

CHAPTER 12
TELECOMMUNICATIONS

Article 12.1
Definitions

For the purposes of this Chapter:

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

“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 networks or 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;

“international mobile roaming service” means a commercial mobile service provided pursuant to a commercial 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 particular user;

“licence” means any authorisation that a Party may require of a person, in accordance with its laws and regulations, in order for that person to offer a public telecommunications network or service, including concessions, permits or registrations;

“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:

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

“network element” means a facility or equipment used in the provision of 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, in like circumstances, to users of like public telecommunications networks or services, including with respect to timeliness;

“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 the same category of suppliers of public telecommunications services;

“public telecommunications network” means telecommunications infrastructure used to provide public telecommunications services between defined network termination points;

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

“reference interconnection offer” means a publicly available interconnection offer extended by a major supplier and filed with, approved by, or determined by, a telecommunications regulatory authority that sufficiently details the terms, rates, and conditions for interconnection so that a supplier of public telecommunications networks or 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 regulatory authority ¹” means a body or bodies responsible for the regulation of telecommunications; and

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

¹ For greater certainty, for Australia, the telecommunications regulatory authorities are the Australian Communications and Media Authority (or its successor) and the Australian Competition and Consumer Commission (or its successor).

Article 12.2
Scope

1. This Chapter applies to measures of a Party affecting trade in telecommunications services.
2. This Chapter does not apply to:
 - (a) audio-visual services;
 - (b) any measure affecting services providing, or exercising editorial control over, content transmitted using telecommunications networks or services; or
 - (c) any measure affecting broadcast or cable distribution of radio or television programming, except that:
 - (i) Article 12.4 (Access and Use) applies with respect to a cable or broadcast services supplier's access to and use of public telecommunications services; and
 - (ii) Article 12.21 (Transparency) applies to any measure affecting broadcast or cable distribution of radio or television programming, to the extent that the measure also affects public telecommunications networks or services.
3. Nothing in this Chapter shall be construed to:
 - (a) require a Party, or require a Party to compel an enterprise, to establish, construct, acquire, lease, operate, or provide a telecommunications network or service not offered to the public generally;
 - (b) require a Party to compel an enterprise exclusively engaged in the broadcast or cable distribution of radio or television programming to make available its broadcast or cable facilities as a public telecommunications network; or
 - (c) prevent a Party from prohibiting a person who operates a private network from using its private network to supply a public telecommunications network or service to third persons.

Article 12.3
Approaches to Regulation

1. The Parties recognise the value of competitive markets to deliver a wide choice in the supply of telecommunications networks or 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 suppliers of telecommunications services that do not own network facilities; or
 - (c) use any other appropriate means that benefit the long-term interests of end-users.
3. A Party that refrains from engaging in regulation in accordance with this Article remains subject to the obligations under this Chapter.

Article 12.4 Access and Use

1. Each Party shall ensure that any service supplier of the other Party has 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, transparent, and non-discriminatory terms and conditions. This obligation shall be applied, inter alia, through 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) interconnect leased or owned circuits with public telecommunications networks or services or with circuits leased or owned by another service supplier;
 - (d) use operating protocols of their 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 or services for the movement of information in its territory or across its borders, including for intra-corporate communications of such service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in the territory of either Party.
4. Notwithstanding paragraph 3, a Party may take such measures as are necessary to:
 - (a) ensure the security and confidentiality of messages; or
 - (b) protect the privacy of personal data of end-users of public telecommunications networks or services,subject to the requirement that the measures taken 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 those networks and services;
 - (b) a requirement, if necessary, for the interoperability of those networks and services;
 - (c) type approval of terminal or other equipment that interfaces with the network and technical requirements relating to the attachment of that equipment to those networks; and
 - (d) notification, registration, and licensing.

Article 12.5

Access to Essential Facilities and Unbundled Network Elements

1. Subject to paragraph 2, each Party shall ensure that major suppliers in its territory provide to suppliers of public telecommunications networks or services of the other Party:
 - (a) access to essential facilities²; and
 - (b) access to network elements on an unbundled basis,for the purpose of providing public telecommunications networks or services on terms and conditions, and at cost-oriented rates, which are reasonable, non-discriminatory, and transparent. Subject to technical feasibility, access shall be provided on a timely basis.
2. Each Party may determine, in accordance with its laws and regulations:
 - (a) the essential facilities to which a major supplier must provide access; and
 - (b) the network elements a major supplier must provide on an unbundled basis.
3. If a Party makes a determination under subparagraphs 2(a) or 2(b), it shall take into account factors such as the competitive effect of lack of access and the long-term interests of end-users.

