

Trade in Services Agreement (TiSA)

Annex on Electronic Commerce

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Article 1: General Provisions

1. This Annex shall apply to measures by a Party affecting trade in services using or enabled by electronic means.
2. The Parties recognise that electronic commerce provides opportunities for inclusive economic growth and recognise the importance of avoiding unnecessary barriers to its use and development.
3. The Parties recognise the need for measures that promote consumer confidence in electronic commerce, particularly 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.
4. **[CA/JP/KR/MU/PK/PE propose; AU/CL/NZ/TR considering:** The obligations under Articles (Movement of Information, Transfer or Access to Source Code, and Location of Computing Facilities)] **[AU/CA/KR/PK propose; CL/NZ/TR considering:** (Electronically Transmitted Content)] shall not apply to the terms, limitations, conditions and qualifications, which are set out in Party's Schedule.]
5. This Annex shall not apply to
 - (a) **[AU/CA/CL/CO/HK/JP/KR/MU/MX/PK/PA/PE//US propose; CH/CR/IL/NZ/TR considering; EU oppose:** government procurement; or]
 - (b) **[CL/HK/JP/KR/MU/MX/PK/PA/PE/TW propose; CR/IL/CH/TR considering:** subsidies or grants provided by a Party including government-supported loans, guarantees, and insurance;]
 - (c) **[CA/CL/CO/KR/MU/NZ/PK/TW 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.]

Parties agree to review 5(a) and (b) in light of horizontal discussions on these issues.
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5 bis. [CH propose; PK considering;

AU/CA/CL/CO/EU/IL/JP/KR/MU/MX/NZ/NO/PE/TR/TW/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).]

CH is ready to move its proposed paragraph into paragraph 5 if this helps move to consensus.

6. [CH/KR/MU propose; MX/NZ/PK considering; AU/CA/CL/EU/IS/NO/PE oppose:

This Annex does not apply to financial services.]

6 alt. [US propose: Articles 2 (Movement of Information) and 8 (Location of Computing Facilities) shall not apply to covered persons as defined in Article X.2 of the Annex on Financial Services.]

Articulation of the relationship between this Annex and other Annexes under Part III is under consideration.

Article 2: Movement of Information [CH propose:¹]

1. [AU/CA/CL/CO/IL/JP/MU/MX/NZ/PK/PA/PE/TW propose: [CH propose: Notwithstanding paragraph 2,] [CH oppose: The Parties recognise 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/CO/HK/JP/MX/PE/TW/US propose; IL/MU considering: No Party may prevent a service supplier of another Party from transferring, [[JP oppose: accessing],

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

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. [CA/CL/CO/JP/MU/MX/TW 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.]

Article 3: Online Consumer Protection

1. The Parties recognise 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 recognise 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/CH/CL/CO/IL/JP/KR/MU/MX/NZ/NO/PK/PA/PE/TR/TW propose; CR/HK/US considering: The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce.] [CH propose:²]
2. [AU/CA/CH/CL/CO/IL/JP/KR/MU/MX/NZ/NO/PA/PE/TR/TW propose; HK/US considering: [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

² [CH propose: Switzerland reserves the right to take all measures necessary to protect the personal data of natural and juridical persons.]

protection frameworks, each Party should take into account principles and guidelines of relevant international bodies.[**US propose:**³]

3. [**US propose:** Each Party shall endeavour to provide mechanisms to allow service suppliers of Parties with different legal frameworks to transfer information in and between the territories of both Parties. Such mechanisms may include an undertaking by a service supplier of another Party that is governed by a different legal framework to protect personal information in a manner substantially similar to the requirements of the Party's laws.]
4. [**CA/CL/CO/MU/PK propose; CO/KR/MX/TW considering:** Each Party shall 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.]
5. [**AU/CA/CH/CL/CO/HK/IL/JP/KR/MU/MX/NZ/NO/PA/PE/TW propose; CR/IS/LI/PK/TR/US considering:** Each Party [**CH propose:** shall] [**CH oppose:** should] publish [**CH propose; AU/CA/KR/NZ/US 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.]
6. [**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.]

Article 5: Unsolicited Commercial Electronic Messages

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

³ [**US propose:** For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy personal information or personal data protection laws, sector-specific laws covering privacy or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

- (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 **[EU propose:⁴]**; [or]
- (c) **[CL/CO/MU/PA/PK/PE/US propose; IL/NZ considering; EU/IS/LI/NO/CH oppose:** otherwise provide for the minimisation of unsolicited commercial electronic messages.]

