APPENDIX 7

TiSA ANNEX ON FINANCIAL SERVICES

The financial services annex reflects the accumulation of the various financial services instruments in the GATS, subsequent free trade agreements (FTAs), and demands from the finance industry for further innovations that protect their interests and profitability.[1] As with the rest of TiSA there is an added focus on cross-border financial services and data.

Scope of coverage

As with the rest of TiSA, the rules apply to '*measures*' (law, regulation, rule, procedure, decision, administrative action, or any other form) '*affecting*' (not just directed at) the '*supply*' (production, distribution, marketing, sale and delivery) of financial services, as well as measures affecting the purchase, payment or use of those services.[2] Financial services are defined extremely broadly through the same long non-exhaustive list as in the GATS Annex on Financial Services (see Box 6.1).[3]

Box 6.1 Article X.2 of the Annex on Financial Services (15 November 2016)

For the purpose of this annex/section

(A) a financial service is any service of a financial nature offered by a financial service supplier of a Party. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

i. Direct insurance (including co-insurance):

(A) life

(B) non-life

ii. Reinsurance and retrocession;

iii. Insurance intermediation, such as brokerage and agency;

iv. Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

v. Acceptance of deposits and other repayable funds from the public;

vi. Lending of all types, including consumer credit, mortgage, credit, factoring and financing of commercial transaction;

vii. Financial leasing;

1 For additional analyses see Andrew Lang and Leonie Amarasekera, *Financial Services Liberalisation and TiSA: implications for EU Free Trade Agreements*, 26 July 2016 (Lang Report); Peter Rajsingh and Stéphane Mage, 'The Financial Services Annex of the Trade in Services Agreement: Impact Analysis in light of the Global Financial Crisis', February 2016, https://www.tizianabeghin.eu/images/newsletter/TTIP_LEAKS/tisa_eng.pdf

2 TiSA, Article X.1.1, Annex on Financial Services, dated 15 November 2016, cross referencing to TiSA, Article I-1(a), Core text, dated 14 July 2016

3 TiSA, Article X.2, Annex on Financial Services, dated 15 November 2016. Other definitions are set out in the TiSA, Article I-2(c), Core text, dated 14 July 2016

viii. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

ix. Guarantees and commitments;

x. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits);

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

xi. Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

xii. Money broking;

xiii. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

xiv. Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

xv. Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

xvi. Advisory, intermediation and other auxiliary financial services on all the activities listed in sub-paragraphs (v) to (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

As with the GATS, the annex excludes activities of central banks or monetary authorities in pursuit of monetary or exchange rate policies. It also excludes activities that are part of a statutory social security or public retirement plan, and other activities conducted by a public entity for the account of, with the guarantee, or using the resources of the state – unless they are supplied in competition with another entity.[4]

Presumptions of commitments

Special rules apply to scheduling of financial services that go beyond the standard TiSA approach.

Market access

Under the November 2016 leaked text, a negative list approach applies to market access for almost all financial services. TiSA countries must make **market access** commitments for:[5]

- all financial services supplied inside the country by a provider from another TiSA country (Mode 3)
- all financial services and supplied in another TiSA country (Mode 2), and
- cross-border supply (Mode 1) of certain insurance services plus a wide range of auxiliary services to insurance and banking, and financial information and data transfer and processing services.[6]

4 TiSA, Article 1.2 and 1.3 Annex on Financial Services, dated 15 November 2016

5 TiSA, Article X.3.1, Annex on Financial Services, dated 15 November 2016

6 eg. maritime shipping and commercial aviation, goods in international transit, reinsurance and retrocession

A negative list applies, meaning governments would have to list what is not subject to the rule. Any restrictions, such as limiting a foreign supplier's share of the local market or banning certain kinds of financial services would have to be specified in the country's schedule. If it is not listed, it cannot be restricted. Those commitments would apply to new technologies to deliver those services –new apps for online travel or vehicle insurance that require informed consent and are difficult to assess, or new kinds of apps or algorithms for online trading in food derivatives.

