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Financial services liberalisation and TiSA: implications for EU Free Trade Agreements

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STUDY

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ABSTRACT

With 23 participating countries, including all of the world's largest financial centres, covering the vast bulk of global financial services trade, the TiSA negotiations on financial services trade are strategically important for the EU. They are likely to deliver commitments and rules, which go significantly beyond the GATS package negotiated over two decades ago – and to extend their umbrella to a greater range of countries. In addition, the level of market access commitments ultimately incorporated into TiSA will set a new benchmark and reference point for future EU FTA negotiations. Depending on the outcome of remaining negotiations, the TiSA may also establish influential new and consolidated texts on such matters as data transfer, forced localisation, source code, regulatory transparency, and domestic regulation.

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List of abbreviations

BCBS	Basel Committee on Banking Supervision
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement (EU-Canada)
EU	European Union
FATF	Financial Action Task Force
FSB	Financial Stability Board
FTA	Free Trade Agreement
G20	Group of Twenty
GATS	General Agreement on Trade in Services
IAIS	International Association of Insurance Supervisors
IOSCO	International Organisation of Securities Commissions
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TTIP	Trans-Atlantic Trade and Investment Partnership
US	United States of America
WTO	World Trade Organization

Executive summary

Background

The plurilateral Trade in Services Agreement (TiSA) is amongst the largest and most significant free trade agreement currently being negotiated, involving 23 participating countries, representing approximately 70 % of world services exports, and including 12 members of the G20. Stemming from the failure of the services negotiations in the WTO's Doha Round, it is designed to boost liberalisation of the global services sector, moving beyond the current levels of liberalisation represented in the WTO's General Agreement on Trade in Services. Talks began in early 2013, and there have been 19 rounds of negotiations in total so far, working towards a stated general ambition of concluding the agreement by the end of 2016, or shortly thereafter.

Members of the EU are the world's largest exporters and importers of financial services, with a net annual trade surplus of well into the tens of billions of euros. As a result, the financial services sector has emerged as key priority for trade negotiations. Since the TiSA negotiations involve the three largest global financial centres – the US, EU and Japan – as well as a number of other important economies, they represent one of the most significant opportunities for further liberalisation currently available. This is particularly the case given the currently uncertain future of the TTIP negotiations.

Aim

The aim of this study is to better understand the scope, depth and implications of the EU's potential financial services commitments in TiSA, and more particularly:

- to analyse the content of the TiSA as it relates to financial services, on the basis of officially available non-confidential material;
- to compare the level of ambition, and the content of the rules, likely to be contained in TiSA to the state of the art in other recent EU and US free trade agreements; and
- to analyse how the outcome of the TiSA negotiations on financial services might affect other FTAs which the EU is currently negotiating, or may in the future negotiate, with particular focus on TTIP.

Key findings

It is impossible to say with any certainty at this stage precisely what the TiSA will contain, as negotiations are still ongoing, and important negotiating texts remain confidential and unsettled in many respects. By agreement, the following analysis is based on officially available material, primarily the EU's initial and revised offers, as well as its textual proposals for the TiSA core text and the Annex on Financial Services. Since these documents are now relatively old, and do not represent the latest EU position on all issues, this material has been supplemented as appropriate with material from interviews with key stakeholders close to the negotiations.

Looking first at the level of ambition of the offers currently tabled during the negotiations, the following conclusions can be drawn:

- TiSA market access commitments in financial services will certainly go beyond those commitments set out in the GATS Understanding on commitments in Financial Services. The GATS Understanding contains very broad commitments on Mode 3 trade (commercial presence), covering essentially all financial services, including a right of establishment. It also includes a limited number of commitments on Mode 1 and 2 (cross-border) border trade in services in sectors such as insurance for air and maritime transport, reinsurance, provision and transfer of financial information and financial data processing, among others.

- While the precise ways in which TiSA market access commitments will exceed those contained in the GATS Understanding is impossible to predict with certainty, opportunities may exist for extended commitments for cross-border trade in the areas of portfolio management services provided to investment funds, electronic payment services, and business to business insurance intermediation, among others.
- The EU's initial market access offer essentially corresponded to the package of commitments it made in its FTA with Korea. It has since indicated that it may be prepared to improve its offer to the level of ambition it achieved with Canada in CETA. A number of other parties to the TiSA negotiations have made offers which essentially replicate positions agreed under the Trans-Pacific Partnership, but few if any TPP parties have gone beyond the TPP package in the TiSA negotiations.
- TiSA parties have adopted a 'negative list' approach to the national treatment obligation, with the result that this obligation will apply broadly across all TiSA parties, in respect of all financial services and services suppliers, subject only to the conditions and qualifications explicitly listed in each Party's Schedule. Controversially, however, the EU's revised offer contains a significant reservation to the national treatment obligation in respect of a wide range of financial services.
- One obvious but significant point of difference between the TiSA and most new generation FTAs is that, unlike the latter, TiSA will not contain investment protections, and related investor-state dispute settlement, in respect of investments and investors in the financial sector.

Second, in relation to scope and content of the rules concerning financial regulation contained in the TiSA core text and Annex on Financial Services:

- The TiSA package is likely broadly to replicate the GATS Understanding and GATS Annex on matters such as monopoly rights, public procurement, new financial services, senior management, payment and clearing mechanisms, and self-regulatory matters, among others matters.
- However, TiSA is likely to contain new and important disciplines on forced data localisation, and source code, even if it is not yet clear whether or not these will apply unchanged to the financial services sector.
- TiSA is likely to contain developed disciplines on transparency and domestic regulation, and may even represent the state of the art in these areas.
- However, disciplines relating to regulatory cooperation, regulatory harmonisation and mutual recognition are not likely to be particularly innovative or strong, in part as a result of the limitations imposed by the multilateral negotiating context.

Third, in relation to the range of exceptions, safeguards and carveouts likely to be included in TiSA:

- The EU's public proposals contain a prudential carveout, and a general exceptions provision, taken from WTO documents. Although the text of these provisions remains very much under discussion in the negotiations, the EU's official texts do not reflect more recent developments in both US and EU FTA practice, which – in some respects as least – would appear to provide higher levels of protection for prudential regulatory measures.
- This may limit the legal protections offered by these more recent safeguards in some circumstances.

Finally, on the question of how the TiSA negotiations on financial services may impact other FTAs, including the content and conduct of future FTA negotiations to which the EU may be a party:

- The impact of the TiSA on future FTA negotiations will vary significantly depending on whether the TiSA contains an MFN obligation, and if it does, whether it is accompanied by an exception for economic integration agreements. This is still unsettled at the time of writing.

- The overall package of liberalisation commitments ultimately agreed in TiSA are likely to set a new baseline for future EU FTA negotiations. This will particularly be the case in respect of upcoming or ongoing FTA negotiations with other TiSA Parties, such as Australia, New Zealand and Japan.
- In addition, TiSA may be particularly influential in establishing reference texts for new or enhanced disciplines on data localisation, data transfer, source code, regulatory transparency, and domestic regulation.
- Furthermore, in those areas (such as in which the texts used by the EU and the US in their current FTA practice differs), the compromise reached in the TiSA negotiations may act as a focus for greater convergence in these areas in future FTAs. In particular, these compromises are likely to be replicated in TTIP negotiations.
- While the safeguards and exceptions provisions contained in the TiSA are likely in many respect to be comprehensive, there may be some aspects in which they may not reflect current best practice (compared, for example, to the prudential carveout in CETA). Where that is the case, TiSA may have an impact on the effective legal protection provided by enhanced exceptions contained in FTAs to which TiSA members are parties.
- Specifically as regards the relation between TiSA and TTIP:

  Textual compromises worked out in the TiSA negotiations between the US and the EU are likely to influence TTIP negotiations very strongly, and in many cases to be replicated in the TTIP text.

  TiSA does not provide a realistic opportunity for the EU to achieve in main priorities for transatlantic trade in financial services, namely the removal of state-level regulatory restrictions on market access in US financial services markets, and greater regulatory cooperation at the federal level. As a consequence, care ought to be taken to maintain a position of some strength in the TTIP financial services negotiations, taking account of TiSA commitments.

  Nevertheless, even the most ambitious of the currently imaginable TiSA outcomes on financial services would still leave something on the table for TTIP negotiations. The most significant is the matter of investment protection obligations for investors and investments in the financial services sector (including ISDS).

  That said, were TTIP negotiations to fall apart for any reasons, TiSA remains the only avenue outside the WTO in which new generation rules for transatlantic financial services trade are being developed. This increases the importance for the EU of a relatively ambitious outcome for the TiSA negotiations, particularly in the context of the uncertainties generated by the result of the referendum on EU membership held in the UK.

1 Background and context

1.1 Overview of the TiSA negotiations

The impetus for the TiSA negotiations came primarily from the failure of the WTO Doha Round services negotiations, when a subset of WTO Members with an interest in service sector liberalisation decided to press ahead with a plurilateral services agreement outside the auspices of the WTO. Talks began in March 2013, and there have been a further 17 rounds of negotiations since then, at a rate of roughly one every two months (see Table 2). While no formal deadline for the conclusion of talks has been set, the parties have indicated their general ambition of concluding the talks by the end of 2016. This seems possible, but optimistic, based on current progress: revised offers have been circulated, and a second revision of offers is foreseen for October 2016.

There are currently 23 participants in the TiSA negotiations, representing approximately 70 % of world services exports, and including 12 members of the G20 (see Table 1). Of the 22 non-EU parties, seven have a bilateral trade agreement of some kind with the EU already, though only one of those (Korea) is a new generation FTA. The key emerging markets of Brazil, India and China are not currently parties to the TiSA, though China expressed an interest in joining the negotiations in 2013. China's bid has been supported by the EU, but resisted by the US and other parties, citing concerns about China's readiness to implement the reforms which TiSA may require. It is highly unlikely that further countries will join the negotiations at this stage.

