

APPENDIX 8

TiSA TEXT ON POST AND DELIVERY SERVICES

The TiSA core text

The core text of TiSA is always the starting point for analysis. It is important to stress that **there is no carve out for public services from TiSA**. The core TiSA text excludes a ‘service supplied in the exercise of governmental authority’ from the definition of ‘services’.¹ To qualify, the service must be ‘supplied neither on a commercial basis, nor in competition with one or more service suppliers’. Monopoly postal services are non-competitive, but they are commercial. Other public postal services would fail to qualify on both grounds.

The core rules

The standard **market access rule** from GATS would give the courier and express delivery industry unrestricted access to a country’s market without facing monopolies, or limits on the size or scope of their operation or geographical coverage. They could not be required to set up through subsidiaries or joint-ventures rather than using agents, or establish a local presence in the country when they operate from across the border (which most do). A full commitment to **non-discrimination** (national treatment) in a lightly regulated market would allow the oligopoly of global firms to exercise control in the absence of effective domestic competition.

Once a TiSA party makes a market access commitment the scheduling rules presume that countries will remove or freeze any discrimination in favour of locals in their delivery services and lock in any future liberalisation, unless they seek and secure a full policy space carve-out. There is no realistic way for countries to reverse those commitments once they are made.

Redefining postal services

The **classification** of a service is critically important for scheduling and the scope of the other rules and annexes in TiSA. The classification system used to define a service for the purpose of listing it in a GATS schedule was drawn up in 1991 (W/120, see Appendix 2). At that time, most postal services were still public monopolies² and the main mode of delivering letters and packages; private delivery services were marginal. Countries could limit their exposure to postal services in the GATS because they are classified separately from courier services, and the two are mutually exclusive: *postal services*

1 Based on Article 1.3 of the GATS 1994.

2 Sometimes including telecommunications and banking as well.

are 'rendered by the *national postal administration*';³ *courier services* are *private*.⁴ The positive list approach to GATS schedules meant few governments made any commitments on the public postal service. Since then the separate categories have blurred as public postal monopolies were deregulated and privatised, but the GATS classification has not been updated.

The 2014 leaked Annex on Commercial Delivery Services set out to update those classifications by distinguishing between a *postal monopoly*, and *express delivery services* (the US preference) or *competitive delivery services* (the EU preference). By focusing on the service rather than the provider, the *non-monopoly* parts of public postal services are shifted into the other delivery category.

The November 2016 leaked text, described as a 'proposed landing zone', had a similar effect by changing the two categories to *postal monopoly* and *delivery services*:⁵

- A **postal monopoly** is an exclusive right to supply a specified service. However, the scope of that right was not agreed: some countries wanted to limit it to an operator who is within the party's territory.⁶
- **Delivery services** are defined as collection, sorting, transport and delivery of documents, printed matter, parcels, goods and other items where service suppliers are in competition.

However, an ambiguous footnote says: 'For greater certainty, this Annex applies to services classified in CPC 751 (Postal and Courier Services)'.⁷ That could mean the TiSA delivery annex applies to the high-level classification and does not distinguish between post and courier services; or it could mean that it still distinguishes between the component elements set out in the classification CPC751. Renaming the annex 'Delivery Services' from the earlier '*Competitive Delivery Services*' suggests they intend to remove the distinction between public and private services, except where the postal service is a monopoly and is subjected to specific rules.

Restricting the postal monopoly

The definition of a **postal monopoly** is not yet agreed in the delivery services annex.⁸ Some countries want it restricted to delivery services *within* a party's territory that are specified by a government measure. No alternatives are suggested in the text.

Whatever definition they decide on, the scope of the postal monopoly must be defined using 'objective' criteria, including quantitative criteria of price and/or weight thresholds.⁹ It is debatable whether geographic areas would be considered 'objective'; they can be clearly defined, but the examples given in the provision only relate to the product being delivered. Qualitative factors, such as the needs of particular communities, may not qualify if the criteria are considered too vague or subjective, especially as they could be covered separately under the universal service obligation. That

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3 **Postal delivery services** were divided into:

Postal Services Related to Letters (75111): *Services consisting of pick-up, transport and delivery services of letters, newspapers, journals, periodicals, brochures, leaflets and similar printed matters, whether for domestic or foreign destinations, as rendered by the national postal administration.*

Postal Services Related to Parcels (75112): *Services consisting of pick-up, transport and delivery services of parcels and packages, whether for domestic or foreign destinations, as rendered by the national postal administration.*

Post Office Counter Services (75113): *Services rendered at post office counters, e.g. sales of postage stamps, handling of certified or registered letters and packets, and other post office counter services.*

Other Postal Services (75119): *Mailbox rental services, "poste restante" services, and public postal services not elsewhere classified. Exclusion: Services related to postal giro and postal savings accounts are classified in class 8111 (Services of monetary intermediaries).*

4 **Courier services** was divided into:

Multi-modal Courier Services (75121): *Services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration. These services can be provided by using either self-owned or public transport media.*

Other Courier Services (75129): *Other courier services for goods, not elsewhere classified, e.g./trucking or transfer services without storage, for freight.*

5 TiSA, Article 1, Annex on Delivery Services, dated 9 November 2016.

6 A change in the wording in the 9 November 2016 text suggests this is intended to restrict the monopoly to a firm that is commercial established in the territory, rather than restrict the monopoly to services inside the territory)

7 TiSA, Footnote 1, Annex on Delivery Services, dated 9 November 2016.

8 TiSA, Article 1, Annex on Delivery Services, dated 9 November 2016.

9 TiSA, Article 2, Annex on Delivery Services, dated 9 November 2016.

restrictive approach to the scope of the monopoly is contested. Some unnamed party/ies want to preserve the right to decide their own criteria in their domestic law.

