



NEW ZEALAND
FOREIGN AFFAIRS & TRADE



TRANS-PACIFIC partnership **STATE-OWNED ENTERPRISES AND DESIGNATED MONOPOLIES**

FACT SHEET

➔ Overview

The Trans-Pacific Partnership (TPP) contains a chapter on state-owned enterprises (SOEs) and designated monopolies (monopolies), which sets out disciplines aimed at ensuring a level playing field between state-owned or controlled companies and their private competitors.

The SOEs provisions apply with respect to large and commercially focused SOEs: those with an orientation towards profit, rather than those which operate on a not-for-profit or cost-recovery basis. For New Zealand this includes companies subject to the *New Zealand State-Owned Enterprises Act 1986* and other commercially focused companies in which the Government owns a majority share, including Air New Zealand.

The monopolies provisions relate to the trading activities of large entities to which a Party has granted the exclusive right to buy or sell a good or service. The provisions do not apply to Fonterra, Pharmac or Zespri or to entities such as district health boards and crown research institutes.

→ State-owned enterprises and designated monopolies

This is the first time New Zealand has negotiated disciplines extending beyond goods trade which relate specifically to SOEs and monopolies. New Zealand's current approach, however, is in line with TPP and with international best practice. There are flexibilities built into the obligations where the Parties have agreed that types of entities and situations should not be

covered. In addition, to ensure future policy flexibility, New Zealand has obtained country-specific exceptions to preserve space for Government assistance to SOEs providing international transport services to and from New Zealand, and services related to communications infrastructure.

→ The context

Over the past few decades, the trend internationally has been for SOEs to evolve from government-granted monopolies operating mainly in national markets to state-owned corporations trading and investing in global markets. SOEs increasingly compete internationally with private firms, through exports of goods and services, through investment in other markets, and in competition with private companies in their domestic markets.

In some countries, SOEs and monopolies may be exempted from rules around anti-competitive conduct and have government-guaranteed advantages, such as preferential financing or preferential regulatory treatment, which can give them a competitive edge. There may be little transparency about how these state-owned companies operate. Where these SOEs and monopolies are engaged in international trade and investment, this can have a distortive effect.

The trade-distorting activities of SOEs and monopolies are already addressed to some extent through existing international trade rules and through provisions in New Zealand's existing free trade agreements. This is mainly through rules that do not distinguish between state-owned and private entities, such as the requirements not to discriminate against overseas imports and traders, and to regulate impartially. The TPP provisions build on these existing rules and focus more specifically on SOEs and monopolies.

In New Zealand, our state-owned commercial companies are set up to operate on a level playing field with privately owned companies and are subject to competition laws. The New Zealand system of governance for these companies is in line with the TPP disciplines.

→ The obligations

The obligations apply to:

- SOEs: companies principally engaged in commercial activities that are more than 50 percent owned or controlled by the government. Because the focus is on commercial companies, the obligations do not apply to entities that mainly serve a public benefit, such as health and education agencies, even if those entities have some commercial activities or charge for some of their services.
- Monopolies: entities designated as the sole provider or purchaser of a good or service in a market. These can be government-owned or privately-owned, but in the case of privately-owned entities, the obligations only cover new designations after TPP comes into force.

The provisions contain an exception for entities that are below a size threshold. At the entry into force of TPP, the threshold will exclude entities with an annual revenue from commercial activities that is below SDR 200 million¹ (currently over NZ\$400 million), to be adjusted every three years. This means that only New Zealand's larger state-owned companies are subject to the obligations.



New Zealand's current approach is in line with TPP and with international best practice

Commercial considerations

Each Party is to ensure that SOEs act in accordance with commercial considerations including factors such as price, quality and availability, except when it is making a public service available pursuant to a government mandate and in a non-discriminatory manner. This obligation only exists when the SOE is engaging in commercial activities, which excludes activities undertaken on a cost-recovery or not-for-profit basis. Similarly, each Party will be required to ensure that monopolies act in accordance with commercial considerations when buying or selling goods or services, except when they are fulfilling the terms of their designation. These obligations reflect the principles of New Zealand's State-Owned Enterprises Act 1986 and reflect New Zealand's existing international obligations in the World Trade Organization (WTO).

Non-discriminatory treatment

Each Party will be required to ensure that an SOE, when it is purchasing a good or service, does not discriminate between goods or services supplied by an enterprise from a TPP Party and those supplied by a New Zealand enterprise or an enterprise from a non-TPP Party. Similarly, when an SOE is selling a good or service, a Party will be required to ensure that the SOE does not discriminate against a TPP Party's enterprise. The obligation only exists when the SOE is engaging in commercial activities.

Similar obligations apply for monopolies when buying or selling a monopoly good or service. This obligation is in line with New Zealand's practice and reflects existing WTO obligations.

A provision in the SOEs chapter makes it clear that these non-discriminatory treatment obligations do not undercut New Zealand's reservations from the TPP Services and Investment chapters including those relating to health services, public education, public transport and research and development.

Anti-competitive practices of monopolies

Each Party is to ensure that monopolies do not use their monopoly position to engage in anti-competitive practices (practices which restrict or distort competition, for example anti-competitive agreements and abuse of dominant position), in markets where the monopoly has not been granted monopoly rights, and that negatively affect trade and investment. This obligation is in line with New Zealand's competition policy and with an existing WTO obligation on monopoly service suppliers in sectors where New Zealand has made commitments.

Government 'non-commercial assistance' to state-owned enterprises

This obligation prevents a TPP Party from causing adverse effects to the interests of another TPP Party through non-commercial assistance that it provides to an SOE. This could be financing or loan guarantees on better than commercially available terms or equity capital inconsistent with usual investment practice, provided either directly by the Government or through another entity. Non-commercial assistance is disciplined where it causes adverse effects or injury to the interests of other TPP Parties. Importantly for New Zealand, services that the SOE supplies in its own territory are excluded.

Transparency

The transparency requirements for SOEs and monopolies are in line with New Zealand's practice and our existing international commitments. There are protections for confidential and commercially sensitive information.

1. The threshold is expressed in International Monetary Fund Special Drawing Rights (SDRs), a unit of account used by the International Monetary Fund and based on a basket of international currencies. The conversion from SDRs to New Zealand dollars changes periodically with currency fluctuations.



There are general flexibilities built into the obligations, as well as exceptions tailored to New Zealand's specific circumstances.

→ Flexibilities

There are a number of flexibilities built into the obligations. The following activities are not covered or are excluded through exceptions:

- Services that the SOE or monopoly supplies in the exercise of governmental authority (services supplied neither on a commercial basis nor in competition with another supplier).
- Government procurement (including procurement through public-private partnerships).
- A Government's measures taken on a temporary basis to respond to a global or national economic emergency.
- Certain types of entities such as sovereign wealth funds (for example the New Zealand Superannuation Fund) and independent pension funds; the activities of export credit agencies and those related to the resolution of failed or failing financial institutions.
- New commitments for SOEs and monopolies at the sub-central level of government (i.e. local government in New Zealand), though the Parties have agreed to negotiate within five years on whether the chapter's rules should be extended to sub-central entities.
- Country-specific exceptions specific to a Party's situation and sensitivities. New Zealand has country-specific exceptions for government non-commercial assistance to SOEs providing transport services to and from New Zealand, or providing services related to communications infrastructure. We have these exceptions because of the importance of maintaining connections for New Zealand to the rest of the world.
- For other exceptions which apply across the agreement (covering issues such as essential security interests and measures necessary to protect human, animal or plant life or health) - see *Legal and Institutional factsheet*.