Table 1: Participants in the TiSA negotiations

Participants in the TiSA negotiations			
Australia~	Hong Kong	Mauritius	Peru
Canada~	Iceland*~	Mexico*	Switzerland*~
Chile	Israel*	New Zealand~	United States~
Colombia*	Japan~	Norway~	Taiwan
Costa Rica	Korea*	Pakistan	Turkey*~
European Union~	Liechtenstein~	Panama	

NOTES:

- Uruguay and Paraguay withdrew from negotiations in 2015

- China expressed in joining the TiSA negotiations in 2013.

- Countries marked with * already have free trade agreements, association agreements, or economic cooperation agreements with the EU.

- Countries marked with ~ made commitments in the WTO according to the GATS Understanding on Commitments in Financial Services.

Since these negotiations are occurring outside the WTO, without the formal consent of the WTO Membership, and without the participation of either the WTO itself or third countries as observers, the TiSA will not be a WTO agreement. This has the consequence that its benefits will be enjoyed only by the parties to it, rather than being extended on an MFN basis to all WTO Members. Furthermore, it will not be enforceable through the WTO's existing dispute settlement mechanism (see section 2.5 below). However, it is the expressed desire of the parties, including the EU, that the TiSA could be 'multilateralised' in the future, and perhaps brought within the formal umbrella of the WTO. In order to facilitate this, the parties have used the WTO's General Agreement on Trade in Services as the textual basis for negotiations.

The EU's negotiating mandate for the TiSA, made public in March 2015, sets out a number of key objectives, including: (a) coverage of all, or substantially all service sectors (other than services supplied in the exercise of governmental authority); (b) binding at least the existing autonomous level of liberalisation of parties; (c) new and enhanced regulatory disciplines beyond those contained in the GATS, including in the area of financial services; and (d) an effective dispute settlement mechanism. The mandate also makes clear that the agreement should unequivocally confirm the EU's right to regulate in the public interest, including its right to introduce new regulations.

More generally, the broader purpose of the TiSA negotiations, from the perspective of the EU, is to update, develop and extend the reach of the GATS Understanding on Commitments in Financial Services, which was concluded in 1994 and has provided the baseline for liberalisation commitments in financial services since then. It is not intended to replace or forestall future FTA negotiations between the EU and its trading partners, but rather to provide a new baseline for such negotiations, and to do so in a single (and therefore more efficient) multilateral process.

The EU made its initial TiSA offer publicly available in July 2014 and has recently published its revised offer in May 2016 together with the other TiSA participants. On 2 February 2016, the European Parliament passed resolution A8-0009/2016, containing a number of detailed recommendations concerning various aspects of the TiSA negotiations, as noted further below.

Table 2: TiSA negotiating rounds

Completed rounds of TiSA negotiations			
Round 1	18-19 March 2013	Round 11	9-13 Feb 2015
Round 2	29 Apr – 5 May 2013	Round 12	13-17 April 2015
Round 3	24-30 June 2013	Round 13	6-10 July 2015
Round 4	16-22 Sep 2013	Round 14	6-13 Oct 2015
Round 5	24-28 Nov 2013	Round 15	2 Nov – 4 Dec 2015
Round 6	17-24 Feb 2014	Round 16	31 Jan – 5 Feb 2016
Round 7	28 Apr – 2 May 2014	Round 17	10-15 April 2016
Round 8	23-24 June 2014	Round 18	28 May – 3 Jun 2016
Round 9	22-26 Sep 2014	Round 19	8 -18 July 2016
Round 10	1-5 Dec 2014		

1.2 The larger negotiating context

The TiSA represents only one of a large number of different venues in which negotiations on services liberalisation – and, in particular, financial services liberalisation – have been conducted over the last decade and more.

Since the at least 2005, both the United States and the European Union have sought to include enhanced disciplines and commitments relating to financial services in their free trade agreements (FTAs). On the US side, the most relevant concluded agreements include the Korea-US FTA (signed June 2007, entered into force 2012), the US-Panama FTA (entered into force 2012) and perhaps most significantly the recently concluded Trans-Pacific Partnership (yet to come into force). On the EU side, the most significant new generation agreements for financial services are the EU-Korea FTA (entered into force 2011), the Comprehensive Economic and Trade Agreement (CETA) with Canada (yet to enter into force), the EU-Singapore FTA (yet to enter into force), and the EU-Vietnam FTA (also still to enter into force). The content of these treaties provides an important background for the TiSA negotiations, setting a reference point for both the level of commitments, and the content of prospective disciplines. Importantly, the TiSA will be the first modern trade agreement to which both the EU and the US are parties, providing one of the first opportunities to consolidate the different approaches which these parties have taken to certain issues in their FTA practice.

In addition, there are a number of TiSA parties with which the EU is either currently negotiating a FTA, or considering doing so. The most significant of these is the US-EU Transatlantic Trade and Investment Partnership, which has been under negotiation since early 2013. As is well known, financial services have posed significant issues in TTIP negotiations. The US has strongly resisted the inclusion of disciplines on regulatory cooperation in respect of financial regulation, for fear of weakening various regulatory initiatives which have been implemented since the financial crisis, and/or interfering with regulatory initiatives underway in other international fora. For its part, the EU has taken the position that market access commitments in the financial services sectors are inextricably linked to enhanced cooperation on regulatory matters, and has refused to negotiate on one without the other. This deadlock has the potential to complicate the TiSA negotiations on financial services. The consequences for TTIP of the recent referendum on EU membership in the UK are not clear, though both sides have indicated that the rationale for an agreement remains as strong as ever.

1.3 The financial services sector and the prospects of increased financial services trade

Financial services make a significant economic contribution to the EU. In 2013, the sector generated gross value added (GVA) of EUR 731 billion (approximately 6 % of the total) and employment for 6.4 million people; moreover, financial services contributed to EUR 59 billion of exports and EUR 23 billion of imports, resulting in a net trade balance of EUR 36 billion and the second highest trade balance of all EU services (Eurostat, 2014).

Enhanced access to foreign markets may contribute to growth of an already economically important sector. A strong financial service sector is a key driver of growth in other EU economic sectors, generating demand across the EU supply chain: EUR 316 billion worth of intermediate goods and services were purchased by the financial services sector from other sectors in 2013 (50 % of the EU's total supply chain spending) (PWC, 2015: 14). In addition, the sector supplies essential services worth EUR 530 billion to EU businesses. Financial services also represent a source of considerable fiscal revenue for Member States: in 2006-2010, the combined tax contribution of UK, France, Italy and Germany's financial services alone amounted to EUR 209 billion per year (PWC, 2015: 3).

There is a perception on the part of European financial services firms that US markets for financial services are particularly difficult to enter, primarily as a result of a number of state-level measures, including foreign ownership restrictions for commercial banks, restrictions on the establishment of representative offices in certain states, requirements to have US personnel on corporate boards, as well as the complications and expense associated with different regulatory measures in place in different sub-federal jurisdictions. The EU has, at present, no comprehensive FTA with the US, outside the framework of WTO rules. It is only through TiSA, as well as TTIP negotiations, that enhanced market access is being pursued for European financial services firms in US markets.

In addition, TiSA parties include a number of countries which have no current FTA with the EU, and/or have not signed up to the GATS Understanding on Commitments in Financial Services. They include Australia, New Zealand, Hong Kong, Taiwan, Chile, Turkey and Mexico. TiSA therefore holds out the prospect of qualitatively enhanced access to the financial services markets of those countries.

1.4 Financial regulation and trade agreements

1.4.1 Regulatory Responses to the Financial Crisis

The 2008 financial crisis exposed structural weaknesses in the regulatory framework for financial services: it is now widely recognised that insufficient regulatory oversight, at both global and national levels, enabled the build-up of systemic risks and contributed to crisis conditions (Claessens and Kodres, 2014: 6). Post-2008, international reform efforts have been focusing on raising regulatory standards in financial services, with a view to avoiding market fragmentation and regulatory arbitrage. International reforms are also addressing too-big-to-fail issues by tightening the regulation of Systemically Important Financial Institutions, subjecting such institution to higher capital requirements and liquidity surcharges, tighter exposure restrictions, levies and structural measures. After the crisis, the Basel Committee on Banking Supervision therefore overhauled the regulatory framework for capital adequacy (Basel 2.5 and Basel III). Basel 2.5 tightens regulation of banks' trading books and securitisations, while the Basel III accord has put reform of the capital structure of banks at the forefront of financial services regulation, and specifically addresses the regulation of systemically important financial institutions.

The EU response to the financial crisis has been shaped by the obligation to implement international regulatory standards, with the objective of building a resilient and stable financial system (European Commission, 2010: 4). It adopted the new Basel III capital and liquidity standards into law in July 2013, through the Capital Requirements Directive IV (CRD IV) and Capital Requirements Regulation (CRR), which will be fully implemented by 2019. These regulations create a single rulebook across the EU regarding bank capital, leverage, liquidity; implement regulations concerning bank governance and risk. Furthermore, since insufficient oversight of the shadow banking sector is now regarded as one of the key contributory conditions to financial instability (Claessens and Kodres, 2014: 6), this package also introduces reforms to the shadow banking sector, alongside the Money Market Funds (MMFs) Proposal of 2013. The Bank Recovery and Resolution Directive 2014 implements the standards set by G20 and the FSB relating to the too-big-to-fail issue.

Reforms to the securities and derivatives market include the European Market Infrastructure Regulation (EMIR) 2012 and the Markets in Financial Instruments Directive II (MiFID II) and Markets in Financial Instruments Regulation (MiFIR) 2014 package which have made structural changes to the over-the-counter (OTC) derivatives market and enhance transparency in the trading market; they implement enhanced regulation of investment firms and trading venues.

