

UN/CEFACT Recommendation 35
Establishing a Legal Framework for International Trade Single Window
DRAFT Version 9.0

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Establishing a Legal Framework for an International Trade Single Window.

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Economic Commission for Europe

United Nations Center for Trade Facilitation and Electronic Business
(UN/CEFACT)

Recommendation on Establishing a Legal Framework for the
International Trade Single Window

*to enable the development of Single Window systems and exchange
of information in the Single Window environment.*

Recommendation No. 35

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1. Introduction:

Single Window facilities are increasingly used around the world as a tool to simplify and make more efficient and effective the data submission process for import and export operations. In many countries, introduction of such a facility brought substantial benefits both to the Government and the trading community¹ and several regional organizations (ASEAN, Eurasec and APEC) are currently evaluating the prospect of implementing a regional Single Window².

At the same time, establishing a Single Window is a complex process, requiring among others measures, a thorough review of the established practices governing the flow of trade-related information. It entails changes and clarifications to the data exchange process and, hence, to existing laws and regulations. Creating legally enabling conditions for an International Trade Single Window constitutes, therefore, one of the main challenges for the countries establishing such a national facility and/or seeking to exchange information with foreign Single Windows.

United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) has been providing countries with practical tools to facilitate introduction of Single Window facilities and to ensure their interoperability. This Recommendation extends that support by helping countries address legal issues

¹ See generally, the UN/CEFACT Single Window Repository at http://www.unece.org/cefact/single_window/welcome.htm.

² Presentations at the SW Symposium.

related to national and cross-border exchange of trade data required for Single Window operations.

2. Scope

Within the context of this Recommendation, a legal framework for an International Trade Single Window is defined as a set of measures that may need to be taken to address legal issues related to national and cross-border exchange of trade data required for Single Window operations.

As noted earlier, establishing a Single Window often requires changes to the existing legislation and regulations, for example, laws on electronic submission of documents, electronic signatures including digital signatures, user and message authentication, data sharing, data retention, destruction, and archiving, and electronic evidence, among others. However, it is possible to create a Single Window without serious legislative changes. In all cases existing regulations and practices governing the flow of trade-related information influence the choice of the business and operational model for a Single Window facility. A timely analysis of existing and potential legal barriers related to trade data exchange is, therefore, a first major step in establishing and operating a Single Window. Such an analysis should take into account the broader context of international trade in which the Single Window exists. The concept of *framework* implies an inclusive and systematic approach in addressing the legal issues related to an International Trade Single Window facility.

3. Benefits

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Essential to all Single Window operations is the transparency and security of trade data information exchange. A sound legal regime, which enables data collection, access and distribution and clarifies confidentiality, privacy and liability regimes, makes it possible to create a solid basis for the operation of the facility, and to build a relationship of trust between all stakeholders.

4. Use of international standards:

The use of international standards is a necessary and key component of the Single Window implementation and operation processes. It allows for the scalability of provided services and ensures an easier interaction between all participants in an international supply chain. Since Single Windows are designed for B2G and G2G relations, attention should be paid to the fact that their operation is interoperable with existing solutions in B2B, B2G and G2G relations. The United Nations legal codification work in the area of electronic commerce, undertaken by the United Nations Commission on International Trade Law (UNCITRAL) should be taken into account and used, whenever possible as the benchmark for developing the Single Window legal infrastructure for both national and international transactions.

