

CHAPTER 12

TELECOMMUNICATIONS

Article 12.1 Definitions

For the purposes of this Chapter:

“associated facilities” means those services, physical infrastructures, and other facilities associated with, or necessary for, a telecommunications network or service that enable or support the provision of services via that network or service or have the potential to do so;

“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;

“essential facilities” means facilities of a public telecommunications network or service that:

- (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
- (b) cannot feasibly be economically or technically substituted in order to supply a service;

“interconnection” means the linking of public telecommunications networks used by the same or different suppliers of telecommunications networks or services in order to allow the users of one supplier to communicate with users of the same or another supplier or to access services provided by another supplier. Services may be provided by the suppliers involved or any other supplier who has access to the network;

“international mobile roaming service” means a commercial mobile service provided pursuant to an agreement between suppliers of public telecommunications services that enables an end-user whose mobile handset or other device normally accesses public telecommunication services in the territory of one Party to use their mobile handset or other device for voice, data, or messaging services in the territory of the other Party;

“leased circuits” means telecommunications services or facilities between two or more designated points that are set aside for the dedicated use of, or availability to, a user;

“major supplier” means a supplier of public telecommunications networks or services that has the ability to materially affect the terms of participation, having

regard to price and supply, in a relevant market for public telecommunications networks or services as a result of control over essential facilities or the use of its position in that market;

“measures of a Party” means measures adopted or maintained by:

- (a) central, regional, or local governments or authorities; or
- (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities;

“network element” means a facility or equipment used in supplying a telecommunications service, including features, functions, and capabilities provided by means of that facility or equipment;

“non-discriminatory” means treatment no less favourable than that accorded, in like situations, to other users of like public telecommunications networks or services;

“number portability” means the ability of end-users of public telecommunications services who so request to retain, at the same location in the case of a fixed line, the same telephone numbers when switching between the same category of suppliers of public telecommunications services;

“public telecommunications network” means telecommunications infrastructure used to provide public telecommunications services;

“public telecommunications service” means any telecommunications service that is offered to the public generally;

“reference interconnection offer” means an interconnection offer by a major supplier that is made publicly available, so that any supplier of public telecommunications services that is willing to accept it may obtain interconnection with the major supplier on that basis;

“telecommunications” means the transmission and reception of signals by any electromagnetic means;

“telecommunications network” means transmission systems and, if applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the transmission and reception of signals by wire, radio, optical, or other electromagnetic means;

“telecommunications regulatory authority” means the body or bodies responsible for the regulation of telecommunications networks and services covered by this Chapter;

“telecommunications service” means a service that consists wholly or mainly in the transmission and reception of signals over telecommunications networks,

including over networks used for broadcasting, but does not include a service providing, or exercising editorial control over, content transmitted using telecommunications networks and services;

“universal service” means the minimum set of services that must be made available to all users or a set of users in the territory of a Party or in a subdivision thereof, regardless of their geographical location; and

“user” means a service consumer or a service supplier using a public telecommunications network or service.

Article 12.2

Objectives

The Parties recognise the importance of the availability of high quality telecommunications services for enabling persons and businesses to access the benefits of trade, as well as the importance of ensuring competition in the telecommunication markets.

Article 12.3

Scope

1. This Chapter shall apply to measures of a Party affecting trade in telecommunications services.

2. This Chapter shall not apply to:

- (a) measures affecting services providing, or exercising editorial control over, content transmitted using telecommunications networks or services;
- (b) audio-visual services; or
- (c) measures relating to broadcast or cable distribution of radio or television programming,

except to ensure that a service supplier of audio-visual services or a service supplier operating a broadcast station or cable system has continued access to and use of public telecommunications networks and services.

3. Nothing in this Chapter shall be construed as requiring a Party:

- (a) to authorise a service supplier of the other Party to establish, construct, acquire, lease, operate, or supply telecommunications networks or services other than as provided for in this Agreement; or

- (b) to establish, construct, acquire, lease, operate, or supply telecommunications networks or services not offered to the public generally, or to oblige a service supplier under its jurisdiction to do so.