1.4.2 TiSA and the regulation of financial services

The implications of liberalisation for financial services regulation is a recurrent theme in the public debate about TiSA. On one hand, some have voiced concerns that disciplines contained in TiSA may undermine regulatory initiatives put in place since the 2008 financial crisis, by placing new limitations on regulations with extra-territorial reach or which relate to cross-border transactions (Reding, 2015: 5-18). Similarly, there is a concern to avoid the inadvertent introduction of new systemic risks through the further liberalisation of financial services markets, and the enhanced integration of the world's largest financial centres. Furthermore, a recent report commissioned by the European Parliament raised concerns that 'greater domestic market access for foreign financial services providers and easier cross-border banking and insurance transactions create opportunities not only for business and economic prosperity, but also for abuse through money laundering and tax fraud' (Douma, Güven et al, 2016: 6).

On the other hand, industry voices argue that there has been a dramatic rise in regulatory discrimination and other barriers to trade since 2008, which ought to be addressed in the context of trade negotiations. The development of international regulatory standards since 2008, described above, has only gone some way to alleviating these concerns. Even when States implement the global financial regulatory agenda at the national level, but the form, nature and scope of regulations are largely left to their discretion. The consequent regulatory divergence is problematic from the perspective of financial institutions, which may face higher transaction costs when undertaking cross-border activities – a potential barrier to trade (Bowles, Brummer and Murphy, 2013: 21). For example, the USA has diverged from many other states, including the EU, by implementing enhanced prudential regulation for foreign financial institutions. In particular, the Dodd-Frank Act requires large foreign financial firms operating in the US to comply with local capital requirements, which may be higher than the capital adequacy levels to which their parent companies are subject. The US legislation has been criticised by the European Commission and other bodies for having abandoned the principle of the group-based setting of capital requirements in favour of geographical supervision, and of having infringed the principle of the primacy of banking supervision by home-country authorities (Deutsch, 2014: 5).

Addressing these issues through trade negotiations unavoidably raises very sensitive issues. As noted above, the TTIP negotiations have made it apparent that the US government wishes to avoid any possibility of its enhanced prudential regulations being undermined. The same is true, of course, on the European side, where the European Parliament has stated very strongly its view, in respect of TiSA, that 'no new commitment [should] be made that could jeopardise EU financial regulation by forcing the EU to turn back on its enhanced regulatory framework for the financial sector or by preventing the EU from using the law to tackle excessive risk-taking by financial institutions' (Resolution A8-0009/2016, 2016: para 1(e))(iv). As the TiSA seeks trade liberalisation between 23 state parties, with varying preferences regarding the stringency of financial regulation, dealing with regulatory divergence is a critical issue. The debate turns on coordinating diverse regulatory frameworks in order to optimise financial services liberalisation, without unduly restricting policies that impose high regulatory standards to limit financial risk.

2 Financial services provisions in TiSA

This chapter examines the possible content of the TiSA as it relates to financial services. Since no final texts have been agreed, and many issues in the negotiations are still highly unsettled, it is impossible to say for sure what the TiSA will contain. By agreement, the following analysis is based on officially available material, primarily the EU's initial and revised offers, as well as its proposals for the core text and the Annex on Financial Services – but not on any documents which have been made available through unofficial channels. Since some of these documents are now relatively old, and do not represent the latest EU position on all issues, this material has been supplemented as appropriate with material from interviews with key stakeholders close to the negotiations. Certain non-confidential EU textual proposals for some important documents, such as the Annexes on Domestic Regulation, Transparency, and E-Commerce, are still not officially available.

2.1 The architecture of the agreement

2.1.1 Structure

Following the basic structure of the WTO's General Agreement on Trade in Services, TiSA will consist of three basic elements:

(1) The **core text** will set out a framework of general rules and disciplines generally applicable all sectors in which Members have agreed to undertake commitments. It will also include certain institutional provisions, including dispute settlement.

(2) Each party will have a **Schedule of Commitments**, setting out the liberalisation commitments it undertakes, on a sector by sector, mode by mode basis, including relevant qualifications, reservations and limitations.

(3) in addition, there will be a series of **Annexes** contain additional rules relating solely to the sector or issue which is the subject of the Annex. For financial services, the most relevant rules are found in the Annex on Financial Services, and perhaps (depending on the ultimate outcome of negotiations) the Annex on Domestic Regulation, the Annex on Transparency and/or the Annex on Electronic Commerce.

All three elements need to be read together to gain a comprehensive understanding of the potential application of TiSA on financial services.

2.1.2 Scope of application

According to the EU's proposed core text, the TiSA will apply to measures by Parties affecting 'trade in services'. The definition of 'trade in services' is exactly that same as that in the GATS, and covers four modes of supply:

- Mode 1 ('cross-border supply') refers to the supply of a service from the territory of one WTO Member to another;
- Mode 2 ('consumption abroad') occurs when a service consumer of one WTO Member consumes a service while in the territory of another;
- Mode 3 ('commercial presence' or 'establishment'), involves a service supplier of one WTO Member doing business in another WTO Member through commercial presence in the latter; and
- Mode 4 ('presence of natural persons') occurs when a service supplier from one WTO Member sends individuals to another WTO Member to supply services to consumers i7n that territory.

Importantly, the category of Mode 3 services trade covers forms of economic activity which are also commonly understood as foreign investment.

The EU's proposed Annex on Financial Services is expressed to apply more specifically to 'measures affecting the supply of financial services'. A 'financial service' is defined as a 'service of a financial nature offered by a financial service supplier of a Party'; and a 'financial service supplier' is in turn defined as any natural or juridical person of a party (other than a public entity) wishing to supply or supplying financial services. The generality of this definition means that in practice financial services are defined by reference to a broad, non-exhaustive list of activities divided into Insurance and Insurance-related Services on one hand, and Banking and Other Financial Services on the other. The former category is then subdivided into life accident and health insurance; non-life insurance; reinsurance and retrocession; and services auxiliary to insurance. Banking and Other Financial Services covers a wide range of economic activities including asset management, taking deposits, lending, financial leasing, trading, participation in securities, provision and transfer of financial information, advisory services, among others.

Services 'supplied in the exercise of governmental authority' are excluded from the definition of 'services' contained in the core text, and the Annex is expressed not to apply to such services. The Annex makes clear that 'services supplied in the exercise of governmental authority' means, in the context of financial services:

- activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
- activities forming part of a statutory system of social security or public retirement plans; and
- other activities conducted by a public entity for the account of the government, or with the guarantee of the government, or using the financial resources of the government.

However, where activities in the latter two categories are provided in competition with other financial service suppliers, they are included within the scope of the agreement. All these provisions mirror the content of the GATS Annex on Financial Services.

2.1.3 Types of obligations, and scheduling modalities

Like the GATS, TiSA contains two broad types of obligations:

- 'general obligations' which apply to all measures covered by the agreement, immediately and without the need for a Party to inscribe anything in its Schedule of Commitments;
- 'specific obligations' which apply only to those services, and those modes of supply, which a party has agreed to make subject to liberalisation commitments.

A further relevant distinction is between a 'positive list' approach to the scheduling of specific commitments, and a 'negative list' approach. According to the former approach, no commitments are made on sectors which are not positively inscribed in a party's Schedule. According to the latter, commitments are made in all relevant sectors and modes of supply *other than* those set out in a party's Schedule. Unlike most other services agreements, the TiSA has adopted a hybrid approach to listing: positive listing for market access; and negative listing for national treatment, resulting in horizontal application of National Treatment across all service sectors (including financial services), unless expressly excluded.

it is also envisaged that Parties may wish to include in their Schedules additional commitments beyond those contained in the core text and the Annexes.

2.2 Liberalisation obligations relevant to financial services

This section sets out certain obligations by which TiSA parties agree to liberalise their financial services markets. The following section 2.3 then turns to TiSA obligations concerning regulatory frameworks in the financial sectors.

2.2.1 Market access commitments

The market access obligation, contained in the core text, is the primary provision by which TiSA parties open their financial services markets to foreign service suppliers. As noted above, in the proposed core text, this obligation only applies only in sectors in which specific commitments are undertaken, on a 'positive list' approach.

Importantly, making a market access commitment in any particular service sector does not entail an obligation to remove *all* restrictions on market access in that sector. Rather, it requires only the removal of a specified range of measures, which typically include: limitations on the number of service suppliers; limitations on the total value of service transactions or assets; limitations on the total number of service operations or on the total quantity of service output; limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ; measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

In relation to financial services, the core text is supplemented by the proposed Annex on Financial Services which sets out the minimum market access commitments which all TiSA parties agree to undertake. This is in turn supplemented by each Party's Schedule of Commitments, which sets out its commitments in detail.

The combined effect of the EU's proposed Annex, and the EU's revised offer Schedule, is as follows:

- *Modes 1 and 2 (Cross-border trade)*

  In relation to Modes 1 and 2 (cross-border trade), the EU's proposed Annex on Financial Services requires all TiSA parties to permit non-resident suppliers to supply a relatively narrow list of financial services, including at least: (a) insurance of risks relating to maritime shipping and commercial aviation and space launching and freight (including satellites), as well as risks relating to goods in international transit; (b) reinsurance and retrocession; (c) services auxiliary to insurance (such as consultancy, actuarial, risk assessment and claim settlement services); (d) provision and transfer of financial information and financial data processing; and (e) advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services. These commitments would, in the EU's proposal, be subject to limitations in the Party's Schedule. Additionally, also in relation to Modes 1 and 2, the EU's proposed Annex would require each TiSA party to permit its residents to purchase in the territory of any other Party a wider range of services, including all the insurance services listed above, along with any banking or other financial service. This initial proposal for the Annex essentially reflected the content of the GATS Understanding.

  The EU's market access commitments on Modes 1 and 2 in its revised offer Schedule broadly reflect this position, though there are a small number of country-specific exclusions of certain services, as well as numerous limitations, relating to such matters as juridical form, residence, the use of telecommunications networks, local establishment, and authorisation. In some respects, however, the EU's revised offer goes beyond the minimum commitments required by the Annex, and reflects instead the level of commitments already agreed to in the EU-Korea FTA. Some EU countries have

undertaken additional commitments relating, for example, to: insurance intermediation; trading of transferable securities; lending, financial leasing, payment and money transmission services, and money broking; credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy and other services. Moreover, Mode 2 commitments in Banking and Other Financial Services are almost entirely unlimited.

