

CHAPTER 9 TELECOMMUNICATIONS

ARTICLE 9.1: SCOPE

1. This Chapter shall apply to measures adopted or maintained by a Party affecting trade in telecommunications services.
2. Except to ensure that enterprises operating broadcast stations and cable systems have continued access to and use of public telecommunications networks or services, this Chapter shall not apply to any measure relating to broadcast or cable distribution of radio or television programming.
3. Nothing in this Chapter shall be construed to require a Party to compel any enterprise to:
 - (a) establish, construct, acquire, lease, operate, or provide telecommunications networks or services not offered to the public generally; or
 - (b) make available its broadcast or cable facilities as a public telecommunications network where the enterprise is exclusively engaged in the broadcast or cable distribution of radio or television programming.

ARTICLE 9.2: 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.

Section A: Access to and Use of Public Telecommunications Networks or Services

ARTICLE 9.3: 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, including leased circuits, offered in its territory or across its borders on a timely basis, and on reasonable and non-discriminatory terms and conditions, including as set out in paragraphs 2 through 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 owned or leased circuits;
- (c) connect 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 service.

3. Each Party shall ensure that service suppliers of the other Party may use public telecommunications networks or services for the movement of information in its territory or across its borders, including for intra-corporate communications, and for access to information 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.

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

- (a) ensure the security and confidentiality of messages; and
- (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 a disguised restriction on trade in services.

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

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

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

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

- (b) requirements, where necessary, for the inter-operability of such networks or services; and
- (c) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks.

Section B: Suppliers of Public Telecommunications Networks or Services

ARTICLE 9.4: OBLIGATIONS RELATING TO SUPPLIERS OF PUBLIC TELECOMMUNICATIONS NETWORKS OR SERVICES²⁵

Interconnection

1. Each Party shall ensure that:
 - (a) 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. The rates, terms and conditions of such interconnection will generally be determined through commercial negotiation between the service suppliers concerned, in accordance with the laws and regulations of the Party; and
 - (b) in carrying out subparagraph (a), suppliers of public telecommunications networks or services in its territory take reasonable steps to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications networks or services and only use such information for the purpose of providing these services.

Number Portability

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

Dialling Parity

3. Each Party shall ensure that:

²⁵ This Article is subject to Annex 9-A.

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

Section C: Additional Obligations Relating to Major Suppliers of Public Telecommunications Networks or Services²⁶

ARTICLE 9.5: 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 suppliers accord in like circumstances to its subsidiaries, its affiliates, or non-affiliated service suppliers regarding:

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

ARTICLE 9.6: COMPETITIVE SAFEGUARDS

1. Each Party shall maintain appropriate measures for the purposes of preventing suppliers of public telecommunications networks or services that, alone or together, are a major supplier in its territory, from engaging in or continuing anticompetitive practices.

2. The anticompetitive practices referred to in paragraph 1 include, in particular:

- (a) engaging in anticompetitive cross-subsidisation;
- (b) using information obtained from competitors with anticompetitive results;
- (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; and

²⁶ This Section is subject to Annex 9-B.

- (d) pricing services in a manner that is likely to unreasonably restrict competition, including predatory pricing.

ARTICLE 9.7: RESALE

1. Each Party shall ensure that major suppliers in its territory do not impose unreasonable or discriminatory conditions or limitations on the resale of their public telecommunications services by suppliers of public telecommunications services of the other Party, where such conditions or limitations would have anticompetitive results.

2. Where a Party requires a major supplier of public telecommunications services in its territory to offer for resale, 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, it shall ensure that such services are offered for resale at reasonable rates.²⁷

ARTICLE 9.8: UNBUNDLING OF NETWORK ELEMENTS

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

ARTICLE 9.9: INTERCONNECTION

1. Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities and equipment of suppliers of public telecommunications networks or services of the other Party:

- (a) at any technically feasible point in the major supplier's network;
- (b) under non-discriminatory terms, conditions (including technical standards and specifications) and rates;

²⁷ For the purposes of paragraph 2:

- (a) a Party may determine reasonable rates through any methodology it considers appropriate; and
- (b) wholesale rates, set in accordance with the laws and regulations of a Party, shall be considered reasonable.