Article 12.6

Resale

1. Neither Party shall prohibit the resale of any public telecommunications services.
2. Each Party may determine, in accordance with its laws and regulations, which public telecommunications services must be offered for resale by major suppliers of public telecommunications services, taking into account the need to promote competition or benefits to the long-term interests of end-users. Where a Party has determined that a service must be offered for resale by major suppliers, that Party shall ensure that any major suppliers in its territory do not impose unreasonable or discriminatory conditions or limitations on the resale of that service.

² The major supplier's essential facilities may include leased circuit services, poles, ducts, conduits, and rights-of-way.

Article 12.7
Competitive Safeguards

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, on a timely basis, to suppliers of public telecommunications networks or services, technical information about essential facilities and commercially relevant information that is necessary for them to provide services.

Article 12.8
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 itself, its subsidiaries, its affiliates, or non-affiliated suppliers of public telecommunications networks or services regarding the:

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

Article 12.9
Interconnection with Suppliers

1. Each Party shall ensure that suppliers of public telecommunications networks or services in its territory:
 - (a) provide interconnection with suppliers of public telecommunications networks or services of the other Party; or

- (b) enter into negotiations for interconnection with suppliers of public telecommunications networks or services of the other Party, if requested to do so by that supplier.
2. In carrying out paragraph 1, each Party shall ensure that suppliers of public telecommunications networks or services in its territory take reasonable steps to protect the confidentiality of commercially sensitive information of, or relating to, suppliers and end-users of public telecommunications services obtained as a result of interconnection arrangements and that those suppliers only use that information for the purpose of providing these services.

Article 12.10
Interconnection with Major Suppliers

1. Each Party shall ensure that major suppliers in its territory provide interconnection for the facilities 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 and conditions (including as regards rates, technical standards, specifications, quality and maintenance);
 - (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) on a timely basis, and on terms, conditions (including technical standards and specifications), and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does 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 with major suppliers in its territory through at least one of the following options:
- (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. In addition to the options provided in paragraph 2, each Party shall ensure that suppliers of public telecommunications services of the other Party have the opportunity to interconnect their facilities and equipment with those of the major supplier through the negotiation of a new interconnection agreement.
- 4. Each Party shall ensure that the applicable procedures for interconnection negotiations with major suppliers in its territory are made publicly available.
- 5. Each Party shall ensure that major suppliers in its territory make publicly available either their interconnection agreements or a reference interconnection offer.

Article 12.11
Number Portability

Each Party shall ensure that suppliers of public telecommunications services in its territory provide number portability, for those services designated by that Party, without impairment to quality, reliability, or convenience, to the extent technically feasible, on a timely basis, and on reasonable and non-discriminatory terms and conditions.

Article 12.12
Access to Numbers

Each Party shall ensure that suppliers of public telecommunications services of the other Party established in its territory are afforded access to telephone numbers on a non-discriminatory basis.

Article 12.13
International Mobile Roaming

- 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. A Party may choose to take steps to enhance transparency and competition with respect to international mobile roaming rates and technological alternatives to roaming services, such as:
 - (a) ensuring that information regarding retail rates is easily accessible to consumers; and

- (b) minimising impediments to the use of technological alternatives to roaming, 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. Each Party shall ensure that suppliers of public telecommunications services in its territory, or its telecommunications regulatory authority, make publicly available information on retail rates for international mobile roaming services for voice, data, and text messages offered to consumers when visiting the territory of the other Party.
 4. The Parties recognise that a Party, if it has the authority to do so, may choose to adopt or maintain measures affecting rates for wholesale international roaming services with a view to ensuring that those rates are reasonable. If a Party considers it appropriate, it may cooperate on and implement mechanisms with the other Party to facilitate the implementation of those measures, including by entering into arrangements with the other Party.
 5. If the Parties enter into an arrangement to reciprocally regulate rates or conditions for wholesale international mobile roaming services for suppliers of public telecommunications services of both Parties, each Party shall ensure that suppliers of public telecommunications services of the other Party have access to the regulated rates or conditions³ for wholesale international mobile roaming services for the suppliers' customers roaming in that Party's territory.⁴
 6. A Party that ensures access to regulated rates or conditions for wholesale international mobile roaming services in accordance with paragraph 5 shall be deemed to be in compliance with its obligations under Article 8.4 (Most-Favoured-Nation Treatment – Cross-Border Trade in Services), Article 12.4 (Access and Use), and Article 12.8 (Treatment by Major Suppliers) with respect to international mobile roaming services.
 7. Nothing in this Article shall require a Party to regulate rates or conditions for international mobile roaming services.