It should be expected that the list of sectors subject to market access commitments for cross-border trade will continue to evolve over the course of negotiations. Other parties to the TiSA negotiations are likely to want to expand the list, including to services such as investment advisory services, portfolio management services as provided to investment funds and electronic payment services. There are some indications that the EU wishes to liberalise cross-border trade in business-to-business insurance intermediation.

- *Mode 3 (Commercial presence)*

In relation to Mode 3 trade (commercial presence), the EU's proposed Annex provides that each TiSA Party is required to grant to foreign financial service suppliers the right to establish and expand a commercial presence within its territory, including through the acquisition of existing enterprises. This would be subject to limitations in the Party's Schedule, and the host Party would retain the right to impose 'terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence', provided that doing so would not circumvent the obligation to grant foreign financial service suppliers a right of establishment.

The EU's market access commitments on financial services in its revised offer Schedule broadly reflects this: Mode 3 commitments are undertaken for essentially all financial services, subject to specific country-by-country limitations relating to, for example requirements as to juridical form, residence, local incorporation, prior operational experience, authorisation, and so on.

Note that there continues to be some uncertainty as to whether these market access commitments are will be subject to a standstill obligation, a matter on which the EU's position has evolved over the course of the negotiations (see section 2.2.4 below).

2.2.2 National treatment commitments

The national treatment obligation ensures that foreign services and service suppliers are not systematically discriminated against *vis-à-vis* their domestic counterparts. This is a fundamental and relatively uncontroversial discipline which is found in all relevant trade agreements. In TiSA, as a result of the adoption of a negative list approach, the national treatment obligation applies to all financial services and services suppliers, subject only to the conditions and qualifications contained in each Party's Schedule.

Accordingly, the EU's initial offer contained relatively comprehensive national treatment commitments. For banking and other financial services (excluding insurance), a very limited number of country-specific reservations were listed, having mainly to do with local branch requirements, management residence requirements, local incorporation, juridical form, and so on. Furthermore, the EU in its initial offer reserved the right to require: (a) that only firms with EU-registered offices can act as depositories of the assets of investment funds; and (b) that a specialized management company (with head and registered offices in an EU Member State) be established in order to manage unit trusts and investment companies. In respect of insurance services, there were broad reservations in respect of direct insurance and direct insurance intermediation, but otherwise only a similarly small range of reservations are present covering, for example, authorisation requirements, the prohibition of promotional activity, limitations on foreign directors, limitations on the juridical form of local commercial presence, and so on.

Importantly, however, the EU's revised offer included a new horizontal limitation, according to which the EU reserves the right to adopt or maintain any measures inconsistent with national treatment with respect to all financial services other than those listed in the Annex as those on which cross-border market access commitments are to be made (see section 2.2.1 above).

2.2.3 Most-favoured nation treatment

In relation to MFN treatment, two different issues need to be distinguished. The first is whether the benefits of the TiSA agreement are to be extended to all WTO Members (even non-TiSA parties) on an MFN basis. As noted above, this issue is settled: only TiSA parties will benefit from commitments made under TiSA.

The second issue is whether the TiSA itself will contain an MFN clause prohibiting any Party from providing preferential treatment to another country without applying it immediately and unconditionally to all TiSA parties, (the 'MFN-forward' issue). This second issue is still not agreed, and at least three possible approaches can be distinguished:

- the TiSA may contain no MFN clause at all. This position is reflected in the EU's core text proposal, and would permit TiSA parties to conclude FTAs with other countries or groups of countries without having to extend their benefits to all TiSA parties automatically.
- the TiSA may contain an MFN clause, with an exception for economic integration agreements. It is understood that the EU position may have evolved to this over the course of negotiations, such that an MFN clause may be acceptable, provided it is accompanied by an article providing for an exception for economic integration agreements notified under GATS Article V.
- the TiSA may contain an MFN clause, without any exception. In this case, any TiSA party concluding a FTA with any other country (TiSA or non-TiSA) would have to extend the preferences granted under that agreement to all other TiSA parties.

The MFN obligation, were it to be included, would be a general obligation, though measures inconsistent with the MFN obligation may be maintained if they are listed within each Party's schedule. The EU's offers contain a number of MFN exemptions, of which three relate specifically to financial services: exemptions for a Hungarian and Slovakian requirement of reciprocity in respect of Mode 3 commitments; and an exemption for Austria in respect of the differential application of economic needs tests to different countries on the basis of reciprocity.

2.2.4 Standstill

The EU's proposal for the TiSA core text incorporates a standstill obligation, according to which any conditions, limitations and qualifications to TiSA commitments must be limited to existing non-conforming measures. In the core text, which covers all sectors, the EU proposes that this standstill requirement cover only limitations to national treatment. While this is an important provision, its effect is limited somewhat by the fact that Parties are permitted to set out in their Schedule a list of actual or potential measures to which this standstill obligation does not apply. Section A of the EU's offer contains relatively extensive reservations of this kind.

In the financial service sector, the standstill provision in the proposed core text is supplemented by the EU's draft Annex, which proposed an additional standstill obligation to limitations to those market access commitments required by the Annex (section 2.2.1 above), the Annex obligations relating the temporary entry of natural persons (section 2.2.8 below), as well as obligations relating to public procurement (section 2.2.7 below). In this initial EU proposal, there was no equivalent flexibility to exclude the operation of this standstill obligation in respect of specified measures or sectors. Importantly, however, this standstill obligation on market access has been a matter for negotiation between the parties, and

there are indications that the EU position has evolved in the course of negotiations. As a result, it is not at all clear that the final text of the Annex will contain a standstill provision relating specifically to market access in financial services.

2.2.5 Ratchet

Ratchet clauses lock in *future* liberalisation undertaken by the parties to the agreement, so that parties are not permitted to resile on any liberalisation initiatives unilaterally undertaken after the coming into force of the agreement. The EU has proposed a ratchet clause covering only national treatment commitments in the core TiSA text (not market access commitments). However, the effect of this ratchet provision is again limited somewhat by the fact that Parties are permitted to set out in their Schedule a list of actual or potential measures to which it does not apply. Importantly, the EU's revised offer contains an extensive reservation, disapplying the ratchet provision to all financial services 'referred to in subparagraphs 1(b) and (c) of Article X.3' of the Annex – which is all those services on which cross-border market access commitments are to be made (see section 2.2.1 above).

2.2.6 Monopoly rights

The EU's proposed Annex on Financial Services requires each party to list existing monopoly rights relating to financial services in their schedules and endeavour to eliminate or reduce their scope. This obligation is expressed to extend to the activities conducted by a public entity for the account, or with the guarantee, or using the financial resources of the government (i.e. activities that would ordinarily fall outside the scope of the Agreement as a service 'supplied in the exercise of governmental authority').

The core text may also include a provision, equivalent to GATS Article VIII, requiring Parties to ensure that monopolies and exclusive service providers in all service sectors do not act in a manner inconsistent with that Party's obligations and commitments. Note, however, that the EU's offer contains a horizontal limitation noting, that 'services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators'.

2.2.7 Public procurement

The EU's proposed Annex on Financial Services requires each TiSA Party to ensure that financial service suppliers of other parties established in its territory are accorded MFN and National Treatment with respect to the purchase or acquisition of financial services by the Party's public entities in its territory. This provision is subject to any conditions, reservations and qualifications inscribed in each Party's, provided such conditions complied with relevant standstill obligations.

2.2.8 Temporary presence of natural persons for business

In the EU's proposed Annex on Financial Services, each Party must permit temporary entry of specialists of a foreign financial services supplier, as well as senior managerial personnel possessing essential proprietary information. Furthermore, each Party must, subject to the availability of qualified personnel in its territory, permit the temporary entry of specialists in computer services, telecommunication services and accounts of the financial service supplier, as well as actuarial and legal specialists. No specific durations are set out in the text itself.

2.2.9 New financial services

The proposed Annex also requires each Party to permit financial service suppliers of any other Party established in its territory to offer in its territory any new financial service. A 'new financial service' is 'a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a Party but which is supplied in the territory of another Party'. Under this proposal, the host party remains

free to determine the 'juridical form' of the financial service, and may require authorisation for 'prudential reasons.' A possible further qualification, used sometimes by other TiSA parties in their FTAs, is that the provision of the new financial service should not require a new law or a change to an existing law.

2.2.10 Data transfer, data localisation and source code

Regulations relating to data flow and data processing have become a key issue for the financial services industry in recent trade negotiations, and this is just as true for TiSA as any other. At least three different kinds of measures need to be distinguished conceptually: (a) restrictions on the ability of firms to send data outside the country in which it is collected for processing or analysis; (b) requirements that foreign financial services firms use local servers or other computing facilities in the conduct of their business; and (c) requirements that those providing certain financial and other services provide access to the source code of software used to provide the service.

- *Data transfer*

The EU's proposed Annex on Financial Services includes a provision prohibiting Parties from preventing information transfers, or the processing of information, which is 'necessary for conduct of the ordinary business of the financial service supplier' – a phrase which has proved to be somewhat ambiguous in, for example, the context of the EU-Korea FTA. The proposed provision makes allowance for Parties' measures to protect data, personal privacy and confidentiality, but only insofar as these protections 'are not used to circumvent' the Agreement (but see also the further protection provide by the general exceptions, section 2.4.3 below). The terms of this provision reflect the terms of the data flow provision contained in the GATS Understanding, negotiated in mid-1990s. There is no free-standing obligation on parties to take adequate measures to protect privacy and personal data. Indications are that text of this kind is likely to be included in the final Annex, and in December 2015, it was reported that progress was achieved in the 15th round of negotiations on 'an article on data transfer which includes a strong reservation for personal data protection'.

In addition, under some proposals, the Annex also contains a provision noting that Parties are not required to disclose confidential information relating to the affairs and accounts of individual consumers or information possessed by public entities.