Article 12.4

Approaches to Regulation

1. The Parties recognise the value of competitive markets to deliver a wide choice in the supply of telecommunications services and to enhance consumer welfare, and that economic regulation may not be needed if there is effective competition or if a service is new to a market. Accordingly, the Parties recognise that regulatory needs and approaches differ market by market, and that each Party may determine how to implement its obligations under this Chapter.
2. In this respect, the Parties recognise that a Party may:
 - (a) engage in direct regulation either in anticipation of an issue that the Party expects may arise or to resolve an issue that has already arisen in the market;
 - (b) rely on the role of market forces, particularly with respect to market segments that are, or are likely to be, competitive or that have low barriers to entry, such as services provided by telecommunications suppliers that do not own network facilities; or
 - (c) use any other appropriate means that benefit the long-term interest of end-users.

Article 12.5

Access and Use

1. Each Party shall ensure that any service supplier of the other Party has access to and use of public telecommunications networks or services, including leased circuits, offered in its territory on reasonable and non-discriminatory terms and conditions. This obligation shall be applied, inter alia, to paragraphs 2 to 6.
2. 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;

- (b) provide services to individual or multiple end-users over leased or owned circuits;
 - (c) connect private leased or owned circuits with public telecommunications networks and services or with circuits leased or owned by another service supplier;
 - (d) use operating protocols of the service supplier's choice; and
 - (e) perform switching, signalling, processing, and conversion functions.
3. 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, including for intracorporate communications of those service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in the territory of a Party.
 4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of communications and to protect the privacy of personal data of end-users of public telecommunications networks or services, subject to the requirement that those 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 and services other than as necessary:
 - (a) to safeguard the public service responsibilities of suppliers of public telecommunications networks or services, in particular their ability to make their networks and services available to the public generally; or
 - (b) to 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) restrictions on resale or shared use of such services if a Party requires a major supplier to offer its service for resale;
 - (b) a requirement to use specified technical interfaces, including interface protocols, for interconnection with such networks and services;
 - (c) a requirement, if necessary, for the interoperability of such networks and services;

- (d) type approval of terminal or other equipment that interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;
- (e) restrictions on interconnection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or
- (f) notification, registration, and licensing.

Article 12.6 **Access to Essential Facilities**

1. Each Party shall ensure that a major supplier in its territory provides access to its essential facilities to suppliers of public telecommunications networks or services on reasonable, transparent, and non-discriminatory terms and conditions for the purpose of providing public telecommunications services, except when this is not necessary to achieve effective competition on the basis of the facts collected and the assessment of market conditions conducted by the telecommunications regulatory authority. The major supplier's essential facilities may include, inter alia, network elements, leased circuits services, and associated facilities.
2. Each Party shall determine those essential facilities required to be made available pursuant to paragraph 1, and to what extent those essential facilities are to be unbundled. That determination shall be based, inter alia, on the objective of achieving effective competition and the benefit of the long-term interest of end-users.
3. If a Party requires a major supplier to offer its public telecommunications services for resale, the Party shall ensure that that supplier does not impose unreasonable or discriminatory conditions on the resale of its public telecommunications services.

Article 12.7 **Interconnection**

1. The Parties recognise that interconnection should in principle be agreed on the basis of commercial negotiation between the suppliers of public telecommunications networks or services concerned.
2. Each Party shall ensure that a supplier of public telecommunications networks or services in its territory:

- (a) provides interconnection with a supplier of public telecommunications networks or services of the other Party; or
- (b) enters into negotiations for interconnection with a supplier of public telecommunications networks or services of the other Party, if requested to do so by that supplier.

