

CHAPTER 9 TELECOMMUNICATIONS SERVICES

Article 9.1 Objective

The objective of this Chapter is to make additional commitments that will further liberalise and promote competition in the telecommunications markets of the Parties. These commitments are consistent with and build on the GATS *Annex on Telecommunications* and the WTO Telecommunications Reference Paper. To this end each Party commits to:

- (a) ensure that anti-competitive conduct does not hinder new entrants to the telecommunications market;
- (b) the provision of access to critical parts (as provided for in this Chapter) of telecommunications networks within its territory to suppliers of telecommunications networks or services of the other Party; and
- (c) ensure that regulatory decisions are clear, timely and transparent.

Article 9.2 Scope

1. This Chapter shall apply to measures affecting trade in telecommunications services.
2. This Chapter shall not apply to measures by a Party affecting the distribution of broadcasting and audio-visual services, as defined in each Party's laws and regulations.
3. Nothing in this Chapter shall be construed as:
 - (a) requiring a Party to compel any juridical person to establish, construct, acquire, lease, operate, or provide telecommunications networks or services not offered to the public generally; or
 - (b) requiring a Party to compel any juridical person 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.

Article 9.3 Definitions

For the purposes of this Chapter, the following definitions shall apply:

- (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) **dialling 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 dialling delays;
- (c) **end user** means a final consumer of or subscriber to public telecommunications networks or services, 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 which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market¹² for public telecommunications services as a result of:
 - (i) control over essential facilities; or
 - (ii) use of its position in the market;
- (h) **network elements** means facilities or equipment used in the provision of a public telecommunications service, including features, functions, and capabilities that are provided by means of such facilities or equipment, which may include local loops, 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;

¹² For greater certainty, "relevant market" may refer to a market for the supply of public telecommunications networks or services (or part thereof) provided by any supplier of public telecommunications networks or services, that give its supplier the ability to materially affect the terms of participation in the market (having regard to price and supply).

- (j) **number portability** means the ability of end users of public telecommunications networks or services 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 services;
- (l) **public telecommunications network** means the telecommunications infrastructure which is used to provide public telecommunications services;
- (m) **public telecommunications service** means any telecommunications service that is 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 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) **service supplier** means a natural person or a juridical person that supplies a service and includes a supplier of public telecommunications services;
- (p) **telecommunications** means the transmission and reception of signals by any electromagnetic or photonic means;
- (q) **telecommunications regulatory body** means a central government body or bodies responsible for the regulation of telecommunications networks or services. For greater certainty, Ministers or the Cabinet of a Party are not such a body; and
- (r) **user** means an end user or a supplier of public telecommunications networks or services.

SECTION A
Access to and Use of Public Telecommunications
Networks or Services

Article 9.4
Access and Use

1. Each Party shall ensure that service suppliers of the other Party have access to and use of any public telecommunications network or service offered in its territory or across its borders in a timely fashion, on transparent, reasonable and non-discriminatory terms and conditions, including as set out in paragraphs 3 to 6.
2. Any new or amended measures of a Party that significantly affect such access or use shall be made publicly available, and service suppliers of the other Party whose interests are adversely affected by such measures shall be provided with an opportunity to comment.
3. Each Party shall ensure that service suppliers of the other Party are permitted to:
 - (a) purchase or lease, and attach terminal or other equipment that interfaces with a public telecommunications network and which is necessary to supply a supplier's service;
 - (b) provide services to individual or multiple end users over leased or owned circuits;
 - (c) interconnect owned or leased circuits with public telecommunications networks or services in the territory, or across the borders, of that Party or with circuits leased or owned by another service supplier;
 - (d) perform switching, signalling, processing, and conversion functions; and
 - (e) use operating protocols of their choice in the supply of any services, other than as necessary to ensure the availability of telecommunications networks and services to the public generally.
4. Each Party shall ensure that service suppliers 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 to which the service supplier is legally entitled contained in databases or otherwise stored in machine-readable form in the territory of either Party or any non-Party which is a party to the WTO Agreement.

5. Notwithstanding paragraph 4, 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,

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

6. 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.

SECTION B

Obligations Relating to Suppliers of Public Telecommunications Networks or Services

Article 9.5 Interconnection

1. Each Party shall ensure that suppliers of public telecommunications networks or services in its territory provide, directly or indirectly, interconnection with suppliers of public telecommunications networks or services of the other Party.