- *Forced localisation*

It is possible that the Annex on E-Commerce may contain a provision prohibiting forced data localisation. However, there are differing amongst participants to the negotiations as to whether any such data localisation provision, if included, would apply to the financial services sector – and whether, if the financial services sector were excluded from its ambit, an alternative provision would be included in the Annex on Financial Services.

- *Source code*

It is also possible that the Annex on E-Commerce may include a provision prohibiting Parties from requiring the transfer of, or access to, source code of software as a condition of providing services related to such software. Again, however, it is not at all clear whether this would, if included, apply to the financial services sector.

2.2.11 Payment and clearing systems

The EU's proposed Annex on financial services requires each Member to grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. Such access is to be provided on a national treatment basis. It does not confer access to the Member's lender of last resort facilities.

2.2.12 Self-regulatory bodies

In the financial services sector, 'self-regulatory bodies' include professional associations, securities exchanges, futures exchanges, national stock exchanges, clearing agencies. The provision on self-regulatory bodies in the proposed Annex on Financial Services seeks to ensure that such bodies adhere to the national treatment obligation set out above, and does so by requiring the party itself to ensure such adherence. Other participating countries have proposed broader coverage, beyond solely the national treatment obligation. The provision applies, however, only where a party requires membership or participation in such a body, or where a party provides such bodies privileges or advantages.

2.2.13 Payments and capital movements

To support the liberalisation commitments made in respect of trade in services, the TiSA contains requirements on Parties to ensure freedom of payments on the current account, as well as freedom of capital movements directly relating to transactions liberalised under the services chapter.

2.2.14 Other

Indications are that the Annex will provide that parties may not require a foreign establishment to appoint to senior or other essential positions natural persons of any particular nationality or having residency in its territory, unless otherwise provided in its schedule of commitments. In addition, provisions setting out certain rules relating to the provision of insurance services by postal entities and cooperatives are likely also to be included in the final Annex.

2.3 Regulatory disciplines

2.3.1 Transparency

In the EU's proposal, the core provisions relating to regulatory transparency, across all sectors, are to be set out in the Annex on Transparency, as well as the Annex on Domestic Regulation, the texts of which are currently not publicly available. However, on the basis of prior texts and discussions with key stakeholders, it might reasonably be speculated that the Annex will contain provisions relating to:

- the prompt official publication of rules in advance of their coming into force, as well as an explanation of their objectives;
- advance notification of prospective rules, in order to provide interested parties an opportunity to comment;
- the consideration which ought to be given to comments received during any comments period; and
- the maintenance of enquiry points, among other matters.

There are indications that these 'horizontal' provisions on transparency may go beyond anything contained in any FTA concluded so far.

However, and importantly, it is not yet agreed whether or not these horizontal transparency provisions will apply to the financial services sectors. There is some resistance to this, particular from key financial service regulators, and in the past it has been common in some prior FTAs to include specific transparency rules for the financial services sector in the Annex on Financial Services. In its proposed Annex on Financial Services, therefore, the EU proposal for 'effective and transparent regulation' requires each Party to make all 'interested persons' aware of proposed measures of general application, in order to allow them the opportunity to comment on the proposed measures. This requirement is not absolute,

but only 'to the extent practicable.' It is reported that the some other Parties may wish to include additional obligations, e.g. regarding the provision of substantive responses to written comments.

In the EU's report of the 18th and most recent meeting of the participants, it is noted that 'the Parties also discussed transparency provisions based on a compromise which the EU, together with a number of other Parties, had introduced at the last round. This compromise would consist of applying horizontal transparency rules and a subset of the horizontal domestic regulation provisions to financial services.'

2.3.2 Domestic regulation

'Domestic regulation' in this context refers to a specific set of regulatory measures, typically including licensing requirements and procedures, qualification requirements and procedures, and in some cases also technical regulations. In the EU's proposal, the core provisions relating to domestic regulation, across all sectors, are to be contained in the Annex on Domestic Regulation, the text of which is currently not publicly available. However, other options include including specific provision on domestic regulation for the financial sector in the Annex on Financial Services, or even putting certain disciplines on domestic regulation in the core text. In any case, there are indications that the agreement may contain some or all of the following obligations, either generally, or just in sectors in which Parties have undertaken specific commitments:

- to administer all measures of general application in a reasonable, objective and impartial manner; and to take decisions regarding the authorisation of the supply of service in an independent and impartial manner;
- in respect of applications, to make the requirements for completing applications publicly available, to inform applicants on request of the status of their application, to take decisions within a reasonable period of time, to provide applicants with a reasonable opportunity to remedy deficiencies, and to notify applicants promptly of decisions and to provide written reasons for the decision;
- to ensure that licenses, once granted, come into effect without unreasonable delay; and
- to ensure that licensing and qualification requirements and procedures, and certain other forms of measure, are based on objective and transparent criteria, not more burdensome than necessary, and are not in themselves a restriction on the supply of the service such as competence and the ability to supply the service.

Assuming (though there is disagreement between some of the Parties on this point) that such disciplines apply to financial regulation, these disciplines would represent a significant evolution of disciplines on domestic regulation as compared to the GATS Understanding. For the EU itself, it would represent a qualitative step beyond the disciplines on domestic regulation contained in the EU-Korea agreement, and would instead come close to the level of ambition contained in CETA of the EU-Vietnam FTA in this area.

2.3.3 International standards

The EU's proposed Annex on Financial Services imposes on TiSA Parties a 'best endeavours' obligation to ensure the implementation of international regulatory standards on financial services. A non-exhaustive list is provided, including standards adopted by the G20, the Financial Stability Board, the Basel Committee on Banking Supervision, IAIS, IOSCO, the FATF and the OECD. It has been reported that international standards on tax evasion may also be referenced in the Annex's harmonisation provision. It is worth noting that many of these international standards provide significant flexibility in the manner of their implementation, and this provision does not purport to limit this flexibility.

2.3.4 Regulatory cooperation, and recognition

'Regulatory cooperation' in this context refers to a process of dialogue between regulators in difference jurisdictions, in respect of future rules which may be implemented after the coming into force of the agreement. The EU TiSA proposals contain no institutional mechanism for regulatory cooperation which would be comparable to that which is under discussion in the TTIP negotiations. The simple reasons for this is that multilateral treaties tend for obvious reasons not to make good environments for such institutional processes, which tend to work better in a bilateral context.

Furthermore, the EU's proposed core text contains no proposed provision on mutual recognition. That said, it is reported to be likely that a provision equivalent to GATS Article VII may be included in the core text, providing for recognition of professional qualifications, or licences and certifications granted, of another country. Such a provision would permit parties unilaterally to recognise such qualifications and measures, provided recognition arrangements are not entered into or applied in a discriminatory way, and provided opportunities are afforded to other Parties to negotiate accession to such arrangements, or comparable ones. Where appropriate, recognition should be based on multilaterally agreed criteria.

By contrast, the EU's proposed Annex on Financial Services does contain a recognition clause specific to financial services, which permits Parties to recognise the prudential measures of another Party, and leaves to each Party the means by which this may occur. Where such arrangements are in place, it requires Parties to provide other Parties the opportunity to negotiate accession to them, or to demonstrate that they should be treated equally.

2.4 Exceptions and safeguards

2.4.1 Prudential carveout

The EU's proposed Annex contains a carve-out for prudential measures in the same terms as the original prudential carveout in the GATS Annex on Financial Services. It provides that '[n]otwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons'. Such measures are noted to include measures 'for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier', as well as measures 'to ensure the integrity and stability of the financial system'. This safeguard is subject to the qualification that non-conforming prudential measures 'shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement'.

2.4.2 Disclosure of confidential information

As noted above, the EU's proposed Annex also provides that Parties are not required by TiSA to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities. Again, this provision is in a standard form, taken from the GATS Annex on Financial Services.

2.4.3 General and security exceptions

The EU's proposal for the TiSA core text contains a general exceptions provision, and a security exception, both taken from the GATS. The former provides a safe harbour for measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protection human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of TiSA – including for example for the protection of 'the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts'; (d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members; and (e) the result of an agreement on

the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which a Party is bound. All of these exceptions are subject to the conditions that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.

2.4.4 Other flexibilities recalled

As noted above, the services covered by the TiSA core text do not include services supplied in the exercise of governmental authority, and the same services are excluded from the operation of the proposed Annex. In the financial sector such services are defined as 'activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; activities forming part of a statutory system of social security or public retirement plans; and other activities conducted by a public entity for the account of the government, or with the guarantee of the government, or using the financial resources of the government.' However, where activities in the latter two categories are provided in competition with other financial service suppliers, they are included within the scope of the agreement. Furthermore, the definition of a 'financial service supplier' does not include a public entity.

It is also worth recalling that TiSA parties are permitted to include horizontal limitations in their Schedules, in respect of both market access and national treatment obligations, subject to the relevant standstill and ratchet obligations, described above. In its offer the EU has taken advantage of this flexibility through the inclusion of a number of horizontal reservation, including those relating to subsidies, and the provision of public services.

2.5 Dispute settlement

While the relevant texts are not officially available, it is reported that TiSA will contain an interstate dispute resolution mechanism of some sort. In this regard, the EU negotiating mandate requires that 'due regard shall be given to the dispute settlement mechanism provided for in the WTO Agreement', and it is reported that the EU wished to use the existing WTO dispute settlement system to resolve TiSA disputes. This proposal has reportedly been blocked, with the consequence the TiSA will have its own dispute settlement system, probably modelled on the WTO system, perhaps with modifications to take into account the difficulties of operationalising a retaliation-based system of remedies in the services context.

It is possible that the TiSA Annex on Financial Services will contain a provision equivalent to those contained in the GATS Annex on Financial Services, providing that dispute settlement panels must have appropriate expertise to hear financial disputes, and perhaps a further provision limiting the possibilities of cross-retaliation in the context of disputes over financial services.

TiSA will not contain investor-state dispute settlement.

