

## Chapter 10

### Trade in Financial Services

#### Article 10.1: Definitions

For the purposes of this Chapter:

**a financial service supplier** means any natural or juridical person that seeks to supply or supplies financial services but the term **financial service supplier** does not include a public entity;

**commercial presence** means any type of business or professional establishment, including through:

- (a) the constitution, acquisition or maintenance of a juridical person; or
- (b) the creation or maintenance of a branch or a representative office, within the territory of a Party for the purpose of supplying a financial service;

**financial service** means any service of a financial nature, offered by a financial service supplier of a Party. Financial services comprise the following activities:

#### *Insurance and Insurance-related Services*

- (a) direct insurance (including co-insurance):
  - (i) life
  - (ii) non-life
- (b) reinsurance and retrocession;
- (c) insurance intermediation, such as brokerage and agency;
- (d) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

#### *Banking and other financial services (excluding insurance)*

- (e) acceptance of deposits and other repayable funds from the public;
- (f) lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
- (g) financial leasing;

- (h) all payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (i) guarantees and commitments;
- (j) trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
  - (i) money market instruments (including cheques, bills, certificates of deposits);
  - (ii) foreign exchange;
  - (iii) derivative products including, but not limited to, futures and options;
  - (iv) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
  - (v) transferable securities;
  - (vi) other negotiable instruments and financial assets, including bullion;
- (k) participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (l) money broking;
- (m) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (n) settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (o) provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services; and
- (p) advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (e) through (o), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

**juridical person** means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

**juridical person of a Party** means a juridical person which is either:

- (a) constituted or otherwise organised under the law of that Party, and is engaged in substantive business operations in financial services in the territory of that Party; or
- (b) in the case of supply of a financial service through commercial presence in the territory of the other Party, is owned or controlled by:
  - (i) natural persons of that Party; or
  - (ii) juridical persons of that Party identified under subparagraph (a);

additionally, in the case of Thailand, such **juridical person** is:

- (c) owned by persons of a Party if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Party;
- (d) controlled by persons of a Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions; and
- (e) affiliated with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

**measure** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

**measures adopted or maintained by a Party** means measures taken by:

- (a) central, regional or local governments and authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities; and

**natural person** means a national of Chile or of Thailand according to their respective legislation;

**public entity** means:

- (a) a government, a central bank or a monetary authority of a Party, or an entity owned or controlled by a Party, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

- (b) a private entity performing functions normally performed by a central bank or monetary authority when exercising those functions.

## **Article 10.2: Scope**

1. This Chapter applies to measures adopted or maintained by the Parties affecting trade in financial services.

2. For the purposes of this Chapter, trade in financial services is defined as the supply of a financial service through the following modes:

- (a) from the territory of a Party into the territory of the other Party (mode 1);
- (b) in the territory of a Party to the financial service consumer of the other Party (mode 2);
- (c) by a financial service supplier of a Party through commercial presence in the territory of the other Party (mode 3); and
- (d) by a financial service supplier of a Party through presence of natural persons in the territory of the other Party (mode 4).

3. This Chapter shall not apply to measures affecting:

- (a) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
- (b) activities forming part of a statutory system of social security or public retirement plans; and
- (c) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

4. For greater certainty, nothing in this Chapter shall be construed to impose any obligation with respect to:

- (a) government procurement; or
- (b) subsidies or grants including government-supported loans, guarantees, and insurance, provided by a Party or to any conditions attached to the receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic services, service consumers or service suppliers.

### **Article 10.3: Market Access**

1. With respect to market access through the modes of supply identified in Article 10.2, each Party shall accord financial services and financial service suppliers of the other Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule referred to in Article 10.5.

2. In sectors where market-access commitments are undertaken, the measures which a Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of financial services suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of financial service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test<sup>16</sup>;
- (d) limitations on the total number of natural persons that may be employed in a particular financial service sector or that a financial service supplier may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of numerical quotas or a requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entities or joint ventures through which a financial service supplier of the other Party may supply a financial service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

### **Article 10.4: National Treatment**

1. In the sectors inscribed in its Schedule referred to in Article 10.5, and subject to the conditions and qualifications set out therein, each Party shall accord to financial services and financial service suppliers of the other Party, in respect of all measures affecting the

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<sup>16</sup> Subparagraph 2 (c) does not cover measures of a Party which limit inputs for the supply of services.

supply of financial services, treatment no less favourable than that it accords to its own like financial services and financial service suppliers.<sup>17</sup>

2. A Party may meet the requirement of paragraph 1 by according to financial services and financial service suppliers of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like financial services and financial service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of financial services or financial service suppliers of a Party compared to like financial services or financial service suppliers of the other Party.

#### **Article 10.5: Schedule of Specific Commitments**

1. The specific commitment undertaken by each Party under Articles 10.3 and 10.4 are set out in the Schedule included in Annex II. With respect to sectors where such commitments are undertaken, each Schedule specifies:

- (a) terms, limitations and conditions on market access; and
- (b) conditions and qualifications on national treatment.

2. Measures inconsistent with both Articles 10.3 and 10.4 are inscribed in the column relating to Article 10.3. In this case, the inscription is considered to provide a condition or qualification to Article 10.4 as well.

#### **Article 10.6: Regulatory Transparency**

1. Each Party shall ensure that measures of general application adopted or maintained by a Party are promptly published or otherwise made publicly available.<sup>18</sup>

2. Each Party shall, to the extent practicable, provide in advance to interested persons any measure of general application that the Party proposes to adopt, in order to allow an opportunity for such persons to comment on the measure.