Article 12.8
Interconnection with Major Suppliers

1. Each Party shall ensure that a major supplier of public telecommunications networks or services in its territory provides interconnection:
 - (a) at any technically feasible point in the major supplier's network;
 - (b) 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;
 - (c) under non-discriminatory terms and conditions (including as regards rates, technical standards, and specifications, including quality and maintenance) and of a quality no less favourable than that provided for its own like services, or for like services of its subsidiaries or other affiliates; and
 - (d) on a timely basis, and on terms and conditions (including rates, technical standards, and specifications) that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the suppliers do not need to pay for network components or facilities that they do not require for the service to be provided.
2. Each Party shall ensure that major suppliers make publicly available, as appropriate:
 - (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 services; or
 - (b) the terms and conditions of an interconnection agreement in effect.
3. Each Party shall make publicly available the applicable procedures for interconnection negotiations with a major supplier in its territory.

Article 12.9

Number Portability

Each Party shall ensure that suppliers of public telecommunications services provide number portability on a timely basis, without impairment of quality, reliability, or convenience, and on reasonable and non-discriminatory terms and conditions.

Article 12.10

Scarce Resources

1. Each Party shall ensure that the allocation and granting of rights of use of scarce resources related to telecommunications, including radio spectrum and frequencies, numbers, and rights of way, is carried out using procedures that are objective, timely, transparent, and non-discriminatory, and shall endeavour to take into account the public interest, including the promotion of competition.
2. Each Party shall make publicly available the current state of allocated frequency bands, but detailed identification of radio spectrum allocated for specific government uses is not required.
3. Each Party may rely on market-based approaches, such as bidding procedures, to assign radio spectrum and frequencies for commercial use.
4. A measure of a Party allocating and assigning radio spectrum and managing frequency is not per se inconsistent with Article 9.4 (Market Access – Cross-Border Trade in Services) and Article 14.5 (Market Access – Investment). Accordingly, each Party retains the right to establish and apply spectrum and frequency management measures that may have the effect of limiting the number of suppliers of telecommunications services, provided that it does so in a manner consistent with this Agreement. This includes the ability to allocate frequency bands taking into account current and future needs and spectrum availability.

Article 12.11

Competitive Safeguards on Major Suppliers

1. Each Party shall adopt or maintain appropriate measures for the purpose of preventing suppliers of public telecommunications networks or services in its territory that, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.
2. The anti-competitive practices referred to in paragraph 1 include, in particular:

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

Article 12.12 **Treatment by Major Suppliers**

Each Party shall ensure that a major supplier in its territory accords suppliers of public telecommunications networks or services of the other Party treatment no less favourable than that major supplier accords in like circumstances to its subsidiaries or affiliates regarding:

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

Article 12.13 **Regulatory Principles**

1. Each Party shall ensure that its telecommunications regulatory authority is legally distinct from, and functionally independent to, any supplier of public telecommunications networks, equipment, and services. With a view to ensuring the independence and impartiality of telecommunications regulatory bodies, each Party shall ensure that its telecommunications regulatory authority does not hold a financial interest or maintain an operating or management role¹ in any supplier of public telecommunications services, networks, or equipment. A Party that retains ownership or control of suppliers of telecommunications networks or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.
2. Each Party shall ensure that regulatory decisions and procedures of its telecommunications regulatory authority or other competent authority, related to this Chapter, are impartial with respect to all market participants.

¹ This paragraph shall not be construed to prohibit a government entity of a Party other than the telecommunication regulatory body from owning equity in a supplier of public telecommunications services.