³ For greater certainty, access under paragraph 5 to the rates or conditions regulated by a Party shall be available to a supplier of the other Party only if those regulated rates or conditions are reasonably comparable to those reciprocally regulated under the arrangement referred to in this paragraph. The telecommunications regulatory authority of the first Party shall, in the case of disagreement, determine whether the rates or conditions are reasonably comparable.

⁴ For greater certainty, neither Party shall, solely on the basis of any obligations owed to it by the other Party under a most-favoured-nation provision, or under a telecommunications-specific non-discrimination provision, in any existing international trade agreement, seek or obtain for its suppliers the access to regulated rates or conditions for wholesale international mobile roaming services that is provided under this Article.

Article 12.14
Submarine Cable Landing Stations and Systems

1. Each Party shall ensure, in accordance with its laws and regulations, that suppliers of public telecommunications networks or services of the other Party has access to submarine cable landing stations and systems in its territory on reasonable, non-discriminatory, and transparent terms and conditions for the purpose of providing a public telecommunications network or service.
2. Each Party may mitigate the risk of damage to submarine telecommunications cable landing stations and systems in its territory that are operated, owned, or controlled by a person of the other Party, which may include measures to maintain the functionality of the cable system.

Article 12.15
Independent Regulatory Authorities

1. Each Party shall ensure that its telecommunications regulatory authority is separate from, and not accountable to, any supplier of public telecommunications networks or services. With a view to ensuring the independence and impartiality of telecommunications regulatory authorities, each Party shall ensure that its telecommunications regulatory authority does not hold a financial interest⁵ or maintain an operating or management role in any supplier of public telecommunications networks or services.
2. Each Party shall ensure that the regulatory decisions and procedures of its telecommunications regulatory authority are impartial with respect to all market participants.
3. Neither Party shall accord more favourable treatment to a supplier of telecommunications services in its territory than that accorded to a like service supplier of the other Party on the basis that the supplier receiving more favourable treatment is owned by the national government of the Party.

Article 12.16
Universal Service

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 transparent, non-discriminatory, and competitively neutral manner, and

⁵ This paragraph shall not be construed to prohibit a government entity of a Party other than the telecommunications regulatory authority from owning equity in a supplier of public telecommunications networks or services.

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.

Article 12.17
Licensing and Authorisation Process

1. Each Party may permit a supplier of public telecommunications services to provide their services without prior formal authorisation, such as a licence.
2. If a Party requires a supplier of a public telecommunications services to have a licence, the Party shall ensure the public availability of:
 - (a) all the licensing criteria and procedures that it applies;
 - (b) the period of time normally required to reach a decision concerning an application for a licence; and
 - (c) the terms and conditions of individual licences.
3. Each Party shall ensure that, on request, an applicant receives the reasons for the:
 - (a) denial of a licence;
 - (b) imposition of supplier-specific conditions on a licence;
 - (c) revocation of a licence; or
 - (d) refusal to renew a licence.

Article 12.18
Scarce Resources

1. Each Party shall administer its procedures for the allocation and use of scarce resources, including radio spectrum, 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 detailed identification of radio spectrum that is allocated or assigned for specific government uses is not required.
3. A measure of a Party allocating and assigning spectrum and managing frequency is not per se inconsistent with Article 8.5 (Market Access – Cross-Border Trade in Services) and Article 13.4 (Market Access – Investment).

Accordingly, each Party retains the right to establish and apply spectrum and frequency management policies that may have the effect of limiting the number of suppliers of public telecommunications services, provided that the Party 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.

4. When making a spectrum allocation for commercial telecommunications services, each Party shall endeavour to rely on an open and transparent process that considers the public interest, including the promotion of competition. Each Party may rely on market-based approaches, such as auctions, to assign spectrum for commercial use.

Article 12.19 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 apply a measure that limits the technologies that a supplier of public telecommunications networks or services may use to supply its services, provided that the measure is designed to achieve a legitimate public policy interest and is not adopted or applied in a manner that creates unnecessary obstacles to trade in services.
3. If a Party finances the development of advanced networks,⁶ it may make its financing conditional on the use of technologies that meet its legitimate public policy interests.

Article 12.20 Resolution of Telecommunications Disputes

Each Party shall ensure that:

- (a) suppliers of public telecommunications networks or services of the other Party have timely recourse to a telecommunications regulatory authority or judicial authority of the Party to consider and, to the extent provided for in its laws and regulations, to resolve a dispute regarding the Party's measures relating to the obligations contained in this Chapter;

⁶ For greater certainty, "advanced networks" includes broadband networks.

