INTRODUCTION

Regulations in the financial sector are needed to protect the public interest since financial services play an important role in the economy and in society. Following the 2008 financial sector crisis in the US and the EU and its huge consequences for economies and societies, there has been an international consensus that the lightly regulated and deregulated financial sector needed more strict regulation. This resulted in a series of financial reforms. In contrast, TISA does not support these reforms but continues to ‘discipline’ and restrict how legislators, regulators and supervisors can regulate the financial sector, going even further than the deregulatory GATS rules did before the financial crisis.

The following analysis highlights just some of the dangerous provisions in the TISA Annex on Financial Services that will expose the general public again to risky activities by the financial sector. It explains how many of these TISA provisions limit what governments, legislators, regulators and supervisors can do to restrict the financial sector. TISA allows the financial sector to expand, rather than being further subject to needed regulations. Be aware that these TISA negotiations in financial services do not take into account that international financial reforms and international supervisory arrangements are far from finished, and far from sufficient to prevent another financial crisis or to intervene swiftly in case of an international financial crisis.

Another important aspect of this TISA Annex on Financial Services is that it does not mention that the agreement should, or intends to, improve access to, and the quality of, financial services for citizens, nor that it should be instrumental in meeting the financial needs of TISA countries, let alone filling the financial gaps to deal with climate change and growing inequality.

It should be borne in mind when reading this analysis of the draft TISA Annex on Financial Services that there are two related parts of the TISA text which are not leaked:

1) the text with general articles applicable to all services, which is very likely to be quite similar to the GATS text and FTA texts on services;

2) the ‘list of commitments’ – that is, the list of sub-sectors in financial services (for example, insurance, taking deposits, trading in derivatives) which each TISA country commits to liberalise, and for which TISA rules and Annex apply, except if exemptions are written down in the list. As we know that TISA aims at making binding commitments, in other words making permanent any liberalisation a TISA country has effected in any free trade agreement – and possibly through any unilateral liberalisation – TISA will result in a huge amount of market access for financial services, even very risky ones. Note that the EC has published its initial list of commitments it offers, subject to further negotiation, to be downloaded from its website: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf
ANALYSIS

The current leaked TISA Annex on Financial Services, dated 23 February 2015, contains some specific details of the current state of the TISA negotiations. In some important areas of the Annex, there seems to remain quite some disagreements, given that the text has different proposals in between brackets, especially as regards the following issues (some of which are analysed below):

- allowing new financial services in the territory of the other TISA countries (draft Art. X.10);
- the transfer and processing of financial information outside the territory where a financial service supplier operates (draft Art. X.11);
- the way by which regulation and licensing/authorisation processes have to be transparent and available for comments by interest groups (draft Art. X.16); and
- the supply of insurance services by postal insurance entities (draft Art. X.22).

Some of the disagreements are the same as could be seen in the texts of the TISA Annex on Financial Services dated 14 April 2014 published by WikiLeaks on 19 June 2014 (see: http://wikileaks.org/tisa-financial)

Given that only some of the differences among the negotiators are detailed, not all nuances can be given in the following short analysis highlighting particular articles of the Annex in Financial Services.

**Standstill clause (Draft Art. X.4): preventing future regulations**

The general idea of the standstill clause is that regulatory qualifications, restrictions or limitations on the financial sector are being frozen and no new restrictions are allowed in the future. The draft TISA text shows that there is still some detailed disagreement, but in general no restrictive measures would be allowed in the future regarding financial services that are liberalised through the TISA list of commitments made for cross-border trade in financial services (mode 2), establishment of foreign financial service suppliers (mode 3), and financial services purchased by public entities. This standstill clause could apply on the date that TISA takes effect. Not all TISA negotiators are yet fully supporting the standstill clause or all its details, and Turkey is opposing many details.

The consequence of this standstill clause is that in the future it will be difficult if not impossible to impose more restrictive regulations for the financial sector. However, the financial crises have taught us that future developments and little known innovations in the financial services sector can cause dangers to the financial system and society, and these might require new restrictive measures that can now not be foreseen. In fact, there are still financial reforms that need to be enacted as promised after the most recent financial crisis and after new scandals in the financial sector have been discovered, indicating that legislators and regulators still need full room of manoeuvre to regulate the financial sector.
Non-discriminatory measures (Draft Art. X.15): deregulation gone too far?

The TISA draft includes a provision that requires that each country removes or limits any measure, even if it is non-discriminatory, that has “significant adverse effects” on foreign financial services suppliers, for example when the latter cannot expand their activities in the whole of the host country, or cannot sufficiently compete in the host country even if all TISA provisions are respected. It is not clear whether the EU will endorse this Article, although the EU did agree to the same provision included in the special annex of GATS (the Understanding on Commitments in Financial Services). Peru is opposed, while most of the rest are in favour of this draft Art. X.15.

