

# AmCham EU's input for European Commission's Public Consultation on the Trade in Services Agreement (TISA)

CONSULTATION RESPONSE

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# Background and Analysis

## Introduction

The American Chamber of Commerce to the European Union (AmCham EU) supports the progress of the Trade in Services Agreement (TISA) and welcomes the opportunity to share our priorities with the European Commission in the early phase of negotiations through this public consultation.<sup>1</sup> Developing a commercially meaningful TISA that allows companies to compete on a level playing field in the global marketplace, will play a vital role in safeguarding the recovery of both the European economy and paving the road to renewed economic prosperity.

AmCham EU maintains that services are essential to enabling all international trade; in order to make, buy, move or sell products, services play an integral role. High-tech services enable research and development, and in many sectors, make up an important part of the final product itself. Professional and financial services provide the support needed for the development and sale of products, retail services provide the venue to the sale of products, and logistics and delivery services get products to and from the market. Developing a common international framework and opening markets to the provision of foreign services will play a crucial role in enabling the international trading platform to meet both current and future demands.

Earlier this year, AmCham EU released a position statement outlining several priorities, which we encourage both the European Commission negotiators and their counterpart 'Really Good Friends of Services' to use as guiding principles for a successful TISA. In this paper, AmCham wishes to revisit and expand upon these priority areas, providing country-specific examples of barriers to trade in services, obstacles concerning transparency, subsidies, state-owned enterprises, and other issues.

1. Transparency, regulatory coherence and stakeholder consultation
2. Promoting fair competition and a global level playing field
3. Facilitating customs processes
4. Protection against forced localisation barriers to trade
5. Deeper concessions for express delivery services (EDS)
6. Facilitation of cross-border data flows
7. Open and accessible market commitments for electronic security services

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<sup>1</sup> This paper builds on the AmCham EU TISA Position Paper (PoP) released in May this year: [AmCham EU's position on Trade in Services Agreement, 23 May 2013](#), [European Commission's Public Consultation on TISA](#).



8. Facilitating direct selling services
9. Enhancing global mobility

### **1. Transparency, regulatory coherence and stakeholder consultation**

AmCham EU is a long-standing supporter of transparency of legislative processes, broad and frequent consultation with all stakeholders from the earliest stages, and regulatory coherence; this can be achieved through consultative partnerships between regulatory agencies and their stakeholders, and productive dialogues between international counterparts. AmCham EU welcomes this consultation as an example of such engagement.

It is important to ensure that regulatory requirements do not act as discriminatory barriers to market access, and regulation should be limited to that which is necessary to achieve specific and legitimate policy objectives. In cases where competitive market forces impede the achievement of a regulatory objective, regulatory review or forbearance should take place as appropriate.

### **2. Promoting fair competition and a global level playing field**

The principle of fair competition is a high priority for AmCham EU members, most of whom are operational across all TISA member countries. Opening domestic markets to foreign services must go hand in hand with the promotion of fair competition and a global level playing field for all companies. Avoiding discrimination against foreign service-providers through national treatment and other means is particularly important in services companies, which are typically highly regulated and where authorities may enforce onerous licensing requirements that favour local providers and stifle growth.

### **3. Facilitating customs processes**

Given the ongoing multilateral efforts to reach a Trade Facilitation Agreement, AmCham EU is aware that the focus of the TISA will not be on customs processes themselves. Nevertheless, in order to ensure that service liberalisation commitments are effective, AmCham EU believes that the TISA should include an acknowledgement of the need for modernised and transparent customs processes as a prerequisite for a number of service functions, including but not exclusively express delivery.

### **4. Prohibition of forced localisation barriers to trade**

AmCham EU urges TISA members to aggressively address forced localisation barriers in any final agreement and increase cooperation in addressing these barriers in non-TISA markets. Localisation barriers to trade (LBTs) represent an unprecedented threat to global trade and investment and, if left unchecked, will stifle global trade, innovation and job creation. These policies, which are proliferating throughout global markets, seek to advance a range of protectionist practices designed to boost domestic players by discriminating against foreign companies. These include mandatory technology transfer requirements, local sourcing requirements in government and private sector procurements, forced



local ownership, discrimination against foreign online sellers, forced local hires, import restrictions and restrictions on the cross-border flow of data including domestic data centre location and data hosting requirements.

These practices impede foreign direct investment, and TISA members should prohibit such restrictions, which limit investment and hinder the growth of digital trade and electronic commerce. The agreement should also seek to limit exceptions, such as life, safety and national security to ensure they are not used as disguised barriers to trade. Moreover, TISA members should commit to greater multilateral cooperation to reverse and deter LBT policies in key non-TISA markets.

### 5. Deeper concessions for express delivery services (EDS)

AmCham EU recommends the inclusion of an annex for delivery services that introduces disciplines related to market access, domestic regulation and the application of pro-competitive principles for the provision of competitive delivery services, including express delivery and ancillary services.

Despite their critical role in international trade supporting the development of modern, global supply chains, the EDS sector faces some of the most antiquated policy environments for doing business, including onerous regulations on cross-border transport, inefficient border clearance procedures and domestic regulations that distort fair competition.