3. Each Party shall ensure that its telecommunications regulatory authority acts independently by not seeking or taking instructions from any person outside the authority when exercising responsibilities assigned under national law which are relevant to the enforcement of obligations in this Chapter.²
4. Each Party shall ensure that the telecommunications regulatory authority is sufficiently empowered to carry out the responsibilities assigned to it relevant to the enforcement of obligations set out in this Chapter. Such power shall be exercised transparently and in a timely manner.
5. Each Party shall provide its telecommunications regulatory authority with the power to ensure that suppliers of telecommunications networks or services provide it, promptly on request, with all the information, including financial information, that is necessary to enable the telecommunications regulatory authority to carry out its tasks in accordance with this Chapter. Information requested shall be treated in accordance with the requirements of confidentiality.
6. Each Party shall ensure that a supplier of telecommunications networks or services affected by a decision of the telecommunications regulatory authority has the right to appeal against that decision³ to an appeal body that is independent of the telecommunications regulatory authority and of the affected supplier. Pending the outcome of the appeal, the decision of the telecommunications regulatory authority shall stand, unless interim measures are granted in accordance with national law.
7. Each Party shall ensure that its telecommunications regulatory authority reports regularly, inter alia, on the state of the electronic communications market, on its human and financial resources, and how those resources are attributed. Each Party shall ensure that these reports and any decisions it issues are made publicly available.

Article 12.14 **Authorisation⁴**

1. If a Party requires an authorisation for the provision of telecommunications networks or services, it shall make publicly available the types of services requiring authorisation, together with all authorisation criteria, applicable procedures, and terms and conditions generally associated with the authorisation.

² For greater certainty, this paragraph shall not apply in respect of a measure of a Party allocating and assigning radio spectrum and managing frequency referred to in paragraph 4 of Article 12.10 (Scarce Resources).

³ For greater certainty, this right of appeal may be limited to points of law in accordance with the laws of a Party.

⁴ For greater certainty, authorisation can include licensing.

2. Each Party shall endeavour to authorise the provision of telecommunications networks or services without a formal procedure and to permit the supplier to start providing its networks or services without having to wait for a decision by the telecommunications regulatory authority. If a Party requires a formal authorisation decision, it shall state a reasonable period of time normally required to obtain that decision and communicate this in a transparent manner. It shall endeavour to ensure that the decision is taken within the stated period of time.
3. Each Party shall ensure that any authorisation criteria or applicable procedure, as well as any obligation or condition imposed on or associated with an authorisation, is objective, transparent, non-discriminatory, and related to and not more burdensome than necessary for the kind of service provided.
4. Each Party shall ensure that an applicant receives in writing, which may include in electronic form, the reasons for the denial or the revocation of an authorisation, or the imposition of supplier-specific conditions or the refusal to renew any authorisation. In such cases, an applicant shall have a right of appeal before an appeal body.
5. Each Party shall ensure that administrative fees imposed on suppliers are objective, transparent, non-discriminatory, and commensurate with the administrative costs reasonably incurred in the management, control, and enforcement of the obligations set out in this Chapter. Administrative fees do not include payments for rights to use scarce resources and mandated contributions to universal service provision.

Article 12.15 **Transparency**

To the extent not already provided for in this Agreement, each Party shall make publicly available:

- (a) the responsibilities of its telecommunications regulatory authority in an easily accessible and clear form, in particular if those responsibilities are given to more than one body;
- (b) its measures relating to public telecommunications networks or services, including:
 - (i) regulations implemented by its telecommunications regulatory authority, together with the basis for these regulations;
 - (ii) tariffs and other terms and conditions of services;

- (iii) specifications of technical interfaces;
 - (iv) conditions for attaching terminal or other equipment to the public telecommunications networks;
 - (v) notification, permit, registration, or licensing requirements, if any; and
- (c) information on bodies responsible for preparing, amending, and adopting standards-related measures.

Article 12.16

Universal Service Obligation

1. Each Party has the right to define the kind of universal service obligation it wishes to maintain.
2. Each Party shall administer any universal service obligation that it maintains in a manner that is transparent, non-discriminatory, and neutral with respect to competition. Each Party shall ensure that its universal service obligation is not more burdensome than necessary for the kind of universal service that it has defined. Universal service obligations defined according to these principles shall not be regarded per se as anti-competitive.
3. If a Party designates a universal service supplier, it shall do so in a manner that is efficient, transparent, non-discriminatory, and open to all suppliers of public telecommunication networks or services.
4. If a Party decides to compensate a universal service supplier, it shall ensure that such compensation is determined through a competitive process or a determination of net costs.