- (c) of a quality no less favourable than that provided by the major supplier for its own like services, for like services of non-affiliated service suppliers, or for its subsidiaries or other affiliates;
- (d) in a timely fashion, and on terms and conditions (including technical standards and specifications) and at cost-oriented rates, that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the suppliers seeking interconnection need not pay for network components or facilities that they do not require for the service to be provided; and
- (e) on request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

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 in accordance with at least one of the following options:²⁸

- (a) a reference interconnection offer or another standard interconnection offer containing the rates, terms, and conditions that the major supplier offers generally to suppliers of public telecommunications networks or services;
- (b) the terms and conditions of an existing interconnection agreement; or
- (c) through negotiation of a new interconnection agreement.

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

4. Each Party shall ensure that major suppliers in its territory may be required to file interconnection agreements with the Party's telecommunications regulatory body.

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

ARTICLE 9.10: 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 reasonable period of time, on

²⁸ For Australia, these options include arbitration.

terms and conditions, and at rates, that are reasonable, non-discriminatory and transparent.

2. In carrying out paragraph 1, each Party shall provide its telecommunications regulatory body with the authority to require major suppliers in its territory to offer 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 9.11: 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 on a timely basis and on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory and transparent.

2. Notwithstanding paragraph 1, where physical co-location is not practical for technical reasons or because of space limitations, each Party shall ensure that major suppliers in its territory provide an alternative solution on a timely basis and on terms and conditions, and at cost-oriented rates, that are reasonable, non-discriminatory and transparent.

3. Each Party may determine, in accordance with its laws and regulations, which premises in its territory are subject to paragraphs 1 and 2.

ARTICLE 9.12: ACCESS TO TELECOMMUNICATIONS FACILITIES

1. Each Party shall ensure that major suppliers in its territory provide access to poles, ducts, conduits, rights of way and any other structures deemed necessary by the Party, owned or controlled by major suppliers to suppliers of public telecommunications networks or services of the other Party in the Party's territory on a timely basis and on terms and conditions, and at 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 or other structures to which it requires major suppliers in its territory to provide access under paragraph 1.

Section D: Other Measures

ARTICLE 9.13: SUBMARINE CABLE SYSTEMS

Where a supplier of telecommunications networks or services operates a submarine cable system to provide public telecommunications networks or services, the Party in whose territory the supplier is located shall ensure that such supplier accords the suppliers of public telecommunication networks or services of the other Party reasonable and non-discriminatory treatment with respect to access²⁹ to that submarine cable system (including landing facilities) in its territory.

ARTICLE 9.14: CONDITIONS FOR THE SUPPLY OF VALUE-ADDED SERVICES

1. Neither Party shall require a service supplier in its territory that it classifies as a supplier of value-added services and that supplies those services over facilities that the supplier does not own to:

- (a) supply those services to the public generally;
- (b) cost-justify its rates for those services;
- (c) file a tariff for those services;
- (d) connect its networks with any particular customer for the supply of those services; or
- (e) conform with any particular standard or technical regulation of the telecommunications regulatory body for connecting to any other network, other than a public telecommunications network.

2. Notwithstanding paragraph 1, a Party may take the actions described in paragraph 1 to remedy a practice of a supplier of value-added services that the Party has found in a particular case to be anticompetitive in accordance with its laws and regulations, or to otherwise promote competition or safeguard the interests of consumers.

²⁹ For greater certainty:

- (a) access to submarine cable landing facilities is subject to capacity; and
- (b) with respect to access for suppliers of public telecommunications networks or services of the other Party that do not own facilities in the territory of the Party, a Party may comply with this provision by ensuring access to submarine cable systems through facilities leased from, or public telecommunications services provided by, a supplier of public telecommunications networks or services licensed in its territory.

ARTICLE 9.15: INDEPENDENT REGULATORY BODIES

1. Each Party shall ensure that its telecommunications regulatory body is separate from and functionally independent of any supplier of public telecommunications networks or services. To this end, each Party shall ensure that its telecommunications regulatory body does not own equity³⁰ or maintain an operating or management 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 market participants³¹ and shall be made and implemented on a timely basis.

ARTICLE 9.16: 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 9.17: LICENSING PROCESS

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

- (a) all the licensing criteria and procedures it applies;
- (b) the period it normally requires to reach a decision concerning an application for a licence; and
- (c) the terms and conditions of all licences in effect.

2. Each Party shall ensure that, on request, an applicant receives the reasons for the denial of, revocation of, refusal to renew, or imposition of conditions on, a licence.

³⁰ For greater certainty, this paragraph shall not prohibit a government entity of a Party other than the telecommunications regulatory body from owning equity in a supplier of telecommunications services.