3 The state of the art: how does the EU's TiSA offer compare to other FTAs?

This section compares the content of the EU's public TiSA offer, as described above, with a number of most significant FTAs recently concluded by the EU and the US, in respect of the treatment of financial services.

As noted earlier, a significant portion of the EU's proposals for the TiSA core text and the Annex on Financial Services simply replicate existing WTO provisions in the GATS, the GATS Annex on Financial Services, and the GATS Understanding on Commitments in Financial Services. Such areas of overlap are not considered in this section. While they are significant, because they extend further the list of countries to which the GATS Understanding applies, they are less relevant for this report, as they simply reflect a continuation of the *status quo* which exists between the 11 TiSA parties that also made commitments under the GATS Understanding (see Table 1), including both the EU and the US. The focus in this section is on the ways in which the TiSA may significantly extend the content of the GATS package.

3.1 Market access and liberalisation

As regards the EU's market access offers, there has been some disagreement between different stakeholders as to the appropriate level of ambition for the TiSA. There is general agreement amongst the major participants to the negotiations that the TiSA should extend existing multilateral rules significantly, and that offers should as far as possible reflect at least each country's 'best FTA' practice. The European Parliament, too, has called for 'an ambitious yet balanced' agreement, that 'goes beyond the GATS Annex on Financial Services' (Resolution A8-0009/2016, 2016: para 1(e)(i)). At the same time, it is recognised that some scope will and should be left for countries to pursue more ambitious packages at a bilateral or regional level, given that agreement on many issues may not be feasible in a multilateral context.

On this basis, the EU's initial offer was essentially at the same level as that which was agreed in the EU-Korea FTA, which was the most ambitious FTA in force at the time of the start of the TiSA negotiations (Viilup, 2015). Indeed, the market access and national treatment commitments in the EU's offers, as they relate to financial services, also broadly replicate the commitments which can be found in the EU's Schedule in the EU-Singapore FTA, or indeed the EU-Vietnam FTA.

Over the first half of 2016, other parties to the negotiation have put pressure on the EU to increase its offer to what was agreed with Canada in the CETA, or even beyond. In fact, while CETA represented a significant advance beyond prior FTAs overall, this was less true in relation to financial services. There are, certainly, some respects in which the EU's TiSA offers fall short of the CETA. CETA, for example, includes broad cross-border market access commitments in relation to portfolio management services provided to investment funds, subject to certain qualifications, and a small number of country-specific limitations included in the EU's initial TiSA offer also do not appear to be present in the CETA. But the differences are not profound. In any case, in early June 2016, the EU gave a strong signal that it may be prepared to raise its market access commitments to the level of CETA, or very close to it. Within the European financial services sector, there is a view that this may be premature, given what they see as the relatively low level of ambition of offers from other major negotiating parties in respect of market access in financial services.

Conversely, there are some aspects of the TiSA which would appear to go beyond anything contained in any EU FTA. The standstill and ratchet clauses in the TiSA described above, for example, may in principle represent an additional commitments when compared to other EU FTAs – there is no ratchet clause in other FTAs, and the standstill clauses in other agreements lock-in an earlier (and therefore in principle lower) level of market access commitments. Nevertheless, the effect of these clauses for the EU may be

limited in practice. As noted above, the ratchet clause potentially applies only to the national treatment obligation, and in any case is subject to an important reservation in the EU's revised offer. The standstill clause is also subject to significant reservations, and in any case is less relevant since the EU's market access commitments come close to binding the *status quo*.

Given the important role of the US in setting the ambition of the TiSA financial services negotiations, it is also worth noting the extent to which EU's TiSA offers fall short of the commitments which have been included in the US' most recent FTAs (primarily KORUS and the TPP). For example, the market access commitments made by TPP parties, in respect of Mode 1 and 2 (cross-border supply), go somewhat further than those proposed by the EU for TiSA, given that most TPP parties have undertaken market access commitments for the cross-border supply of some or all aspects of insurance intermediation, including brokerage. A number of parties, including Canada and Mexico, have also undertaken commitments on the cross-border supply of credit reference and analysis services, and Japan has made commitments in respect of certain securities-related transactions. Importantly, Annex 11-B to the TPP contains a number of significant new market access commitments requiring states to permit the cross-border supply of investment advice, portfolio management services provided to investment funds, as well as electronic payment services. These are sectors in which some of the EU's major trading partners have strong export interests, and the EU is certain to be under some pressure to expand its offer to include some aspects of these service sectors.

That said, there is reason to doubt that the TiSA parties will be able to extend cross-border market access commitments far beyond the incremental advances seen in the recent TPP. This is partly because of difficult regulatory issues which arise in respect of cross-border trade in financial services, which cannot easily be solved without a much more significant degree of regulatory convergence or cooperation that we see at present (EP Resolution A8-0009/2016, 2016: para 1(e)(v)). In addition, it is probably the case the US and Japan came close to exhausting their range of possible financial services commitments in the TPP, and may be unwilling to reopen such questions in the context of TiSA negotiations.

3.2 Investment protections for financial institutions and financial service providers

The EU's more recent FTAs – including CETA, as well as the FTAs with Singapore and Vietnam – contain investment liberalisation and investment protection provisions which apply to investors and investments in the financial services sector. The bulk of these provisions are subject to a separate process of investor-state dispute settlement of one kind or another, distinct from the application of interstate dispute settlement provisions to other obligations. These dispute settlement provisions provide private financial institutions and service providers the ability to bring claims directly against host governments in respect of breaches of investment obligations.

Investment protection and some form of ISDS also feature in most of the recent US FTAs, including the TPP, which explicitly incorporate certain investment protections for investments and investors in foreign financial institutions in their Financial Services chapters.

Importantly, then, TiSA does not contain an investment chapter, and there are no investment protection provisions *stricto sensu* for financial institutions and financial service suppliers, over and above the standard Mode 3 liberalisation obligations outlined in Section 2 above. This is a significant difference between the TiSA and new generation FTAs, as they apply to the financial services sector.

3.3 Data

3.3.1 Data transfer

As noted above, the EU's proposed Annex on Financial Services contains a provision, taken directly from the GATS Understanding prohibiting Parties from preventing information transfers, or the processing of information, which is necessary for conduct of the ordinary business of the financial service supplier. However, rules relating to data transfer have been elaborated in a number of different directions in recent EU and US FTAs, and it appears that some countries' positions on the suitability of strong data transfer positions in the area of financial services may be evolving.

For example, some FTAs, such as the TPP, supplement the financial services data transfer provision with a horizontal, cross-sectoral provision in the E-Commerce chapter requiring parties to allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a relevant person. A similar provision has been proposed for the TiSA E-Commerce Annex, though it is not yet clear whether it will apply in addition to the specific provision contained in the Annex on Financial Services. (Financial services were excepted from this general obligation in the TPP, and TPP parties included in respect of financial services the provision on data transfer almost identical to that which the EU has proposed for TiSA.)

Furthermore, there are subtle but potentially significant variations in the scope of the financial services data transfer obligation as it appears in different FTAs. For example, some restrict its application to transfers of information 'for data processing', while others do not have this limitation. There are also reportedly disagreements as to whether and to what extent the provision requires parties to permit data transfer to third party IT vendors, rather than solely subsidiaries and overseas headquarters.

Finally, while the proposed TiSA Annex follows the GATS Understanding in providing an exception from data transfer obligations in respect of measures to protect privacy and personal data, some EU FTAs have included instead a *positive obligation* on parties to adopt adequate safeguards to the protection of privacy. While it is not clear which formulation represents stronger legal protection for such privacy measures, the latter version constitutes an important claim that obligations in respect of free flow of data ought to be conditioned in principle on strong protection for personal privacy. The European Parliament has expressed its strong interest in protecting confidential data and personal privacy in the context of TiSA and other trade negotiations (EP Resolution A8-0009/2016, 2016: para 1(e)(i)).

3.3.2 Data localisation and source code

Importantly, some recent FTAs (such as the TPP) also include an additional prohibition on forced data localisation as a condition of conducting business in a Party's territory, subject to a general exception for measures to achieve legitimate public policies. The TPP's E-Commerce chapter also contains a strong provision on source code in Article 14.17. There is disagreement between different stakeholders as to the appropriateness of such a provision in the context of financial markets, and so far no FTA (including the TPP) has applied such a provision to financial services. However, whether to extend prohibitions on forced data localisation and source code to the financial service sector is an important and sensitive issue, and it should be expected that the case will be made strongly by some stakeholders in the TiSA negotiations that they should be applied to financial services. If that were to happen, it would be a major development.

3.4 Regulatory disciplines, including regulatory cooperation

In the financial services sector, regulatory issues are at least as significant a source of trade frictions as questions of market access and liberalisation. Does the TiSA represent the state of the art in its approach to regulatory issues? Broadly speaking, and within the limits of what it is possible to predict, TiSA is likely to contain a relatively extensive set of obligations concerning domestic regulation and transparency (see section 2.3 above). The horizontal Annex on Domestic Regulation is reported to go qualitatively beyond what is contained in both the GATS package, as well as in the EU-Korea FTA, and is closer to CETA and the EU-Vietnam FTA in its level of ambition. Perhaps the primary exception in this respect is the apparent absence of a broader necessity test in relation to domestic regulation in the financial services sector, though opinions differ as to how appropriate that would be. However, the same cannot be said for the current TiSA proposals for regulatory cooperation or regulatory harmonisation.

3.4.1 Regulatory cooperation

The EU has experimented with new institutional mechanisms for regulatory cooperation in a number of the trade agreements it is negotiating, or has recently concluded. The CETA, for example, establishes a Financial Services Committee, tasked in part with carrying out a dialogue on the regulation of the financial services sector with a view to improving mutual knowledge of the respective regulatory systems and to cooperate in the development of international standards. According to the agreement, this dialogue is to be based on the principles and prudential standards agreed at multilateral level.

