

*Limited*

*This **document** is the European Union's (EU) proposal for the EU-Australia FTA. It has been tabled for discussion with Australia. The actual text in the final agreement will be a result of negotiations between the EU and Australia.*

***DISCLAIMER:** The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.*

## **EU-Australia Free Trade Agreement**

**TITLE [ ]**

### **DIGITAL TRADE**

#### **Contents**

- Chapter I      General Provisions
- Chapter II     Data flows and personal data protection
- Chapter III    Specific Provisions

## **Chapter I**

### **General Provisions**

#### **Article 1**

##### **Scope**

1. This Title applies to measures of a Party affecting trade enabled by electronic means.
2. This Title does not apply to audio-visual services.

#### **Article 2**

##### **Right to regulate**

The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.

#### **Article 3**

##### **Exceptions**

Nothing in this Title prevents Parties from adopting or maintaining measures in accordance with [insert references to general exceptions, security exception and prudential carve-out] for the public interest reasons set out therein.

*[This Article may be moved to a horizontal title that applies to the entire FTA.]*

## **Article 4**

### **Definitions**

1. The definitions included in Article 1.2 of the Title on Investment Liberalisation and Trade in Services apply to this Title.
2. The definition of 'public telecommunications service' in Article 5.12(j) of the Telecommunications Chapter applies to this Title.
3. For the purpose of this Title:
  - a) 'consumer' means any natural person using a public telecommunications service for other than professional purposes;
  - b) 'direct marketing communication' means any form of commercial advertising by which a natural or juridical person communicates marketing messages directly to a user via a public telecommunications service and, for the purpose of this Agreement, covers at least electronic mail and text and multimedia messages (SMS and MMS);
  - c) 'electronic authentication' means an electronic process that enables to confirm:
    - i. the electronic identification of a natural or juridical person, or
    - ii. the origin and integrity of data in electronic form;
  - d) '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 latter's origin and integrity;
  - e) 'electronic signature' means data in electronic form which is attached to or logically associated with other data in electronic form that is :
    - i. used by a natural person to agree on the data in electronic form to which it relates; and
    - ii. linked to the data in electronic form to which it relates in such a way that any subsequent alteration in the data is detectable;
  - f) 'electronic trust service' means an electronic service consisting of:

- i. the creation, verification and validation of electronic signatures, electronic seals, electronic time stamps, electronic registered delivery services and certificates related to those services;
  - ii. the creation, verification and validation of certificates for website authentication; or
  - iii. the preservation of electronic signatures, seals or certificates related to those services;
- g) 'user' means any natural or juridical person using a public telecommunications service.

## **Chapter II**

### **Data flows and personal data protection**

#### **Article 5**

##### **Cross-border data flows**

1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by:
  - a) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing 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 the Party's territory for storage or processing;
  - c) prohibiting storage or processing in the territory of the other Party;
  - d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Party's territory or upon localisation requirements in the Party's territory.

2. The Parties shall keep the implementation of this provision under review and assess its functioning within 3 years of the entry into force of this Agreement. A Party may at any time propose to the other Party to review the list of restrictions listed in the preceding paragraph. Such request shall be accorded sympathetic consideration.

## **Article 6**

### **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 trust in the digital economy and to the development of trade.
2. Each Party may adopt and maintain the safeguards 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 safeguards.
3. Each Party shall inform the other Party about any safeguard it adopts or maintains according to paragraph 2.
4. For the purposes of this agreement, 'personal data' means any information relating to an identified or identifiable natural person.

## **Chapter III**

### **Specific Provisions**

## **Article 7**

### **Customs duties on electronic transmissions**

1. Electronic transmissions shall be considered as a supply of services within the meaning of the Title on Investment Liberalisation and Trade in Services.
2. A Party shall not impose customs duties on electronic transmissions.

## **Article 8**

### **No prior authorisation**

1. A Party shall not require prior authorisation solely on the ground that a service is provided online, or adopt or maintain any other requirement having an equivalent effect.<sup>1</sup>
2. Paragraph 1 does not apply to telecommunications services, broadcasting services, gambling services, or legal representation services, nor to services of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority.

