

Trade in Services Agreement (TiSA)

Annex on Electronic Commerce

Derived From: Classification Guidance
Dated September 16, 2013
Reason: 1.4(b)

* This document must be protected from unauthorized disclosure, but may be mailed or transmitted over unclassified e-mail or fax, discussed over unsecured phone lines, and stored on unclassified computer systems. It must be stored in a locked or secured building, room, or container.

Article 1: General Provisions

1. This Annex shall apply to measures by a Party affecting trade in services using [**CR considering**: or enabled by] electronic means.
2. [**CH propose; PK considering; AU/CA/CL/TW/CO/EU/IL/JP/KR/MU/MX/NZ/NO/PE/TR/US oppose**: This Annex is without prejudice to the policy objectives and legislation of the Parties in areas such as the protection of intellectual property, the protection of privacy and of the confidentiality of personal and commercial data, the protection of consumers and the protection and promotion of the diversity of cultural expressions (including through public funding and assistance).]
3. [**KR propose**: For greater certainty, the obligations contained in Article 2 (Movement of Information), Article 6 (Transfer or Access to Source Code) and Article 8 (Location of Computing Facilities) are subject to the relevant provisions and exceptions of this Agreement.]
4. [**CA/JP/KR/MU/NZ propose; AU/CL considering**: The obligations under Articles (Movement of Information, Transfer or Access to Source Code, and Location of Computing Facilities) [**AU/CA/KR/NZ propose; CL considering**: (Electronically Transmitted Content)] shall not apply to:
 - a) the measures adopted or maintained by a Party, which are set out in the List of Exemptions in accordance with Paragraph 2 of Article (Most-Favoured-Nation Treatment); and
 - b) [**CA propose; AU/NZ considering**: the terms, limitations, conditions and qualifications, which are set out in Party's Schedule.]]
5. [**CA/CL/TW/CO/HK/JP/KR/MU/MX/NZ/PK/PA/PE/US propose; AU/IL/NZ/CH considering**: This Annex shall not apply to:]
 - a) [**CA/CL/TW/CO/HK/JP/KR/MU/MX/PK/PA/PE/US propose; AU/CL/IL/NZ/CH considering** government procurement; or]
 - b) [**HK/JP/KR/MU/MX/PK/PA/PE propose; IL/CH considering; NZ oppose**: subsidies or grants provided by a Party including government-supported loans, guarantees, and insurance;]
 - c) [**CA/CL/TW/CO/KR/MU/NZ/PK propose, AU/MX/NZ/PE/US considering**: information held or processed by, or on behalf of, a Party or measures related to such information, including measures related to its collection.]

6. [**KR/MU/CH propose; MX/PK considering; AU/CA/CL/EU/NZ/NO/PE oppose:** This Annex does not apply to financial services.]

7. [**EU/MU propose; AU/CA/CL/TW/CO/IS/IL/JP/KR/LI/MX/NZ/NO/PK/US considering:** The Parties recognize the importance of measures conducive to the development of [consumer trust] in [digital trade] and in particular of measures covered by Article 3 (Online Consumer Protection), Article 4 (Personal Information Protection), Article 5 (Unsolicited Commercial Communications), and Article 9 (Electronic Authentication) of this Annex.]

<p>US: The possible applicability of Article 2 (Movement of Information) and Article 8 (Local Infrastructure) of this Annex to financial services is under consideration.</p>
--

Article 2: Movement of Information [CH propose: Cross-Border Information Flows ¹]

1. [CA/CL/TW/CO/MU/MX/NZ/PA/PE propose: [CH propose: Notwithstanding paragraph 2,] [CH oppose: The Parties recognize that] each Party [CH oppose: may have] [CH propose: has the right to apply] its own regulatory requirements concerning the transfer of information by electronic means.]
2. [HK/MU propose; IL considering: Subject to any measures adopted or maintained by a Party to protect the privacy of individuals in relation to personal data, and the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or disguised restriction on trade in services,] [CA/TW/CO/HK/JP/MX/PE/US propose; IL/MU considering: No Party may prevent a service supplier of another Party from transferring, [[JP oppose: accessing], processing or storing] information, including personal information, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business.]
3. [MU/CH propose: Parties should enhance their enforcement capacity to ensure that the applicable laws and regulations concerning the protection of data and privacy are complied with.]
4. [CA/CL/TW/CO/JP/MU/MX propose; PE/PK considering: 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 disguised a restriction on trade.]

US: The possible applicability of this Article to financial services is under consideration.

¹ [CH propose: This article is without prejudice to the policy objectives and legislation of Switzerland in the area of data protection.]

Article 3: Online Consumer Protection

1. The Parties recognize the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices 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 recognize the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare.