Probably more significant is the chapter on regulatory cooperation currently under discussion in the TTIP negotiations. The proposals for this chapter go significantly beyond anything contained in prior FTAs, and far beyond what is envisaged for the TiSA. They may require, for example, extensive stakeholder consultations on the part of financial regulatory authorities in both jurisdictions, regular publication of information concerning prospective regulation, the use of impact assessments tools, data sharing, and mutual consultation prior to the adoption of new measures. Furthermore, they establish a formal institutional mechanism, bringing together relevant regulators from both parties, to identify priority issues, exchange information, and assess possibilities for mutual recognition, equivalence or harmonisation of regulatory rules where appropriate.

Famously, the inclusion of financial services in the regulatory cooperation arrangements is a matter of some dispute between the TTIP negotiating parties. As noted above, the US has taken the position that regulatory cooperation is best conducted through existing international venues, and that its inclusion in the context of a trade agreement risks undermining its strong regulatory framework.

Given the number of parties to TiSA, as well as the novelty and ambition of these provisions, there would seem to be no prospect of including in the TiSA anything approximating the provisions on regulatory cooperation currently under negotiation in the TTIP, in respect of financial services. Such frameworks for cooperation are sought to be more efficiently and effectively pursued in a bilateral context.

3.4.2 Harmonisation

On the question of regulatory harmonisation in the financial services sector, it is important to remember that trade agreements are not used to develop international standards, nor to set out substantive regulatory requirements as a basis for regulatory harmonisation. In the field of financial services, substantive work of this sort occurs in institutions such as Basel Committee for Banking Supervision, the Financial Markets Regulatory Dialogue (US-EU), the International Organization of Securities Commissions, the International Association of Insurance Supervisors, the Financial Stability Board, and the G20. Rather, in the context of trade negotiations, the question is typically the extent to which, and the manner in which, trade agreements ought to encourage parties to adopt the standards set by those bodies.

The European Parliament has recommended that TiSA 'commit … parties to the implementation and application of international standards for the regulation and supervision of the financial sector, such as those endorsed by the G20, the Basel Committee on Banking Supervision, the Financial Stability Board, the International Organisation of Securities Commissions and the International Association of Insurance Supervisors' (EP Resolution A8-0009/2016, 2016: para 1(e)(ii)). The Commission itself sees a relatively modest role for the TiSA in this respect, to give an incentive for TiSA parties to use international standards for future regulatory initiatives, and to help to ensure common reference points for future regulatory dialogues. TiSA is not seen as an appropriate forum for discussing regulatory standards. As a result, and as noted above, the EU proposal for the TiSA Annex requires only that Parties use their 'best endeavours' to ensure the implementation of international regulatory standards on financial services.

It is worth noting, however, that in areas other than financial regulation, other trade agreements contain a range of different and stronger provisions which incorporate, or at least create a link to, the international regulatory standards developed in other bodies. Examples include:

- positive obligations to implement international standards;
- positive obligations to 'base' regulations on international standards, or to have regard to international standards in the development of domestic regulatory rules;
- the use of presumptions of legality where Parties use international standards as the basis for their regulations; or
- in the context of dispute settlement, provision for the referral of certain issues to standard-setting bodies for consideration and determination.

There would appear to be little if any prospect of including these sorts of more stringent harmonisation obligations in the TiSA, in respect of financial services regulation.

3.5 Safeguards and exceptions

The preservation of its right to regulate, including for the purposes of financial stability, has always been an important priority of the EU in its financial services negotiations. The European Parliament, for its part, also sees this as a high priority, and has called for the inclusion in TiSA of 'a prudential carve-out building on that contained in [CETA], preserving the sovereign right of a party to deviate from its trade commitments and adopt any measure it deems necessary to regulate its financial and banking sectors for prudential and supervisory reasons' (EP Resolution A8-0009/2016, 2016: para 1(e)(iii)).

In this respect, it is noteworthy that the EU's proposed Annex contains the prudential carveout in its original, GATS form, without some of the developments and enhancements it has included in the more recent EU FTAs, including CETA. For example, in some recent FTAs, the language of the prudential carveout has been expanded to: (a) explicitly include measures to maintain the safety, soundness, integrity or financial responsibility of individual financial service suppliers; (b) include prohibitions of particular financial services or activities for prudential reasons, provided such prohibitions are applied on a non-discriminatory basis; and (c) to remove the qualification that the prudential measure not be used to avoid commitments or obligations under the Agreement. Furthermore, in CETA, a new Annex was added, primarily on the request of Canada, which contains a set of high-level principles to guide the interpretation of the prudential carve-out, including that interpreters ought to defer 'to the highest degree possible' to the decisions and determinations of domestic financial regulatory authorities. It also provides that a measure shall qualify for protection where it 'has a prudential objective' and 'is not so severe in light of its purpose that it is manifestly disproportionate to the attainment of its objective'. On the other hand, and importantly, some agreements also subject the prudential carve-out to new qualifications. The EU-Singapore FTA, for example, provides that prudential measures 'shall not be more

burdensome than necessary to achieve their aim', and that they 'shall not constitute a means of arbitrary or unjustifiable discrimination against financial service suppliers of the other Party'.

None of these elaborations were included in the EU's initially proposed Annex on Financial Services, though a number of TiSA parties have reportedly asked for certain changes to the text, which are under discussion. That said, it is true that some of the elaborations just described potentially weaken the carveout, even as others strengthen it – and others perhaps may amount to cosmetic changes only. Nevertheless, the TiSA represents an important opportunity to update the sparse and ambiguous language of the existing GATS prudential carveout. The specification in the CETA that a measure shall qualify for protection where it 'has a prudential objective' and 'is not so severe in light of its purpose that it is manifestly disproportionate to the attainment of its objective' is of particular interest in this respect.

A number of other enhanced safeguards and carveouts from recent EU FTAs are also missing from the proposed TiSA texts. For example, where the TiSA core text indirectly excludes services supplied in the exercise of governmental authority by virtue of the definition of 'services', a number of EU FTAs state more directly that the relevant chapter 'shall not apply to services supplied in the exercise of governmental authority within the respective territories of the Parties'. The difference is subtle, but the latter is certainly stronger. Moreover, as noted above, the exception from data flow obligations for measures to protect data privacy has been modified in some EU FTAs to a positive obligation on each party to adopt adequate safeguards to the protection of privacy – a change which has, it should be said, unclear results for the protection of such regulatory measures. Finally, in respect of the general exceptions provisions, there are a few heads which are included in some EU FTAs but not in the proposed TiSA core text, such as an exception relating to public security, though this may be covered by the similar general exceptions in the core text.

In addition, the financial services chapter of new generation US FTAs (e.g. KORUS), contain at least one further exception, which is not contained the EU's proposed Annex, namely an exception for 'non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate'.

4 Potential impacts of TiSA on future FTA practice

4.1 MFN-forward and future FTA negotiations

As noted above (section 2.2.3), it is still unsettled whether the TiSA text will include an MFN provision, and if so, whether it will be accompanied by an exception for economic integration agreements. The option ultimately chosen will have a significant impact on the degree to which TiSA affects the dynamics of services negotiations in future FTAs.

If the TiSA contains no MFN obligation, as per the EU's public proposal for the TiSA core text, then all TiSA parties, including the EU, would be free to negotiate further preferential arrangements on a bilateral or plurilateral basis with any other country, without extending those preferences to all other TiSA parties. In such cases, future FTAs would need to comply with GATS Article V, as is currently the case, but the TiSA would introduce no further restrictions.

If an MFN principle were incorporated into the TiSA text, without a corresponding exception for economic integration agreements, TiSA parties would essentially have no ability to make more ambitious future trade agreements on a bilateral basis, without extending the benefits of those agreements to all TiSA parties. This would constitute a significant, and probably unacceptable, limitation on the EU's FTA strategy going forward. Its effect would be even more significant, given that non-TiSA parties would have the ability to negotiate economic integration agreements amongst themselves in accordance with GATS Article V.

The third, and perhaps most likely, possibility is that an MFN clause is included, but accompanied by an article providing for an exception for economic integration agreements notified under GATS Article V – along with the flexibility to schedule inconsistent MFN measures. In this case, TiSA parties, including the EU, would be free to negotiate further preferential arrangements in services with other countries, but only where such satisfy the requirements of comprehensive sectoral coverage contained in GATS Article V.

4.2 A new baseline for liberalisation commitments in the financial services sector

For many years, the baseline for liberalisation commitments in respect of financial services sector was established by the GATS Understanding on Commitments in Financial Services, negotiated during the WTO's Uruguay Round. Most European and US FTAs which have been negotiated since then have sought, first, to bind more countries to the level of commitments reflected in the Understanding, and, second, incrementally to increase the level of those commitments on a mode-by-mode, sub-sector by sub-sector basis. The recent conclusion of the TPP was an important milestone in this respect, since it covers two of the three most significant global financial centres, and includes probably the most comprehensive set of liberalisation commitments on financial services in any presently existing FTA. As noted above, these include a broad right of market access through commercial presence, commitments on cross-border trade in some aspects of portfolio management services provided to investment funds and electronic card payment services, as well as new rules relating to postal insurance services.

TiSA is likely to consolidate many if not most of these incremental increases in liberalisation commitments which have been included in US and EU FTAs since the Uruguay Round, and to multilateralise them across the network of TiSA countries. Although it is hard to speculate, the total package of commitments in financial services may approximate a combination of those contained in the TPP and in CETA: it is hard to see the US and Japan agreeing to a package of commitments which is significantly lower than they were able to achieve in the context of the TPP – just as the EU has an

obvious interest in securing through the TiSA at least the same level of access to US and Japanese markets as it would if it were a party to the TPP. As noted above, the EU has already indicated its willingness to raise the level of its offer essentially to the standard of CETA.

