



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **A**  
ECONOMIC AND SCIENTIFIC POLICY



**Economic and Monetary Affairs**

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# Financial Services in EU Trade Agreements

Study for the ECON Committee





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **Financial Services in EU Trade Agreements**

**STUDY**

## **Abstract**

This document prepared by Policy Department A for the Economic and Monetary Affairs Committee (ECON) provides an overview of rules concerning trade in financial services in a range of recent preferential trade agreements (PTA) to which the EU is a party, in view of ongoing negotiations with the US over the Transatlantic Trade and Investment Partnership (TTIP). EU Member States are collectively the world's largest exporters of financial services, and the sector is of strategic importance in the EU's trade policy. In its trade agreements with Korea, Singapore, Colombia/Peru, Central America and CARIFORUM, and its ongoing negotiations with Canada, the EU has sought and obtained considerable concessions in the sector which go beyond those agreed multilaterally in the WTO.

This document was requested by the European Parliament's Committee on Economic and Monetary Affairs.

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## LIST OF ABBREVIATIONS

<b>ACP</b>	African, Caribbean and Pacific
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>BITs</b>	bilateral investment treaties
<b>BCBS</b>	Basel Committee on Banking Supervision
<b>CARIFORUM</b>	Caribbean Forum of ACP States
<b>CAD</b>	Canadian dollar
<b>CAN</b>	Andean Community of Nations (Spanish: Comunidad Andina); customs union of Bolivia, Colombia, Ecuador, and Peru; <a href="http://www.comunidadandina.org/ingles/who.htm">http://www.comunidadandina.org/ingles/who.htm</a>
<b>CETA</b>	Comprehensive Economic and Trade Agreement (EU-Canada)
<b>ECLAC</b>	Economic Commission for Latin America and the Caribbean
<b>EPA</b>	Economic Partnership Agreement
<b>EU</b>	European Union
<b>FATF</b>	Financial Action Task Force
<b>FSB</b>	Financial Stability Board
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>IAIS</b>	International Association of Insurance Supervisors
<b>IOSCO</b>	International Organisation of Securities Commissions
<b>ISDS</b>	Investor-State Dispute Settlement
<b>MFN</b>	Most Favoured Nation
<b>NAFTA</b>	North American Free Trade Agreement
<b>OCTS</b>	Overseas Countries and Territories
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>PTA</b>	preferential trade agreement
<b>TiSA</b>	Trade in Services Agreement
<b>RTA</b>	regional trade agreement
<b>TTIP</b>	Trans-atlantic Trade and Investment Partnership
<b>US</b>	United States of America
<b>WPDR</b>	[GATS] Working Party on Domestic Regulation
<b>WTO</b>	World Trade Organization

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## EXECUTIVE SUMMARY

In light of its competence in the area of financial services, the European Parliament's Committee on Economic and Monetary Affairs (ECON) has asked for a concise, factual overview and analysis of the treatment of financial services in a range of recent trade agreements and ongoing trade negotiations, to further in-depth discussion of the issues which arise, namely in view of the current negotiations with the US on a Transatlantic Trade and Investment Partnership (TTIP). The concluded agreements covered by this report are those with Singapore<sup>1</sup>, South Korea, the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM), Central America, and Colombia/Peru. The report also makes reference to ongoing negotiations with Canada, and to the Trade in Services Agreement (TiSA), to the extent that relevant information is publicly available. The TTIP itself is not covered in this overview.

### **N.B.**

- *Links to the documents mentioned, where available, are indicated in the References chapter.*
- *The broad white lines in the tables separate concluded agreements from those under negotiation or awaiting signature/ratification.*

## Aims

This document aims to:

- provide brief context for the development of international rules on trade in financial services and their inclusion in European preferential trade agreements;
- provide a concise description of the scope and content of the agreements covered;
- highlight in particular the extent to which the commitments and disciplines contained in these agreements go beyond the WTO's General Agreement on Trade in Services;
- indicate the most recent and most significant innovations in rules regarding trade in financial services;
- highlight significant potential future developments in this area.

## Summary and key findings

Since the publication of the European Commission's *Global Europe*<sup>2</sup> strategy in 2006, the EU has been actively negotiating deep and comprehensive preferential trading agreements with strategic partners, particularly in emerging Asian markets. Given the global competitiveness of European financial services firms, financial services have emerged as a key sector in these negotiations. The EU has sought, and in many cases obtained, considerable concessions in the sector which go beyond those agreed multilaterally in the World Trade Organisation. These concessions include not only additional sectoral commitments for market access and national treatment, but importantly also new and enhanced rules governing financial regulation.

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<sup>1</sup> Some aspects of the EU-Singapore agreement are still under negotiation, but, on the information available at the time of writing, these negotiations are due to be completed in the coming weeks.

<sup>2</sup> European Commission Communication, *Global Europe: Competing in the World*, COM(2006)567 final.

Key findings from the survey of these agreements include:

- the EU's main priority has been to secure enhanced market access in the area of **commercial presence** (Mode 3), and this is where most additional commitments have been concentrated;
- **market access and national treatment concessions in commercial presence have been relatively comprehensive**, covering virtually all financial service sectors, and usually locking in existing levels of liberalisation, alongside some significant additional commitments;
- the EU has secured **broad rights of establishment for its financial services firms**, in many cases enabling such firms to supply a full range of services in foreign markets through the juridical vehicle of their choice;
- **cross-border services trade** has been the subject of few additional commitments, and commitments tend to be narrowly confined to a handful of subsectors (e.g. reinsurance and retrocession, auxiliary insurance services, provision of financial information and financial data processing);
- some **innovations** have occurred **in the negotiating modalities** of these agreements, with the adoption of 'hybrid' and 'mixed' approaches to scheduling commitments, rather than the purely negative list approach followed in the General Agreement on Trade in Services (GATS);
- a significant recent development in ongoing negotiations has been the application to financial services sector of general **investment protection provisions** akin to those found in bilateral investment treaties (BITs);
- as regards **regulatory autonomy**, all of the covered agreements include an explicit 'right to regulate', as well as standard form carve-outs and protections for subsidies, government procurement, services supplied in the exercise of governmental authority, prudential regulation, and a range of general and security exceptions which largely replicate or enhance those contained in the GATS;
- the **CETA text contains two important innovations** to ensure sufficient **space for prudential regulation** – namely, Guidance notes on the interpretation of the prudential carve-out, and the filter mechanism for investor-state proceedings – but their precise effect requires further study to predict;
- the **regulatory disciplines** in these agreements use the *GATS Understanding on Commitments in Financial Services* as a minimum baseline, with a number of **important additional disciplines**;
- one of the most important additions has been the inclusion of comprehensive **advance notice** and **comment obligations** for proposed financial regulation, which have attracted controversy, due to their potential impact on decision-making processes within the EU and its trading partners;
- other important additional regulatory disciplines include: a **necessity test** for prudential regulation; new rules encouraging the implementation and application of specified **international standards for financial regulation**; and further provisions for **recognition arrangements**.

# 1. FINANCIAL SERVICES IN EU TRADE AGREEMENTS: BACKGROUND AND CONTEXT

## 1.1. International agreements and development of EU trade policy

International trade agreements, in particular their provisions regarding financial services, have developed within an established legal and institutional framework. For readers less familiar with this framework, **Annex 1** provides a **brief introduction to different treaties**, the involved institutions, and the terms used. Annex 1 also provides an overview on the **strategic direction of EU trade policy**, from its early focus on providing leadership in multilateral trade negotiations (2000-2006), to the more recent emphasis on the negotiation of preferential trade agreements (PTAs) as a complement to the multilateral track from the *Global Europe* strategy in 2006<sup>3</sup>. Initially, PTA partners were selected from among key growth markets in Asia, as well as development partners in Central and South America. A new stream was added to the strategy in 2009 with the commencement of negotiations with Canada over a new Comprehensive Economic and Trade Agreement (CETA) - the first to be initiated by a trading partner, rather than the EU itself. More recently, negotiations with the United States over a Transatlantic Trade and Investment Partnership (TTIP) began in July 2013.