5. Recommendation:

The United Nations Centre for Trade Facilitation and Electronic Business recognizing that a sound legal

framework is required to support the operations of an International Trade Single Window recommends governments and those engaged in the international trade and movement of goods:

1. **Undertake a study (including e-Commerce legal benchmarking and ‘gap analysis’ studies) in order to determine an appropriate set of measures that may need to be taken to address legal issues related to national and cross-border exchange of trade data required for Single Window operations (The International Trade Single Window legal framework).**
2. **Use the UN/CEFACT checklist and its guidelines (Annexes A and B) to ensure the most frequent legal issues related to national and cross-border exchange of trade data are included in the framework**
3. **Amend existing legislation, regulations, decrees, etc., if necessary, to address the identified legal issues and gaps.**
4. **Utilize international standards, international legal instruments, and soft law instruments, where available, throughout the entire process of creating a legally enabling environment for an International Trade Single Window.**

Guidelines to the Recommendation on Establishing a Legal Framework for International Trade Single Window

Annex A: Checklist of Legal Issues for Single Window operations

When a national or regional single window is established, legal issues mentioned in this checklist may arise.³ It is important to note that this list is not exhaustive. Depending on the actual implementation of the single window facility, legal issues not mentioned in this Annex may arise. For many governments, this beginning list of legal issues will provide the basis for discovering other issues related not only to B2G and G2B transactions but also to the broader B2B environment nationally and internationally.

- Has the legal basis for the implementation of the single window facility been examined/established.
- Has an appropriate organizational structure for the establishment and operation of a single window facility been chosen?
- Are proper identification, authentication and authorization procedures in place?
- Who has the authority to demand data from the single window?
- When and how data may be shared and under what circumstances and with what organizations within the government or with government agencies in other countries?
- Have proper data protection mechanisms been implemented?
- Are measures in place to ensure the accuracy and integrity of data? Who are the responsible actors?
- Are liability issues that may arise as a result of the single window operation addressed?
- Are there mechanisms in place for dispute resolution?
- Are procedures in place for electronic archiving and the creation of audit trails?

³ It is important to distinguish between national and regional (or transnational) Single Windows. Where a national single window is established, attention is primarily paid to the legal regime of the state concerned, including the international agreements binding the state. A regional single window, however, must in principle observe the requirements of all states it is serving but being mindful as well of the broader trade opportunities for members of such regional group beyond the member-countries themselves.

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- Have issues of intellectual property and database ownership been addressed?
- Are there any situations where competition issues may arise?

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Annex B: Checklist Guidelines

Issue	Guidelines
<p>Legal basis for implementing a Single Window facility:</p>	<p>It is important to establish the legal basis for the operation of the single window in national law and regulations. A thorough review of existing legislation, regulations and decrees should be conducted to ensure that the operation of the single window facility complies with current national (and international) law and to identify any “gaps” that may exist as well as the method(s) for addressing them. It is important, to the extent possible, to incorporate “international standards” and best practices when developing legislation and regulations at the national level in order to be in a position to achieve international “legal interoperability” as trade through the national Single Window grows. For example, the principles of ‘non-discrimination’ between paper and electronic documents or messages and ‘technology neutrality’ are important considerations for both a domestic legal framework and for legal interoperability at the international level.</p> <p>If there is no legal basis for the establishment of a single window, one must be created in national law. And when establishing the legal authority for the national single window, governments should explicitly authorize cross-border transactions in such laws, regulations and/or decrees. When national single window facilities cooperate on an international level, bi-lateral or multi-lateral agreements often need to be established to govern the operations of each single window and take into account a variety of legal issues that may arise between cooperating countries to allow legal interoperability between national and/or regional single windows. One key issue in such agreements will be the terms for mutual recognition of electronic documents and data messages that may be exchanged between single window facilities (as well as private sector parties utilizing the single facilities.) Underlying such agreements on mutual recognition will be considerations related to security measures (e.g., the level of encryption that may be required), secure data storage issues, requirements for acceptance of cross-border certifications if necessary, and so on.</p> <p>It is recognized that managing many bilateral and/or multilateral agreements, as the number of single window trading partner countries grows, can be a difficult task at least until such time as an international “framework” emerges for such agreements. Countries should involve their foreign ministries early in single window development efforts to assist in managing this process. [Note: there are other areas when the use of such agreements is</p>