³¹ For greater certainty, the term “market participants” includes service suppliers seeking to participate in the telecommunications market.

ARTICLE 9.18: ALLOCATION AND USE OF SCARCE TELECOMMUNICATIONS RESOURCES

1. Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies, numbers, and rights of way, in an objective, timely, transparent and non-discriminatory manner.
2. Each Party shall make publicly available the current state of allocated frequency bands but shall not be required to provide detailed identification of frequencies allocated or assigned for specific government uses.
3. For greater certainty, a Party's measures allocating and assigning spectrum and managing frequency are not measures that are *per se* inconsistent with Article 7.4 (Market Access) either as it applies to Chapter 7 (Cross-Border Trade in Services) or through the operation of Article 7.1 (Scope) to Chapter 11 (Investment). Accordingly, each Party shall retain 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 that 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.
4. Each Party shall endeavour to allocate and assign spectrum for non-government telecommunications services in a transparent manner that considers the overall public interest, including the encouragement of the economically efficient use of the spectrum and competition among suppliers of telecommunications services, and recognising that a Party may encourage such activities through a variety of means, including through administrative incentive pricing, auctions, or unlicensed use.

ARTICLE 9.19: ENFORCEMENT

1. Each Party shall provide its telecommunications regulatory body with the authority to enforce the Party's measures relating to the obligations in Articles 9.3 through 9.13.
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), corrective orders, or the modification, suspension, or revocation of licences.

ARTICLE 9.20: RESOLUTION OF TELECOMMUNICATIONS DISPUTES

Further to Articles 19.3 (Administrative Proceedings) and 19.4 (Review and Appeal), each Party shall ensure that:

Recourse

- (a) suppliers of public telecommunications networks or services may have recourse to a telecommunications regulatory body or other relevant body of the Party to resolve disputes between suppliers of public telecommunications networks or services on a timely basis regarding measures relating to matters in Articles 9.3 through 9.13;
- (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 have recourse, within a reasonable and publicly specified period after the supplier requests interconnection, to a telecommunications regulatory body or other relevant body to resolve disputes regarding the terms, conditions, and rates for interconnection with such major supplier; and

Judicial Review

- (c) any service supplier whose legally-protected 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 of the Party. Neither Party shall permit the making of 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 otherwise determines.

ARTICLE 9.21: TRANSPARENCY

Further to Article 19.1 (Publication), each Party shall ensure that:

- (a) regulatory decisions, including the basis for such decisions, of its telecommunications regulatory body are promptly published or otherwise made available to all interested persons;
- (b) its measures relating to public telecommunications networks or services are made publicly available, including:
 - (i) tariffs and other terms and conditions of service;
 - (ii) specifications of technical interfaces;
 - (iii) conditions for attaching terminal or other equipment to public telecommunications networks;

- (iv) notification, permit, registration, or licensing requirements, if any;
 - (v) the amendment and adoption of measures concerning technologies or standards affecting access and use; and
 - (vi) procedures relating to judicial or administrative review; and
- (c) its telecommunications regulatory body or other relevant body provides, on request by a supplier of public telecommunications networks or services of the other Party, a written explanation of reasons for any decision that denies access of the kind specified in Articles 9.9, 9.11 and 9.12.

ARTICLE 9.22: MEASURES CONCERNING TECHNOLOGIES AND STANDARDS³²

1. Neither Party shall prevent suppliers of public telecommunications networks or services or value-added services from having the flexibility to choose the technologies that they use to supply their services.

2. Notwithstanding paragraph 1, a Party may apply a measure that limits the technologies or standards that a supplier of public telecommunications networks or services or value-added services may use to supply its services, provided that the measure is designed to satisfy a legitimate public policy objective and is not prepared, adopted or applied in a manner that creates unnecessary obstacles to trade.³³

ARTICLE 9.23: CONSULTATION WITH INDUSTRY

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

³² For greater certainty, except for paragraph 1, this Article shall not apply to measures adopted before the date of entry into force of this Agreement.

³³ For greater certainty:

- (a) a Party retains the right to define its own legitimate public policy objectives; and
- (b) whenever such a measure is based on relevant international standards, it shall be rebuttably presumed not to create unnecessary obstacles to trade.