3. Each Party's appropriate financial regulatory authority shall make available to interested persons its requirements for completing applications relating to the supply of financial services.

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<sup>17</sup> Specific commitments assumed under this Article shall not be construed to require either Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

<sup>18</sup> For greater certainty, the Parties agree that such information may be published in each Party's chosen language.

4. On the request of an applicant in writing, the appropriate financial regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.

5. Each Party shall make its best endeavour to implement and apply in its territory internationally agreed standards for regulation and supervision in the financial services sector.

#### **Article 10.7: Data Processing in the Financial Services Sector**

1. In sectors where specific commitments are undertaken, each Party shall permit a financial service supplier of the other Party to transfer information in electronic or other forms, into and out of its territory, for data processing where such processing is required in the ordinary course of business of such financial service supplier.

2. Nothing in paragraph 1 shall:

- (a) restrict the right of a Party to protect personal data, personal privacy and the confidentiality of individual records and accounts including in accordance with its domestic laws and regulations so long as such right shall not be used as a means of avoiding the Party's commitments or obligations under this Agreement;
- (b) prevent a regulator of a Party for regulatory or prudential reasons from requiring a financial service supplier in its territory to comply with domestic regulation in relation to data management and storage, and system maintenance, as well as to retain within its territory copies of records; or
- (c) be construed to require a Party to allow the cross-border supply or the consumption abroad of services in relation to which it has not made specific commitments including to allow non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, the provision and transfer of financial information and financial data processing as referred to in subparagraph (o) of Article 10.1.

#### **Article 10.8: Confidential Information**

Nothing in this Chapter shall:

- (a) require any of the Parties to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, whether public or private; and

- (b) be construed to require a Party to disclose information relating to the financial affairs and accounts of individual customers, or any confidential or proprietary information in the possession of public entities.

#### **Article 10.9: Prudential Carve-out**

Nothing in this Agreement shall prevent a Party from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity, soundness and stability of the financial system. Where such measures do not conform with the provisions of this Chapter, they shall not be used as a means of avoiding the Party's commitments or obligations under this Chapter.

#### **Article 10.10: Recognition**

1. A Party may recognise prudential measures of the other Party in determining how the Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement or may be accorded autonomously.

2. A Party that is a party to an agreement or arrangement with a third party such as those referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for the other Party to negotiate its accession to such agreement or arrangement, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the Parties to the agreement or arrangement. Where a Party accords recognition autonomously, it shall afford adequate opportunity for the other Party to demonstrate that such circumstances exist.

#### **Article 10.11: Committee on Financial Services**

1. The Parties hereby establish a Committee on Financial Services (hereinafter referred to as "the Committee"). The Committee shall be composed of representatives of the Parties. The principal representative of each Party shall be an official of the Party's Ministry of Finance or authorities designated by the Ministry of Finance.

2. The functions of the Committee shall include supervising the implementation of this Chapter and considering issues regarding financial services that are referred to it by a Party.

3. The Committee shall meet upon request of a Party on a date and with an agenda agreed in advance by both Parties.

#### **Article 10.12: Consultations**

1. A Party may request consultations with the other Party regarding any matter arising under this Chapter. The other Party shall give sympathetic consideration to the request. The Parties shall report the results of their consultations to the Committee.



2. Consultations under this Article shall include officials of the authorities specified in Annex I.

3. Nothing in this Article shall be construed to require financial authorities participating in consultations to disclose information or take any action that would interfere with individual regulatory, supervisory, administrative or enforcement matters.

4. Where a financial authority of a Party requires information for supervisory purposes concerning a financial service supplier in the other Party's territory, such financial authority may approach the competent financial authority in the other Party's territory to seek the information. The provision of such information may be subject to the terms, conditions and limitations contained in the other Party's relevant law or to the requirement of a prior agreement or arrangement between the respective financial authorities.

### **Article 10.13: Specific Provisions on Dispute Settlement**

1. Except as otherwise provided in this Article, any disputes under this Chapter shall be settled in accordance with the provisions of Chapter 14 (Dispute Settlement).

2. Consultations held under Article 10.12 shall be deemed to constitute the consultations referred to in Article 14.3 (Consultations), unless the Parties otherwise agree. If the matter has not been resolved within sixty (60) days after the starting date of the consultations under Article 10.12 or ninety (90) days after the receipt of the request for consultations under Article 10.12.1, whichever is earlier, the complaining Party may request in writing the establishment of an arbitral panel. The Parties shall report the results of their consultations directly to the Commission.

3. Arbitrators of arbitral panels constituted for disputes arising under this Chapter shall meet the requirements set out in Article 14.7 (Composition of Arbitral Panels) and shall also have expertise or experience in financial services law or practice, which may include the regulation of financial institutions.

4. Consistent with Article 14.14 (Non-Implementation – Compensation and Suspension of Concessions or other Obligations), in any dispute where an arbitral panel finds a measure to be inconsistent with the obligations of this Agreement and the measure affects:

- (a) only the financial services sector, the complaining Party may suspend benefits only in the financial services sector;
- (b) the financial services sector and any other sector, the complaining Party may suspend benefits in the financial services sector to the same extent that such measure have an effect on the Party's financial services sector; or
- (c) only a sector other than the financial services sector, the complaining Party may not suspend benefits in the financial services sector.