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	<p>mentioned and the same considerations apply.]</p> <p>In the event that disputes arise, whether at the national or international levels and whether between government agencies and private sector parties or between private sector parties, special consideration should be given to issues that may arise with respect to the admissibility of electronic evidence in courts or administrative tribunals (including processes for the discovery of information and data in electronic form.) The principle of “non-discrimination” between paper and electronic documents should be applied to judicial rules of evidence so that electronic documents or data messages will not be denied admissibility in such proceedings. This, of course, will lead to considerations, typical of most evidential requirements, of how electronic documents and data will be stored, secured, etc., so as to insure the level of reliability required for such documents or data messages to be admitted in such proceedings. Additionally, these considerations must be taken into account in cross-border transactions to insure that electronic documents and data messages are admissible in judicial proceedings in foreign jurisdictions as well as being admissible in domestic proceedings.</p> <p>A further consideration in cross-border single window transactions will be issues of jurisdiction over parties transacting business through the national single window of two or more countries as well as choice of law questions, that is, which country’s laws will be applied to the parties engaged in a dispute or in a criminal or enforcement matter. These types of issues should be explicitly addressed both in national law and regulations as well as in any bilateral or multilateral agreements between cooperating national single window facilities. (It might be noted that at the private sector level, i.e., between parties that have entered contracts for the sale or purchase of goods, those parties may wish to negotiate terms in their international contracts dealing with jurisdiction and choice of law at least to the extent that government enforcement action is not involved and such terms do not violate public policy in countries in which these private parties contract between themselves.)</p>
<p>SW facility structure and organization:</p>	<p>Single window facilities can be established in a number of different ways, not only from a technological viewpoint, but also from an organizational viewpoint. The way in which a single window is structured plays an important role with respect to possible legal issues that may arise. Single windows can be established by governmental organizations (such as the customs authorities), private businesses, or public-private partnerships. For</p>

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	<p>each of these different organizational forms, the authority and mandate of the single window needs to be established clearly in national law and regulation. Furthermore, when multiple organizations take part in the creation and operation of the single window it is important to have a formal agreement between the parties involved that clearly and precisely defines the different roles, responsibilities and obligations of each participant. For instance, the use of Memoranda of Understanding, Service Level Agreements of various types, and Information Security Agreements may be appropriate depending on the particular organizational circumstances. Finally, it is necessary to establish “end user agreements” with the users of the single window facility (i.e., with traders, freight forwarders, agents, banks, <i>et cetera</i>). Such agreements should include terms related to access and security controls and procedures, electronic signatures (if required for the ICT environment), liability issues, and so on.</p>
<p>Data Protection.</p>	<p>The issue of data protection within the single window facility is of vital importance. Data protection is concerned with issues such as the access to, and the integrity and accuracy of data. Without proper mechanisms for the protection of data, single window facilities should not be allowed to operate. To this end adequate security and access protocols need to be established through identification, authentication, and authorization mechanisms (see also identification, authentication and authorization issues). The use of risk analysis techniques in the single window area can be particularly helpful in finding vulnerabilities in single window facility systems with a view to avoiding data breaches.</p> <p>The issue of data protection is closely related to that of privacy (e.g., personal data protection) as well as the protection of proprietary company data and confidential trade data. When personal data is processed by a single window facility it must be determined whether this is in compliance with all relevant data protection laws.</p> <p>Some national legal regimes may distinguish between “privacy” issues; particularly those related to personally identifiable information and “confidentiality” issues related to both trade data and business information. Governments may wish to consider how these two areas should be addressed nationally and in the cross-border environments. The following comments, however, should be read as including both privacy and confidentiality legal issues.</p> <p>Countries that do not have data protection laws in place should seriously consider updating their legal framework in order to</p>

