the telecommunications industry in the territory of that Party.

Article 11.26: International Standards

The Parties recognise the importance of international standards for global compatibility and interoperability of telecommunications networks and services, and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.