Article 4: Personal Information Protection

1. [AU/CA/CL/TW/CO/IL/JP/KR/MU/MX/NZ/NO/PA/PE/CH propose: The Parties recognize the [MU/CH propose: rights of consumers] [CH oppose: economic and social benefits] of [MU/CH propose: the protection of] [CH oppose: protecting] the personal information [CH oppose: of users of electronic commerce] [and the contribution that this makes to enhancing consumer confidence in electronic commerce].] [CH propose: ²]
2. [AU/CA/CL/TW/CO/IL/KR/MU/MX/NZ/NO/PA/PE/CH propose: [CH oppose: To this end,] each Party shall adopt or maintain a domestic legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of these personal information protection frameworks, each Party should take into account principles and guidelines of relevant international bodies.]
3. [CA/MU propose; CL/TW/CO/KR/MX considering: Each Party shall [CA propose; CL/CO considering: endeavour to] ensure that its domestic legal framework for the protection of personal information of users of electronic commerce is applied on a non-discriminatory basis.]
4. [AU/CA/CL/TW/CO/IL/JP/KR/MU/MX/NZ/NO/PA/PE/CH propose: Each Party [CH propose: shall] [CH oppose: should] publish [CH propose; AU/CA/KR/NZ oppose: comprehensive] information on the personal information protections it provides to users of electronic commerce, including:
 - a) how individuals can pursue remedies; and
 - b) how business can comply with any legal requirements.]

² [CH propose: It is understood that pursuant to this paragraph Parties may maintain and further develop their own legislation in the area of personal information protection.]

Article 5: 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; [or]
 - c) [**PK/PE/US propose; EU/IS/IL/LI/NO/CH oppose**: otherwise provide for the minimization of unsolicited commercial electronic messages.]
2. Each Party shall provide recourse against suppliers of unsolicited commercial electronic messages who do not comply with its 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 6: Transfer or Access to Source Code

1. **[CA/CO/JP/MU/CH propose; MX/PK/PE/US considering:** No Party may require the transfer of, or access to, source code of software owned by a person of another Party, as a condition **[CA/JP propose;** for supplying a service] [of providing services related to such software] in its territory].
2. **[CA/CO/JP/MU/CH propose; MX/PK considering:** Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph I 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 disguised a restriction on trade.]
3. **[JP propose; CA/CL/MU/PK/US considering:** Nothing in this Article shall preclude:
 - a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or
 - b) a Party from requiring the modification of source code of software necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement.]
4. **[JP propose; CA/CL/MU/PK/US considering:** 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 unauthorized disclosure under the law or practice of a Party.]

Article 7: Open Networks, Network Access and Use of the Internet

1. Each Party recognizes the benefit of [**EU oppose:** consumers] [**EU propose:** end users] in its territory, subject to applicable laws, and regulation being able to:
 - a) access [**EU propose:** distribute] and use services and applications of their choice available on the Internet subject to [**EU propose:** non-discriminatory and] reasonable network management;
 - b) connect their choice of end user devices to the Internet provided that such devices do not harm the network; and
 - c) have access to information on network management practices of their Internet Access service suppliers.

Article 8: Location of Computing Facilities [KR propose: ³]

1. [CA/CL/CO/IL/JP/MU/MX/PK/PE propose: The Parties recognize 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 communications.]
2. [CA/CL/CO/IL/JP/MU/PE/PK/US propose; MX considering; CH oppose: No Party may require a service supplier, as a condition for supplying a service in its territory, to use or locate computing facilities in the Party's territory.]
3. [CO/MU propose; PK considering: For greater certainty, nothing in paragraph 2 should prevent a Party from conditioning the receipt or continue receipt of an advantage on compliance with the requirement to use, establish, or expand computing facilities in its territory, including those needed for the processing or storage of data.]
4. [CA/CL/CO/IL/JP/MU/MX/PK/PE propose: Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a [PK considering: 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 disguised a restriction on trade.]

US: The possible applicability of this Article to financial services is under consideration.

³[KR propose; PK considering: Article 8 does not apply with respect to suppliers of public telecommunication networks or services.]

Article 9: Electronic Authentication and Electronic Signatures

1. Except where otherwise provided for in its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.
2. No Party may adopt or maintain measures for electronic authentication that would:
 - a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic authentication methods for that transaction; or
 - b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to electronic authentication.
3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of electronic authentication meet certain performance standards or be certified by an authority accredited in accordance with the Party's law.

Article 10: Customs Duties [on Electronic Transmissions]⁴

1. No Party may impose customs duties on [**US propose; CA/EU/IL/NO/CH oppose:** electronically transmitted content] [electronic transmissions].
2. For greater certainty, nothing in paragraph 1 prevents a Party from imposing internal taxes, fees or other charges on [electronic transmissions] [**US propose:** electronically transmitted content], provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

⁴ [**CA/JP propose; AU/CL/CO/KR/MU/NZ/NO/PK considering:** This Article is without prejudice to whether electronic transmissions are a good or a service.]

Article 11: Electronically Transmitted Content

1. [US propose; PK considering: No Party shall accord less favourable treatment to electronically transmitted content created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to electronically transmitted content of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like electronically transmitted content.⁵
2. The Parties understand that this Article does not apply to subsidies or grants provided by a Party including government-supported loans, guarantees and insurance.
3. This Article shall not apply to broadcasting.]