## 1.2. Financial services as a sector of importance

The *Global Europe* strategy identified liberalisation of trade in services as central to the next generation of European trade agreements. This is not surprising: the EU is the world largest trader of services, accounting recently for almost a quarter of both exports and imports of services globally<sup>4</sup>. In common with most advanced economies, the services sector in the Internal Market accounts for a large and growing share (more than 65%) of domestic output and employment.

More specifically, the financial services sector has emerged as a key priority for trade negotiations. Member States of the EU are the world's largest exporters and importers of financial services, and in 2011 enjoyed a net trade surplus in financial services of around USD 36 million<sup>5</sup>. As a consequence, the EU has used its PTA negotiations to pursue innovations in rules for the financial services sector, pressing for new obligations and additional commitments<sup>6</sup> which go beyond those contained in WTO agreements. Key priorities include, among others:

- **the freezing of existing levels of market access** across substantially all financial and related professional services sectors, including all modes of supply;
- ensuring enhanced **rights of establishment**, including rights to determine the juridical form of a business presence (e.g. foreign branches for banks);
- the **automatic liberalisation of new financial services**;
- strict disciplines on **cross-border data flows**; and
- new disciplines on **financial regulation**, including **notice and comment provisions** in respect of **proposed new regulations**.

At the same time, the EU's demands for relatively broad liberalisation of financial services trade has complicated negotiations with South-East Asian nations with direct experience of

<sup>3</sup> European Commission Communication, *Global Europe: Competing in the World*, COM(2006)567 final.

<sup>4</sup> Deutsch, 2012, p.5.

<sup>5</sup> Robles, 2014, p.3.

<sup>6</sup> The difference between 'obligations' and 'commitments' is explained in Section 2.3. below.

the Asian financial crisis of the late 1990s, such as Malaysia, Indonesia, Thailand and the Philippines. This experience has made them cautious about the pace and shape of financial liberalisation, and less receptive to the priorities of the EU in this sector<sup>7</sup>. The EU recognises the need to couple an ambitious agenda for financial liberalisation with safeguards to ensure the continued ability of parties to safeguard financial stability and the integrity of financial markets.

### 1.3. Key EU trade agreements covering financial services

#### 1.3.1. Concluded agreements

Few EU PTAs prior to 2006 contained detailed rules and commitments covering trade in services. The most significant exception is the EU-**Chile** Association Agreement, provisionally in effect since 2003, which includes principles relating to services liberalisation similar to GATS, and was at the time of its conclusion heralded as a benchmark for future agreements.

Of the PTA negotiations with the Asian region, only the EU-**Korea** agreement has finally entered into force in July 2011. Given the high levels of growth seen in the Korean economy over the last decade, the highly restricted nature of its financial sector, and the financial services commitments undertaken by Korea in its PTA with the United States (US), new rules and commitments on financial services were a central aim of EU negotiators. They were successful: the EU-Korea PTA contains what has been described as a 'new template' for financial services rules, and is the most significant new agreement since the WTO Uruguay Round<sup>8</sup>. In some respects, this agreement goes beyond what is contained in the US-Korea FTA<sup>9</sup>.

In addition, the EU-**Singapore** PTA was initialled in September 2013, though some aspects remain under negotiation, apparently to be finalised in the coming weeks. Given the services orientation of the Singaporean economy, its generally open character, and the strategic desire of Singapore to act as a gateway to Asia for many multinational services firms, it is no surprise that the services chapter of this agreement (including rules on financial services) was equally ambitious as that in the EU-Korea PTA.

The other three relevant concluded agreements have all been signed with American states. The EU-**Central America**, EU-**Colombia/Peru**, and EU-**CARIFORUM** all contain significant obligations and commitments covering financial services. Again, this reflects the existing level of openness of some of these economies, as well as the strategic orientation of a number of them towards the development of their services sector. It is also a reflection of the fact that the US has in recent years negotiated PTAs with a number of these countries, containing broadly equivalent rules on financial services.

#### 1.3.2. Ongoing negotiations

The EU is also part of the group of WTO Members which is currently negotiating the *Trade in Services Agreement (TiSA)*. Frustrated with the lack of progress in services negotiations in the WTO's Doha Round, a group of WTO Members agreed in July 2012 to forge ahead with their own initiative to liberalise global services markets, with a view to multilateralising its contents in due course. At present, the group consists of 23 participants (counting the EU as one), which together account for almost 70% of world services trade, and 58% of European services exports.<sup>10</sup> The talks formally started in March 2013, with an agreed basic

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<sup>7</sup> Robles, 2014, p.5.

<sup>8</sup> Brown, 2011, pp.297-8.

<sup>9</sup> TheCityUK, 2011, p.3.

<sup>10</sup> Marchetti and Roy, 2013, p.11.

text (excluding schedules) concluded in September 2013. The countries have not yet set a deadline to end the negotiations.

At the bilateral level, while there are numerous ongoing negotiations (see Table 1 and Annex 1), the focus in this report will be on the CETA negotiations, for which there is sufficient material publicly available for meaningful analysis. Other negotiations will be referred to only occasionally, given the lack of available information on the status of negotiations and the relevant content of negotiating drafts.

**Table 1: Relevant agreements and ongoing negotiations**

Agreement	Parties	Timing of Negotiations	Date of Signature	Entry into Force
GATS	Multilateral	1986 to 1994	15 April 1994	1 January 1995
[NAFTA	<i>Canada, the US and Mexico</i>	<i>1986 to 1992</i>	<i>17 December 1992</i>	<i>1 January 1994]</i>
EU-Chile	EU and Chile	2000 to 2002	18 November 2002	1 March 2005
EU-CARIFORUM	EU and Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Christopher & Nevis, St Lucia, St Vincent & the Grenadines, Suriname, Trinidad & Tobago	April 2004 to December 2007	15 October 2008	1 November 2008
EU-Republic of Korea	EU and Republic of Korea	May 2007 to October 2009	6 October 2010	1 July 2011
EU-Central America	EU and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama	April 2007 to March 2011	29 June 2012	1 August 2013
EU-Colombia/Peru	EU and Colombia, Peru	June 2007 to April 2011	26 June 2012	1 March 2013
EU-Singapore	EU and Singapore (Investment Protections chapter still being negotiated)	March 2010 to September 2013		
EU-Canada (CETA)	EU and Canada	May 2009 to Present		
EU-Vietnam	EU and Vietnam	June 2012 to Present		
EU-Thailand	EU and Thailand	May 2013 to Present		
TISA	Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, Turkey and the United States	March 2013 to Present		

## 2. ARCHITECTURE, SCOPE AND COVERAGE

This chapter introduces the core legal concepts used for international legal disciplines on trade in services, as well as the basic structure of trade agreements as they relate to services. The content of these agreements is analysed in subsequent chapters. The more general framework is described in Annex 1.

### 2.1. Definition of 'trade in financial services'

#### 2.1.1. Definition of trade in services

In the schema used in most trade negotiations, '*trade in services*' can occur according to four different 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 in that territory.

However, this **terminology is not uniform**. In a number of EU PTAs, the term 'cross-border supply' is used to cover both of Modes 1 and 2 (see Section 2.2.2. below).