Looking forward, the package of commitments agreed to in TiSA is likely to act as a new baseline for the EU's future FTA negotiations, just as the Understanding has done in previous years. Putting to one side the TTIP negotiations, which present their own difficulties and are addressed separately below, we might expect future EU FTAs to incorporate the level of commitments reflected in TiSA, alongside further incremental increases where possible. Given that current commitments are at or near the *status quo* of liberalisation, and in light of the considerable regulatory challenges which face cross-border liberalisation in the financial service sector, those increases are unlikely to be radical or rapid.

Importantly, these dynamics would change somewhat in the (unlikely) event that an MFN clause were included in TiSA in the absence of a corresponding exception for future economic integration agreements (section 4.1 above). In that case, subject to any scheduled MFN reservations, the TiSA would clearly and explicitly incorporate all the best FTA commitments of each party, and multilateralise them to all TiSA parties. At the same time, however, it would clearly inhibit the negotiation of further and additional commitments in future FTA negotiations, as noted above.

4.3 An important reference point for evolving disciplines on financial regulation

The regulatory provisions included in TiSA are also likely to have a significant impact on future trade agreements, in a number of different ways.

- *Safeguards and exceptions*

  There is the possibility that TiSA will represent a retrograde step – or at least an opportunity lost – in respect of the carveout for prudential regulation. As noted above, there have been two decades of elaboration and development of the exceptions contained in the GATS – particularly in relation to the prudential carveout, which takes a significantly stronger form in, for example, CETA than it did in the GATS Annex on Financial Services. However, since the TiSA talks are proceeding on the basis of GATS texts, they include the prudential carveout and general exceptions in their original form. While not all elaborations of the prudential carveout contained in the EU's prior FTA practice may be necessary or desirable, some have arguably strengthened and clarified it in important ways. The TiSA negotiations open up the possibility of clarifying and improving the current GATS text, to integrate better and more secure regulatory safeguards into the multilateral framework for services liberalisation. Conversely, retaining the original GATS text in its current form may, on the margin, undermine the legal protection offered by the stronger exceptions contained in existing and future FTAs – at least where the FTA partner is also a party to TiSA, and therefore has the choice of bringing a claim under the FTA or TiSA. In this respect, indications that modifications to the text are under discussions are a positive sign.

- *Data*

  Whatever outcome is ultimately reached on data transfer, data localisation and source code, it is likely to have a major effect on how that issue is treated in other FTAs going forward. The choice of whether or not to apply horizontal disciplines on these matters to the financial services sector is particularly important, and likely to be reflected in the architecture of future agreements. This is still a relatively new issue, and the approaches of major trading powers to the issue is at an inflection point, with the consequence that any text to which the EU, the US, Japan, and all other TiSA parties can agree is likely to be highly influential. This is particularly the case in respect of future FTAs between TiSA parties (e.g. EU FTAs with Japan, Australia and New Zealand).

- *Consolidation of EU and US approaches to new issues*

For those issues to which the EU and the US have adopted different textual approaches in their FTA practice, the TiSA offers an opportunity to take the first steps towards a single consolidated approach. Examples including the issue of data transfer and data localisation just mentioned, but also differences of wording and even approach in EU and US model provisions on new financial services, transparency and domestic regulation, among others. Whatever solution is adopted on such issues in the TiSA text could in principle be incorporated into both EU and US FTAs in the future, and is almost certain to be replicated in the text of the TTIP (see section 4.4 below). This is especially likely to be the case where US and EU negotiators take the view that the existing differences are textual only, and reflect no genuine difference in substantive approach.

- *A new state of the art for transparency disciplines, and disciplines on domestic regulation?*

It seems likely that the TiSA text will represent the state of the art in respect of transparency disciplines and horizontal procedural disciplines on domestic regulation, and may provide a new benchmark for those provisions in future FTA negotiations. However, it is very unlikely to provide major innovations or advances in respect of disciplines on regulatory cooperation, harmonisation and mutual recognition. These issues have historically been very difficult to meaningfully address in a multilateral context, and may be more effectively dealt with in bilateral negotiations.

- *A continued role for further experimentation in new FTAs*

Despite all of this, there is no reason to think that further experimentation and elaboration of regulatory disciplines will not continue to occur in future FTAs. We are far from an ideal set of disciplines, whether in TiSA or otherwise.

4.4 Implications for transatlantic relations in respect of financial services (TTIP)

As noted above, the financial services negotiations within TTIP are famously deadlocked on a number of issues, with the US unwilling to include financial regulation within the ambit of regulatory cooperation initiatives, and the EU unwilling to make major concessions on market access in financial services in the absence of addressing regulatory frictions. What, then, might be the impact of TiSA on the dynamics of TTIP negotiations?

First, it is important to note that TiSA does not represent an alternative means for the EU to achieve its core objectives for financial services in the TTIP. It is clear that the proposals currently on the table in the TiSA negotiations do not provide any clear model for breaking the deadlock on financial services in the TTIP negotiations. Nothing proposed for the TiSA would address the EU's desire to have strong action on regulatory cooperation to deal with specific transatlantic regulatory frictions in the financial services sector. As noted above, while the TiSA is likely to have reasonably extensive provisions relating to transparency and domestic regulation, there is no prospect of the inclusion of an institutional mechanism of regulatory cooperation similar to that envisaged for TTIP, nor are there at present proposals relating to harmonisation, or institutionalised relationships with existing standard-setting bodies, which may offer a way forward. Furthermore, the particular barriers which European financial services firms face when seeking to enter US markets (see, e.g., section 1.3 above) cannot be addressed in the context of the TiSA, and indeed it would put the TiSA negotiations in trouble were the EU to attempt to do so.

Second, it follows that there is a risk that any meaningful offer which the EU makes on financial services in the TiSA negotiations may undermine the position it has taken in TTIP, in which it has made negotiations on liberalisation of financial services conditional on negotiations on regulatory cooperation in the financial sector. Certainly, if the package of commitments which result from the TiSA negotiations is

ambitious and far-reaching, there may be significantly less left for the EU to offer on financial services in the context of subsequent TTIP negotiations to break the deadlock. But even if the package is less ambitious, merely making an offer would undermine at some level the EU's claim that liberalisation and regulatory cooperation are two sides of the same coin, to be pursued in tandem, or not at all. The EU may therefore wish to be vigilant to ensure that it retains sufficient leverage in the TTIP negotiations to push for movement on its key priorities for transatlantic trade in financial services.

Third, that said, even the most ambitious of the currently imaginable TiSA outcomes on financial services would still leave something on the table for TTIP negotiations. The most significant of these is the matter of investment protection obligations for investors and investments in the financial services sector (including ISDS) – which TiSA does not and will not contain, but TTIP might. Even in the area of cross-border market access commitments, the EU may well be able to craft a set of commitments acceptable to TiSA parties, while still being able to offer something more in the TTIP, for example in respect of cross-border trade in portfolio management services provided to investment funds, electronic card payment services, or business to business insurance intermediation.

Fourth, for the reasons given above, the particular form of the carveouts and exceptions which the EU agrees to in TiSA will have significant knock-on effects on the practical protection offered by the corresponding provisions in the TTIP. This is because both parties to the latter agreement will often have a choice whether to bring a dispute under the TTIP or the TiSA, given the likely substantive overlap of disciplines and commitments under each. To the extent that the EU wishes to set a gold standard for certain exceptions for legitimate regulation in the financial services, it would be necessary to press for its equal inclusion in both TiSA and TTIP.

Fifth, as noted in section 4.3 above, in those areas in which the EU and the US have evolved different approaches to certain issues in their FTA practice, the solution adopted in the TiSA is likely to be repeated again in TTIP. There would be little reason or incentive to reopen such questions in the latter negotiations. In these particular respects, then, the outcome of the TiSA negotiations will essentially determine the TTIP on the same topics – perhaps making the latter negotiations somewhat smoother, by removing some issues off a heavily burdened table.

Finally, however, it is also worth noting the real possibility that TTIP negotiations never come to a conclusion – or at least are heavily scaled back in terms of their ambition. Despite statements to the contrary from both sides, the recent Brexit referendum has further complicated these negotiations and rendered their future considerably more uncertain. In any case, whatever the current prognosis, it is fair to say that the greater the likelihood of the failure of TTIP negotiations – and for that matter, the greater the likelihood of Britain's exit from the single market – the more emphasis the EU is likely to place on TiSA as a vehicle for facilitating transatlantic trade in financial services, and the higher its ambition for those talks is likely to be. In an environment in which the EU financial services industry faces significant uncertainty as a result of potential new relations between the EU and the UK, the prospect of secure, stable, enhanced access for all European operators to important foreign markets becomes still more significant.

5 Conclusion

With 23 participating countries, including all of the world's largest financial centres, covering the vast bulk of global financial services trade, the TiSA negotiations on financial services trade are strategically important for the EU. They are likely to deliver a package of commitments and rules which significantly beyond the GATS package negotiated over two decades ago – and to extend their umbrella to a greater range of countries. In addition, the level of market access commitments ultimately incorporated into TiSA will set a new benchmark and reference point for future EU FTA negotiations. Depending on the outcome of remaining negotiations, the TiSA may also establish influential new and consolidated texts on such matters as data transfer, forced localisation, source code, regulatory transparency, and domestic regulation.

TiSA will not, of course, take the place of bilateral and regional FTA negotiations – there is every reason think that further experimentation and elaboration of regulatory disciplines and market access commitments will continue to occur in future FTAs. In particular, TiSA is not the appropriate venue for the EU fully to address the issues faced by European financial services firms seeking to gain non-discriminatory access to US financial services markets in different states, nor the question of enhanced regulatory cooperation. Such issues are better addressed in the bilateral context of TTIP negotiations, and it will be a difficult challenge for the EU to make a sufficiently ambitious TiSA offer to satisfy its negotiating partners at the plurilateral level while at the same time maintaining a position of strength in the context of TTIP. At the same time, it is also true, that, should the TTIP negotiations for any reason fall apart, the EU has a strong strategic interest in a relatively ambitious package of TiSA commitments and rules, provided always that such rules enhance, rather than undermine, the long-term stability, through strong supervision, of European and global financial services markets.

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