Some of these services are easily offshored: financial information, financial data processing and related software services, advisory, brokering and agency services, and support services for the entire list of financial services covered by the annex. The proposal specifically mentions credit reference and analysis, investment and portfolio research and advice, and advice on mergers and acquisitions, corporate restructuring and strategy.

There are obvious problems even with these non-core financial services. For example, it is already hard to monitor employment practices and regulatory compliance at call centres that provide advice within a country, especially when workers are under pressure to take short-cuts to meet impossible performance requirements or win bonuses. It would become almost impossible to monitor those practices from offshore. The same applies to ethical requirements on brokers and agents. Firms that can supply their services from across the border will have incentives to operate from countries that rely on self-regulation or disclosure, for example for financial advisers, and push for that regime to be recognised in the other TiSA parties.

National treatment and local presence

The text refers to a 'Supreme Understanding' (not otherwise explained) that countries 'will include' for the scheduling of commitments on the **national treatment and local presence** rules.[7] This appears to preserve policy space (Section A of the schedule) for all financial services, except for the insurance services they have already been required to make market access commitments on. Presumably, the reason for describing it as a 'Supreme Understanding' is that all TiSA countries would adopt it in the column of the schedule where they would usually list specific sectors.

However, there is a fallback if 'all participants [are] not satisfied with the outcome of this approach'. In that case, national treatment alone would apply fully to the cross-border (mode 1 and mode 2) insurance services and auxiliary services they have already been required to make market access commitments on, unless the schedule indicated otherwise. It is unclear whether this means making additional commitments or taking limitations on those insurance services. The ratchet would not apply.

Whichever of these options was adopted, the combined effects of the market access and national treatment commitments would be far more extensive exposure to financial services rules designed to serve the global finance industry.

Foreign finance firms operating locally

- **Collective investment schemes and portfolio management**: Investment advice and portfolio management for collective investment schemes (sometimes called pooled investments) is big business, and there have been some high-profile examples of 'mis-selling' investments (fraud).[8] The schemes are often unregulated because they fall outside defined categories. A large number of countries want to include these services in the list that is guaranteed market access, but only when the firm supplying the services has a local presence.[9] The proposal would allow each country to list its current legal definition in an annex, which suggests that a standstill would apply to prevent new regulation. Some countries are opposing the proposal.[10]
- **New financial services and products**: A government of a TiSA country cannot stop a firm from another TiSA country that is established in its territory from selling novel and risky new services

7 TiSA, Article X.4, Annex on Financial Services, dated 15 November 2016

8 'Sipp fraud case poised to be first of many', *Financial Times*, 10 December 2014, https://www.ft.com/content/7bbd7a90-7fc9-11e4-adff-00144feabdc0

9 TiSA, Article X.3 (vi), Annex on Financial Services, dated 15 November 2016, proposed by Australia, Canada, Switzerland, Chile, Colombia, Israel, Japan, South Korea, Mauritius, Mexico, Panama, Taiwan and the US.

10 Costa Rica, the EU, Hong Kong, Turkey, Lichtenstein, and New Zealand.

and products if its local firms could sell them.[11] But most financial 'innovations' are designed to find gaps in a country's existing laws. These are the kinds of complex and opaque products that were at the centre of the global financial crisis. The government won't have a regulation in place because it has never thought of the service or product, let alone been able to assess the risks and the need to regulate them. All the government would be allowed to do is require the service or product to be supplied through a particular legal form and to be authorised- but authorisation can only be refused for prudential reasons, which assumes the product and its potential impacts are understood. Precautionary measures are unlikely to be allowed because the government would have to be able to show the potential risks to justify a prudential measure.