Importantly, the category of Mode 3 services trade covers forms of economic activity which are also commonly understood as **foreign investment**, leading to an **overlap between rules on trade in services and rule relating to the treatment of foreign investors** (see Section 2.5. below).

**Table 2: Four modes of supply in financial services - examples**

Mode	Example 1	Example 2
Mode 1: Cross-border supply	A bank established in the City of London accepts deposits via telephone or internet banking from a client in the Republic of Korea.	A Singaporean firm sells commercial aviation insurance to a French airline company located in France.
Mode 2: Consumption abroad	A Spanish company opens a bank account in Colombia for transactions occurring in Colombia.	A Swiss company takes out accident insurance from a Singaporean firm for its work in Singapore.
Mode 3: Commercial presence	A London bank establishes a branch in Korea to lend funds in Korea.	An American insurance company establishes a German subsidiary to provide reinsurance services in Germany.
Mode 4: Temporary presence of persons	The management of a Korean branch is staffed by British citizens from the bank's London headquarters.	A German portfolio manager travels to Canada to provide counsel and advice to a 'high-net-worth' Canadian client.

### 2.1.2. Definition of Financial services

**Financial services** are defined broadly as any service of a financial nature offered by a financial service supplier of a party to the relevant agreement. The generality of this definition means that **in practice financial services are defined by reference to lists of specific subsectors**. In the standard classification scheme, financial services are divided into:

- **Insurance and Insurance-related Services**, which include: direct life, accident and health insurance; direct non-life insurance; reinsurance and retrocession; and services auxiliary to insurance; and
- **Banking and Other Financial Services**, which include a wide range of economic activities including asset management, taking deposits, lending, financial leasing, trading, participation in securities, provision and transfer of financial information, and advisory services, among others.

### 2.1.3. Financial institutions vs financial services suppliers

Firms engaged in international trade in financial services include commercial and savings banks, credit card issuers and other non-depository credit intermediaries, investment banks, securities brokers, financial information providers, and financial advisory firms, such as those providing portfolio management and investment advice. Given the great variety of types of firms and the services they provide, a question arises as to which are covered by trade agreements, and which are not?

All relevant EU trade agreements covered by this report – other than CETA – refer to the concept of a '*financial services supplier*', defined as any natural or juridical person of a party (other than public entities) wishing to supply or supplying financial services. The concept defines the scope of application of all of the core obligations contained in these trade agreements. It is broad enough to include all of the firms mentioned above.

The CETA, by contrast, is modelled on NAFTA, and uses the operative concept of the '*financial institution*' to define the scope of application of its Mode 3 obligations. (*Financial service supplier* is still used in respect of other Modes.) This is a narrower concept, including only those institutions which are regulated and supervised as financial institutions within the domestic regulatory context. An important category of firm which is excluded from the coverage of the financial services chapter by this term is that of financial information providers, such as Reuters or Bloomberg (though such providers are covered by the investment chapter of that agreement).

## 2.2. Architecture

Different trade agreements incorporate rules on financial services in different ways, and globally there are at least three different models commonly in use<sup>11</sup>. Most EU agreements follow what we will call the **standard model** of EU PTAs, which **departs in some significant respects from the WTO's General Agreement on Trade in Services (GATS)**. A different model – much closer to NAFTA's treatment of financial services, though with differences – has been used in the CETA negotiations.

### 2.2.1. The GATS and TiSA model

The **GATS was the first major multilateral trade agreement** to provide a framework of rules for the liberalisation of international trade in services<sup>12</sup>. It was negotiated in the WTO

<sup>11</sup> There is a considerable literature on the strengths and weaknesses of each model, e.g. Stephanou, 2009; Stephenson, 2011.

<sup>12</sup> The North American Free Trade Agreement and Canada-US Free Trade Agreement were prior trilateral and bilateral agreements respectively, which included commitments on trade in services.

as part of the Uruguay Round of trade negotiations (1986-1994), and entered into force on 1 January 1995. It applies in the relations between all WTO Members, and is enforceable through the WTO dispute settlement machinery.

GATS rules relating to financial services can be found in four main documents<sup>13</sup>:

- the **GATS framework agreement** itself, which contains **obligations applicable to all services** and all modes of supply;
- **WTO Members' Schedules of Commitments**, which contain their **specific market access and national treatment commitments in the financial services sector**, divided by services subsector, and by mode of supply;
- the **Annex on Financial Services** ('the Annex'), containing **additional provisions relating solely to financial services**, the most important of which relate to services supplied in the exercise of governmental authority prudential regulation, mutual recognition, and dispute settlement; and
- the **Understanding on Commitments in Financial Services** ('the Understanding') which is a document setting out a **standard set of market access and national treatment commitments, as well as additional obligations which WTO Members may undertake, on a voluntary basis, in the financial services sector**. Around 40 countries chose to undertake such obligations during and just after the Uruguay Round, including all members of the EU<sup>14</sup>.

Although the structure and content of the **TiSA** remain subject to negotiation, indications are that it will largely replicate the structure of the GATS, with a small handful of **significant differences** (outlined below). An EU proposal circulated in March 2013<sup>15</sup> includes a core text which reproduces the relevant provisions of the GATS and is generally applicable across all service sectors, as well as a new Annex on Financial Services (the 'TiSA Annex') which essentially combines the provisions of the GATS Annex and Understanding, along with a number of additional provisions reflecting new developments.

### 2.2.2. The standard European PTA model for financial services

In one sense, the EU has based its PTA negotiations in financial services on the GATS. It has taken the GATS, the Annex and the Understanding as a starting point for negotiations, and sought to develop new rules and commitments upon that base. However, in their structure and architecture, most EU PTAs depart from the GATS in a number of ways. In these agreements, **rules on trade in financial services are primarily contained in a chapter entitled Trade in Services, Establishment and Electronic Commerce**<sup>16</sup>. This chapter is then divided into separate sections for rules relating to:

<sup>13</sup> Other relevant documents include the Second GATS Annex on Financial Services, the Fifth Protocol to the GATS, and the GATS Decision on Financial Services, but these do not contain additional substantive obligations.

<sup>14</sup> The countries are: Australia, Canada, all members of the EU, Iceland, Japan, Liechtenstein, New Zealand, Nigeria, Norway, Sri Lanka, Switzerland, Turkey and USA (also Aruba and Netherland Antilles).

<sup>15</sup> 'Plurilateral Services Agreement, Draft Text Provisions: Proposal by the European Union', March 2013, [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152687.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152687.pdf).

<sup>16</sup> The EC-CARIFORUM EPA uses the term 'Investment' instead of 'Establishment', but the difference is not significant.



- the Objective, Scope and Coverage of the chapter;
- Cross-Border Supply of Services (which covers both Mode 1 and Mode 2 services trade);
- Establishment/Commercial Presence/Investment;
- Temporary Presence of Natural Persons for Business;
- Regulatory Frameworks, which contains a specific sub-section on regulation in the financial services sector;
- Electronic Commerce; and
- Exceptions.

Unlike the GATS, therefore, only three modes of supply are defined. Furthermore, different rules apply to these different modes of supply – rather than having general obligations which apply to all modes of supply. Another important difference from the GATS is that the rules relating to Mode 3 (investment/establishment) apply generally to all sectors of the economy, not just to service suppliers<sup>17</sup>. In this sense, this part of these agreements constitutes something of a **hybrid between a trade and investment agreement**<sup>18</sup>, even without the incorporation of investor protection provisions, as discussed in Section 2.5. below.

