

This document contains the revised EU proposal as it stands at the end of the XXXIInd round of negotiations (21 February – 2 March 2018) on State owned enterprises in the Trade Part of the EU-Mercosur Association Agreement. This is without prejudice to the final outcome of negotiations. Both sides reserve the right to make subsequent modifications to their proposals.

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 share capital or controls more than 50% of 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 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, including the meaning in the Annex on Financial Services where applicable.

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 shall not apply to the extent that a Party's state-owned enterprise, enterprise granted special rights or privileges or designate monopoly makes purchases and sales of goods or services pursuant to:

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

- (a) any existing non-conforming measure in accordance with Article x (Non-Conforming Measures) of Chapter _ (Cross-Border Trade in Services) or Article y (Non-Conforming Measures) of Chapter _ (Investment) that the Party maintains, continues, renews or amends set out in its Schedule in Annex XX; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article x (Non-Conforming Measures) of Chapter _ (Cross-Border Trade in Services) or Article y (Non-Conforming Measures) of Chapter _ (Investment) as set out in its Schedule in Annex YY.

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.

Article 4
Non-discrimination and commercial considerations

1. Each Party shall ensure that its state-owned enterprises, enterprises granted special rights or privileges and 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 (or: terms of its public service mandate) that are not inconsistent with paragraph 1(b) or (c); and
- (b) in its purchase of a good or service:
 - (i) accords to a good or service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and
 - (ii) accords to a good or service supplied by an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to a like good or a like service supplied by enterprises in the relevant market in the Party's territory that are investments of investors of the Party; and
- (c) in its sale of a good or service:
 - (i) accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and
 - (ii) accords to an enterprise that is a covered investment in the Party's territory treatment no less favourable than it accords to enterprises in the relevant market in the Party's territory that are investments of investors of the Party.

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 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 writing that Party to supply information about the operations of that enterprise related to the carrying out of the provisions of this Chapter. Such information may include organisational, corporate and financial information.

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.