

EU-MERCOSUR text on electronic commerce - Consolidated text after Intersessional in Brussels on 6 September 2017

EU Proposal	MERCOSUR Proposal	Merge
Article 49 Objective and scope	Article XX Objective and Principles	Article 49 Objective and [EU: scope [MRS: Principles]
1. The Parties, recognising that electronic commerce increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, including by co-operating on the issues raised by electronic commerce under the provisions of this Chapter.	1. The Parties recognise that electronic commerce increases trade opportunities in many sectors of the economy and agree to promote its development in their respective territories.	1. The Parties, recognising that electronic commerce increases trade opportunities in many economic activities, agree to promote the development of electronic commerce between them, including by co-operating on the issues raised by electronic commerce under the provisions of this Section.
2. This Chapter shall apply to trade enabled by telecommunications and/or other information and communication technologies.	2. For the purposes of this chapter, electronic commerce means the provision of services through electronic transmissions.	2. This Section shall apply to trade enabled by/through electronic transmissions.
	3. The Parties agree that the commerce conducted through electronic transactions shall be consistent with international standards, in order to ensure the confidence of consumers using electronic means.	
3. The provisions in this chapter shall not apply to gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services.	4. The provisions of this section shall not apply to financial services, telecommunications, gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services.	4. [EU: The provisions of this section shall not apply to [MRS: financial services, telecommunications], gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services.] [MRS: 4. For greater certainty, the disciplines of this section apply only to the sectors and modes of supply in which commitments were undertaken by the Parties in their respective schedules of specific commitments included in Annex XX, which are an integral part of this chapter.]
Article 50 Definitions		
For the purpose of this Chapter:		
a) 'consumer' means any natural person using or requesting a publicly available electronic communications service for purposes outside his trade, business 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:		

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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 are 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; or		
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 51. Customs duties on electronic transmissions		
The Parties agree that electronic transmissions shall be considered as the provision of services, within the meaning of Chapter III (cross-border supply of services), which cannot be subject to customs duties.		
Article 52. Principle of no prior authorisation		[EU: Article 52. Principle of no prior authorisation]
1. The Parties shall ensure that the provision of services by electronic means may not be subject to prior authorisation or any other requirement having equivalent effect.		1. The Parties shall ensure that the provision of services by electronic means may not be subject to prior authorisation or any other requirement having equivalent effect.
2. Paragraph 1 shall be 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 electronic communications.		2. Paragraph 1 shall be 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 electronic communications.]
		New proposal: [EU: 3. For greater certainty, nothing shall prevent a

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		<p>Party from adopting or maintaining measures inconsistent with paragraph 1 to achieve a legitimate public policy objective in accordance with [reference:</p> <p>i) right to regulate (Art. 1.4);</p> <p>ii) to general exception (Art. 48);</p> <p>iii) security exceptions (Art. 49); and</p> <p>iv) and prudential carve-outs (Art. 36)].</p> <p>Drafter's note: MERCOSUR to consult.</p>
<p>Article 53. Conclusion of contracts by electronic means</p>		<p>[EU: Article 53. Conclusion of contracts by electronic means</p>
<p>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 effectiveness and validity for having been made by electronic means.^{FN 1}</p>		<p>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 effectiveness and validity for having been made by electronic means, unless provided for in their laws and regulations.^{FN 1}</p>
<p>Footnote1 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.</p>		<p>Footnote1 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.</p>
<p>Article 54. Electronic trust and authentication services</p>	<p>Article XX Electronic Signature</p>	<p>[EU: Article 54: Electronic trust and authentication services] [MRS: Article XX Electronic Signature]</p>
<p>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.</p>	<p>1. The Parties recognize that laws shall seek to accept electronic signatures as having the same legal value as handwritten signatures, subject to exceptions set forth in domestic regulations.</p>	<p>[EU: 1. A Party shall not deny the legal effect and admissibility as evidence in legal proceedings of an electronic [EU: trust] [EU-new proposal: signature] and electronic authentication service solely on the basis that the service is in electronic form.]</p>
<p>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</p>		<p>[EU: 2. Neither Party shall adopt or maintain measures regulating electronic [EU: trust] [EU-new proposal: signature] and electronic authentication services that would: (a) prohibit parties to an electronic transaction from mutually</p>