EU PTAs adopting this model (with some variations) are those with CARIFORUM, Korea, Singapore, Central America, and Colombia/Peru.<sup>19</sup>

### 2.2.3. CETA

The structure of the CETA is different from both the GATS and the standard EU PTA model, adhering more closely to the structure adopted in NAFTA. The most important difference is that it contains a **dedicated financial services chapter, which contains virtually all the rules relevant to trade and investment in financial services**. There is, accordingly, a carve-out in the general chapters on Investment and Cross-Border Provision of Services for measures which fall within the scope of the financial services chapter. The major exception to this structure is the general chapter on Temporary Entry and Stay of Natural Persons for Business Purposes, which does apply to natural persons who are supplying financial services.

## 2.3. Negotiating modality

Trade agreements covering services contain two broad types of obligation:

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

The terms 'rules', **'obligations'** and 'disciplines' are used interchangeably to refer to the rules contained in the main text of the agreement itself, requiring or prohibiting certain kinds of action on the part of the signatory states. The term **'commitments'** refers to the

<sup>17</sup> Subject to the relatively minor sectoral carve-outs typically contained in the opening Articles of the Establishment section, none of which are relevant to financial services.

<sup>18</sup> Mathis and Laurenza, 2012, pp.158-9.

<sup>19</sup> Note that the EU-Chile Association Agreement, not covered in the terms of reference for this paper, is something of an anomaly in this respect, and follows a model much closer to the NAFTA model in its treatment of financial services.

inscription in schedules (or annexes) of the particular sectors to which these rules are to apply.

A further relevant distinction is between those agreements:

- which adopt a **'positive list'** approach to the scheduling of commitments (no commitments are made on sectors which are not positively inscribed in a party's Schedule/Annex), and those
- which adopt a **'negative list'** (all disciplines apply to all relevant sectors and measures, other than those set out in a party's Schedule/Annex).

Conventional wisdom is that a **'negative list' negotiating modality tends to yield greater levels of liberalisation**, simply because the default position in this context becomes the application of all rules to all sectors and all modes of supply.

The **GATS** adopts a **'positive list' approach** to market access and national treatment commitments. Agreements which follow the **EU standard model** also follow basically a positive list approach to both national treatment and market access obligations for all three modes of supply, but with one potentially significant modification. Schedules have two columns, with committed sectors and sub-sectors listed in one column, and reservations in the other<sup>20</sup>. The effect is to create a default full commitment for all listed sectors, subject only to the specific reservations inscribed. Some commentators have called this a **'hybrid'** approach<sup>21</sup>.

The **TISA** parties have agreed to a **mixed approach**, combining a positive list negotiating modality for market access with a negative list modality for national treatment.

Importantly, **CETA** adopts a **'negative list' approach** to the market access, national treatment and most-favoured nation obligations. This is seen as a major step: it is the first trade agreement offering 'full transparency' of all non-conforming measures in the financial services sector, including on the Canadian side both provincial and federal measures. This means that all non-conforming measures are explicitly listed in parties' schedules, and therefore easily identified.

## 2.4. Scope of application and carve-outs

### 2.4.1. General scope of application

Sectoral scope: All the agreements covered in this report are close to universal in their sectoral scope, subject only to exceptions which are unrelated to the financial services sector, and therefore not detailed in this report.

Subject matter scope: The GATS applies broadly to all *'measures affecting trade in services'*. The services chapter of standard model EU PTAs applies more broadly still to: (a) measures *'affecting establishment'*; (b) measures *'affecting the cross-border supply of services'*; and (c) measures *'concerning the entry into, and temporary stay in, [parties'] territories of key personnel, graduate trainees, business services sellers, contractual service suppliers and independent professionals'*. As noted above, this means that the establishment and Mode 4 obligations apply generally to all economic sectors, not just to service suppliers. The CETA Financial Services chapter applies to measures relating to financial institutions, investors and investments in financial institutions, and the cross-border supply of financial services (see also Section 2.1.3.).

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<sup>20</sup> The exception is the EU-CARIFORUM agreement, in which the schedules for the CARIFORUM states follow the GATS format.

<sup>21</sup> Sauv e and Ward, 2009; Stevens et al., 2012, p. 6, 38, 45.

**Formal scope:** The obligations in EU services trade agreements apply to measures taken by central, regional or local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities<sup>22</sup>. Although they do not directly apply to non-governmental self-regulatory bodies, including professional associations, there is an obligation on parties to ensure such bodies comply with certain provisions of the agreement (see Section 4.9.).

#### 2.4.2. Services supplied in the exercise of governmental authority

In all of the relevant EU trade agreements there is an important carve-out for services supplied in the exercise of governmental authority. Following the GATS model, this is typically achieved through the definition of 'services': the agreement is said to apply to all measures affecting trade in 'services', but 'services' are defined as '*any service in any sector except services supplied in the exercise of governmental authority*'. Both the EU-Singapore and EU-Colombia/Peru PTAs, 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*'. CETA contains similar text in its general chapter on cross-border trade. Importantly, services provided by public entities only benefit from this carve-out to the extent that they supply services neither on a commercial basis, nor in competition with one or more service suppliers.

There are additional and different protections in the financial services sector. For example, the GATS Annex on Financial Services makes clear that '*services supplied in the exercise of governmental authority*' means, in the financial services context:

- 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.

This language is also included in all EU PTAs, including CETA. Additionally, all EU trade agreements provide that the term '*financial service supplier*' does not include public entities. Given that the definition of '*financial service*' is limited by the definition of '*financial service supplier*', this represents in some circumstances a **significant additional layer of protection for public entities** in the financial services sector. Yet further protection is sometimes provided in the EU's schedules, which can include protection for public monopolies and exclusive rights for certain public service suppliers.

#### 2.4.3. Prudential carve-out

All agreements covered in this report provide a carve-out for '*measures for prudential reasons*'. In the prototypical provision, the GATS Annex 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-

<sup>22</sup> Note that the GATS contains this notoriously **ambiguous additional text**: '*In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory*'.

conforming prudential measures *'shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement'*.

While there is a considerable margin of appreciation in the interpretation of this carve-out, it has been criticised as ambiguous and uncertain in its effect. Importantly, then, some modifications have been made in some (but not all) subsequent PTAs to:

- include measures to maintain the safety, soundness, integrity or financial responsibility of individual financial service suppliers;
- include prohibitions of particular financial services or activities for prudential reasons, provided such prohibitions are applied on a non-discriminatory basis<sup>23</sup>; and
- remove the qualification that the prudential measure not be used to avoid commitments or obligations under the Agreement.

In this vein, the prudential provisions of the CETA are innovative and potentially provide a significant new layer of comfort for financial regulators. Two key new elements have been added:

- an Annex which provides Guidance on the application of the prudential carve-out; and
- a 'filter mechanism' which applies wherever investor-state proceedings are initiated in respect of prudential regulations (see Section 2.6.).

The Annex 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 PTA, 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'*. There is similar wording also in the EU-Korea and EU-Colombia/Peru PTAs, as well as the CETA Guidance Annex.

#### 2.4.4. Other carve-outs

A number of other carve-outs are included in broadly the same form across most of the EU PTAs covered in this report. They include carve-outs in respect of:

- subsidies provided by a party, including government-supported loans, guarantees and insurance<sup>24</sup>;
- government procurement;
- measures affecting natural persons seeking access to the employment market of a party; and
- measures regarding citizenship, residence or employment on a permanent basis, nor does it prevent a party from applying measures to regulate the entry of natural persons into its territory.