2. In carrying out its obligations under 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 obtained as a result of interconnection arrangements and only use such information for the purpose of providing those services.

Article 9.6 Number Portability

Each Party shall adopt or maintain measures to ensure that suppliers of public telecommunications networks or services in its territory provide number portability on a timely basis, and on reasonable terms and conditions for mobile services and any other services as designated by that Party.

Article 9.7

Dialling Parity

Each Party shall ensure that:

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

Article 9.8

Submarine Cable Systems

Where a Party authorises a supplier of public telecommunications networks or services to operate a submarine cable system as a public telecommunications service, it shall ensure that such supplier accords the suppliers of public telecommunications networks or services of the other Party reasonable and non-discriminatory treatment with respect to access to submarine cable systems (including landing facilities) in its territory.

Article 9.9

General Competitive Safeguards

1. Each Party shall maintain appropriate measures, including the effective enforcement of such measures, for the purpose of preventing service suppliers from engaging in or continuing anti-competitive practices.
2. The anti-competitive practices referred to in paragraph 1 shall mean business conduct or transactions that adversely affect competition, including:
 - (a) anti-competitive horizontal arrangements between competitors;
 - (b) abuse of dominant position; and
 - (c) anti-competitive vertical arrangements.

SECTION C

Additional Obligations Relating to Major Suppliers of Public Telecommunications Networks or Services

Article 9.10

Treatment by Major Suppliers

Each Party shall ensure that major suppliers in its territory accord suppliers of public telecommunications networks or services of the other Party treatment no less

favourable than such major supplier accords in like circumstances to its subsidiaries, its affiliates, or any non-affiliated service suppliers regarding:

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

Article 9.11 Competitive Safeguards

1. Each Party shall maintain appropriate measures, including the effective enforcement of such measures, for the purpose of preventing suppliers that, alone or together, are a major supplier in its territory from engaging in or continuing anti-competitive practices.

2. The anti-competitive practices referred to in paragraph 1 include:

- (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 9.12 Resale

1. Each Party shall ensure that major suppliers in its territory:

- (a) offer for resale, at reasonable rates, 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 services¹³.

2. Each Party may determine in accordance with its laws 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.

¹³ Parties may determine whether conditions or limitations are unreasonable or discriminatory by reference to their effect on competition or other such factors as the Party considers relevant.

Article 9.13
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 or services of the other Party access to network elements for the provision of public telecommunications networks or services on an unbundled basis, in a timely fashion, on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory, and transparent.

Article 9.14
Interconnection with Major Suppliers

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) 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 their subsidiaries or other affiliates;
- (c) in a timely fashion, on terms and conditions (including technical standards and specifications), and at cost-oriented rates, that are transparent, reasonable and non-discriminatory, having regard to economic feasibility, and sufficiently unbundled so that the suppliers need not pay for network components or facilities that they do not require for the service to be provided; and
- (d) 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.

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 options:

- (a) a Reference Interconnection Offer or other Standard Interconnection Offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications networks or services;
- (b) terms and conditions of an existing interconnection agreement;
- (c) through negotiation of a new interconnection agreement; or
- (d) binding arbitration.

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

4. With respect to any major supplier in its territory each Party shall ensure that:

- (a) a Reference Interconnection Offer or other Standard Interconnection Offer; or
- (b) the terms of the major supplier's interconnection agreement;

are published or otherwise made publicly available¹⁴.

Article 9.15 **Provisioning and Pricing of Leased Circuit Services**

1. Each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications networks or services of the other Party leased circuit services that are public telecommunications services in a timely fashion, on terms and conditions, and at rates, that are reasonable, non-discriminatory and transparent.

2. In carrying out its obligations under 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 services to suppliers of public telecommunications networks or services of the other Party at capacity-based, cost-oriented prices.

Article 9.16 **Co-Location**

1. Each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications networks or services of the other Party physical co-location of equipment necessary for interconnection or access to unbundled network elements in a timely fashion, on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory, and transparent.