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<p>determining the appropriate electronic methods for their transaction; or (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.</p>		<p>determining the appropriate electronic methods for their transaction; or (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 [EU: trust] [EU-new proposal: signature] and electronic authentication services.]</p>
	<p>2. While enacting and implementing legislation on electronic signature, the Parties shall observe the following principles: (a) operational autonomy and permanent coordination among national infrastructures; (b) interoperability based on international standards; (c) transparency in the management of electronic signatures; (d) to allow the exchange, among and within the Parties, of digital information and documentation with legal validity and probative value, under safe technical conditions.</p>	
<p>Article 55. Unsolicited direct marketing communications</p>		<p>[EU: Article 55. Unsolicited direct marketing communications</p>
<p>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.</p>		<p>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.</p>
<p>2. Each Party shall ensure that natural and legal persons do not send direct marketing communications to consumers who have not given their prior consent¹.</p>		<p>2. Each Party shall ensure that natural and legal persons do not send direct marketing communications to consumers who have not given their consent².</p>
<p>3. Notwithstanding paragraph 1, 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.</p>		<p>3. Notwithstanding paragraph 1, 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.</p>
<p>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</p>		<p>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</p>

¹ Consent shall be defined in accordance with each Party's own laws and regulations.

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

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necessary information to enable end-users to request cessation free of charge and at any moment.		end-users to request cessation free of charge and at any moment.]
Articles 56-30 on Use of Intermediaries' Services		
Discussion to take place in the IPR Chapter		
Article 61. Cooperation on regulatory issues in e-commerce³	Article XX Regulation of Electronic Commerce	[EU: Article 61. Cooperation on regulatory issues in e-commerce⁴]
<p>1. The parties shall maintain a dialogue on regulatory issues raised by electronic commerce, which shall inter alia address the following issues:</p> <ul style="list-style-type: none"> - 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 electronic commerce. 	<p>1. The Parties shall maintain a dialogue on the regulatory aspects regarding electronic commerce which shall address, inter alia, the following issues:</p> <ul style="list-style-type: none"> (a) the recognition of certificates of electronic signatures; (b) the liability of intermediary service providers⁵ with respect to the transmission or storage of information; (c) the treatment of unsolicited electronic commercial communications; (d) the protection of consumers; (e) the protection of personal data; (f) the promotion of paperless trading; and (g) any other issue relevant to the development of electronic commerce. 	<p>1. The Parties shall maintain cooperation and dialogue on the regulatory issues raised by electronic commerce, on the basis of mutually agreed terms and conditions, which shall address, inter alia, the following issues:</p> <ul style="list-style-type: none"> (a) the recognition and facilitation of interoperable cross-border electronic trust and authentication services; (b) the liability of intermediary service providers with respect to the transmission or storage of information; (c) the treatment of direct marketing communications; (d) the protection of consumers in the ambit of electronic commerce; (f) the promotion of paperless trading; and (g) any other issue relevant to the development of electronic commerce.
<p>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.</p>	<p>2. The Parties shall conduct such cooperation, inter alia, by exchanging experiences and information regarding their respective relevant legislation and jurisprudence, as well as on the implementation of such legislation.</p>	<p>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.</p>
	Article XX Protection of Personal Data	
	<p>1. For the purposes of this agreement,</p> <ul style="list-style-type: none"> a) "Personal data" means any information or data relating to an identified or identifiable natural person; and b) "Processing of Personal Data" means obtaining, recording or holding the information or data or carrying out any 	

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³ The relation between this chapter and the chapter on regulatory cooperation will be further discussed.

⁴ The relation between this chapter and the chapter on regulatory cooperation will be further discussed.

⁵ ; [UY: Intermediary service provider means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing, and/or a provider or operator of facilities for online services, equipment colocation or network access.]

