

*This **TEXTUAL PROPOSAL** is the European Union's initial proposal for legal text on "State-owned Enterprises" in TTIP. It was tabled for discussion with the US in the negotiating round of 14-18 July 2014 and made public on 7 January 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.*

TEXTUAL PROPOSAL

POSSIBLE PROVISIONS ON STATE ENTERPRISES AND ENTERPRISES GRANTED SPECIAL OR EXCLUSIVE RIGHTS OR PRIVILEGES

In line with the proposed content developed in the Initial Position Paper proposed by the EU on "Anti-Trust, Government Influence and Subsidies", this paper provides further details on some of the core elements that the EU proposes to be included in the Chapter on state enterprises and enterprises granted special or exclusive rights or privileges.

The EU's main objective for including SOE-related disciplines in the TTIP is to develop a joint platform of rules which could be used in other agreements/forums to address concerns raised by the development of state capitalism.

For the EU, government ownership is not problematic in itself but certain advantages provided by governments must be addressed. SOEs (and sometimes even private companies) may enjoy privileges and immunities that are not available to competitors, thereby giving them undue competitive advantage over their rivals. There is a clear need to understand the behaviour and practices of SOEs in the international trading system, to identify the key concerns and to develop ambitious common rules to discipline the harmful effects of SOEs stemming from undue advantages which would contribute to creating and maintaining a level playing field between public and private market participants.

The proposed language is without prejudice to any other elements that the EU may propose for inclusion in the TTIP competition text at a later stage. The choice of wording could be further elaborated upon during the next round of discussions.

Chapter on Initial Provisions and Definitions

X

Unless otherwise specified in this Agreement, each Party shall ensure that a person [definition of "person" must include state enterprises, enterprises granted special or exclusive rights or privileges] that has been delegated regulatory, administrative or other governmental authority by a Party at any level of government, such as the power to grant import or export licenses or licenses for other economic activities, approve commercial transactions or impose quotas, fees or other charges, acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority.

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Chapter on State Enterprises, Enterprises Granted Special or Exclusive Rights or Privileges

I Definitions

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

(a) "State enterprise" means any enterprise involved in a commercial activity over which a Party at central or sub-central level exercises or has the possibility of exercising decisive influence directly or indirectly by virtue of its ownership of it, its financial participation therein, by the rules or practices on the functioning of the enterprise, or by any other means relevant to establish such decisive influence. Decisive influence on the part of a Party shall be presumed when it, directly or indirectly: (i) holds the majority of the enterprise's capital; or (ii) holds the majority of the votes attached to the shares issued by the enterprise; or (iii) can appoint more than half of the members of the enterprise's administrative, managerial or supervisory body.

(b) "Enterprise granted special or exclusive rights or privileges" means any enterprise, public or private involved in a commercial activity, that has been granted by a Party, at central or sub-central level, in law or in fact, exclusive or special rights or privileges. Such rights or privileges may include the right to act as a distributor, a network provider or another intermediary for the purchase or sale of a good or the provision or receipt of a service. Enterprises granted exclusive rights covers monopolies involved in a commercial activity.

A "monopoly" means an entity involved in a commercial activity, including a consortium or government agency, that in a relevant market in the territory of a Party is designated at central or sub-central level 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.

(c) "Special rights" means rights granted by a Party at central or sub-central level to a limited number of enterprises within a given geographical area or a product or service market the effect of which is to substantially limit the ability of any other enterprise to carry out its activity in the same geographical area or the same product or service market under substantially equivalent conditions. The granting of a license to a limited number of enterprises in allocating a scarce resource through objective, proportional and non-discriminatory criteria is not in and of itself a special right.

(d) "Non-discriminatory treatment" means national treatment or most-favoured-nation treatment as set out in this Agreement, whichever is the better.

(e) "In accordance with commercial considerations" means consistent with customary business practices of a privately held enterprise operating according to market economy principles in the international trade.

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- (f) "Designate" means to establish or authorize a monopoly, or to expand the scope of a monopoly, whether in law or in fact.