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<sup>23</sup> Note, however, that CETA states that 'Such a prohibition may not apply to all financial services or to a complete financial services sub-sector, such as banking' (Article 15.3). Prohibitions of certain specific practices, such as 'short-selling' are unlikely to be treated as a prohibition of a 'complete sub-sector'.

<sup>24</sup> Note that while the GATS contains no explicit and comprehensive carve-out for subsidies, GATS Article XV (according to which Members agree to negotiate future disciplines on subsidies) implies that may aspects of subsidies remain outside the scope of GATS disciplines.

In addition, it is made clear that:

- nothing in the services chapter requires the privatisation of any public undertaking; and
- each party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives '*consistent with*' the chapter.

The first four of these reflect similar provisions in the GATS itself. The last two represent responses to concerns which arose after the GATS entered into force, that rules on trade in services may require privatisation, and/or interfere with the right to regulate, in certain circumstances.

The CETA financial services chapter provides further that '*nothing in this Agreement applies to measures taken by any public entity in pursuit of monetary or exchange rate policies*'.

## 2.5. The application of investor and investment protection provisions in the financial services sector

Most of the PTAs covered by this report only contain **soft obligations** on parties to '*review*' their legal frameworks for foreign investment, with a view to enhancing the investment environment, but without dedicated investment protection provisions.

However, since the entry into force of the Lisbon treaty in 2009, investment protection has been included as part of negotiation mandates for free trade agreements. As a result, the more recent agreements – CETA, Singapore, and possibly Thailand – contain investment protection provisions which apply to investors and investments in the financial services sector. This is likely to be a feature of future agreements.

These investment protection provisions include all of the core obligations typically found in bilateral investment treaties, relating to expropriation, fair and equitable treatment, non-discrimination, denial of benefits, and freedom to transfer funds. This represents a **potentially very significant increase in the legal protections available to financial services firms, particularly where they are accompanied by provision for investor-state dispute settlement (ISDS)**, see Section 2.6.

## 2.6. Dispute settlement and institutional provisions

EU PTAs contain dedicated **state-to-state dispute settlement mechanisms** modelled broadly on the WTO system. Specific rules relating to financial services disputes typically provide for dispute settlement panels to include members with expertise and experience in financial services law or practice, as well as provisions relating to cross-sectoral retaliation.

A significant addition in recent negotiations has been the inclusion of **investor-state dispute settlement (ISDS)** mechanisms in respect of investment protection obligations. In both CETA and the EU-Singapore agreement, for example, all investment protection obligations have been incorporated into the financial services chapter and are explicitly subject to the ISDS mechanism.<sup>25</sup> However, the CETA text also provides for a '**filter mechanism**' exclusive to financial services disputes relating to prudential regulation. By the operation of this mechanism, where the states parties to the agreement agree (through the Financial Services Committee or the CETA Trade Committee) that the measure in question falls within the prudential carve-out, the investor shall be deemed to have

<sup>25</sup> This is based on the best information available on the EU-Singapore agreement. Note that this is more comprehensive than NAFTA, which does not include the broader provision of fair and equitable treatment within the scope of the ISDS mechanism.

withdrawn its claim and proceedings shall be discontinued. This represents a significant development of the filter mechanism found in NAFTA.

In addition, EU PTAs establish a series of **committees** and sub-committees to supervise and facilitate the implementation and application of the agreement. Consisting of representatives of the EU and the other state party, **such bodies typically have the power to make binding decisions**, by mutual agreement between the parties.

Apart from their general oversight function, these committees can be given powers in relation to a number of specific matters. For example, they can act as an alternative venue for the (non-judicial) resolution of disputes, and have the power to adopt rules of procedure for investment arbitrations conducted under the agreement. They also can adopt amendments, as well as interpretations which in some cases are binding on dispute settlement bodies.

While committees adopt their own rules of procedure, they are typically empowered to communicate with all interested parties including private sector and civil society organizations. A number of PTAs include a provision affirming the parties' *'respective practices of considering the views of members of the public'*.

Some agreements contain specific institutional provisions of interest:

- The CARIFORUM and Central America PTAs establish two additional bodies: a **Parliamentary Committee**, as a forum for MEPs and members of the other party's legislature to exchange views; and a **Consultative Committee**, to promote dialogue with civil society including the academic community.
- The CETA establishes a specific **regulatory cooperation forum**, to address and facilitate the implementation of the forms of voluntary regulatory cooperation envisaged under the agreement. The Colombia/Peru PTA also envisages the establishment of a **working group on regulatory issues**.
- The **CETA committees** also are empowered to play a number of important roles in relation to investor protection, beyond the filter mechanism described above. These include regular review of the content of the fair and equitable treatment standard for investors, considering whether an appellate mechanism ought to be created for ISDS under the agreement, and establishing a list of arbitrators.
- The Singapore agreement, in its most recent draft, includes some of the same provisions relating to investor protection, as well as an interesting provision providing for **consultations** to ensure that future changes to WTO law are reflected in the relevant provisions of the PTA where appropriate.'

**Table 3: Architecture, scope and coverage of the relevant agreements**

Feature	GATS	EC-CARI-FORUM	EU-Republic of Korea	EU-Central America	EU-Colombia & Peru	EU-Singapore	CETA	TiSA
Architecture	General services agreement + FS Annex	Standard model	Standard model	Standard model	Standard model	Standard model	Separate chapter for financial services	General services agreement + FS Annex
Negotiating modality	Positive	Hybrid~	Hybrid~	Hybrid~	Hybrid~	Hybrid~	Negative	Mixed
Governmental authority carve-out	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prudential carve-out	Yes	Yes	Yes	Yes	Yes	Yes	Yes (+ filter mechanism)	Yes
Subsidies carve-out	No^	Yes	Yes	Yes	Yes	Yes	Yes	Unknown †
Government procurement carve-out	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	No
Privatisation carve-out	No	Yes	No	Yes	No	Yes	No	No
Immigration carve-out	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Employment Carve-out	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Right to regulate	Yes (Preamble)	Yes	Yes	Yes	Yes	Yes	Yes	Unknown †
Investment protection provisions	No	No	No	No	No	Yes	Yes	No

**Notes:**

\* Carve-out not applicable to discriminatory measures for those countries scheduling commitments according to the Understanding

† no public access to relevant agreed text

~ for meaning of 'hybrid', see text Section 2.3.

^ see text Section 2.4.4.

### 3. CROSS-BORDER SUPPLY, ESTABLISHMENT AND PRESENCE OF NATURAL PERSONS

Recall that trade agreements contain 'obligations' which set out the measures which states are not permitted to apply in committed sectors, and 'commitments' which set out the sectors to which these obligations apply. Sections 3.1. and 3.2. deal with the *obligations* contained in the text of the agreements. Section 3.3. briefly surveys the range of *commitments* which have been undertaken in the various agreements. The information contained in Chapters 3 and 4 are summarised in a convenient manner in Table 7, contained in Annex 2 at the very end of this report.

#### 3.1. Cross-Border Supply and Establishment

##### 3.1.1. Market access

The **market access obligation** is the core provision by which parties to trade agreements open their financial services markets to foreign institutions and service suppliers. It applies only in sectors in which specific commitments are undertaken. While the GATS contains a single market access obligation which applies in principle to all modes of service supply, in PTAs following the EU's standard model, there are two separate market access commitments in the sections on Cross-Border Supply and Establishment respectively<sup>26</sup>.

