

CHAPTER 12

DIGITAL TRADE

SECTION A

GENERAL PROVISIONS

ARTICLE 12.1

Scope

1. This Chapter applies to measures of a Party affecting trade enabled by electronic means.

2. This Chapter does not apply to:

- (a) audio-visual services;
- (b) information held or processed by or on behalf of a Party, or measures relating to such information, including measures related to its collection; and
- (c) measures adopted or maintained by New Zealand that it deems necessary to protect or promote Māori rights, interests, duties and responsibilities<sup>1</sup> in respect of matters covered by this Chapter, including in fulfilment of New Zealand's obligations under te Tiriti o Waitangi / the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or a disguised restriction on trade enabled by electronic means. Chapter 26 (Dispute settlement) does not apply to the interpretation of te Tiriti o Waitangi / the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it.

## ARTICLE 12.2

### Definitions

1. The definitions set out in Article 10.3 (Definitions) of Chapter 10 (Trade in services and investment) apply to this Chapter.

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<sup>1</sup> For greater certainty, Māori rights, interests, duties and responsibilities include those relating to mātauranga Māori.

2. The definition of the term "public telecommunications service" in point (i) of Article 10.47 (Definitions) applies to this Chapter.
  
3. For the purposes of this Chapter, the following definitions apply:
  - (a) "consumer" means any natural person using a public telecommunications service for other than professional purposes;
  
  - (b) "digital procurement" means procurement through electronic means;
  
  - (c) "direct marketing communication" means any form of commercial advertising by which a person communicates marketing messages directly to a user via a public telecommunications service, including electronic mail and text and multimedia messages (SMS and MMS);
  
  - (d) "electronic authentication" means an electronic process or act of verifying that enables the confirmation of:
    - (i) the electronic identification of a person; or
  
    - (ii) the origin and integrity of data in electronic form;
  
  - (e) "electronic invoicing" or "e-invoicing" means the automated creation, exchange and processing of invoices between suppliers and buyers using a structured digital format;

- (f) "electronic seal" means data in electronic form, used by a juridical person, which is attached to, or logically associated with, other data in electronic form to ensure the origin and integrity of that other data;
- (g) "electronic signature" means data in electronic form that is attached to, or logically associated with, other data in electronic form which:
  - (i) may be used to identify the signatory in relation to the other data in electronic form; and
  - (ii) is used by a signatory to agree on the other data in electronic form;<sup>2</sup>
- (h) "internet access service" means a public telecommunications service that provides access to the internet, and thereby connectivity to virtually all endpoints of the internet, irrespective of the network technology and terminal equipment used;
- (i) "personal data" means information relating to an identified or identifiable natural person;
- (j) "trade administration document" means a form issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods; and
- (k) "user" means a person using a public telecommunications service.

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<sup>2</sup> For greater certainty, nothing in this definition prevents a Party from according greater legal effect to an electronic signature that satisfies certain requirements, such as indicating that the data has not been altered or verifying the identity of the signatory.

## ARTICLE 12.3

### Right to regulate

The Parties reaffirm each Party's right to regulate within their territories to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment, including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, the promotion and protection of cultural diversity, and, in the case of New Zealand, the promotion or protection of the rights, interests, duties and responsibilities of Māori.

## SECTION B

### CROSS-BORDER DATA FLOWS AND PERSONAL DATA PROTECTION

## ARTICLE 12.4

### Cross-border data flows

1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy and recognise that each Party may have its own regulatory requirements in this regard.

2. To that end, a Party shall not restrict cross-border data flows taking place between the Parties in the context of an activity that is within the scope of this Chapter, by:

- (a) requiring the use of computing facilities or network elements in its territory for data processing, including by requiring the use of computing facilities or network elements that are certified or approved in the territory of the Party;
- (b) requiring the localisation of data in its territory;
- (c) prohibiting storage or processing of data in the territory of the other Party; or
- (d) making the cross-border transfer of data contingent upon the use of computing facilities or network elements in its territory or upon localisation requirements in its territory.

3. For greater certainty, the Parties understand that nothing in this Article prevents the Parties from adopting or maintaining measures in accordance with Article 25.1 (General exceptions) to achieve the public policy objectives referred to therein, which, for the purposes of this Article, shall be interpreted, where relevant, in a manner that takes into account the evolutionary nature of the digital technologies. The preceding sentence does not affect the application of other exceptions in this Agreement to this Article.

4. The Parties shall keep the implementation of this Article under review and assess its functioning within three years after the date of entry into force of this Agreement unless the Parties agree otherwise. A Party may also at any time propose to the other Party to review this Article. Such proposal shall be accorded sympathetic consideration.

5. In the context of the review referred to in paragraph 4, and following the release of the Waitangi Tribunal's Report Wai 2522 dated 19 November 2021, New Zealand:

- (a) reaffirms its continued ability to support and promote Māori interests under this Agreement; and
- (b) affirms its intention to engage Māori to ensure the review referred to in paragraph 4 takes account of the continued need for New Zealand to support Māori to exercise their rights and interests, and meet its responsibilities under te Tiriti o Waitangi / the Treaty of Waitangi and its principles.