This provision is quite outlandish in that it favours foreign financial services trade and suppliers to expand in TISA countries. It can be subject to broad interpretation and allow a foreign services supplier from a TISA home country to claim any measure, “although respective of the provisions of [TISA]”, to be a hindrance to its operations and profit-making in a TISA host country. However, a company could just be non-competitive or not able to adapt to circumstances of the host country. In addition, many measures that might have “adverse effects” on foreign financial services suppliers might well be needed to protect particular public interest needs in the host country, or to be preventive against financial instability and financial crises.

Prudential measures (Draft Art. X.17): which financial regulations are allowed?

The TISA draft text has a provision that allows a country, to a limited extent, to go against the TISA rules for prudential reasons. Such prudential regulation is being interpreted as especially related to protecting clients (for example, investors and depositors) of financial services suppliers and ensuring the integrity and stability of a country’s financial system. However, the provision also specifies that such prudential measures should not be seen as a way to be contrary to TISA rules. This TISA draft Article replicates the stipulation on domestic regulation in the GATS Annex on Financial Services, with just a one-word difference, and is supported by all TISA negotiators while wider application proposals (see draft Art. X.17, footnote 5) are being opposed.

This GATS/TISA provision has been subject to many debates and is considered to be too vague to be sure which prudential measures are allowed. It allows prudential measures to be brought before a dispute panel by other GATS/TISA Parties to assess whether they could be considered as abusive circumvention of the rules or as protectionist. The question is how will financial prudential considerations and public interests be taken fully into account when a panel must make an assessment based on trade law? The narrow interpretation of what a prudential measure is does not make it clear whether, for example, prudential measures can be taken for social reasons (such as no speculation with food derivatives) or for the stability of the global financial sector or one particular financial company. This can withhold countries from taking preventive and necessary strict regulations (‘chilling effect’).

These problems have actually been recognised in the EU-Canada free trade agreement (CETA). CETA texts not only include an additional stipulation that prudential measures can be used for “the maintenance of the safety, soundness, integrity or financial responsibility of a Financial Institution, cross-border financial service supplier or financial service supplier”. The CETA text also has an Annex with guidance for interpretation when a prudential measure
should be allowed, and when it could not be allowed (namely, when it is “a disguised restriction on foreign investment or an arbitrary or unjustifiable discrimination between investors in like situations”). This raises the question of why the EU and Canada are now negotiating a TISA text in which the provision to allow prudential measures is again problematic and not consistent with their own CETA text.

**New financial services (Draft Art. X.10): what lessons have been learnt from the financial crisis?**

Switzerland proposes that host TISA countries must allow “any new financial service” from another financial TISA country, as is mentioned in the GATS Understanding on Commitments in Financial Services. This is opposed by many other TISA negotiators, who propose that a new financial service from a service supplier of another TISA country can be permitted without new financial regulations but that new regulations and conditions or authorisation processes are allowed.

The 2008 financial crisis was mainly caused by the underestimation of the risks of new financial products, such as collateralised debt obligations (CDOs) on subprime mortgages and credit default swaps (CDS), which remained unregulated before 2008. It seems that some TISA countries have learned some lessons and do not want to allow any new financial services without conditions or regulations as provided for in the GATS Understanding. However, it is not clear what compromise will be found with Switzerland, which still wants no conditions to be imposed on new financial services as that would benefit the Swiss banks to compete with other banks in the host countries. Still, in the case that this draft Article would not compromise with Switzerland, it does not guarantee that the necessary regulations and conditions to eliminate the risks of new financial services will be in place.

**Data transfer (Draft Art. X.11): trying to avoid localisation of data**

TISA would allow all financial services suppliers to transfer information or process financial information, including by electronic means, in and out of a TISA country, for conducting their business. The US opposes an additional stipulation proposed by many other TISA negotiators that each country would retain the right to protect personal data, personal privacy and confidentiality of individual records.

This TISA provision goes against the current trend by which countries, not in the least the EU, want to prevent or prohibit that data from operations in their territory are leaving the continent. There are, of course, many questions in how far this TISA rule would nevertheless result in personal data privacy being broken.
Transparency of regulations (Draft Art. X.16): opportunity for the financial lobby to change the rules?

There are still quite different text proposals for the provision in the TISA Annex on transparency of regulations. While a few countries propose only more transparency for the authorisation of financial services, some others want to give "interested persons" the opportunity and due time to comment before a new law or regulation is decided on. The US in addition wants that those interested parties that have given substantive comments should be given a written response.

The provision on transparency of regulations in the TISA Annex on Financial Services reflects the TISA transparency text dated 23 January 2015: the current analysis made by WikiLeaks of that text is applicable to this draft Art. X.16. In practice, existing consultations before financial laws are decided on in the EU and the US has resulted in “interested persons” being mostly the representatives of the financial industry who are making their interests well known, at the expense of the public interest since only very few civil society organisations have the means and capacity to engage in the very technical financial consultations. Many parts of the TISA Annex on Financial Services (see also draft Art.X.22 on postal insurance entities) already clearly reflect how the negotiators are negotiating based on lobby inputs from the financial industry and favouring the interests of the financial industry. Consequently, the public interest and ability to take preventive measures and strict regulations to protect societies against financial instability and financial crises are being sidelined.