

This document contains an EU proposal for a Digital trade title in the Trade Part of a possible modernised EU-Chile Association Agreement. It has been tabled for discussion with Chile. The actual text in the final agreement will be a result of negotiations between the EU and Chile. The EU reserves the right to make subsequent modifications to this proposal.

EU-Chile Free Trade Agreement

EU TEXTUAL PROPOSAL

TITLE ON DIGITAL TRADE

[Placeholder for provisions on the right to regulate and general exceptions: such provisions will either apply to this title but be incorporated in another title or be incorporated in this title].

Article 1 Objective and scope

1. This Title shall apply to trade enabled by telecommunications and/or other information and communication technologies.
2. The provisions in this Title shall not apply to gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services.

Article 2 Definitions

For the purpose of this Title:

- a) 'consumer' means any natural person using or requesting a publicly available electronic communications service for purposes outside his trade, business, craft or profession;
- b) 'direct marketing communication' means any form of advertising by which a natural or legal person communicates marketing messages directly to end-users via a public electronic communications network and, for the purpose of this agreement, covers at least electronic mail and text and multimedia messages (SMS and MMS);
- c) 'electronic authentication service' means a service that enables to confirm:
 - i. the electronic identification of a natural or legal person, or
 - ii. the origin and integrity of data in electronic form;
- d) 'electronic seal' means data in electronic form used by a legal person which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity;
- e) 'electronic signature' means data in electronic form which is attached to or logically associated with other electronic data and fulfils the following requirements:
 - i. it is used by a natural person to agree on the electronic data to which it relates;
 - ii. it is linked to the electronic data to which it relates in such a way that any subsequent alteration in the data is detectable;
- f) 'electronic trust services' means an electronic service consisting of the creation, verification, validation of electronic signatures, electronic seals, electronic time stamps, electronic registered delivery, website authentication and certificates related to those services;

- g) 'end-user' means any natural or legal person using or requesting a publicly available electronic communications service, either as a consumer or for trade, business or professional purposes.

Article 3

Customs duties on electronic transmissions

The Parties agree that electronic transmissions shall be considered as the supply of services, within the meaning of Chapter III (cross-border supply of services) of the Title on investment and trade in services, and neither Party may impose customs duties on electronic transmissions.

Article 4

Principle of no prior authorisation

1. The Parties shall ensure that the supply of services by electronic means may not be subject to prior authorisation.
2. Paragraph 1 is without prejudice to authorisation schemes which are not specifically and exclusively targeted at services provided by electronic means, and to rules in the field of telecommunications.

Article 5

Conclusion of contracts by electronic means

The Parties shall ensure that their legal systems allow contracts to be concluded by electronic means and that the legal requirements for contractual processes neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effect and validity for having been made by electronic means¹.

Article 6

Electronic trust and authentication services

1. A Party shall not deny the legal effect and admissibility as evidence in legal proceedings of an electronic trust and electronic authentication service solely on the basis that the service is in electronic form.
2. Neither Party shall adopt or maintain measures regulating electronic trust and electronic authentication services that would:
 - (a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic methods for their transaction; or

¹ This provision shall not apply to contracts that create or transfer rights in real estate; contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; contracts of suretyship granted and or collateral securities furnished by persons acting for purposes outside their trade, business or profession; and contracts governed by family law or by the law of succession.

- (b) prevent parties to an electronic transaction from having the opportunity to prove to judicial and administrative authorities that their electronic transaction complies with any legal requirements with respect to electronic trust and electronic authentication services.

Article 7
Online consumer trust

1. The Parties recognise the importance of maintaining and adopting transparent and effective measures that contribute to consumer trust, including but not limited to measures that protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce.
2. To this end, each Party shall adopt or maintain measures that contribute to consumer trust, including measures that proscribe fraudulent and deceptive commercial practices.
3. The Parties recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to electronic commerce in order to enhance consumer trust.