ARTICLE 9.24: RELATION TO INTERNATIONAL ORGANISATIONS

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

ARTICLE 9.25: COMMITTEE ON TELECOMMUNICATIONS

1. For the purposes of the effective implementation and operation of this Chapter, the Committee on Telecommunications, established in accordance with Article 21.4 (Committees and Working Groups), shall comprise officials of each Party, including officials responsible for telecommunications.

2. The Committee shall:

- (a) review and monitor the implementation and operation of this Chapter; and
- (b) discuss any issues related to this Chapter, and other issues relevant to the telecommunications sectors of the Parties.

3. Further to Article 21.4 (Committees and Working Groups), the Committee shall, as appropriate, report its findings and the outcomes of its discussions to the Joint Committee.

4. The Committee shall meet as agreed by the Parties.

5. The Parties may invite, by mutual consent, representatives of relevant entities other than the governments of the Parties, including those from the private sector, with the necessary expertise relevant to the issues to be discussed, to attend meetings of the Committee.

Section E: Definitions

ARTICLE 9.26: DEFINITIONS

For the purposes of this Chapter:

co-location (physical) 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 provide public telecommunications networks or services;

commercial mobile services means public telecommunications services supplied through mobile wireless means;

cost-oriented means based on cost, and may include a reasonable profit and may involve different cost methodologies for different facilities or services;

dialling parity means the ability of an end-user to use an equal number of digits to access the same type of public telecommunications service, regardless of the supplier of public telecommunications services chosen by such end-user and in a way that involves no unreasonable dialling delays;

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 provide a service;

interconnection means linking with suppliers providing public telecommunications services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier;

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

major supplier means a supplier of public telecommunications services that has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for public telecommunications services as a result of:

- (a) control over essential facilities; or
- (b) use of its position in the market;

network element means a facility or equipment used in supplying a public 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 to any other user of like public telecommunications networks or services in like circumstances;

number portability means the ability of end-users of public telecommunications services to retain, at the same location, the same telephone numbers when switching between suppliers of the same type of public telecommunications services;

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

public telecommunications networks or services means public telecommunications networks, or public telecommunications services, or public telecommunications networks and services;

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, and excludes value-added services;

service supplier of the other Party means a person of the other Party that seeks to supply or supplies a service, including a supplier of public telecommunications networks or services;

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

telecommunications regulatory body means any body or bodies at the central level of government responsible for the regulation of telecommunications;

user means an end-user or a supplier of public telecommunications networks or services; and

value-added services means services that add value to telecommunications services through enhanced functionality. For Australia, these are telecommunications services for which suppliers add value to customer information by enhancing its form or content or by providing for its storage or retrieval. For Korea, these are services as defined in subparagraph 12 of Article 2 of the *Telecommunications Business Act*.

ANNEX 9-A
SUPPLIERS OF PUBLIC TELECOMMUNICATIONS SERVICES

Korea

Article 9.4.3 shall not apply to Korea with respect to suppliers of international public telecommunications services.

ANNEX 9-B
EXEMPTIONS FROM SECTION C: ADDITIONAL OBLIGATIONS
RELATING TO MAJOR SUPPLIERS OF PUBLIC TELECOMMUNICATIONS
NETWORKS OR SERVICES

Korea

1. Major suppliers shall be exempt from the application of the obligations specified in Articles 9.8, 9.9.1(a), 9.9.1(e), 9.11 and 9.12 to the extent that the supplier of public telecommunications networks or services of the other Party is a non-facilities based supplier.

2. Notwithstanding Articles 9.9.1(b), 9.9.1(d) and 9.10, Korea may permit major suppliers to offer rates, terms, and conditions to non-facilities based suppliers of public telecommunications services that are discriminatory compared to the rates, terms and conditions offered to facilities-based suppliers of public telecommunications services. For greater certainty, this provision does not derogate from Article 9.20, and non-facilities based suppliers of public telecommunications services may have recourse to the telecommunications regulatory body or other relevant body regarding disputes over such rates, terms, and conditions.

3. Consistent with Article 5.3 of the *Telecommunications Business Act*, a “non-facilities based supplier” is a licensed supplier of public telecommunications services that does not own wire or wireless lines or other transmission facilities, but may own a switch, router, or multiplexer, and supplies its public telecommunications services through transmission facilities of a licensed facilities-based supplier.

4. Major suppliers shall be exempt from the application of the obligations specified in Articles 9.5, 9.7, 9.8 and Articles 9.10, 9.11 and 9.12 to the extent that they are supplying commercial mobile services.