Importantly, making such a 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** whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- limitations on the **total value of service transactions or assets** in the form of numerical quotas or the requirement of an economic needs test;
- limitations on the **total number of service operations** or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- limitations on the **total number of natural persons** that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service;
- measures which restrict or require **specific types of legal entity** or joint venture through which a service supplier may supply a service;
- 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; and

The CETA text makes clear that its market access obligation with respect to Cross-Border Supply generally requires each party '*to permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of the other Party located in the territory of the other Party*'. It also clarifies, however, that this does not require a Party to permit such suppliers to do business or solicit in its territory.

<sup>26</sup> Note that the EU-Colombia/Peru agreement makes clear that '*each Party may require that in the case of constitution of juridical person under its own law, investors must adopt a specific legal form*'.



For Mode 3 trade, some agreements also provide a **right of establishment**, according to which each party grants financial service suppliers of any other party the right to establish or expand a commercial presence within its territory, including through the acquisition of existing enterprises. A right of establishment is contained in some form in NAFTA, the GATS Understanding on Commitments in Financial Services, and certain proposed TiSA texts.

Some TiSA proposals further require parties to permit foreign financial service suppliers, which own or control a financial institution in the Party's territory, to establish in that territory **as many additional commercial presences as may be necessary** for the supply of the full range of financial services allowed under the domestic law.

Some agreements specify further that investors have the **right to choose the juridical form of their business establishment**; while others reserve the rights of Parties to determine the juridical form of a business, provided this is done in a non-discriminatory manner.

### 3.1.2. National treatment

The national treatment obligation ensures that foreign financial institutions 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**.

The text of GATS Article XVII is the model:

*'In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.'*

There are two national treatment commitments in standard model EU trade agreements, for Cross-Border Supply and Establishment respectively – with the latter simply substituting *'establishments and investors'* for *'services and service suppliers'*<sup>27</sup>.

Like the market access obligation, this obligation applies only in sectors in which specific commitments are undertaken. All EU agreements, other than CETA and TiSA, adopt a positive or hybrid negotiating modality for the scheduling of commitments (see Section 2.3.).

### 3.1.3. Most favoured nation (MFN)

The GATS contains a *'Most favoured nation'* (MFN) obligation, which in principle ensures that each WTO Member extends all preferential treatment to all other WTO Members immediately and unconditionally. While this provision is subject to qualifications inscribed in Members' schedules, as well as an exception for economic integration agreements which reach certain thresholds for minimum levels of liberalisation, it is still often described as one of the most fundamental of all GATS obligations.

<sup>27</sup> The proposed CETA text contains a variant which follows more closely the wording of national treatment obligations in NAFTA. National treatment in respect of Establishment is ensured for *'financial institutions'* and *'investors and their investments in financial institutions'*, provided they are *'in like situations'* *vis-à-vis* their European counterparts. Financial service suppliers which are not financial institutions are covered by the Investment Chapter in respect of Mode 3 trade. In respect of Cross-Border trade, *'service suppliers'* are the relevant beneficiaries.

However, the situation is not the same at the level of PTAs. **Not all EU trade agreements contain an MFN clause:** the PTAs with Singapore, Central America, and Colombia/Peru, for example, do not. Furthermore, most MFN obligations are subject to important limitations and conditions, which can vary significantly from agreement to agreement:

- the EU-Korea MFN obligation applies only to economic integration agreements signed after the entry into force of that agreement. Furthermore, there is an additional exclusion for preferential treatment arising from a regional economic integration agreement where such treatment *'is granted under sectoral or horizontal commitments for which the regional economic integration agreement stipulates a significantly higher level of obligations than those undertaken'*;
- the EU-CARIFORUM MFN obligations applies only to economic integration agreements signed by CARIFORUM states *'with a major trading economy'* (such as the US), and does not apply to regional economic integration agreements which create an internal market (such as agreements under the auspices of CARICOM);
- neither the proposed CETA nor the EU-Korea MFN obligations apply to the investor-state dispute settlement provisions contained in those agreements;
- the MFN obligations in the CETA, EU-Korea, EU-CARIFORUM and the GATS are subject to limitations and qualifications positively inscribed in Party's Schedules;
- MFN obligations can also be subject to standard exceptions for recognition arrangements, contiguous frontier zones, and tax agreements.

The **complexity** of these MFN provisions reflects in part the strength of the competing interests at stake. On one hand, there is an obvious interest in ensuring that EU firms receive the benefit of any concessions granted by PTA partners to third countries pursuant to other economic integration agreements. At the same time, MFN clauses can impede the dynamics of future PTA negotiations, and at times can give rise to **unpredictable results**.

#### 3.1.4. Standstill and ratchet

Some agreements **lock in existing levels of liberalisation** with what is called a **'standstill'** obligation. Depending on the way it is drafted, this obligation may apply in respect of market access or national treatment obligations, or both. The mechanism by which this effect is achieved varies. Sometimes, it is achieved by limiting the conditions, limitations and qualifications which parties may inscribe in their schedules to *'existing non-conforming measures'*. In others, the agreements contain a more explicit obligation to, for example, *'maintain the conditions of market access and national treatment [...] applicable according to their respective legislation [...] at the time of the signature of [the] Agreement'*.

Interestingly, in the EU-CARIFORUM EPA, the CARIFORUM signatories committed to a standstill clause in their schedules, but there is no equivalent provision for EU parties. The EU-Singapore PTA contains a more qualified version of the standstill obligation in respect of financial services commitments, which largely exempts future non-protectionist measures in the banking sector, as long as compensatory adjustments are made at the same time.

**'Ratchet'** clauses **lock in future liberalisation** undertaken by the parties to the agreement, so that parties are not permitted to go back on any liberalisation initiatives unilaterally undertaken after the coming into force of the agreement. **Ratchet clauses are relatively rare**, and none of the EU's concluded trade agreements includes one. The EU has, however, proposed a ratchet clause covering national treatment commitments in the TiSA.

### 3.1.5. Other obligations (payments, capital movements)

To support the liberalisation commitments made in respect of trade in services, most EU trade agreements contain **secondary requirements** on both 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.

## 3.2. Temporary presence of natural persons for business (Mode 4)

In sectors in which a Mode 4 commitment is made, a party must permit the temporary entry of workers in that sector for certain purposes and within certain limits. Note that this does *not* affect a state's ability to regulate access to its employment market, nor to set conditions regarding citizenship, residence or employment on a permanent basis.

The rules distinguish between **five different categories of personnel**: i) key personnel, ii) graduate trainees, iii) business services sellers, iv) contractual service suppliers and v) independent professionals. Some agreements also include a category of vi) short term visitors for business purposes. Different conditions, and different permitted durations of stay, apply to each category, as set out in Table 4 at the end of this section.

The **GATS Understanding** includes a somewhat different provision relating solely to the presence of natural persons in the financial services sector. Under Paragraph 9, each Member making commitments according to the Understanding must **permit temporary entry of specialists and senior managerial personnel possessing essential proprietary information**. Furthermore, such Member 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 Understanding itself. These provisions are **largely mirrored in the TiSA Annex**.