⁵ For greater certainty, to the extent that electronically transmitted content of a non-Party is “like electronically transmitted content,” it will qualify as “other like electronically transmitted content” for the purposes of paragraph 1 of this Article.

Article 12: International Cooperation

1. **[MU/PK propose:** Each Party shall **[MU oppose:** endeavour to] cooperate with the other Parties to increase the level of digital literacy globally and reduce the “digital divide.”]
- 1 alt.**[MU propose; PK considering:** Parties affirm their intention to work together and cooperate in international fora to increase the level of digital literacy and to reduce the global digital divide.]
2. **[MU propose; PK considering:** Parties **[MU oppose:** will] **[MU propose:** shall] **[MU oppose:** to the extent possible] exchange information in the area of electronic commerce. That may include information on, inter alia:
 - a) technological developments and research in the area of electronic commerce;
 - b) commercial and technical aspects of the supply of electronic commerce through all modes of supply;
 - c) available possibilities for the exchange of electronic commerce technology; and
 - d) applicable laws and regulations, legislative processes and recent legislative developments; applicable technical standards.]
3. **[MU/PK propose:** Parties will exchange views on developments related to electronic commerce at the international level.]
4. **[PK considering:** Parties affirm their intention to:
 - a) promote these provisions in order to contribute to the expansion and spread of electronic commerce ; and
 - b) cooperate with third countries with a view to enhancing national regulatory capacity and to contribute to the spread of electronic commerce which is a powerful tool for promoting economic development.]

[CO/CH propose alt: 1. Parties recognize the importance of exchanging information relating to the implementation of this Annex, and other aspects related to electronic commerce. To this end, Parties will endeavour to answer arising queries presented through the Contact Points (as established in Transparency Article 6.a.) related to issues concerning the development of electronic commerce, which may include:

- a) technological developments and research in the area of electronic commerce;
 - b) commercial and technical aspects of electronic commerce;
 - c) applicable laws and regulations, legislative processes and recent legislative developments; applicable technical standards.
2. Parties affirm their intention to cooperate with a view to enhancing national regulatory capacity and to contribute to the spread of electronic commerce which is a powerful tool for promoting economic development.]

Article 13

[MU/US propose; PK considering: Nothing in [Section III (Electronic Commerce)] shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.]

[PK propose: This Annex shall be construed without prejudice to the requirements of licensing provided in the laws of a Party for provision of any particular service.]

JP would like to clarify the meaning of “essential security interests” in paragraph 1 of this article.
--

Article 14: Definitions

For purposes of this Annex:

[**AU/CA/TW/CO/CR/IL/JP/KR/MU/MX/NZ/PK/PE/TR/US propose; HK considering:** electronic authentication means the process or act of [establishing] [TW/IL/JP/MU/MX/NZ/NO/PK/TR/US propose: verifying] the identity of a party to an electronic communication or transaction or [IL/PK/TR/US propose: and] ensuring the integrity of an electronic communication;]

[**CA/CL/JP/KR/MU/MX/PE/US propose; CO/PK considering:** computing facilities means computer servers and storage devices for the processing or storage of information for commercial use [KR propose; PK considering; and not for public telecommunications services];]

[**CA/CO/MU/US propose; PK considering:** customs duties includes any customs or import duty and a charge of any kind imposed in connection with the importation of a good, including any form of surtax or surcharge in connection with such importation, but does not include any:

- a) charge equivalent to an internal tax imposed consistently with Article III:2 of GATT 1994, in respect of like, directly competitive, or substitutable goods of the Party, or in respect of goods from which the imported good has been manufactured or produced in whole or in part;
- b) antidumping or countervailing duty that is applied pursuant to a Party's law; or
- c) fee or other charge in connection with importation commensurate with the cost of services rendered;]

[**CR/EU/MU/TR:** electronic signature means data in electronic form which are attached to or logically associated with other electronic data and fulfils the following requirements:

- a) it is used by a person to agree on the electronic data to which it relates;
- b) it is linked to the electronic data to which it relates in such a way that any subsequent alteration in the data is detectable;]

[**US propose:** electronic signature means data in electronic form that is in, affixed to, or logically associated with, an electronic document, and that may be used to identify the signatory in relation to the electronic document and indicate the signatory's approval of the information contained in the electronic document;]

[**US propose:** electronically transmitted content means any content that is digitally encoded and produced for commercial sale or distribution, including a computer program. For greater certainty, electronically transmitted content does not include digitized representations of financial instruments, including money. This definition is without prejudice to whether electronically transmitted content is a good;]

[**AU/CA/TW/CO/JP/KR/MU/MX/NZ/CH/TR propose:** personal information means any information, including data, about an identified or identifiable natural [**CH propose:** or juridical] person;]

Proponents will consult on this definition of personal information.

[**CR considering:** unsolicited commercial electronic message means an electronic message which is sent [**US considering:** primarily] for commercial [**HK oppose:** or marketing] purposes to an electronic [**PE propose:** mail] address without the consent of the recipient or against the explicit rejection of the recipient, using an Internet access service supplier and, to the extent provided for under the domestic laws and regulations of each Party, other telecommunications service.]