

This document contains a new EU proposal for a legal text on State-Owned Enterprises in the Trade Part of the EU-Mercosur Association Agreement. It has been tabled for discussion with Mercosur. The actual text in the final agreement will be a result of negotiations between the EU and Mercosur. The EU reserves the right to make subsequent modifications to this proposal.

EU proposal on State-owned enterprises, enterprises granted special rights or privileges, and designated monopolies

Article x (Delegated Authority)

Unless otherwise specified in this Agreement, each Party shall ensure that any person including a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly that has been delegated regulatory, administrative or other governmental authority by a Party at any level of government, acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority.

Article 1 **Definitions**

For the purposes of this Chapter, the following definitions shall apply:

- (a) "State-owned enterprise" means an enterprise, including any subsidiary, in which a Party, directly or indirectly:
 - (a) owns more than 50% of the enterprise's subscribed capital or the votes attached to the shares issued by the enterprise; or
 - (b) can appoint more than half of the members of the enterprise's board of directors or an equivalent body; or
 - (c) exercises or has the possibility to exercise control over the enterprise.
- (b) "Enterprise granted special rights or privileges" means any enterprise, public or private, including any subsidiary, that has been granted by a Party, in law or in fact, special rights or privileges. Special rights or privileges are granted by a Party when it designates or limits to two or more the number of enterprises authorized to provide a good or a service, other than according to objective, proportional and non-discriminatory criteria, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions.
- (c) A "designated monopoly" means an entity, including a group of entities or a government agency, and any subsidiary thereof, that in a relevant market in the territory of a Party is designated as the sole supplier or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant.
- (d) "Designate" means to establish or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service.

- (e) "Commercial activities" means activities, the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making¹.
- (f) "Commercial considerations" means price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise operating according to market economy principles in the relevant business or industry.
- (g) "A service supplied in the exercise of governmental authority" has the same meaning as in the GATS.

Article 2

Scope of application

1. The Parties confirm their rights and obligations under paragraphs 1 through 3 of Article XVII of the GATT 1994, the Understanding on the Interpretation of Article XVII of the GATT 1994, as well as under paragraphs 1, 2 and 5 of Article VIII of the GATS.
2. This Chapter applies to all enterprises defined in Article 1 engaged in a commercial activity. Where an enterprise combines commercial and non-commercial activities², only the commercial activities of that enterprise are covered by this Chapter.
3. This Chapter applies to all enterprises defined in Article 1 at central and sub-central levels of government.
4. This Chapter shall not apply to "covered procurement" by a Party or its procuring entities within the meaning of Article II of (Chapter XX - Public procurement).
5. This Chapter shall not apply to any service supplied in the exercise of governmental authority.
6. This Chapter shall not apply to enterprises defined in Article 1 if in any one of the three previous consecutive fiscal years the annual revenue derived from the commercial activities of the enterprise was less than 200 million SDR.
7. Article 4 does not apply to the sectors which are outside the scope of this Agreement.
8. Article 4 applies to the commercial activities of enterprises as defined in Article 1, if the same activity would affect trade in services and investment with respect to which a Party has undertaken a commitment under Article XXX (NT) or YYY (MFN), subject to conditions or qualifications set out in its schedule pursuant to Articles XXXX and YYYY. For greater certainty, in case of conflict between Paragraph 4 and conditions or qualifications set out in its schedule pursuant to Articles XXXX and YYYY, the latter will prevail.

¹ For greater certainty, this excludes activities undertaken by an enterprise: (a) which operates on a not-for-profit basis; or (b) which operates on cost recovery basis.

² such as carrying out a legitimate public service obligation

Article 3
General provisions

1. Without prejudice to the Parties' rights and obligations under this Chapter, nothing in this Chapter prevents the Parties from establishing or maintaining state-owned enterprises or designating or maintaining monopolies or from granting enterprises special rights or privileges.
2. Where an enterprise falls within the scope of application of this Chapter, the Parties shall not require or encourage such an enterprise to act in a manner inconsistent with this Chapter.