An example of current barriers faced by EDS providers within TISA member countries can be found in Japan. Although it is possible for private companies to provide express delivery services in Japan, there are a number of barriers relating to the national operator Japan Post which significantly impair the ability to do so:

- **Express mail service (EMS) defined as part of universal service obligation (USO):** Japan Post considers the EMS it offers to fall under its USO, and therefore extends preferential treatment to it in various forms, enabling it to provide EMS at operational and cost advantages relative to private operators providing the same or similar services. This includes preferential treatment of the clearance, pick-up and delivery of EMS items and from a cost perspective this extends to Japan Post supporting EMS in a seemingly subsidised manner.
- **On-airport customs, quarantine and security clearance:** Private operators must ensure that all items complete all necessary customs, quarantine and security clearance requirements prior to being released into Japan. This is not necessarily a burdensome requirement, however items carried by Japan Post's competing EMS service are not subject to the same requirement thereby creating a non-level playing field.
- **Self-funded customs, quarantine and security clearance:** Private operators must fund their own customs, quarantine and security



clearance. Again, this is not necessarily a burdensome requirement and is in fact a common practice supported by private operators in almost all countries around the world. However, items carried by Japan Post's competing EMS service are provided in a seemingly subsidised manner by customs and other government authorities thereby creating a non-level playing field.

- **Parking for pick-up and delivery vehicles:** Private operators' and Japan Post vehicles are targeted in an unequal manner by local police authorities for parking infringements. National parking laws were revised in an attempt to address this, however there is a lack of awareness amongst the local police authorities to this change, and there remains no system for distinguishing between Japan Post vehicles carrying competing EMS items versus those carrying USO items.

AmCham EU believes that Japan Post should be prohibited from using its monopoly on universal services to engage in anti-competitive practices in other service sectors. The TISA provides a critical opportunity to address these difficulties, which involve anti-competitive practices, a lack of transparency and effective cross-subsidisation.

## 6. Facilitation of cross-border data flows

Given advances in information and communication technology, and the increasing possibilities for services to be delivered electronically, restrictions on cross-border data flows, including requirements to store or process data locally, increasingly serve as barriers to services trade. With this in mind, the TISA should allow cross-border data flows, external data management, storage and access (including the ability to use cloud-based technologies), both within a firm and in its operations with customers.<sup>2</sup> The TISA should establish an obligation to allow cross-border data flows for the purpose of delivering permitted services (Mode 1) and operations of global services businesses, including local investments (Mode 3). Finally, AmCham EU believes that the TISA should provide for consistency and regulatory certainty in the field of cross-border data flows by ensuring compliance with accepted international principles.<sup>3</sup>

While there are examples of existing restrictions on cross-border data flows in TISA countries, including the Republic of Korea's restrictions on outsourcing of information processing for financial institutions and Australia's requirement to process electronic health records domestically, the primary goal of addressing cross-border data flows in the TISA is to establish rules to prevent future barriers. Establishing good rules now for digital trade will be especially important as the TISA is expanded to include other countries and ultimately multilateralised in the WTO. Many other countries that might be brought into

<sup>2</sup> This principle has been described in the 2011 US-EU Trade Principles on ICT Services (and similar US-Japan principles), and in the OECD Internet policy principles.

<sup>3</sup> Such as the OECD Privacy Principles contained in the OECD Guidelines on the Protection of Privacy and Trans Border Flows of Personal Data.

the TISA in the future have established, or are considering, restrictions on cross-border data flows that could become major trade barriers in the rapidly growing digital economy. These countries include: Brazil, China, India, Indonesia, Malaysia and Vietnam. It is therefore critical that the TISA establishes strong rules to promote growth of the digital economy by creating a right to transfer data in the course of providing permitted services or operating foreign investments.

### **7. Open and accessible market commitments for electronic security services**

Where innovative life safety technology and services are deployed, small and medium sized businesses will prosper. Conversely, investment will be discouraged when consumers do not feel secure. Products are only as good as the quality of the design, installation, service and monitoring of the electronic security system. In line with protection against forced localisation, the benefits of commercial and residential electronic security services should be free from localisation requirements under the banner of national security. The adoption and distribution of best available techniques and products are essential when threats to commerce and personal safety exist; therefore AmCham EU encourages the EU to include provisions on electronic security services in the TISA.

### **8. Facilitating direct selling services**

Companies still experience national restrictions to their direct selling services as a distribution channel. These restrictions limit the opportunity for growth of direct selling enterprises abroad.

AmCham EU recommends clarifying international trade commitments in this sector. The TISA should assert direct selling as a valuable distribution service channel with the right to equal recognition and regulatory environments as other distribution channels. This would also potentially enable the opening of other forms of distribution channels in some countries in the future.

### **9. Enhancing global mobility**

AmCham EU urges TISA members to commit to improving the ability of business professionals to travel temporarily for work. This will enhance economic growth and integration across all parties. We support action on Mode 4 services in a TISA that would clarify, harmonise and broaden the definition of business visitor across TISA participants.

This definition should include functions related to providing after-sales service; participating in commercial transactions, negotiations and litigation; participating in scientific, educational, professional or business conferences, consultations or conventions; exhibiting at an international fair or trade show; engaging in research, design, marketing, market research, sales, or distribution; engaging in short-term educational programmes; and providing professional or business services.



Secondly, the definition of business visitor should permit and facilitate the temporary entry of intra-company transferees, professionals with specialised knowledge or advanced degrees, and traders and investors. Finally, the TISA should create pathways to facilitate visa processing and entry for business professionals and frequent travellers, including by facilitating the creation and harmonisation of electronic document submission options for TISA members, and developing a TISA-wide trusted-traveller and border processing programme.

**The future of the TISA and role of the World Trade Organization:**

In addition to boosting international services trade, in the longer term the TISA presents an important opportunity for its members to shape future standards. The group of WTO members currently engaged in TISA negotiations represent a vital segment of the global service industry, up to 70 percent of the world's trade in services, and this is a powerful starting point. Nevertheless as negotiations progress, AmCham EU supports the EU's stated commitment to the multilateral framework, with a view to enlarged future participation, particularly by large emerging economies such as China and India, and possible incorporation in the WTO suite of agreements.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.*

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