**Table 4: Temporary presence of natural persons**

Category of Person	Main Criteria	Length of Stay Allowed	Sectoral Application	Variations and notes (TiSA excluded)
i) Key Personnel (Business visitors)	Persons responsible for setting up a commercial presence and paid by a source outside of the host territory.	90 days per 12-month period	Applies to sectors in which Mode 3 commitments made	<u>CETA</u> : 90 days within any 6 month period for business visitors for investment purposes; up to 1 year for investors.
ii) Key Personnel (Intra-corporate transfers: Managers and Specialists)	Persons employed by a company in the sending country at least a year before entry to the host country to work within a partner company there.	Up to 3 years	Applies to sectors in which Mode 3 commitments made	<u>EU-Central America</u> : personnel from EU only allowed up to 1 year in CA.
iii) Graduate Trainees	University graduates, employed by a company for at least a year and entering either Party for career development or training in a branch or parent company.	Up to 1 year	Applies to sectors in which Mode 3 commitments made	
iv) Business services sellers	Persons entering to negotiate a sale or an agreement but who receive remuneration from a source outside of a Party and do not make direct sales.	90 days per 12-month period	Applies to sectors in which Mode 1, 2, or 3 commitments made	
v) Contractual Service Suppliers (CSS)	Professionals with 3 years' experience employed by a company in the sending country, which does not have a presence in the other party but has a service contract with a client in the other party.	Up to 6 months per year	Applies to sectors in which GATS mode 4 commitments made	<u>CETA</u> : 12 cumulative months per 24-month period. <u>EU-Singapore</u> : no provision on CSS. <u>EU-Colombia/Peru</u> : FS not included.
vi) Independent Professionals (IP)	Self-employed professionals with 6 years' experience and service contract.	Up to 6 months per year	Applies to sectors in which GATS mode 4 commitments made	<u>CETA</u> : 12 cumulative months per 24-month period. <u>EU-Singapore</u> : no provision on IP. <u>EU-Colombia/Peru</u> : Financial Services not included.
vii) Short Term Visitors for Business Purposes	Persons that are not selling services can enter either Party to perform a range of activities such as: research and design, marketing research, training, trade fairs and exhibitions, sales, purchasing and tourism.	90 days per 12-month period	Applies only to sectors in which further Mode 4 commitments made	<u>CETA</u> : 90 days per 6-month period. EU-Korea, EU-Central America, EU-Singapore: not included.

### 3.3. Commitments in the financial services sector

In the financial services sector, Modes 1 and 3 account for more than 75% of world services trade, while Mode 2 is largely unrestricted<sup>28</sup>. It has proven difficult to liberalise Mode 1 trade in more than a small handful of subsectors, for reasons have to do with both consumer protection and prudential regulation. As a result, the **primary focus of the EU in most of its trade agreements so far has been on securing a good package of rights in relation to Mode 3** (establishment). As noted in Section 3.2., Mode 4 liberalisation is most often treated as ancillary to liberalisation undertaken in respect of establishment.

<sup>28</sup> Marchetti and Roy, 2013, p.13.

### 3.3.1. Cross-border supply (Modes 1 and 2)

In the agreements covered by this report, the EU's commitments on cross-border supply cover only a **small number of subsectors** of financial services:

- (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.

Commitments in these sectors include **both market access and non-discrimination**.

This was the extent of the commitments exchanged by willing WTO Members under the GATS Understanding, and the EU has not offered much beyond this package in its subsequent PTAs. On occasion, the package contained is in some respects less than that contained in the Understanding – the EU's commitments on cross-border supply under its agreement with Korea, for example, do not include reinsurance and retrocession. There are, furthermore, a number of country-specific qualifications even in the sectors listed above. The result is that most aspects of the European market in direct insurance, and virtually all banking and financial services are exempt from international commitments on Mode 1 cross-border supply<sup>29</sup>.

The same is largely true of the commitments made by the EU's trading partners. There are some exceptions – Singapore and some CARIFORUM states, for example, have made commitments on cross-border supply for certain aspects of direct insurance – but they are limited, and largely reflect a lock-in of the *status quo*.

### 3.3.2. Establishment / Commercial Presence (Mode 3)

By contrast, **the EU's commitments on Mode 3 access to its financial services markets are very broad**. The EU considers itself to be one of the most open markets for foreign investment in the financial services sector, and this is reflected in its PTA Mode 3 commitments.

As a result of the hybrid negotiating modality noted above (Section 2.3.), the EU's commitments on Mode 3 cover the full range of financial services, subject only to the reservations and qualifications contained in its schedules. Recurrent important reservations include requirements that:

- foreign firms have their registered office in the EU, or to be incorporated in the EU, in order to provide certain services, such as (e.g.) managing the deposits of investment funds, taking deposits, or asset management;
- a certain proportion of senior management, and/or the CEO, have permanent residence within the EU;
- branches of foreign firms adopt a specified juridical form.

<sup>29</sup> Note that Mode 2 cross-border supply is covered more extensively by paragraph 4 of the Understanding.

They can also include exemptions, on a country-by-country basis, for such matters as:

- the participation of foreign investors in sales of public assets and the granting of concessions over public property;
- the participation of foreign institutions in such services as the management of the assets of private pension funds, asset management generally, or the management of venture capital;
- the participation of foreign investors in banks under privatisation.

By and large, **the EU has also managed to secure very significant Mode 3 commitments from its trading partners**, at a minimum binding the status quo, and removing all discriminatory measures. Some highlights from recent agreements include:

- in relation to **Korea**, provisions were included to ensure that **certain public enterprises are not accorded a competitive advantage over private suppliers** of like services, and are subject to the same regulatory regime applicable to private suppliers. Such enterprises prominently included Korea Post, as well as a number of mutual insurance cooperatives such as the National Agricultural Cooperative Federation, the National Federation of Fisheries Cooperatives, the Korea Federation of Community Credit Cooperatives and the National Credit Union Federation of Korea.
- in relation to **Singapore**, **caps on the number of branches and ATMs of foreign providers in the retail banking sector were increased to 50**. Furthermore, and foreign branches in that sector are to be treated on par with national firms in relation to the provision of remote/internet banking services.
- in relation to the CETA agreement with **Canada**, the EU **successfully bound and reduced the impact of Canada's 'widely held' rule**, which prohibits any person from owning more than 20% of the voting shares of financial institutions which meet certain criteria. Under the CETA, this measure is bound, so that it cannot be extended to further sectors; the maximum shareholding caps cannot be reduced; and (other than banks with CAD 12bn or more in equity) it applies only to those institutions required to be widely held at the time of entry into force of the agreement. Furthermore, EU financial institutions may continue to control banks they own, even after they reach the CAD 12bn threshold, provided their ownership is sufficiently continuous.

## 4. REGULATORY FRAMEWORK

### 4.1. Overview

Some of the most commercially significant barriers to trade in financial services are regulatory in nature, including local licensing requirements, approval procedures for the marketing of financial products, accounting standards, and divergent regulatory requirements more generally. Data protection and privacy laws which prohibit the transfer of consumer data abroad without consent can also constitute a major barrier, to the extent that they require financial institutions to establish costly data processing centres in foreign markets.

In the Uruguay Round negotiations in the early 1990s, regulatory barriers were addressed to some extent in the GATS framework agreement, but most regulatory provisions were contained in the GATS Understanding, applicable only to those 40 countries adopting it. In its subsequent PTAs, the EU has taken the disciplines contained in the **GATS Understanding as its baseline**, and developed a number of new and enhanced obligations, the most important of which are **notice and comment obligations relating to proposed new regulations**.

### 4.2. Transparency and confidential information

Transparency obligations have been incorporated in services trade agreements from the beginning. GATS Article III contained some limited obligations, applicable to all services sectors, regarding publication and notification of relevant regulatory measures, as well as the prompt provision of information regarding such measures. However, the trend since then has been to add to these obligations in subsequent agreements, in a number of significant respects. Indeed, reflecting the particular importance of regulatory transparency in the financial services sector, most EU trade agreements contain specific transparency rules relating to financial regulation, in addition to general rules covering all measures of general application.