- **Foreign directors and managers** – The recent Wells Fargo fraud in the US shows how difficult it is to hold senior managers and directors to account where customers have been systematically cheated so as to profit the bank.[12] Accountability becomes even more problematic if the government can't require that at least some senior managers or essential personnel are nationals or come from another specified country that has a good reputation for financial regulation and is familiar with the host country's financial and regulatory system.[13] The annex may also prevent nationality requirements for a majority (or even some) of the board of directors.
- **Too big to fail** – The market access rule would prevent a government from restricting the size of financial institutions, despite the infamous bailouts of banks and insurers that are deemed too big to be allowed to fail.[14] This problem continues after the global financial crisis. For some time in 2016 it appeared that Deutsche Bank (half the size of the German economy) would need a government bailout to pay a massive $14 billion fine imposed by US authorities for its trading in toxic mortgages during the global financial crisis.[15]
- **Gambling with depositors' funds** – The market access rule also says governments cannot prescribe the legal form of a financial service supplier. That means they can't prevent a firm engaging in multiple and potentially conflicting activities, such as insurance, retail banking and investment banking, at the same time. This has become an important issue in the US. The US Glass Steagall Act 1933 was designed to prevent the use of depositors' or policy-holders' funds for speculative market trades. It was repealed in 1999 as part of the massive deregulation of US financial markets around the same time as the financial services agreement was concluded in the GATS. As part of the re-regulation following the global financial crisis, Democrat Senator Elizabeth Warren and Republican John McCain submitted a bill to the US Congress in 2016 that would have reinstated the firewalls between basic consumer banking and speculative high-risk banking.[16] If passed, the Bill would likely have breached both TiSA and the TPP. An executive order from President Trump in February 2017 signalled a review of that bill and other re-regulation.[17]

Insurance

The insurance industry has made more aggressive demands than the banks. The GATS definition of financial services sets out four categories of insurance (Box 6.1): *direct life and non-life insurance; reinsurance and retrocession; insurance intermediation, such as brokerage and agency; and auxiliary services, such as consultancy, actuarial, risk assessment and claim settlement services*. Proposals to remove restrictions on those services could have a huge impact on UNI workers. This repeats the earlier description of commitments in an attempt to make the sectoral impacts more apparent.

11 TiSA, Article X.9, Annex on Financial Services, dated 15 November 2016

12 'Wells Fargo whistleblower says she flagged fraud years ago', *CBS News*, 4 October 2016, http://www.cbsnews.com/news/wells-fargo-accounts-fraud-california-whistleblower-yesenia-guitron/

13 TiSA, Article X.13, Annex on Financial Services, dated 15 November 2016

14 TiSA, Article X.3, Annex on Financial Services, dated 15 November 2016

15 'No way Merkel can bail out Deutsche Bank, German media say', CNBC, 2 October 2016 http://www.cnbc.com/2016/10/02/no-angela-merkel-bail-out-deutsche-bank-german-media-say-amid-lehman-moment-worries.html. Deutsche Bank settled in January 2017 for $7.2 billion, still a massive sum.

16 https://www.bloomberg.com/features/2016-elizabeth-warren-interview-issue/

17 Robert Pozen, 'What will happen to Dodd-Frank under Trump's Executive Orders?', *Brookings*, 6 February 2017, https://www.brookings.edu/blog/up-front/2017/02/06/what-will-happen-to-dodd-frank-under-trumps-executive-order/. That is ironic, given Trump's campaign slogan of 'draining the swamp' of Wall Street influence. Instead, the appointment of several top executives from Goldman Sachs to his cabinet makes it more likely the US will remain in the TiSA negotiations and become even more assertive on behalf of Wall Street.