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Scope

1. The Parties confirm their rights and obligations under Article XVII, paragraphs 1 through 3, of GATT 1994, the Understanding on the Interpretation of Article XVII of GATT 1994, as well as under Article VIII of GATS, paragraphs 1, 2 and 5, which are hereby incorporated into and made part of this Agreement and shall apply.
2. This Chapter does not apply to "covered procurement" by a Party or its procuring entities within the meaning of Article II of (Chapter XX - Public procurement).
3. This Chapter shall apply to enterprises operating in sectors in which the Parties have undertaken specific commitments under the Chapter on Cross-border Supply of Services or the Chapter on Investment of this Agreement and only to the extent that these specific commitments apply.
4. This Chapter shall not apply to a measure adopted or maintained by an enterprise in those sectors where a market access, national treatment, or most-favoured-nation reservation of a Party is scheduled in the Party's schedule of specific commitments.

3

1. Without prejudice to the Parties' rights and obligations under this Chapter, nothing in this Chapter prevents the Parties from establishing or maintaining state enterprises or designating or maintaining monopolies or from granting enterprises special or exclusive 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 Agreement.

4

Non-discrimination

Each Party shall ensure in its territory that any enterprise satisfying the conditions set out in 1(b) accords non-discriminatory treatment to a covered investment, to a good of the other Party and/or to a service or a service supplier of the other Party in its purchase or sale of a good or a service.

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Commercial considerations

Except to fulfill the purpose¹ for which special or exclusive rights or privileges have been granted, or in the case of a state enterprise to fulfill its public mandate, and provided that the enterprise's conduct in fulfilling that purpose or mandate is consistent with the provisions in 4 and the Chapter on Competition, each Party shall ensure that any enterprise referred to in 1(a) and 1(b) acts in accordance with commercial considerations in the relevant territory in its purchases and sales of goods, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale, as well as in its purchases or supply of services, including when these goods or services are supplied to or by an investment of an investor of the other Party.

6

Pricing

For greater clarity, charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as supply and demand conditions, is not in itself inconsistent with 4 and 5.

7

Transparency & Corporate Governance

1. The Parties shall ensure that enterprises referred to in 1(a) and 1(b) shall observe high standards of transparency and corporate governance in accordance with the OECD Guidelines on corporate governance of state owned enterprises [exact reference].

2. A Party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise or enterprises referred to in 1(a) and 1(b) of the other Party may request that Party to supply information about the operations of its enterprise related to the carrying out of the provisions of this Agreement.

3. Each Party shall, at the request of the other Party, make available information concerning specific enterprises referred to in 1(a) and 1(b) and which do not qualify as small and medium-sized enterprises as defined in the European Union law and [limitation for the other Party]. Requests for such information shall indicate the enterprise, the products/services and markets concerned, and include indications that the enterprise is engaging in practices that hinder trade or investment between the Parties.

The information may include:

- (a) the organisational structure of the enterprise, the composition of its board of directors or of an equivalent structure or of any other executive organ exercising direct or indirect influence through an affiliated or related entity in such an enterprise; and

¹ such as a public service obligation

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cross-holdings and other links with different enterprises or groups of enterprises referred to in 1(a) and 1(b);

- (b) 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 referred to in 1(a) and 1(b) cumulatively own;
- (c) a description of any special shares or special voting or other rights that a Party and/or an enterprise referred to in 1(a) and 1(b) hold, where such rights differ from the rights attached to the general common shares of such entity;
- (d) the name and title(s) of any government official of a Party serving as an officer or member of the board of directors or of an equivalent structure or of any other executive organ exercising direct or indirect influence through an affiliated or related entity in the enterprise;
- (e) details of the government departments or public bodies which monitor the enterprise and any reporting requirements;
- (f) the role of the government or any public bodies in the appointment, dismissal or remuneration of managers; and
- (g) annual revenue or total assets, or both;
- (h) exemptions, non-conforming measures, immunities and any other measures derogating from the application of a Party's laws or regulations or granting favourable treatment by a Party; and
- (i) [transparency provisions are pending the outcome of the discussions on subsidies]

4. The provisions of paragraphs 2 and 3 shall not require any Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

5. Each Party shall ensure that any regulatory body responsible for regulating enterprises referred to in 1(a) and 1(b) is independent from, and not accountable to, any of the enterprises referred to in 1(a) and 1(b).

6. Each Party shall ensure the enforcement of laws and regulations in a consistent and non-discriminatory manner at all levels of government, be it central or local, and including on enterprises referred to in Article 1(a) and 1(b). Exemptions must be limited and transparent.

7. The provisions of 7 apply to enterprises operating in all sectors.

[General exceptions of the Agreement apply]