- (b) in the event of a dispute referred to in subparagraph (a), the telecommunications regulatory authority or judicial authority of the Party:
 - (i) issues a binding decision to resolve a dispute;
 - (ii) provides a supplier that is a party to the dispute with the reasons for its decision; and
 - (iii) make its decision publicly available to the extent provided for in its laws and regulations;
- (c) notwithstanding subparagraph (b), if the telecommunications regulatory authority of the Party declines to initiate an action on a request to resolve a dispute, it provides the supplier of the other Party that is a party to the dispute with the reasons for its decision;
- (d) a supplier of public telecommunications networks or services of the other Party aggrieved by a decision of the telecommunications regulatory authority has the right to appeal that decision to a judicial authority. That appeal shall not constitute grounds for noncompliance by that supplier with the decision, unless its relevant authority determines otherwise.
- (e) in the hearing of an appeal by a judicial authority referred to in subparagraph (d):
 - (i) a supplier that is a party to the appeal has a reasonable opportunity to obtain sufficient information to form informed views on the issues to be determined in the appeal and to provide those views to the judicial authority;
 - (ii) the judicial authority takes into account views provided by that supplier; and
 - (iii) the judicial authority makes available to that supplier its decision and the reasons on which the decision is based; and
- (f) a supplier of public telecommunications services of the other Party that has requested interconnection with a major supplier in the Party's territory may seek review, within a reasonable and publicly specified period of time after the supplier requests interconnection, by its telecommunications regulatory authority to resolve a dispute regarding the terms, conditions, and rates for interconnection with that major supplier.

Article 12.21 Transparency

1. Further to Chapter 28 (Transparency and Anti-Corruption), each Party shall endeavour to ensure that:
 - (a) telecommunications service suppliers are provided with adequate advance notice of, and opportunity to comment on, a regulatory decision of general application that its telecommunications regulatory authority proposes; and
 - (b) suppliers of public telecommunications networks or services of the other Party are, on request, provided with a clear and detailed explanation of the reasons for a decision to deny access of the kind specified in Article 12.5 (Access to Essential Facilities and Unbundled Network Elements) and Article 12.10 (Interconnection with Major Suppliers) where that decision is made, approved, endorsed, or authorised by the Party.

2. Further to Chapter 28 (Transparency and Anti-Corruption), each Party shall ensure that its measures relating to public telecommunications networks or services are made publicly available, including:
 - (a) tariffs and other terms and conditions of service;
 - (b) specifications of technical interfaces;
 - (c) conditions for attaching terminal or other equipment to the public telecommunications network;
 - (d) notification, permit, registration, or licensing requirements, if any;
 - (e) general procedures relating to resolution of telecommunications disputes provided for in Article 12.20 (Resolution of Telecommunications Disputes); and
 - (f) information on bodies responsible for preparing, amending, and adopting standards-related measures.

Article 12.22 Enforcement

Each Party shall provide its telecommunications regulatory authority with the authority to enforce the Party's measures relating to the obligations in Article 12.4 (Access and Use), Article 12.5 (Access to Essential Facilities and Unbundled Network Elements), Article 12.6 (Resale), Article 12.7 (Competitive Safeguards), Article 12.8 (Treatment by Major Suppliers), Article 12.9 (Interconnection with

Suppliers), Article 12.10 (Interconnection with Major Suppliers), Article 12.11 (Number Portability), Article 12.12 (Access to Numbers), Article 12.14 (Submarine Cable Landing Stations and Systems), and Article 12.17 (Licensing and Authorisation Process). That authority shall be exercised transparently, in a timely manner, and include the ability to impose, or seek from administrative or judicial bodies, effective sanctions, which may include financial penalties, injunctive relief (on an interim or final basis), or the modification, suspension, or revocation of licences.

Article 12.23 Relation to International Organisations

The Parties recognise the importance of international standards for global compatibility and interoperability of telecommunications networks and services and undertake to promote those standards through the work of relevant international organisations.

Article 12.24 Cooperation

1. The Parties recognise the transformational impact of communications 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 take measures to:
 - (a) encourage a diverse and competitive market for telecommunications services and networks in its territory; and
 - (b) protect the security and integrity of its telecommunications infrastructure.
3. The Parties shall endeavour to:
 - (a) exchange information on the opportunities and challenges associated with communication networks, infrastructure, and technologies; and
 - (b) work together in regional and multilateral fora to promote a shared approach to these opportunities and challenges.

Article 12.25 Confidentiality

Each Party shall ensure, in accordance with its laws and regulations, the confidentiality of telecommunications and related traffic data⁷ of users over public telecommunications networks and services without unduly restricting trade in services.

⁷ For the purposes of this Article, “traffic data” means any data processed for the purpose of transmitting a communication over a public telecommunications network or service, and includes data relating to the duration or time of the communication, or the location from which the communication was made.