- **Unrestricted cross-border insurance services:** All TiSA countries must agree to allow a financial service supplier in another TiSA country to deliver the following insurance services across the border: *maritime shipping and aviation, goods in international transit, reinsurance and retrocession, insurance intermediation related to those services* and the broad range of '*auxiliary services'*, which are easily offshored or outsourced. Any restrictions, such as limiting its share of the local market or banning certain kinds of insurance services, would have to be listed in the country's schedule on a negative list basis. Services not listed can't be restricted. The effect of a negative list is to capture new services and new technologies to deliver services that have not been protected.
- **Expedited approval of insurance products:**[18] The TiSA parties have singled out insurance products offered by licensed suppliers for special treatment by short-cutting normal authorisation requirements. This is additional to the rules that prevent the regulation of new financial services or products that can be sold locally. It presumably applies to insurance services that are supplied across the border, provided the supplier is licensed to operate in the country. Several ways of expediting approval are identified, although none is compulsory:
    - allowing the introduction of products that have not been *disapproved* within a 'reasonable' time; that puts the onus on the regulators, not the insurance firms, to understand and move quickly to regulate new products;
    - not requiring insurance products to be approved unless they are sold to individuals or involve compulsory insurance, on the presumption that 'sophisticated' customers can assess the products for themselves – a belief that was proved spectacularly wrong during the global financial crisis; and
    - no limits on the number or frequency of new insurance products introduced – with the consequence that financial regulators could be submerged under a steady stream of new products they need to assess, especially if the burden to regulate within a specific time also applied.

Pressuring public insurance schemes

The insurance industry has long complained that public insurers have unfair advantages and have pushed for their privatisation or deregulation. Two TiSA provisions sponsored by the US are principally targeted at Japan's insurance cooperatives and Japan Post's insurance arm, although similar arrangements in other countries would also be affected.

Postal insurance

The first provision, supported by the EU, is taken directly out of the TPP and acts as a backstop to the broader SOE annex in TiSA.[19] Japan[20] is trying to resist it this time around. When a state-operated postal insurance entity that is owned by the state post office provides or underwrites direct insurance services to the public it must operate as if it was a private business. Insurance directly related to its postal services activities are excluded.

A government can't give the state entity a competitive advantage over a private supplier of similar services, for example by imposing more onerous conditions on its licence or providing the state entity with a more favourable distribution channel (meaning the post office's entire distribution network must be available to private insurers). The state entity must be subject to the same regulations and enforcement activities and produce detailed financial statements subject to the equivalent auditing. If there is a dispute that finds a breach of these obligations, the home country (eg Japan) must consult the complaining country before allowing the state entity to issue new competing products or increase the limit on the value of the insurance product. These are all very specific complaints the US insurance industry has made against Japan in the past.

18 TiSA, Article X.20, Annex on Financial Services, dated 15 November 2016

19 TiSA, Article X.21, Annex on Financial Services, dated 15 November 2016

20 as well as Colombia, Costa Rica, South Korea, Panama and Pakistan

These rules apply to state-owned postal insurance entities and to any private entity that is given some competitive advantage. A postal entity would be exempt if the amount of direct life and non-life insurance it underwrites does not exceed 10% of premiums paid in the country for each of those products on 1 January 2015 – the date Japan joined the TPPA negotiations! If it exceeds the 10% after TiSA was signed then the obligations relating to regulation and reporting would apply.

Insurance cooperatives

This provision is novel and is directed at Japan's insurance cooperatives and the Consumer Cooperative Union,[21] but it would have much wider impact. A cooperative is defined as an entity that underwrites and sells insurance only to its members, who own it in whole or part. It would be subject to this provision if its premium income from either life or non-life insurance ranks it among the largest suppliers in the country, and together account for 75% of total premiums from such insurance in the country (presumably 'together' means the sum of its share of life and non-life insurance).

Under the rule cooperatives *should to the extent practicable* be regulated by private insurance regulators, especially for solvency matters related to the sale of insurance. To the extent they are not, they *should* not enjoy a competitive advantage over private insurers. The wording 'should' and 'to the extent practicable' give some flexibility, but governments would still be bound to perform that obligation in good faith. This rule would have major implications for dominance insurance cooperatives that exist in many countries, including those run by trade unions and coordinated through the national trade union congress. It was initially proposed by the US and EU, but the November 2016 draft shows the US is now just 'considering'. A large number of countries are opposed, which shows concern about its potentially broad reach.[22]

Monopolies

In addition to the provisions in the core TiSA text, any monopolies and exclusive service suppliers of financial services that exist at the date TiSA comes into force must be listed in an annex.[23] That includes a public entity that carries out financial activities with a government guarantee or using public financial resources, which are otherwise exempt from the annex.