2. Where physical co-location under paragraph 1 is not practical for technical reasons or because of space limitations, each Party shall ensure that major suppliers in its territory cooperate with suppliers of public telecommunications networks or services to find and implement a practical and commercially viable alternative solution in a timely fashion, on terms and conditions, and cost-oriented rates, that are reasonable, non-discriminatory and transparent. Such solutions may include, but are not limited to:

- (a) permitting facilities-based suppliers to locate equipment in a nearby building and to connect such equipment to the major supplier's network;

¹⁴ For Australia, this paragraph only applies to services deemed or declared a 'declared service' by Australia's telecommunications regulator in accordance with Australian legislation. For Malaysia, this paragraph only applies to services listed on the Access List by the Malaysian telecommunications regulator in accordance with Malaysian legislation.

- (b) conditioning additional equipment space or virtual co-location in a timely fashion, on terms and conditions, and at cost oriented rates, that are reasonable, non-discriminatory and transparent;
- (c) optimising the use of existing space; or
- (d) finding adjacent space.

3. Each Party may determine, in accordance with its laws and regulations, the locations at which it requires major suppliers in its territory to provide the physical co-location or the practical and commercially viable alternative solutions referred to in paragraphs 1 and 2.

Article 9.17

Access to Facilities

1. Each Party shall ensure that major suppliers in its territory provide access to poles, ducts, conduits, rights of way, transmission towers, underground facilities, and 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 timely fashion, on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory, and transparent.

2. Each Party may determine, in accordance with its laws and regulations, the poles, ducts, conduits, rights of way, transmission towers, underground facilities or other structures to which it requires major suppliers in its territory to provide access under paragraph 1 on the basis of the state of competition in the relevant market.

Article 9.18

Denial of Access

If access to any part of a major supplier's network, including but not limited to access to interconnection, co-location, poles, ducts, conduits, rights of way, transmission towers or underground facilities, is denied through a decision of a Party's telecommunications regulatory body, that Party shall ensure that its telecommunications regulatory body provides the access seeker with a clear and transparent explanation of its decision to deny such access.

SECTION D

Other Measures

Article 9.19

Independent Regulatory Bodies and Government Ownership

1. Each Party shall ensure that any telecommunications regulatory body that it establishes or maintains is separate from, and not accountable to, any supplier of public telecommunications networks or services. To this end, each Party shall ensure that the Party's telecommunications regulatory body does not hold any financial interest or maintain an operating role in any such supplier.

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 any financial interest that it holds in a supplier of 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 the procedures used by, its telecommunications regulatory body shall be fair and impartial and shall be made and implemented without undue delay.

Article 9.20 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 9.21 Licensing Process

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

- (a) the procedures for applying for all such licences, and the criteria by which applications for such licences are assessed,
- (b) the standard terms and conditions applicable to such licences; and
- (c) the period normally required to reach a decision concerning an application for a license.

2. Each Party shall ensure that, on request, an applicant receives the reasons for its denial of a license.

Article 9.22 Allocation and Use of Scarce Resources

1. Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies and numbers, 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 allocated for specific government uses.

3. A Party's measures allocating and assigning spectrum and managing frequency are not measures that are *per se* inconsistent with Article 8.5 (Market Access) of Chapter 8 (Trade in Services). Accordingly, each Party retains the right to establish and apply spectrum and frequency management policies that may have the

effect of limiting the number of suppliers of public telecommunications networks or services, provided it does so in a manner consistent with other provisions of this Agreement. This includes the ability to allocate frequency bands, taking into account current and future needs and spectrum availability.

4. When making a spectrum allocation for non-government 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-government telecommunications services.

Article 9.23 Enforcement

1. Each Party shall provide its relevant bodies the authority to enforce compliance with the Party's measures relating to the obligations set out in Articles 9.4 to 9.17:

Access and Use (Article 9.4);

Interconnection (Article 9.5);

Number Portability (Article 9.6);

Dialling Parity (Article 9.7);

Submarine Cable Systems (Article 9.8);

General Competitive Safeguards (Article 9.9);

Treatment by Major Suppliers (Article 9.10);

Competitive Safeguards (Article 9.11);

Resale (Article 9.12);

Unbundling of Network Elements (Article 9.13);

Interconnection with Major Suppliers (Article 9.14);

Provisioning and Pricing of Leased Circuit Services (Article 9.15);

Co-Location (Article 9.16); and

Access to Facilities (Article 9.17).