## ARTICLE 12.5

### Protection of personal data and privacy

1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to enhancing consumer confidence and trust in digital trade.

2. Each Party may adopt or maintain measures it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this Agreement shall affect the protection of personal data and privacy afforded by the Parties' respective measures.

3. Each Party shall inform the other Party about any measures referred to in paragraph 2 that it adopts or maintains.

4. Each Party shall publish information on the protection of personal data and privacy that it provides to users of digital trade, including:

- (a) how individuals can pursue a remedy for a breach of protection of personal data or privacy arising from digital trade; and
- (b) guidance and other information regarding compliance of businesses with applicable legal requirements protecting personal data and privacy.

## SECTION C

### SPECIFIC PROVISIONS

#### ARTICLE 12.6

##### Customs duties on electronic transmissions

1. A Party shall not impose customs duties on electronic transmissions between a person of one Party and a person of the other Party.



2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on electronic transmissions, provided that such taxes, fees or other charges are imposed in a manner consistent with this Agreement.

#### ARTICLE 12.7

##### No prior authorisation

1. Each Party shall endeavour not to impose prior authorisation or any other requirement having an equivalent effect on the supply of services by electronic means.

2. Paragraph 1 shall be without prejudice to authorisation schemes that are not specifically and exclusively targeted at services provided by electronic means, and to rules in the field of telecommunications.

#### ARTICLE 12.8

##### Conclusion of contracts by electronic means

Unless otherwise provided for under its laws and regulations, each Party shall ensure that:

(a) contracts may be concluded by electronic means;

- (b) contracts are not deprived of legal effect, validity or enforceability solely on the ground that the contract was concluded by electronic means; and
- (c) no other obstacles to the use of electronic contracts are created or maintained.

## ARTICLE 12.9

### Electronic authentication

1. Except in circumstances otherwise provided for under its laws and regulations, a Party shall not deny the legal effect or admissibility as evidence in legal proceedings of an electronic document, an electronic signature, an electronic seal, or the authenticating data resulting from electronic authentication, solely on the ground that it is in electronic form.
2. A Party shall not adopt or maintain measures that would:
  - (a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic authentication methods for their electronic transaction; or
  - (b) prevent parties to an electronic transaction from being able to prove to judicial and administrative authorities that the use of electronic authentication in that electronic transaction complies with the applicable legal requirements.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of electronic transactions, the method of electronic authentication:

- (a) is certified by an authority accredited in accordance with the law of that Party; or
- (b) meets certain performance standards, which shall be objective, transparent and non-discriminatory and only relate to the specific characteristics of the category of electronic transactions concerned.

4. To the extent provided for under its laws or regulations, a Party shall apply paragraphs 1 to 3 to other electronic processes or means of facilitating or enabling electronic transactions, such as electronic time stamps or electronic registered delivery services.

#### ARTICLE 12.10

##### Electronic invoicing

1. The Parties recognise the importance of e-invoicing standards as a key element of digital procurement systems to support interoperability and digital trade and that such systems can also be used for business-to-business and business-to-consumer electronic transactions.

2. Each Party shall ensure that the implementation of measures related to e-invoicing in its jurisdiction is designed to support cross-border interoperability. When developing measures related to e-invoicing, each Party shall take into account, as appropriate, international frameworks, guidelines or recommendations, where such international frameworks, guidelines or recommendations exist.

3. The Parties shall endeavour to share best practices pertaining to e-invoicing and digital procurement systems.

#### ARTICLE 12.11

##### Transfer of or access to source code

1. The Parties recognise the increasing social and economic importance of the use of digital technologies, and the importance of the safe and responsible development and use of digital technologies, including in respect of source code of software to foster public trust.

2. A Party shall not require the transfer of, or access to, the source code of software owned by a person of the other Party as a condition for the import, export, distribution, sale or use of such software, or of products containing such software, in or from its territory.<sup>3</sup>

3. For greater certainty, paragraph 2:

(a) does not apply to the voluntary transfer of, or granting of access to, source code of software on a commercial basis by a person of the other Party, for example in the context of a public procurement transaction or a freely negotiated contract; and

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<sup>3</sup> This Article does not preclude a Party from requiring that access be provided to software used for critical infrastructure, to the extent required to ensure the effective functioning of critical infrastructure, subject to safeguards against unauthorised disclosure.

(b) does not affect the right of regulatory, administrative, law enforcement or judicial bodies of a Party to require the modification of source code of software to comply with its laws and regulations that are not inconsistent with this Agreement.