Electronic payment services

The US wants no restrictions on the use of electronic payment services and transactions provided from offshore[24] and suggests an updated classification for those services.[25] A large number of countries are opposed. The obligation would only apply to payment services that use proprietary (private and closed) networks to process the transactions. The US would allow countries to keep their existing restrictions on market access and discriminatory measures as of a certain date.

Finance industry capture of regulation

Self-regulation by private firms – Nothing is done to rein in the self-regulation or light-handed regulation of privately-owned entities, such as stock markets and futures exchanges, which have monopolies over various financial services activities. They just have to allow foreign players to join those activities.[26]

Opportunities for pressure – The more intrusive domestic regulation annex would not apply to financial services, apparently because the US cannot override the states' jurisdiction over financial

21 This includes the Japan CO-OP Insurance Consumers' Cooperative Federation (JCIF) and National Federation of Workers and Consumers Insurance Cooperative (ZENROSAI)

22 Australia, Colombia, Costa Rica, Japan, Korea, Mauritius, Mexico, Panama

23 TiSA, Article X.5, Annex on Financial Services, dated 15 November 2016

24 TiSA, Article X.3(viii), Footnote 3, Annex on Financial Services, dated 15 November 2016

25 UNCPC Version 2.0, https://unstats.un.org/unsd/cr/registry/cpc-2.asp

26 TiSA, Article X.2(e) and Article X.12, Annex on Financial Services, dated 15 November 2016

regulation.[27] The alternative provision, called 'transparency',[28] contains a number of provisions regarding processing of applications for authorisation and the right to object that financial regulation is not being ***administered*** in a ***'reasonable, objective and impartial'*** way. There is no indication that the TiSA annex on Transparency does not apply to financial services, which would guarantee the finance industry's ability to lobby on proposed new regulations.

Finance industry arbitrators deciding disputes – If a dispute involves financial services, the arbitrators who hear the dispute must have expertise in the financial sector.[29] There is a high likelihood they will be drawn from the industry, rather than a regulatory, consumer, or social perspective.

Indirect investor-state disputes still possible – While TiSA would not allow a foreign investor to directly enforce the agreement against a country, an investor could argue that it had a 'legitimate expectation' of compliance with the rules as part of a claim under the investment chapter of another free trade agreement or bilateral investment treaty.

Lack of consumer protections

Increased risk without consumer protection – The annex greatly multiplies the risks to consumers through more online delivery of services, a negative list on both market access and national treatment, no regulation of new financial services and products, and more. Yet there is no attempt to protect consumers of financial services or ensure they have a remedy. If a government was convinced to provide protection that breached one of its TiSA obligations, it would have to rely on the seriously inadequate protection for consumers against deceptive or fraudulent practices in the general exception in the core TiSA text (see Chapter 5).

Aggressive offshore sales – It is practically impossible for individual consumers to seek redress for fraud, lack of informed consent, or predatory practices when funds managers, financial advisory services, or services auxiliary to insurance (eg. claim settlement) operate from offshore (which governments are required to commit to allow[30]), and very difficult for domestic regulators to effectively monitor compliance or enforce penalties for breaches.

Failure to protect data privacy – The annex says governments cannot restrict the transfer of financial information offshore for data processing when that processing is necessary for the conduct of its ordinary business.[31] While governments are *allowed* to adopt privacy rules, they *do not have to*, so data may be processed in a country (eg the US) that has weak privacy protections. The GATS exception provides no additional comfort: its circular provision on personal privacy and confidentiality only applies where the government's action is to secure compliance with a law that is consistent with TiSA (see Chapter 5)! The only explicit protection in the financial services annex says the annex cannot be interpreted to require a government to disclose information about individual customers or confidential or proprietary information that is held by a public entity.[32]

The prudential defence

The leaked November 2016 text of the financial services annex follows the deeply flawed GATS approach on prudential measures. It does not state a positive right for governments to adopt measures for prudential reasons that don't comply with the rules; it says governments are not prevented from doing so under certain conditions.[33] If a prudential measure was challenged for breaching the TiSA rules the government would have to establish as a defence that it met those conditions.