2. Such authority shall include the ability to impose, or seek from administrative or judicial bodies, effective sanctions which may include financial penalties, injunctive relief (on an interim or final basis), or the modification, suspension, and revocation of licenses.

Article 9.24
Resolution of Telecommunications Complaints and Disputes

Further to Chapter 17 (Transparency), each Party shall ensure the following:

- (a) suppliers of public telecommunications networks or services of the other Party may seek timely review by a telecommunications regulatory body or other relevant body of the Party to resolve complaints by or disputes between suppliers of public telecommunications networks or services regarding the Party's measures relating to matters set out in Articles 9.4 to 9.17;
- (b) suppliers of public telecommunications networks or services of the other Party that have requested interconnection with a major supplier in the Party's territory may seek review, within a reasonable and publicly specified period after the supplier of public telecommunications networks or services requests interconnection, by its telecommunications regulatory body to review disputes regarding the terms, conditions, and rates for interconnection with such major supplier;
- (c) any service supplier that is aggrieved or whose interests are adversely affected by a determination or decision of the Party's telecommunications regulatory body may obtain review of the determination or decision by an impartial and independent judicial authority; and
- (d) neither Party shall permit an application for judicial review to constitute grounds for non-compliance with the determination or decision of the telecommunications regulatory body unless the relevant judicial body stays such determination or decision.

Article 9.25
Transparency of Measures Relating to Telecommunications

Further to Chapter 17 (Transparency) and subject to Articles 9.1 (Objective), 9.4 (Access and Use), 9.11 (Competitive Safeguards), 9.14 (Interconnection with Major Suppliers), 9.18 (Denial of Access), 9.21 (Licensing Process) and 9.22 (Allocation and Use of Scarce Resources), 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; and
- (b) its measures relating to public telecommunications networks or services are made publicly available, including measures relating to:
 - (i) tariffs and other terms and conditions of service;

- (ii) procedures relating to judicial and other adjudicatory proceedings;
- (iii) specifications of technical interfaces;
- (iv) conditions for attaching terminal or other equipment to the public telecommunications network; and
- (v) notification, permit, registration, or licensing requirements, if any.

Article 9.26

Flexibility in the Choice of Technologies

1. Neither Party may prevent suppliers of public telecommunications networks or services from having the flexibility to choose the technologies that they use to supply their services, including commercial mobile wireless services and packet based services, subject to requirements necessary to satisfy legitimate public policy interests¹⁵.

2. Notwithstanding paragraph 1, a Party may apply measures that limit the technologies or standards that a supplier of public telecommunications networks or services may use to supply its services, provided that its measures are designed to achieve a legitimate public policy objective and are not prepared, adopted or applied in a manner that creates unnecessary obstacles to trade.

Article 9.27

Industry Participation

1. Each Party shall facilitate the involvement of suppliers of public telecommunications networks or services of the other Party operating in its territory in the regulation of the telecommunications industry, in a manner that is open to any participant in the telecommunications industry in the territory of the Party concerned.

2. Industry participation shall include the following objectives:

- (a) to assist in representing the interests of market entrants and incumbents;
- (b) to provide feedback to the regulatory agency on its decisions; and
- (c) to prepare standards governing relationships between suppliers.

3. Each Party shall ensure its service suppliers comply with a standard formulated by the industry:

- (a) where they have agreed to do so; or

¹⁵ For the avoidance of doubt, public policy interests include those that protect the technical integrity of the network.

- (b) where the regulator has approved and implemented the standard as an enforceable measure.

Article 9.28
Relation to Other Chapters

In the event of any inconsistency between this Chapter and another Chapter, this Chapter shall prevail to the extent of the inconsistency.

Article 9.29
Consultation

At the request of either Party, the Parties shall enter into consultations to discuss any issues arising under this Chapter, including issues of interpretation and issues arising due to technological or industry developments.

Article 9.30
Cooperation

The Parties shall explore additional avenues of cooperation, including capacity building measures in the area of telecommunications competition policy and other technical and regulatory issues, for the purpose of enhancing each Party's ability to enforce its laws and regulations governing telecommunications.

Article 9.31
Relation to International Organisations and Agreements

The Parties recognize the importance of international standards for global compatibility and inter-operability of telecommunications networks or services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunications Union and the International Organization for Standardization.