

APPENDIX 5

OVERVIEW OF THE TiSA CORE TEXT

The Core text of TiSA has a Preamble plus four parts:

- I. **General Provisions**, which largely mirror the rules in the GATS;
- II. *Scheduling Commitments*, which says how countries must schedule their commitments to the rules;
- III. *New and Enhanced Disciplines*, which refers to the proposed annexes on specific services and regulatory issues (these currently number around 18);
- IV. *Institutional Provisions* on how TiSA would be run, including settling of disputes and steps to insert it into the WTO.

Part 1: General Provisions

Almost all of Part I is common to the GATS and uses the standard definitions and rules to make it easier to export TiSA back into the WTO. The agreement has sweeping application to any

- ‘**measure**’ (defined as a law, regulation, rule, procedure, decision, administrative action, or *any other form*)
- at *central, regional or local government levels* and bodies exercising authority delegated by any of those levels (with central government required to take reasonable steps to ensure their observance)
- ‘**affecting**’ (not just directed at) the
- ‘**supply**’ (defined as production, distribution, marketing, sale and delivery)
- of a ‘**service**’.

The **classification list for services, known as W/120**¹ has over 160 sub-sectors (Annex 4). It dates back to 1991 and some TiSA annexes seek to modify or supplement it. Many of the same activities would fall the service itself (eg. retail distribution (of a book)) or constituent parts of the service (eg. financial (billing), labelling and packaging, courier services), or within the extended definition of ‘supply’ of a service (eg. distribution, sale or delivery (of a book)).

‘**Trade in services**’ can be conducted in four ways:

1. across the border (eg. offshore call centres selling insurance, international courier delivery, buying books from Amazon) (**mode 1**)
2. consuming a service delivered abroad (eg. offshore bank accounts, reinsurance through foreign firms, using credit cards at foreign ATMs, study abroad) (**mode 2**)
3. establishing a commercial presence in another TiSA country (eg. foreign ownership of telcos, a Boots or Uber franchise, Tesco’s overseas subsidiaries, the foreign agency or branch of an insurance company) (**mode 3**)
4. temporary entry of foreign natural persons (eg. bank managers, engineers, IT specialists, drivers) (**mode 4**)

1 ‘Services Sectoral Classification List’, MTN.GNS/W/120, 10 July 1991. See Appendix 2.

Some who argue that none of these relate to the Internet have proposed the introduction of a **'mode 5'**.² But they are not clear about what it covers, and there is no likelihood that such a dramatic change to how trade in services would be agreed because of the flow-on effects for existing commitments and rules.

The two core rules are unchanged from the GATS:

- i. the **'national treatment'** rule says a government cannot give local services and suppliers better treatment than their counterparts from TiSA countries. Examples of discriminatory treatment include local hiring requirements; only paying subsidies to locally owned Internet providers; restricting deposit guarantees to domestically-owned banks; a ban on foreign ownership of land or capping foreign ownership in privatised businesses; reserving certain retail sectors for local firms; allowing only nationals to be chief executives of financial institutions;
- ii. a government must not restrain competition in, and the potential expansion of, services markets, regionally or across the country (**market access**), by imposing limits that are numerical or have a similar effect, even if the limits apply to locals as well. Examples include a monopoly that provides disaster insurance, a requirement to show unmet need before opening a new hypermarket, limits on the size and numbers of liquor outlets in a region, a cap on currency trading licenses, restricting the ratio of call centres to street front bank outlets, a ban on trading in the latest toxic derivative, or requiring investment in investment banks through a subsidiary rather than an agency.

There are several significant and controversial changes proposed to other parts of the GATS text:

- a light-handed approach to future **domestic regulation** of
 - *qualifications requirements and procedures* (eg for telco technicians, financial advisers, engineers)
 - *licensing qualifications and procedures* (eg. pension fund managers, training providers, courier operators)
 - *technical standards* (eg. financial trading rules, staffing levels, health and safety rules, location and size of warehouses and hypermarkets)and a corporate-friendly approach to their administration³;
- guaranteed rights for foreign states and corporations to comment on proposed new policy and regulation (**transparency**)⁴; and
- the right of all TiSA parties to share the benefits of any FTAs that other TiSA parties have in force (**most-favoured-nation treatment**); the scope of that provision is in dispute.

Part II: Scheduling commitments

Each party's schedule of its commitments to the core rules on market access and national treatment voluntarily limits the government's right to maintain or adopt more restrictive approaches in the future – and opens them to legal challenges and economic penalties if they breach those obligations. The TiSA approach to scheduling imposes more restraints than the GATS.