Prudential reasons include the protection of investors, depositors and policyholders who are owed a fiduciary duty, and to ensure the integrity and stability of the financial system. A footnote[34] specifically

27 As with TiSA, Article X.15.3*bis*, Annex on Financial Services, dated 15 November 2016 on licensing requirements and procedures and qualification procedures.

28 TiSA, Article X.15, Annex on Financial Services, dated 15 November 2016

29 TiSA, Article X.19.1, Annex on Financial Services, dated 15 November 2016

30 TiSA, Article X.3, Annex on Financial Services, dated 15 November 2016

31 TiSA, Article X.10, Annex on Financial Services, dated 15 November 2016

32 TiSA, Article X.17, Annex on Financial Services, dated 15 November 2016

33 TiSA, Article X.16, Annex on Financial Services, dated 15 November 2016

34 TiSA, Footnote 11, Annex on Financial Services, dated 15 November 2016

also includes the safety, soundness and financial responsibility of individual financial institutions as a reason. The problem arises with the circular requirement in the second sentence of the provision: ***a prudential measure that breaches the TiSA provisions must not be used as a means to avoid the country's commitments or obligations under TiSA!***[35]

The EU has taken important steps in its free trade agreements with the Cariforum states, Vietnam and Canada to strengthen the prudential powers of financial regulators, in particular by dropping that second sentence. The CETA includes an Annex that sets out a consultative process in the case of an investment dispute (not directly applicable in TiSA).[36] That annex also set out a number of high level principles, including the presumption that: '*those applying these principles shall defer to the highest degree possible to regulations and practices in the Parties' respective jurisdictions and to the decisions and factual determinations, including risk assessments, made by financial regulatory authorities*'.[37] As noted earlier, the European Parliament explicitly warned the European Commission not to dilute these advances in TiSA, which it has done.

Location of Financial Data

The leaked e-commerce text prohibits restrictions on data transfer,[38] or requirements to use or locate computers locally[39] and disclosure source code.[40] This text is discussed in Chapter 4 and Appendix 4. As of November 2016, the application of the e-commerce annex to financial services was undecided.[41] But there were two proposals in the financial services annex that sought to address the issue.

Cross-border transfer of financial data

In July 2016, the US proposed a blanket provision in the financial services annex that would prohibit countries from stopping a 'covered person' from transferring information, including human resources information or other personal information, into or out of its territory by electronic means or otherwise.[42] The US defined a 'covered person' to be a financial institution of another party that is authorised and regulated by law to do business, or a cross-border supplier of a financial service that the receiving country would require a financial institution to supply.[43] As the Lang report observed, such an outcome would be *'a major development'*.[44]

By November 2016 the leaked annex showed a complicated range of options for the transfer of information. The core of the proposal said every TiSA government must allow a financial service supplier of another TiSA country to transfer information in electronic or other form into and out of its territory.[45] Numerous variations then extended or qualified the obligation. Basically, the US wanted the broadest scope and others wanted to narrow it. The US-supported proposals:

- specify that information can include human resources information and other personal information (proposed by US, opposed by Australia); and
- the transfer is for the conduct of business within the scope of the licence, authorisation or registration of that financial service supplier (US proposal, Australia considering).

The US opposed proposals that:

- data transfers can be subject to prior authorisation by a regulator (US, Australia, Japan, Switzerland, Norway and others oppose);

35 TiSA, Article X.16, Annex on Financial Services, dated 15 November 2016

36 CETA, Annex 13-B, applicable to Article 13.16

37 CETA, para 8(c), Annex 13-B

38 TiSA, Article 2.2, Annex on Electronic Commerce, dated November 2016

39 TiSA, Article 8, Annex on Electronic Commerce, dated November 2016

40 TiSA, Article 6, Annex on Electronic Commerce, dated November 2016

41 TiSA, Article 1.6, Annex on Electronic Commerce, dated November 2016. Switzerland and Mauritius want it excluded; Australia, Canada, Chile, the EU, Iceland, Norway, Peru and the US oppose its exclusions; South Korea, Mexico, New Zealand and Pakistan are undecided.