Article 4
Non-discrimination and commercial considerations

1. Each Party shall ensure that its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies, when engaging in commercial activities,:
 - (a) act in accordance with commercial considerations in their purchases or sales of goods or services, except to fulfil any legitimate public service obligations that are not inconsistent with paragraph 1(b); and
 - (b) accord to enterprises of the other Party, enterprises that are investments of investors of the other Party, goods of the other Party, and services of the other Party, treatment no less favourable than they accord to, respectively, enterprises of the Party which are in like situations, like goods of the Party, and like services of the Party, with respect to their purchases or sales of goods or services in the relevant market.
2. Paragraph 1 does not preclude state-owned enterprises, enterprises granted special rights or privileges or designated monopolies from
 - (a) purchasing or supplying goods or services on different terms or conditions, including those relating to price; or
 - (b) refusing to purchase or supply goods or services,

provided that such different terms or conditions or refusal is undertaken in accordance with commercial considerations.

Article 5
Neutral regulation

1. The Parties shall respect and make best use of relevant international standards including, *inter alia*, the OECD Guidelines on Corporate Governance of State-Owned Enterprises.
2. Each Party shall ensure that any regulatory body or function that it establishes or maintains
 - (a) is independent from and not accountable to any of the enterprises that it regulates in order to ensure the effectiveness of the regulatory function, and

(b) acts impartially³ in like circumstances with respect to all enterprises that it regulates, including enterprises defined in Article 1.⁴

3. Each Party shall ensure the enforcement of laws and regulations in a consistent and non-discriminatory manner, including on enterprises defined in Article 1.

Article 6 **Transparency**

1. A Party which has reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of an enterprise or enterprises defined in Article 1 of the other Party and subject to the scope of this Chapter as defined in Article 2 may request in written form that Party to supply information about the operations of that enterprise related to the carrying out of the provisions of this Chapter.

2. Requests for such information shall indicate the enterprise, the products/services and markets concerned, and include indications of the interests under this Chapter that the requesting Party believes to be adversely affected that the enterprise is engaging in practices that hinder trade or investment between the Parties in a manner inconsistent with this Chapter.

This information includes the following:

- (a) the ownership and the voting structure of the enterprise, indicating the percentage of shares and the percentage of voting rights that a Party and/or an enterprise defined in Article 1 cumulatively own or hold;
- (b) a description of any special shares or special voting or other rights that a Party and/or an enterprise defined in Article 1 hold, where such rights differ from the rights attached to the general common shares of such entity;
- (c) the organisational structure of the enterprise, the composition of its board of directors or of an equivalent body exercising direct or indirect control in such an enterprise; and cross-holdings and other links with different enterprises or groups of enterprises, as defined in Article 1;
- (d) a description of which government departments or public bodies regulate and/or monitor the enterprise, a description of the reporting requirements imposed on the enterprises by these departments or public bodies, and the rights and practices of the government or any public bodies in the appointment, dismissal or remuneration of managers;
- (e) annual revenue or total assets over the most recent 3 year period of that enterprise, or both;
- (f) exemptions, non-conforming measures, immunities and any other measures derogating from the application of a Party's laws or regulations or granting favorable treatment by a

³ For greater certainty, the impartiality with which the regulatory body exercises its regulatory functions is to be assessed by reference to a general pattern or practice of that regulatory body.

⁴ For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to the regulatory body in other Chapters, the relevant provision in the other Chapters as set out in this Agreement shall prevail.

Party, applicable in the territory of the requested Party to any enterprise defined in Article 1; and

(g) any additional information regarding the enterprise as defined in Article 1 that is publicly available, including annual financial reports and third party audits.

3. The provisions of paragraphs 1 and 2 shall not require any Party to disclose confidential information the disclosure of which would be inconsistent with its laws and regulations, impede law enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises.

4. If the requested information is not available to the Party, that Party shall provide the reasons for this in writing to the other Party who requested the information.

Article 7
Review Clause

The Parties shall review this Chapter no later than [five] years after the entry into force of this Agreement and at regular intervals thereafter notably in light of its effectiveness and administrative burden. The Parties shall consult each other on the need to modify this Chapter in light of the experience gained and the development of any corresponding rules in the WTO.