Article 12.17

International Mobile Roaming Services

1. The Parties shall endeavour to cooperate on promoting transparent and reasonable rates for international mobile roaming services that can help promote the growth of trade between the Parties and enhance consumer welfare.
2. Each Party shall consider steps to enhance transparency and competition with respect to international mobile roaming rates and technological alternatives to roaming services, including:

- (a) ensuring that information regarding retail rates is easily accessible to consumers, such as making information on retail rates accessible to consumers through industry codes of practice; and
 - (b) minimising impediments to the use of mobile roaming and technological alternatives, whereby consumers when visiting the territory of a Party from the territory of the other Party can access telecommunications services using the device of their choice.
- 3. Nothing in this Article shall require a Party to regulate rates or conditions for international mobile roaming services.

Article 12.18

Dispute Resolution

- 1. Each Party shall ensure that, in the event of a dispute arising between suppliers of telecommunications networks or services in connection with the rights and obligations that arise from this Chapter, and at the request of a supplier involved in the dispute, the telecommunications regulatory authority issues a binding decision within a reasonable period of time to resolve the dispute.
- 2. Each Party shall ensure that, if its telecommunications regulatory authority declines to initiate any action on a request to resolve a dispute, the telecommunications regulatory authority shall, upon request, provide a written explanation for its decision within a reasonable period of time.
- 3. Each Party shall ensure that a decision issued by its telecommunications regulatory authority is made publicly available, having regard to the requirements of business confidentiality.
- 4. Each Party shall ensure that the suppliers involved in the dispute:
 - (a) are given a full statement of the reasons on which the decision is based; and
 - (b) may appeal the decision, in accordance with paragraph 6 of Article 12.13 (Regulatory Principles).
- 5. For greater certainty, the procedure referred to in paragraphs 1 and 2 shall not preclude a supplier of telecommunications networks or services involved in a dispute from bringing an action before the courts in accordance with the laws and regulations of the Party.

Article 12.19

Confidentiality

1. Each Party shall ensure that suppliers that acquire information from another supplier in the process of negotiating arrangements pursuant to Articles 12.5 (Access and Use) to Article 12.8 (Interconnection with Major Suppliers) use that information solely for the purpose for which it was supplied and respect, at all times, the confidentiality of information transmitted or stored.⁵
2. Each Party shall adopt or maintain measures, in accordance with its laws and regulations, to protect the confidentiality of telecommunications and related traffic data of users over public telecommunications networks and services, without unduly restricting trade in telecommunications services.

Article 12.20 **Flexibility in the Choice of Technology**

1. Neither Party shall prevent a supplier of public telecommunications services from choosing the technologies it wishes to use to supply its services.
2. Notwithstanding paragraph 1, a Party may take measures to protect a legitimate public policy interest, provided that any measure is not applied in a manner that creates unnecessary obstacles to trade in services.

Article 12.21 **Cooperation**

1. The Parties recognise the transformational impact of telecommunications networks, infrastructure, and technologies (including those that are new and emerging), and the importance of these technologies to the Parties' respective economies and societies.
2. Accordingly, each Party shall adopt or maintain measures to:
 - (a) encourage a diverse and competitive market for telecommunications services and networks in its territory; and
 - (b) protect the security, resilience, and integrity of its telecommunications infrastructure.
3. The Parties shall endeavour to:
 - (a) exchange information on the opportunities and challenges associated with telecommunications networks, infrastructure, and technologies; and

⁵ For greater certainty, a Party can meet this obligation through the enforcement of non-disclosure agreements between the suppliers.

- (b) work together in international forums to promote a shared approach to these opportunities and challenges.