4. Nothing in this Article shall:

- (a) affect the right of regulatory authorities, law enforcement, judicial or conformity assessment bodies of a Party to access source code of software, either prior to or following import, export, distribution, sale or use, for investigation, inspection or examination, enforcement action or judicial proceeding purposes, to determine compliance with its laws and regulations, including those relating to non-discrimination and the prevention of bias, subject to safeguards against unauthorised disclosure;
- (b) affect requirements by a competition authority or other relevant body of a Party to remedy a violation of competition law;
- (c) affect the protection and enforcement of intellectual property rights; or
- (d) affect the right of a Party to take measures in accordance with point (a) of Article 14.1(2) (Incorporation of certain provisions of the GPA) under which Article III of the GPA is incorporated into and made part of this Agreement, *mutatis mutandis*.

## ARTICLE 12.12

### Consumer trust online

1. Recognising the importance of enhancing consumer trust in digital trade, each Party shall adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including measures that:
  - (a) proscribe fraudulent and deceptive commercial practices, including misleading commercial practices;
  - (b) require suppliers of goods and services to act in good faith and abide by fair commercial practices, including by respecting the rights of consumers regarding unsolicited goods and services; and
  - (c) grant consumers access to redress for breaches of their rights, including a right to remedies in cases where goods or services are paid for and not delivered or provided as agreed.
2. Each Party shall provide a level of protection for consumers engaging in electronic commerce transactions that is at least equivalent to that provided for consumers of commerce conducted by non-electronic means under its laws, regulations and policies.
3. The Parties recognise the importance of entrusting their consumer protection agencies or other relevant bodies with adequate enforcement powers and the importance of cooperation between their consumer protection agencies or other relevant bodies in order to protect consumers and enhance consumer trust online.

4. The Parties recognise the benefits of mechanisms to facilitate the resolution of claims relating to cross-border electronic commerce transactions. To that end, the Parties shall explore options to make such mechanisms available for cross-border electronic commerce transactions between themselves.

#### ARTICLE 12.13

##### Unsolicited direct marketing communications

1. Each Party shall adopt or maintain measures to ensure the effective protection of users against unsolicited direct marketing communications.
2. Each Party shall ensure that direct marketing communications are not sent to users who are natural persons unless they have given their consent to receiving such marketing communications. Consent shall be defined in accordance with the law of the Party concerned.
3. Notwithstanding paragraph 2, each Party shall allow persons that have collected, in accordance with its law, the contact details of a user in the context of the supply of goods or services, to send direct marketing communications to that user for their own similar goods or services.
4. Each Party shall ensure that direct marketing communications are clearly identifiable as such, clearly disclose on whose behalf they are made and contain the necessary information to enable users to request cessation free of charge at any moment.

5. Each Party shall provide users with access to redress against suppliers of unsolicited direct marketing communications that do not comply with the measures adopted or maintained pursuant to paragraphs 1 to 4.

#### ARTICLE 12.14

##### Cooperation on regulatory matters with regard to digital trade

1. The Parties shall exchange information on the following regulatory matters in the context of digital trade:

- (a) the recognition and facilitation of interoperable electronic trust and authentication services;
- (b) the treatment of direct marketing communications;
- (c) the protection of consumers online, including means for consumer redress and building consumer confidence;
- (d) the challenges for SMEs in the use of electronic commerce;
- (e) e-government; and
- (f) other matters relevant for the development of digital trade.



2. For greater certainty, this Article shall not apply to a Party's rules and safeguards for the protection of personal data and privacy, including on cross-border transfers of personal data.

3. The Parties shall, where appropriate, cooperate and participate actively in international fora to promote the development of digital trade.

4. The Parties recognise the importance of cooperating on cybersecurity matters relevant to digital trade.

## ARTICLE 12.15

### Paperless trade in goods

1. With a view to creating a paperless border environment for trade in goods, the Parties recognise the importance of eliminating paper forms and documents required for the import, export or transit of goods. To that end, the Parties are encouraged to eliminate paper forms and documents, as appropriate, and transition toward using forms and documents in data-based formats.

2. Each Party shall endeavour to make trade administration documents that it issues or controls, or that are required in the normal course of trade, available to the public in electronic format. For the purposes of this paragraph, the term "electronic format" includes formats suitable for automated interpretation and electronic processing without human intervention, as well as digitised images and forms.

3. Each Party shall endeavour to accept the electronic versions of trade administration documents as the legal equivalent of paper versions of trade administration documents.
4. The Parties shall endeavour to cooperate bilaterally and in international fora to enhance acceptance of electronic versions of trade administration documents.
5. In developing initiatives that provide for the use of paperless trade in goods, each Party shall endeavour to take into account the methods agreed by international organisations.

#### ARTICLE 12.16

##### Open internet access

The Parties recognise the benefits of users in their respective territories, subject to each Party's applicable policies, laws and regulations, being able to:

- (a) access, distribute and use services and applications of their choice available on the internet, subject to reasonable network management that does not block or slow down traffic based on commercial reasons;
- (b) connect devices of their choice to the internet, provided that such devices do not harm the network; and
- (c) have access to information on the network management practices of their supplier of internet access services.