Countries' schedules are developed through a process of requests and offers between individual parties, and then consolidated so all countries receive the same benefits.

Each TiSA party guarantees to open its 'market' in a service sector or sub-sector (market access) the same way as in the GATS: they list what sub-sectors will be covered for each way of delivering the service (known as a **positive list**), and any limitations on that opening. TiSA parties are expected to commit at least the highest level of market access in their existing FTAs, even though the impacts

2 Lucian Cernat and Zornista Kutlina-Dimitrova, 'Thinking in a box: a "mode 5" approach to service trade', European Commission Chief Economist Note, Issue 1, March 2014

3 Whether these provisions are in the core text and Annex on Domestic Regulation has not been finalised.

4 This occurs in both the leaked core text and the TiSA, Annex on Transparency, dated 6 November 2016

of giving that to all TiSA countries could be quite different; whether they do that comes down to bargaining power.

Where a government has promised market access for a service sub-sector, TiSA presumes the non-discrimination rule will apply – all levels of government will not give local firms any better treatment than their foreign counterparts. There are two ways a party could counteract that presumption, *provided all the other parties consent*:

- a government could negotiate to keep ‘discriminatory’ measures that exist when TiSA comes into force (a **‘standstill’**). Any new liberalisation would be automatically locked in (a **‘ratchet’**). Existing preferential treatment for locals that was not expressly listed would breach the rules (this is a **‘negative’ list** approach).
- a government could exclude some services or sectors from the non-discrimination obligation to preserve its **future policy space**, but that must be spelt out in the country’s schedule (again, a ‘negative’ list) and all the other countries must agree.

Some annexes, including on financial services, telecoms, and delivery services, seek to restrict the schedules even further, by not allowing any reservations for certain services or imposing a standstill for both the market access and national treatment rules.

Services are generally being identified using the 1991 W/120 **classification list**,⁵ so they are consistent with the GATS. However, countries’ offers that have been released show additional sub-sectors have been used and they are often embedded in clusters of commitments and model schedules. Certain annexes, eg on delivery services, alter the standard GATS classifications.

Schedules are technically complex and raise problems of foreseeability and error. Negative lists are especially high risk. It is almost impossible to change a schedule later, as that requires consent of all other parties and new concessions can be demanded as the price of their consent.

Committing a service in the schedule for market access and national treatment would trigger other rules, such as the ‘disciplines’ on a government’s regulation of qualifications, licensing, technical standards in those sectors, discussed in detail below.

Part III: New and enhanced disciplines

This Part of TiSA refers to the 18 or so proposed annexes (see Appendix 1). Each annex has a specific focus and aims to achieve one or more of the following:

- extend the GATS rules that restrict how governments can approach the regulation of services generally (eg. least-burdensome domestic regulation, rights of foreign states and corporations to comment on proposed laws);
- expand the coverage of sectors where that is limited under the GATS (eg. express delivery, digital services);
- introduce new rules for sectors of particular interest to some countries (eg. road transport, energy, professional services, environment); and
- apply the services rules to activities or entities not covered by GATS, but which are included in some FTAs, often introduced as a fallback for the TPP (eg. e-commerce, SOEs, government procurement, prohibitions on requiring a local presence, and prohibited performance requirements on foreign investors).

Part IV: Institutional Provisions

The final Part of TiSA sets out mechanisms for decision making, dispute settlement, and operating the agreement. These are being designed so that TiSA can fit back into the WTO.

Disputes: The panel of arbitrators hearing a dispute under TiSA would be trade experts, not proper judges. Unlike the WTO, the current proposal does not provide any appeal from a panel’s decision. If a party was found in breach of the TiSA rules, it would have to abandon or adjust the non-compliant

5 WTO, W/120. Appendix 2.

measure, or face the risk of sanctions against other parts of its export economy, such as agriculture or manufacturing.

Entry into force: A minimum number of the original negotiating parties would have to ratify TiSA before it could enter into force. The July 2016 leaked text proposes two-thirds of original signatories.⁶ It is not weighted to require the major powers to be among those parties, as in the TPP.

Joining TiSA (accession): Any country wanting to join TiSA would have to get approval from a Working Group that can include all existing parties, who often negotiate one by one and then collectively.⁷ That inevitably means they would have to promise more than was in the original TiSA.

6 TiSA, Article IV:16, Core text, dated 14 July 2016

7 TiSA, Article IV:10, Core text, dated 14 July 2016