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	<p>ensure the best possible operation of the single window facility. While there is not a “uniform” privacy approach on a global basis at this time, there are a number of models that can be considered for national regulation. Also, this factor can be important to a government’s single window facility when seeking to interact with another country’s single window where privacy legislation or regulations are in place. In the event that the single window facility enters an agreement with a single window facility in another country that has privacy laws or regulations, careful attention should be given to this area.</p>
<p>Authority to access and share data between government agencies.</p>	<p>Legislation and regulations should be examined to determine which governmental agencies may require information from and provide data to the Single Window. Governments should establish regulations regarding the use of data, such as retention, confidentiality, redistribution or sharing. Such considerations may relate to areas of both privacy and data retention policies.</p> <p>Given the growing importance of privacy legislation and regulations, as noted above, consideration should be given to how and under what circumstances access to data provided to a single window should be authorized both nationally and with other country, regional or international single windows. Some countries operating Single Windows have developed a specific Memorandum of Understanding (MoU) type of approach in this area for the exchange of data between government agencies. In any case, rules for accessing data within the Single Window should comply with international and national law. Countries are also encouraged to conduct regular ‘privacy impact assessments’ (PIAs) to be certain that can identify risks that need to be addressed in this area. As noted above, consideration should be given to bilateral, and possible multilateral agreements, to meet the needs of both domestic and regional legislation and regulation. Ideally, such international agreements should be harmonized to the greatest extent possible.</p>
<p>Identification, authentication and authorization.</p>	<p>In order to ensure the protection, quality, accuracy, and integrity of data within the single window facility, proper mechanisms for the identification, authentication and authorization of users (both operators and end-users) are necessary. Since there are no worldwide legal, procedural, and technical standards in this area at the present time, operators of single window facilities must turn to national law. (The growing trend appears to be to adopt “identity management” approaches in this area.) For regional single window facilities, the rules and procedures need to be agreed upon by the participating governments. At the same time,</p>

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	<p>such regional single window facilities should adopt, as far as possible, international legal standards and best practices so that the regional single window is “interoperable” with single window facilities throughout the world.</p>
Data Quality Issues	<p>The quality of data (i.e. its accuracy and integrity) processed within a single window environment is vital. Therefore, it is important to determine the responsibility for entering data into the single window facility and the subsequent processing of this data within the single window facility.</p> <p>When it comes to data processing within single window facility it is necessary to determine for each step who is the data controller. To this end, audit trails need to be established by means of identification, authentication and authorization and proper logging and recording mechanisms.</p>
Liability issues (obligations and responsibility)	<p>The use of inaccurate, incomplete, or incorrect data by users of the single window facility could lead to damages. Due to the nature of the single window, it is possible that the reuse of inaccurate, incomplete, or incorrect data could lead to multiple instances where damages are incurred. As such, it is necessary to address liability issues like national and international legal recourse and possible indemnities for damages suffered.</p>
Arbitration and dispute resolution	<p>Given the costs of and often protracted time for litigation in many jurisdictions, legislation should be reviewed for provisions relating to alternate dispute resolution mechanisms. Provisions for arbitration or similar approaches to dispute resolution between parties might be considered in model consortium agreements and end-user agreements for parties that may utilize the Single Window. Similar provision may be provided for in agreements where a Single Window is operated by a private or semi-private enterprise on behalf of a government agency. These considerations might apply to civil disputes but not necessarily, for example, in those situations where there has been a violation of a particular law or government regulation for which there may be a sanction.</p> <p>In those situations where national Single Windows operate cooperatively with those in other countries (such as in regional Single Window arrangements), agreements should include similar arbitration and dispute resolution provisions. Provisions for legal recourse for third parties (i.e. people or organisations that are not party to the agreement) should also be taken into account.</p>
Electronic	<p>In order to increase the effectiveness and efficiency of Single Windows,</p>

