

EU proposal

Without prejudice

This document contains an EU proposal for a State-owned enterprises Chapter in the Trade Part of a possible modernised EU-Chile Association Agreement. It has been tabled for discussion with Chile. The actual text in the final agreement will be a result of negotiations between the EU and Chile. The EU reserves the right to make subsequent modifications to this proposal.

EU-Chile Free Trade Agreement

EU TEXTUAL PROPOSAL

STATE-OWNED ENTERPRISES CHAPTER

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
 - (b) controls the exercise of more than 50% of the voting rights; or
 - (b) holds power to 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, 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 state-owned enterprises, enterprises granted special rights and privileges or designated monopolies engaged in a commercial activities. 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 state-owned enterprises, enterprises granted special rights or privileges and designated monopolies 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 state-owned enterprises, enterprises granted special rights or privileges and designated monopolies 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 (Non-Discriminatory Treatment and Commercial Considerations) does not apply to the sectors which are outside the scope of this Agreement.

8. Article 4 (Non-Discriminatory Treatment and Commercial Considerations) 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 mandate

- (a) any existing non-conforming measure in accordance with Article 7 (Non-Conforming Measures) of Chapter _ (Cross-Border Trade in Services) or Article 7 (Non-Conforming Measures) of Chapter _ (Investment) that the Party maintains, continues, renews or amends set out in its Schedule in Annex XI; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with Article 7 (Non-Conforming Measures) of Chapter _ (Cross-Border Trade in Services) or Article 7 (Non-Conforming Measures) of Chapter _ (Investment) as set out in its Schedule in Annex XII.

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-discriminatory treatment and commercial considerations

1. Each Party shall ensure that each of its state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, when engaging in commercial activities:

- (a) acts in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil any terms of its public service mandate that are not inconsistent with subparagraph (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 5 **Regulatory framework**

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, as appropriate.

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 preclude state-owned enterprises, enterprises granted special rights or privileges and designated monopolies.⁴

3. Each Party shall apply its laws and regulations to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies in a consistent and non-discriminatory manner.

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 state-owned enterprises, enterprises granted special rights or privileges or designated monopolies of the other Party may request the other Party in writing to supply information on the commercial activities of the enterprise related to the carrying out of the provisions of this Chapter.

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.

2. The requested Party shall provide the following information, provided that the request includes an explanation of (i) how the activities of the entity may be affecting the interests of the requesting Party under this Chapter and (ii) which of the following information shall be provided.

- (a) the ownership and the voting structures of the enterprise, indicating the percentage of shares that the Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies cumulatively own, and the percentage of voting rights that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies hold, where such rights are different from those attached to the general common shares of the entity;
- (c) the organisational structure of a state-owned enterprise, enterprise granted special rights or privileges or designated monopoly and the composition of its board of directors or of an equivalent body;
- (d) a description of the government departments or public bodies which regulate or monitor the enterprise; a description of the reporting requirements imposed on the enterprise by these departments or public bodies; and the rights and practices of the government or any public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of the board of directors or any other equivalent management body;
- (e) annual revenue or total assets over the most recent 3 year period of that enterprise, or both;
- (f) any exemptions, immunities and related measures from which the entity benefits under the laws and regulations the requested Party; and
- (g) any additional information regarding the enterprise 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.

