

EU-Mercosur Agreement on Trade in Services

Balancing market access and the right to regulate

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This briefing is the third in a series on the EU-Mercosur agreement, where BLOMSTEIN addresses key provisions with respect to Trade in Goods, Trade in Services, Public Procurement, Competition and Sustainability, and outlines implications and opportunities for businesses.

In this release, we focus on the Agreement's core provisions related to Trade in Services, particularly the commitments framework, national treatment and limitations. In 2023, the EU exported €28.5 billion in services to Mercosur, while Mercosur's service exports to the EU amounted to €13.1 billion. The Agreement is expected to significantly boost this bilateral exchange. For the EU in particular, the agreement presents expanded opportunities in strategic sectors such as business services, financial services, telecommunications, maritime transport, and postal and courier services.

Scope

The Services chapter is designed to facilitate the provision of services between the two blocs - whether through local establishment, consumption abroad (*i.e.* supply in the territory of a party to the service consumer of the other party), cross-border delivery (*i.e.* supply from the territory of a party into the territory of the other), or the entry and temporary presence of natural persons.

While the framework is broad, it allows each party (*i.e.* each EU and Mercosur country) to apply tailored commitments. Also, it generally excludes from its scope services supplied in the exercise of governmental authority, as well as several sensitive sectors. These include air transport services (with exceptions for repair and maintenance, selling and marketing, computer reservation systems, and ground-handling), national maritime cabotage, inland navigation, and audiovisual services.

Crucially, the liberalization measures introduced by the Agreement do not limit either party's right to regulate in a non-discriminatory manner or to provide services in line with public policy objectives. This includes the ability to determine how essential services - such as healthcare, education, and water - are delivered to their citizens. The Agreement safeguards the regulatory autonomy of governments, ensuring that market

access is balanced with the pursuit of legitimate public interests. Specifically, it preserves the ability of regulators to develop and enforce non-discriminatory rules and standards aimed at:

- Protecting health, safety, the environment, and consumers;
- Ensuring high-quality services and qualified service providers;
- Upholding labour rights and fair working conditions.

Market access commitments and national treatment

Each bloc has made specific market access commitments that reflect its unique economic context and sectoral sensitivities. The Agreement follows a positive list approach, meaning that only those sectors explicitly listed are subject to liberalization obligations.

Once a sector is scheduled for liberalization, the parties may not introduce or maintain quantitative restrictions or procedural barriers to market access unless such limitations are explicitly listed. These limitations may include, for example:

- Caps on the number of service suppliers;
- Restrictions on the total value of service transactions or the volume of output;
- Limits on the number of natural persons that may be employed.
- Limits on foreign capital participation (e.g. in the establishment or operation of industrial facilities with national security relevance, or in the acquisition of rural land);
- Requirements concerning the legal form of the business (such as mandatory joint ventures or incorporation under domestic law);

The first three types of limitations (i.e., output, no. of supplier or number of natural persons to be employed) would take the form of numerical quotas or an 'economic needs test.' An *economic needs test* is a mechanism used to determine whether market access for a service or investment should be granted based on the current economic conditions and demand in the host country. In the latter case, the test must be clearly defined, including the specific criteria on which it is based.

Each party must extend national treatment to the companies, services, and service suppliers of the other party - that is, treatment no less favourable than that accorded to its own like domestic service suppliers, unless conditions or qualifications are listed in the

schedules of commitments. For example, Brazil reserves the right to limit national treatment where necessary to promote technological development (e.g. through targeted tax measures) or to support the development of less advantaged regions.

Additionally, the Agreement requires that licensing and qualification procedures be proportionate to legitimate public policy objectives, and that such requirements be clear, objective, transparent, and published in advance.

In summary: The parties may not apply market access or national treatment restrictions beyond those explicitly listed in their respective schedules of specific commitments.

Specific services sectors

The Agreement includes targeted provisions for several key service sectors, such as postal and courier services, telecommunications, financial services, e-commerce, and maritime transport. These disciplines are primarily designed to promote a level playing field for service providers by fostering transparency, non-discrimination, fair competition, and cooperation between the two blocs.

Ensuring a Level Playing Field:

- The e-commerce section establishes the principle of technological neutrality, prohibits customs duties on electronic transmissions, and disallows prior authorization requirements solely based on the electronic nature of the service.
- The telecommunications section mandates that procedures for the allocation and use of scarce resources (e.g. frequencies) be objective, timely, transparent, and non-discriminatory. It also guarantees suppliers the right to negotiate interconnection agreements with other providers and access to essential facilities.

Preventing Anti-Competitive Practices:

- In the postal sector, the Agreement requires each Party to ensure that any postal service provider subject to a universal service obligation or benefiting from a postal monopoly refrains from anti-competitive practices. These include, notably, cross-subsidization and tariff differentiation based on non-objective or discriminatory criteria.
- The telecommunications provisions establish that the parties should establish a legal framework to prevent abuse of dominant market positions in their respective jurisdictions.

Key takeaways

The Agreement establishes a comprehensive framework to enhance market access for services between the EU and Mercosur. While it allows each party to maintain clearly

defined limitations to safeguard regulatory autonomy and public policy objectives, it provides a solid legal foundation for deepening cooperation and fostering more predictable and transparent service trade relations between the two blocs.

BLOMSTEIN will closely monitor further developments and keep you informed. If you have any questions on the topic, Roland Stein, Bruno Galvão, Carolina Vidal, Marcelo de Sousa and the entire team is ready to assist you.