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Documents	<p>governments should promote the functional equivalence of paper and electronic documents.</p> <p>In electronic commerce laws, it is common to use a clause making electronic records functionally equivalent with paper documents. Such legislative method could also be used for e-government laws to overcome barriers to the extent this is permissible under the relevant national law. Attention should then be paid to the fact that such documents meet the requirements of other relevant laws such as the laws on accounting et cetera.⁴</p>
Electronic archiving	<p>In order to comply with national and international rules on the archiving of information (i.e. the keeping of records), proper procedures for electronic archiving must be established. This also includes measures to ensure that an ‘audit trail’ is established when the single window is in operation. By creating an audit trail liability and responsibility issues can be addressed <i>ex post</i>.</p> <p>Since the rules for data retention and electronic archiving differ from country to country, single window operators should ensure they meet their country’s appropriate standards. In the case of regional single window facilities agreements must be made between the participating nations that will meet the requirements of national law in these countries unless, of course, such agreements supercede national law with respect to single window transactions. In addition, agreements dealing with electronic archiving should take into account privacy and confidentiality issues as well as the potential need for retrieving and sharing archived information, for example, for purposes of law enforcement requirements. Further, consideration should be given to these issues as related to cross-border transactions and the possible requirements for e-Archiving among trading partners.</p>
Intellectual property rights and database ownership	<p>Questions may arise as to who “owns” the data and which parties, if any, and including governments, may own the data or have intellectual property interests in it. For example, in some countries agencies of the government other than the customs authority may claim ownership or control of the data, particularly trade data. Naturally, private sector trading entities (e.g., producers and sellers) may have certain ownership rights in the information that is provided to the Single Window. Careful examination of the statutory or regulatory authority for such control may be important, particularly in situations where the Single Window operator is a private or quasi-private entity or the Single Window</p>

⁴ Governments should review carefully the text developed by the United Nations Commission on International Trade Law for clear guidance here. Both its UN Electronic Communications Convention and its Model Law on Electronic Commerce, along with their accompanying interpretive notes are relevant here.

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	<p>operates in a bilateral or multilateral environment (e.g. regional or sub-regional Single Windows).</p> <p>Care should be given to exploring the possibility of a Single Window operation being affected by a third party that may hold patent (or other intellectual property) rights to a process that may be similar to the one being contemplated for the Single Window. In cases where the development of the Single Window data systems is outsourced to other organizations, development agreements should include, for example, warranties of ownership of the rights to such development work (software, firmware, etc.), warranties of non-infringement of any third-party intellectual property rights, rights to license such IP, etc.</p>
Competition	<p>Consideration should be given to the potential that single window operations may be structured so that concerns about antitrust and protectionism may result. These possibilities, though unlikely, can give rise to concerns by those who may utilize an international Single Window facility and be disabling to trade development and facilitation. Additionally, countries should consider their obligations under the General Agreement on Trade and Tariffs (GATT) (in particular articles V, VIII and X) and other international treaties and conventions related to competition law when establishing single window facilities.</p>

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Annex C: Toolkit

For a Single Window facility to operate efficiently, effectively and above all legally, it must adhere to all relevant national legislation and international agreements to which its country is a Contracting Party. Since the rules governing the operation of a Single Window differ from country to country, and at a regional and sub-regional level, are dependent on the actual scope and function of the facility, an exhaustive list of relevant legislation cannot easily be given. This annex aims to provide some useful resources that (potential) operators of Single Window can access to aid the task of building an adequate legal framework for the efficient, effective operation of a facility that fully meets the requirements of government and the business needs of the trading community. This toolkit includes references to a variety of international organisations that are engaged in developing policy considerations for governments and the private sector including treaties and conventions, model laws, guidelines and recommendations that may be useful in the establishment of National Single Windows and their cross-border operations. In addition to the instruments published by International organizations, some industry sectors have created model agreements and contracts that also may provide guidance. These should be explored to determine whether the approach detailed could be of value to establishing a legal framework for single window facilities.

Trade law

Apart from adherence to national law, the operation of single windows across borders should be in accordance with international trade law. The following (model) laws and treaties should be taken into consideration when operating (regional) single window facilities:

- The United Nations Convention on the Use of Electronic Communications in International Contracts (the UN Electronic Communications Convention) (2005)
- The UNCITRAL Model Law on Electronic Commerce (1996)
- UNCITRAL Model Law on Electronic Signatures (2001)
- OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication (2007)
- General Agreement on Tariffs and Trade (GATT)

Privacy & Data protection

Respect for privacy and adequate data protection are important factors when it comes to operating a Single Window. While there is no global privacy law, there are documents that set forth general guidelines for data protection and privacy.

- OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)
- OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication (2007)

Intellectual Property

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Intellectual property is also of importance when it comes the establishment and operation of a Single Window. It is important to note that at the time of publication of this recommendation, a global treaty on the protection of databases did not exist. At the regional level (for instance in the European Union) rules for the protection of databases have been established.

- Berne Convention for the Protection of Literary and Artistic Works (1886)
- Paris Convention for the Protection of Industrial Property (1883)
- WIPO Patent Law Treaty (2000)

Arbitration

- UNCITRAL Arbitration Rules (1976)

Competition

- General Agreement on Tariffs and Trade (GATT)

Important organizations

The organizations listed below can provide further guidance and assistance to (potential) operators of single window facilities.

UNCEFACT

The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), supports activities dedicated to improving the ability of business, trade and administrative organizations, from developed, developing and transitional economies, to exchange products and relevant services effectively. The principal focus is facilitating national and international trade transactions through the simplification and harmonization of processes, procedures and information flows, and so to contribute to the growth of global commerce.

For more information please visit: www.unece.org/cefact

UNCITRAL

The United Nations Commission on international Trade Law (UNCITRAL) is the United Nations core legal body in the field of international trade law. The remit of UNCITRAL is the modernization and harmonization of rules on international business and is responsible for drafting international conventions and (model) laws, but also provides practical advice in the form of guidelines and legislative guides. Further, the UN General Assembly has endorsed work in the area of coordinating the activities of international organizations in the field of international trade law. Of direct importance to the international legal framework for the single window is that the UNCITRAL Commission at its 2008 Plenary approved a joint project with the World Customs Organization that will be developing detailed policy and practical guidance for governments and business related to the legal issues noted in Recommendation 35. It is anticipated that this project will include governments and other international organizations.

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For more information please visit: www.uncitral.org

World Customs Organization

The World Customs Organization (WCO) is the only intergovernmental organization exclusively focused on Customs matters. The work of WCO covers the development of global standards, the simplification, harmonization, and modernization of Customs procedures (including promoting the utilisation of ICT methods), trade supply chain security, international trade facilitation, the enhancement of Customs enforcement and compliance activities, anti-counterfeiting and piracy initiatives, public-private partnerships, integrity promotion, and sustainable global Customs capacity building programmes. The WCO also maintains the international Harmonized System goods nomenclature, and administers the technical aspects of the WTO Agreements on Customs Valuation and Rules of Origin. Additionally, as noted above, the WCO and UNCITRAL are cooperating, with other international organizations, in a major program to address the global legal issues related to the international single window.

For more information please visit: www.wcoomd.org

UNCTAD

The United Nations Conference on Trade and Development has developed considerable expertise in the Customs area within its mission related to trade development. Numerous countries have implemented its Automated System for Customs Data (ASYCUDA.)

For more information please visit: <http://unctad.org/>

International Chamber of Commerce

The International Chamber of Commerce (ICC) is the international private sector body that represents the interests of the global business community. The goal of the ICC is stimulating the global economy by setting rules and standards, promoting growth and prosperity, and spreading business expertise.

Form more information please visit: www.iccwbo.org

The Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development (OECD) is an international body comprised of 30 member countries. The goals of the OECD are to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries' economic development, contribute to growth in world trade.

For more information please visit: www.oecd.org

The Hague Conference on Private International Law

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The Hague Conference on private international law is a global intergovernmental organization. A melting pot of different legal traditions, it develops and services multilateral legal instruments that respond to global needs.

For more information please visit: www.hcch.net

World Intellectual Property Organization

The World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest .

Form more information please visit: www.wipo.int