A separate provision on **cross-subsidisation** would prohibit a postal monopoly supplier from cross-subsidising its own or another supplier's¹⁰ competitive delivery services with revenues from the monopoly.¹¹ Cross-subsidy is not defined and could be read to include sharing of premises and IT or administrative systems. The monopoly must also not 'unjustifiably' apply different prices or other terms for different users, such as bulk mailers or consolidators.

The annex requires the **regulatory authority** to treat equivalent (public and private) delivery services impartially in relation to the same services.¹² That regulatory authority will rest with the public Post Office in many countries. The annex would subject the processes it uses and its decisions to external oversight; however, an earlier requirement for the authority to be independent of suppliers has been dropped.

A firm supplying a non-monopoly delivery service cannot be required to contract, or not contract, with another service supplier (such as the public Post Office) to provide a segment of its service.¹³

Further restrictions on postal regulation

Once a country has scheduled a market access commitment using these definitions, the rules in the **Annex on Domestic Regulation** also apply.¹⁴ These require **licensing requirements and procedures** to be based on 'objective' criteria, for example, they do not include any discretionary considerations. Some countries also want to minimise the burden on those seeking a licence; the US and EU oppose that, so it is unlikely to be accepted.

The requirement for 'objective' criteria also applies to **technical standards**, which would include specifications of size, weight etc. for each delivery category, the frequency and location of delivery and collection, obligations to rural areas, **and the terms of the universal service obligation**.

The **administration** of these regulations must be 'reasonable, objective and impartial', giving the express delivery lobby new scope to press their governments to object to other TISA countries' regulatory processes and decisions.

Universal Postal Service Obligation (UPS0)

The November 2016 'landing zone' text drops some of the EU's more extreme proposals to restrict scope of the UPS0 and how it is delivered.¹⁵ The new version says countries can define what kind of UPS0 they want. But they must **administer** it in a 'transparent, non-discriminatory and neutral/impartial way with regard to all suppliers subject to the obligation'.¹⁶

It is unclear whether the government's '**administering**' of the obligation includes allocating the responsibility for providing the UPS0, or just the conduct of the obligation once allocated. That is an important distinction: if it means allocating, then '**non-discriminatory**' and '**neutral/impartial**' means that foreign private firms could be contracted to deliver the UPS0 and the public Post Office should not enjoy preferential rights to do so; if it means how the UPS0 is supplied, then it means all firms, including foreign delivery firms, should benefit equally from the UPS0. The distinction between non-discriminatory and 'neutral/impartial' is also unclear. '**Transparency**' would mean the basis for decisions and how they are made are clear and public.

10 Such as a subsidiary.

11 TISA, Article 7, Annex on Delivery Services, dated 9 November 2016.

12 TISA, Article 3, Annex on Delivery Services, dated 9 November 2016.

13 TISA, Article 9, Annex on Delivery Services, dated 9 November 2016.

14 New Zealand wants them to apply irrespective of schedules, but that is strongly opposed.

15 TISA, Articles 6, 7 and 8, Annex on Competitive Delivery Services, dated 16 April 2014.

16 TISA, Article 4, Annex on Delivery Services, dated 9 November 2016

The annex also says that commercial operators cannot be required to supply universal services as a condition of being authorised or licensed to supply other delivery services;¹⁷ nor can there be a levy *solely* on those who are not supplying the UPSO to fund it.¹⁸

State-owned post offices

The US has proposed an Annex on State-owned Enterprises (SOEs) that would apply to the public Post Office if it was 50% or more owned by central government and ‘principally’ engaged in ‘commercial activities’. ‘Commercial activities’ are defined as activities undertaken ‘with an orientation towards profit-making’, meaning anything more than cost recovery. Many public postal services would fall within that definition.¹⁹ The Post Office would then have to operate on **a purely commercial basis** when buying or selling that service. Countries might be allowed to exclude their postal SOEs from the annex in a schedule, but that would have to be negotiated with all the TiSA parties, including the US.

The US is willing allow some limited protection for services supplied by an SOE under an explicit **public mandate**, such as a clearly-defined UPSO.²⁰ But that could only apply to postal services supplied *inside* the country under the mandate; any international mail service would still be subject to the obligations in the annex. In practice, those mandated domestic postal services would often be integrated within the postal service’s broader activities and impossible to separate out for a different kind of governance. The EU has proposed a broader protection for any ‘legitimate public service obligation’.²¹ However, both the US and EU approaches would require the SOE not to discriminate when it sells those mandated postal services to people or firms of another TiSA party.

17 TiSA, Article 5, Annex on Delivery Services, dated 9 November 2016

18 TiSA, Article 6, Annex on Delivery Services, dated 9 November 2016

19 TiSA, Article X.1, Annex on Stated-Owned Enterprises, dated November 2016

20 TiSA, Article X.4, Annex on Stated-Owned Enterprises, dated November 2016

21 TiSA, Article X.4, Annex on State-Owned Enterprises [EU Comments October 2016]