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	operation or set of operations on the information, including organization, adaptation, alteration, retrieval, consultation, use, alignment, combination, blocking, erasure, destruction, anonymization, transmission or dissemination.	
	2. The Parties recognize that the processing of personal data must respect fundamental rights, especially those related to privacy. The Parties agree that the protection of personal data helps strengthen consumers' confidence while purchasing services through electronic means.	
	3. The processing of personal data requires free, unambiguous, informed and specific consent from consumers, and such consent may be revoked at any time. Any exceptions should be provided by the national regulations. Consumers have the right to be clearly informed about the processing of their personal data. For transparency purposes, electronic commerce platforms must their privacy policy.	
	4. Each Party may have its own regulatory requirements related to the trans-border flows and domestic treatment of personal data.	
	5. The Parties recognize the importance of encouraging companies to promote good practices in the protection of personal data.	
	Article XX Consumer Protection	[MRS: Article XX Consumer Protection]
	1. The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and misleading commercial practices when consumers engage in electronic commerce transactions.	1. The Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers, inter alia, from fraudulent and misleading commercial practices when they engage in electronic commerce transactions.
	3. The Parties agree that consumer protection legislation regarding electronic commerce shall be guided by the following principles: a) clear and thorough information regarding the service and its provider; b) response to consumer's questions within a reasonable time; c) prohibition of charging consumers for services not requested or for a period in time not authorized by the consumer; and d) the right to be reimbursed for services paid and not provided as agreed.	2. To this end, the Parties shall adopt or maintain measures that contribute to consumer trust, including measures that proscribe fraudulent and deceptive commercial practices. Such measure shall, inter alia, provide for: a) The right of consumers to clear and thorough information regarding the service and its provider; b) [MRS: response to consumer's questions within a reasonable time;] [EU: the obligation of traders to act with professional diligence;] c) The prohibition of charging consumers for services not requested or for a period in time not authorized by the consumer; d) Access to redress for consumers to claim their rights, including as

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Commented [JP1]: In the EU, the concept of professional diligence comes from Article 2(h) of Directive 2005/29/EC on B2C Unfair Commercial Practices (UCPD): *'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.*

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		regards their right to remedies for services paid and not provided as agreed.
	2. The Parties recognize the importance of cooperation among the relevant authorities and institutions related to consumer protection for matters regarding electronic commerce.	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 protect consumers and enhance consumer trust.
	Article XX Cooperation on Small and Medium-sized Enterprises and Electronic Commerce	
	<p>1. The Parties recognize the importance of technical cooperation and assistance to maximize opportunities and to facilitate the participation of small and medium-sized enterprises in electronic commerce.</p> <p>2. Cooperation includes technical assistance, training and capacity building in, inter alia, the following areas:</p> <p>(a) improving the ability of service suppliers of one Party to gather information on regulations and standards applied by other Party regarding electronic commerce;</p> <p>(b) improving the export capacity of small and medium-sized enterprises service suppliers, with particular attention to the needs of MERCOSUR small and medium-sized enterprises; and</p> <p>(c) facilitating interaction and dialogue between service suppliers of both Parties.</p>	
ARTICLE 24: COMPUTER SERVICES		
1. In liberalising trade in computer services in accordance with Sections 2, 3 and 4 of this Chapter, the Parties shall comply with the following paragraphs.		
2. CPC ⁶ 84, the United Nations code used for describing computer and related services, covers the basic functions used to provide all computer and related services: computer programmes defined as the sets of instructions required to make computers work and communicate (including their development and implementation), data processing and storage, and related services, such as consultancy and training services for staff of clients.		

⁶ CPC means the Central Products Classification as set out in Statistical Office of the United Nations, Statistical Papers, Series M, N° 77, CPC rev. 1991.

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<p>Technological developments have led to the increased offering of these services as a bundle or package of related services that can include some or all of these basic functions. For example, services such as web or domain hosting, data mining services and grid computing each consist of a combination of basic computer services functions.</p>		
<p>3. Computer and related services, regardless of whether they are delivered via a network, including the Internet, include all services that provide:</p> <ul style="list-style-type: none"> (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. 		
<p>4. Computer and related services enable the provision of other services (e.g., banking) by both electronic and other means. However, there is an important distinction between the enabling service (e.g., web-hosting or application hosting) and the content or core service that is being delivered electronically (e.g., banking). In such cases, the content or core service is not covered by CPC 84.]</p>		