42 TiSA, US propose *Alt X10* (July 2016), Annex on Financial Services, dated 15 November 2016

43 TiSA, Article X.2 (f) and (h), Annex on Financial Services, dated 15 November 2016

44 Lang Report, p.27

45 TiSA, Article X, Annex on Financial Services, dated 17 November 2016

- limitations can be scheduled, even on a negative list basis (US, EU, Japan, Norway and others oppose);
- the reason for transferring the information must be for data processing (US and Australia oppose);
- the rule only applies where processing is required in the financial service supplier's ordinary course of business (US opposes); and
- governments can require the financial service supplier to get prior authorisation from the regulator to designate a particular legal entity the recipient of that information, based on prudential considerations, provided that does not circumvent the provision of this article (Chile, Mexico and Peru propose, the position US is not listed).

The November leaked text also records a 'landing zone' proposed by the US and others, which the EU was considering.[46] It basically followed the US line, without referring explicitly to personal information, with the addition of a second sentence that said parties could adopt regulations on personal data, personal privacy, confidentiality of records and accounts, ***provided they are not used to circumvent the ban on restricting transfers***. Like the prudential provision, this offered parties a potentially self-cancelling defence: the government will only need to invoke it where it is accused of circumventing the ban on restricting transfers.

Regulators' access to financial data

The US tabled a separate proposal on the *location of computer facilities*,[47] which was presumably intended to address the concerns of its own Treasury about being able to access financial information. The preamble to the proposal recognised that appropriate and effective regulation and supervision by financial regulators requires 'immediate, direct, complete and ongoing' access to information of 'covered persons' that was processed or stored in computing facilities inside or outside the country. It also recognised the need to eliminate potential limitations on such access.

But that was the preamble. The substantive rule says a government cannot require a covered person to use or locate computing facilities in its territory as a condition of conducting its business, so long as the financial regulators have 'immediate, direct, complete and ongoing' access to information processed or stored on the computing facilities the covered person uses or locates outside its territory. Then it goes soft: where the covered financial institution does not provide that access, it must 'to the extent practicable' be given 'a reasonable opportunity to remediate' the problem before the government requires it to use or locate computing facilities inside the country.

So, the US solution relies on self-regulation and voluntary compliance where a financial institution fails to comply. That provides no guarantees whatsoever to a government seeking to prevent or respond to an emergency, and they would have to fall back on the prudential defence. Yet US Treasury Secretary Lew earlier rejected suggestions that the prudential defence would have provided adequate protection for a government that breached this rule: '*U.S. financial regulators advocated for the explicit ability to restrict cross-border data flows in TPP, in addition to the flexibility provided by the prudential exception'.* [48]

Japan and Australia were considering the proposal. Australia wanted to exclude government procurement[49] and information held or processed by or on behalf of a party or measures related to such information. That would leave all financial data and transactions that do not involve government information to the whim of these financial institutions. Australia also wanted this cross-checked against equivalent localisation provisions in the e-commerce chapter and any policy space reservations in countries' schedules, to ensure the parties' level of commitment was not undermined.

46 Australia, Canada, Colombia, Hong Kong, Japan, Turkey, US, with EU, South Korea, Mauritius and Switzerland 'considering'.

47 TiSA, Art X.10 bis, Annex on Financial Services, dated 17 November 2016

48 Rachel Fefer, 'Trade in Services Agreement (TiSA) Negotiations: Overview and Issues for Congress', Congressional Research Service, 3 January 2017, p.12

49 It is unclear if this means the limited definition of government procurement that is for internal government purposes and not used directly, or indirectly, in services or goods for sale.