## **Article 9**

### **Conclusion of contracts by electronic means**

1. Each Party shall ensure that contracts may be concluded by electronic means and that its law neither creates obstacles for the use of electronic contracts nor results in contracts being deprived of legal effect and validity solely on the ground that the contract has been made by electronic means.
2. Paragraph 1 does not apply to broadcasting services, gambling services, legal representation services, to services of notaries or equivalent professions involving a direct and specific connection with the exercise of public authority, and to contracts that establish or transfer rights in real estate, contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, contracts of

---

<sup>1</sup> A service is provided online when it is provided by electronic means and without the parties being simultaneously present.

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.

## **Article 10**

### **Electronic authentication and electronic trust services**

1. A Party shall not deny the legal effect and admissibility as evidence in legal proceedings of an electronic document, an electronic signature, an electronic seal, an electronic time stamp or of data sent and received using an electronic registered delivery service, 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 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 or an electronic trust service in that transaction complies with the applicable legal requirements.
3. Notwithstanding paragraph 2, a Party may require that for a particular category of transactions, the method of electronic authentication or trust service is certified by an authority accredited in accordance with its law or meets certain performance standards which shall be objective, transparent and non-discriminatory and shall only relate to the specific characteristics of the category of transactions concerned.

## **Article 11**

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

1. A Party shall not require the transfer of, or access to, the source code of software owned by a natural or juridical person of the other Party.

2. For greater certainty:
  - a) the general exception, security exception and prudential carve-out can apply to measures of a Party adopted or maintained in the context of a certification procedure;
  - b) paragraph 1 does not apply to the voluntary transfer of or granting of access to source code on a commercial basis by a natural or juridical 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 law;
  - b) intellectual property rights and their protection and enforcement; and
  - c) the right of a Party to take measures in accordance with Article [security and general exceptions of the Public Procurement Title].

## **Article 12**

### **Online consumer trust**

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 but not limited to measures that:
  - a) proscribe fraudulent and deceptive commercial practices;
  - b) require suppliers of goods and services to act in good faith and abide by fair commercial practices, including through the prohibition of charging consumers for unsolicited goods and services;

- c) require suppliers of goods or services to provide consumers with clear and thorough information regarding their identity and contact details<sup>2</sup>, as well as regarding the goods or services, the transaction and the applicable consumer rights; and
  - d) grant consumers access to redress to claim their rights, including a right to remedies in cases where goods or services are paid and not delivered or provided as agreed.
2. 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 agencies in order to protect consumers and enhance online consumer trust.

### **Article 13**

#### **Unsolicited direct marketing communications**

1. Each Party shall ensure that users are effectively protected 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 communications<sup>3</sup>.
3. Notwithstanding paragraph 2, each Party shall allow those natural or juridical persons who 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.

---

<sup>2</sup> In the case of intermediary service suppliers, this also includes the identity and contact details of the actual supplier of the good or the service.

<sup>3</sup> Consent shall be defined in accordance with each Party's laws.

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

## **Article 14**

### **Cooperation on regulatory issues with regard to digital trade**

1. The Parties shall exchange information on regulatory matters in the context of digital trade, which shall address the following:
  - a) the recognition and facilitation of interoperable electronic trust and authentication services;
  - b) the treatment of direct marketing communications;
  - c) the protection of consumers; and
  - d) other matters relevant for the development of digital trade.
2. For greater certainty, this provision 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.

## **NOTE**

*This provision should be placed as a common headnote to the lists of reservations.*

### **Computer services**

1. Any of the following services shall be considered as computer and related services, regardless of whether they are delivered via a network, including the Internet:
  - (a) consulting, adaptation, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, support, technical assistance or management of or for computers or computer systems;
  - (b) computer programmes defined as the sets of instructions required to make computers work and communicate (in and of themselves), as well as 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 programmes;
  - (c) data processing, data storage, data hosting or database services;
  - (d) maintenance and repair services for office machinery and equipment, including computers; and
  - (e) training services for staff of clients, related to computer programmes, computers or computer systems, and not elsewhere classified.
2. For greater certainty, services enabled by computer and related services, other than those listed in paragraph 1, shall not be regarded as computer and related services in themselves.