Chair’s proposal; EU/LI/NO oppose: Parties to include Article 5 para 1c and include grey text in the definition of unsolicited commercial electronic message as well as “to an electronic address.”

- 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 [CL propose:⁵]

- 1. **[CA/CH/CO/JP/MU 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; US considering:** for supplying a service] [of providing services related to such software] in its territory].

⁴ **[EU propose:** For Parties that only maintain rules on unsolicited commercial messages for electronic mail, Article 5 will only apply to other messages once that Party has adopted rules on unsolicited commercial messages that also apply to other messages.]

⁵ **[CL propose:** For greater certainty, nothing in this Article shall be construed to be in conflict with any aspect of the free software and open source licensing systems. Therefore , it can have no adverse impact on private market licensing, distribution, and use of free software, nor can it adversely affect government software acquisition policy.]

2. **[CA/CH/CO/JP/MU propose; MX/PK considering:** Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 1 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 unauthorised disclosure under the law or practice of a Party.]

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

1. Each Party recognises the benefits of consumers in its territory, subject to applicable laws, and regulations being able to:
 - (a) access **[EU propose, CO/US oppose; NO considering:, distribute]** and use services and applications of their choice available on the Internet, subject to **[EU propose; CO/US oppose; NO considering: non-discriminatory and]** reasonable network management;

Parties to consult on package accepting “distribute” and removing “non-discriminatory.”

- (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:⁶]

1. [AU/CA/CL/CO/IL/JP/MU/MX/PK/PE propose: The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.]
2. [CA/CL/CO/IL/JP/MU/PE/PK/US propose; MX considering: 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.]

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

⁶ [KR propose; PK considering: Article 8 does not apply with respect to suppliers of public telecommunication networks or services.]

- 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]⁷

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

Article 11: Electronically Transmitted Content

1. [**US propose; CO/PK/PE considering; EU oppose:** 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.⁸

⁷ [**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.]

⁸ 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.

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.]

[US propose; AU oppose: Article X.X: Interactive Computer Services

1. The Parties recognise the importance of the promotion of interactive computer services as vital to the growth of electronic commerce.
2. To that end, other than as provided in paragraph 4 below, no Party may adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.
3. No Party shall impose liability on a supplier or user of an interactive computer service on account of:
 - (a) any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or
 - (b) any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable.
4. Nothing in this Article shall:
 - (a) apply to any measure of a Party pertaining to intellectual property, including measures addressing liability for intellectual property infringement; or
 - (b) be construed to enlarge or diminish a Party's ability to protect or enforce an intellectual property right; or
 - (c) be construed to prevent:

- (i) a Party from enforcing any criminal law; or
- (ii) a supplier or user of an interactive computer service from complying with a specific, lawful order of a law enforcement authority not inconsistent with the provisions of this Article.]

Article 12: International Cooperation

1. [**CH/CO/MU propose; CL/EU/PK considering:** Parties recognise 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; and
 - (c) applicable laws and regulations, legislative processes and recent legislative developments; applicable technical standards.
2. Parties affirm their intention to cooperate with a view [**CO/MU propose:** to reducing the digital divide,] 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/PK/US propose:** 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:** For greater certainty, 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:

electronic authentication means the process or act of verifying the identity of a party to an electronic communication or transaction or 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/NZ/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 [CA propose: pursuant to a Party's law] [NZ propose; CA oppose: consistently with the provisions of Article VI of GATT 1994, the implementation of Article VI of GATT, as may be amended , and the Agreement on Subsidies and Countervailing Measures in Annex IA to the WTO Agreement, as may be amended]; or
- (c) fee or other charge in connection with importation commensurate with the cost of services rendered;]

[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 digitised representations of

financial instruments, including money. This definition is without prejudice to whether electronically transmitted content is a good;]

[**US propose:** information content provider means any person or entity that creates or develops, in whole or in part, information provided through the Internet or any other interactive computer service;]

[**US propose:** interactive computer service means any system or service that provides or enables electronic access by multiple users to a computer server]

[**AU/CA/CL/TW/CO/HK/IL/ JP/KR/MU/MX/NZ/P A/PE/CH/TR/US propose:** **personal information** means any information, including data, relating to an identified or identifiable natural [**CH propose:** or juridical] person;]

unsolicited commercial electronic message means an electronic message which is sent for commercial purposes [**EU considering:** to an electronic [**CO/PE/US propose;** **AU/CH/IS/LI/MU/NZ/PA considering:** 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.