Article 8
Unsolicited direct marketing communications

1. Each Party shall ensure that end-users are effectively protected against unsolicited direct marketing communications. To this end, in particular the following paragraphs shall apply.
2. Each Party shall ensure that natural and legal persons do not send direct marketing communications to consumers who have not given their prior consent².
3. Notwithstanding paragraph 2, the Parties shall allow natural and legal persons which have collected, in accordance with each Party's own laws and regulations, a consumer's contact details in the context of the sale of a product or a service, to send direct marketing communications to that consumer for their own similar products 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 end-users to request cessation free of charge and at any moment.

Article 9
Transfer of or Access to Source Code

1. No Party may require the transfer of, or access to, source code of software owned by a juridical or natural person of the other Party.
2. For greater certainty:

² Prior consent shall be defined in accordance with each Party's own laws and regulations.

- a) this Article shall not prevent a Party from adopting or maintaining measures inconsistent with paragraph 1 to achieve a legitimate public policy objective, including to ensure security and safety, for instance in the context of a certification procedure, in accordance with [reference to general exception, security exception and prudential carve-out].
- b) paragraph 1 does not apply to the voluntary transfer of or granting of access to source code on a commercial basis by a person of the other Party, for instance in the context of a public procurement transaction or a freely negotiated contract.

3. Nothing in this Article shall affect:

- a) requirements by a court, administrative tribunal or competition authority to remedy a violation of competition laws;
- b) intellectual property rights and their enforcement; and
- c) the right of a Party to take measures in accordance with Article 3 of the Government Procurement Agreement.

Article 10
Electronic public procurement

- 1. When conducting covered procurement in accordance with the Title on Government procurement by electronic means, a procuring entity shall:
 - (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and
 - (b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.
- 2. For each covered procurement within the meaning of Article 6 of the Title on Government procurement, a procuring entity shall publish a notice of intended procurement, which shall be directly accessible by electronic means free of charge through a single point of access, except in circumstances described in Article 12 (limited tendering) of the Title on Government procurement. The notice of intended procurement shall remain readily accessible to the public, at least, until the expiration of the time-period indicated in the notice. The appropriate electronic medium shall be listed by each Party in the relevant Annex of the Title on Government procurement.
- 3. For each covered procurement within the meaning of the Title on Government procurement, a procuring entity shall also promptly offer unrestricted and full direct access free of charge by electronic means to the procurement documents from the date of publication of the notice.

Article 11
Electronic auctions in public procurement

Where, in accordance with the Title on Government procurement, a procuring entity intends to conduct a covered procurement using an electronic auction, the entity shall provide each participant, before commencing the electronic auction, with:

- (a) the automatic evaluation method, including the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction;
- (b) the results of any initial evaluation of the elements of its tender where the contract is to be awarded on the basis of the most advantageous tender; and
- (c) any other relevant information relating to the conduct of the auction.

Article 12
Understanding on computer services

1. The Parties agree that, for the purpose of liberalising trade in services in accordance with [reference to chapters on cross-border trade in services and investment], the following shall be considered as computer and related services, regardless of whether they are delivered via a network, including the Internet:
 - (a) consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, support, technical assistance, or management of or for computers or computer systems; or
 - (b) computer programmes defined as the sets of instructions required to make computers work and communicate (in and of themselves), plus consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, adaptation, maintenance, support, technical assistance, management or use of or for computer programs; or
 - (c) data processing, data storage, data hosting or database services; or
 - (d) maintenance and repair services for office machinery and equipment, including computers; or,
 - (e) training services for staff of clients, related to computer programmes, computers or computer systems, and not elsewhere classified.
4. For greater certainty, services enabled by computer and related services shall not necessarily be regarded as computer and related services in themselves.

Article 13
Cooperation on regulatory issues with regard to digital trade

1. The parties shall maintain a dialogue on regulatory issues raised by digital trade, which shall inter alia address the following issues:

- the recognition and facilitation of interoperable cross-border electronic trust and authentication services;
 - the treatment of direct marketing communications;
 - the protection of consumers in the ambit of electronic commerce; and
 - any other issue relevant for the development of digital trade.
2. Such cooperation shall focus on exchange of information on the Parties' respective legislation on these issues as well as on the implementation of such legislation.

[Placeholder for provisions on liability of intermediary services providers]

[Placeholder for provisions on data flows / data localisation]