Recent agreements therefore typically include some or all of the following requirements:

- to establish enquiry points to provide information to investors and service suppliers of another country concerning relevant regulatory measures, and to respond promptly to requests for information;
- to publish all measures of general application promptly and reasonably in advance of their coming into force, and to give on request an explanation of their objective and their date of entry into force;
- 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, and to notify applicants promptly of decisions and to provide written reasons for the decision;
- to administer all measures of general application in a reasonable, objective and impartial manner;
- in respect of administrative decisions and proceedings, to provide appropriate notice of proceedings, to provide affected parties with an adequate opportunity to make representations, to conduct such proceedings in accordance with law, and to provide an opportunity for review and appeal where necessary;
- in respect of prospective measures, to provide information on their proposed content in sufficient time to provide an opportunity to comment, to endeavour to

take into account the comments received, and (sometimes) to provide written responses to the comments received; and

- more generally, to pursue a transparent and predictable environment, to provide appropriate mechanisms to resolve problems, and to foster the exchange of information and best practice.

It is made clear in all agreements that these transparency provisions do not require parties to provide confidential information where to do so would impede law enforcement or otherwise be contrary to the public interest, or would prejudice the legitimate interests of particular enterprises, public or private.

Some commentators have suggested that these obligations reflect not much more than basic norms of due process<sup>30</sup>, and that their significance is therefore limited. However, the enhanced '**prior comment**' requirements in the most recent EU PTAs are **potentially important**, and have received critical attention. It is noteworthy that they apply to all measures a party *proposes* to adopt, and that they require such measures to be provided in advance to all interested parties for comment. On some interpretations, they **grant rights directly to private parties** – financial institutions and services suppliers themselves – rather than solely to their home states.

On the multilateral level, provisions for prior comment have been a part of the GATS negotiations taken up by the Working Party on Domestic Regulation (WPDR). Based on WPDR Communications from 2001, it is clear that the US envisioned these provisions to allow domestic and foreign service suppliers, as well as state Parties, the opportunity to comment<sup>31</sup>. The EU, on the other hand, mindful of Member States' divergent regulatory and legislative systems, did not support the introduction of a hard obligation for prior comment<sup>32</sup>. Instead, and similar to provisions included in most of the EU PTAs (with the exception of the CETA and TiSA, which state parties '*shall, to the extent practicable*'), the most recent WPDR contains a soft obligation that members '*shall endeavour*' to provide opportunity for comment<sup>33</sup>. It is worth noting that provisions for prior comment can be found in both NAFTA and many NAFTA-based agreements<sup>34</sup>. These provisions, however, have been resisted by a number of developing countries, including the CARIFORUM states in their negotiations with the EU<sup>35</sup>. The primary concern has been their potential **to alter the dynamics of regulatory rule-making**, by opening the process up to powerful and well-resourced foreign interests<sup>36</sup>. An OECD Working Party has also expressed similar concerns, citing the impact on national legislative procedures and the increased administrative burden<sup>37</sup>.

<sup>30</sup> Schloemann and Pitschas, 2009.

<sup>31</sup> WTO, WPDR, *Transparency in Domestic Regulation*, Communication from the United States, S/CSS/W/102, 2001, para. 5.

<sup>32</sup> WTO, WPDR, *Domestic Regulation: Necessity and Transparency*, Communication from the European Communities and their Member States, S/WPDR/W/14, 1 May 2001, para. 28.

<sup>33</sup> WTO, WPDR, *Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, Chairman's Progress Report, p. 57, para. 15. Both the CETA and TiSA

<sup>34</sup> Marconini, 2009, p. 37. NAFTA states: '*To the extent possible, each Party shall (a) publish in advance any such measure that it proposes to adopt; and (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures*' (Article 1802).

<sup>35</sup> Schloemann and Pitschas, 2009, p. 126.

<sup>36</sup> Mashavekhi and Tuerk, 2006, p. 287 and Wouters and Coppens, 2008, p. 244.

<sup>37</sup> OECD, 2000; Wouters and Coppens, 2008, p. 244. Also see Krajewski, 2003, p. 6.



### 4.3. Licensing and qualification requirements, and technical standards

Although EU PTAs tend to go beyond the GATS in the regulatory disciplines they impose, there is one significant respect in which they are 'GATS minus'. GATS Article VI:5 imposes an obligation to ensure that licensing and qualification requirements and technical standards are:

- based on **objective and transparent criteria**, such as competence and the ability to supply the service;
- **not more burdensome than necessary** to ensure the quality of the service;
- in the case of **licensing procedures**, not in themselves a restriction on the supply of the service.

This obligation applies for the purposes of the GATS only in sectors in which a Member has made specific commitments, and only until more general disciplines under Article VI:4 come into force.

Although it has hardly figured in dispute settlement to date, the second of these conditions (the **necessity test**) has proved to be a **relatively controversial provision in the GATS**, attracting some criticism and concern in the secondary literature<sup>38</sup>. It is noteworthy, then, that only the first and third conditions tend to be replicated in most of the EU PTAs considered in this report<sup>39</sup>. The EU-Colombia/Peru agreement is an exception in this regard.

Recall, on the other hand, that in three PTAs (Korea, Colombia/Peru, Singapore), there is a very similar necessity test contained as part of the 'prudential carve-out' (see Section 2.4.3. above). According to this provision, measures adopted for prudential reasons must '*not be more burdensome than necessary to meet their aim*'. As noted above, this is not contained in the equivalent provision in the GATS, and represents a potentially significant addition in the context of financial services regulation.

### 4.4. International standards

Most of the agreements contain a provision concerning the implementation and application of internationally agreed regulatory standards. However, such provisions **typically use soft, hortatory language** – parties '*shall endeavour to facilitate*' or '*shall make its best endeavours to ensure*' the use of international standards – and are therefore somewhat limited in their practical significance. The most important exception to this is the EU-Korea PTA which states that Parties '*shall, to the extent practicable,*' ensure that international standards are implemented and applied in the territories of the parties.

The relevant provision typically contains a relatively comprehensive and **non-exhaustive list of relevant international standards**, which may include:

- the Core Principles for Effective Banking Supervision of the Basel Committee on Banking Supervision (BCBS);
- the Insurance Core Principles and Methodology of the International Association of Insurance Supervisors (IAIS);

<sup>38</sup> See, among a much larger literature, Krajewski, 2003; Delimatsis, 2008.

<sup>39</sup> Note, however, that these agreements do nevertheless tend to contain an obligation to amend the provision on domestic regulation once new GATS disciplines under GATS Article VI:4 come into force. Although negotiation to create such GATS disciplines began many years ago, they have not concluded, and there is no prospect of their conclusion in the near future.

- the Objectives and Principles of Securities Regulation of the International Organisation of Securities Commissions (IOSCO);
- the Agreement on Exchange of Information on Tax Matters of the Organisation for Economic Cooperation and Development (OECD) and/or the 2008 OECD Model Tax Convention on Income and on Capital;
- the Statement on Transparency and Exchange of Information for Tax Purposes of the G20; and
- the Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force (FATF).

The draft CETA text notes more broadly that *'the dialogue on the regulation of the financial services sector within the Financial Services Committee [as required by the agreement] shall be based on the principles and prudential standards agreed at multilateral level'*.

#### 4.5. Recognition

A number of the agreements under consideration contain framework provisions covering the recognition by one party of (a) **professional qualifications** obtained in another country, and (b) specifically in the area of financial services, **prudential measures** of another country. Generally speaking, such provisions:

- explicitly **permit** parties to unilaterally recognise such qualifications and measures, or enter into **mutual recognition arrangements**;
- provide a degree of encouragement for the adoption of such arrangements, through a range of institutional arrangements for their ongoing consideration, requirements to negotiate in certain circumstances, and requirements to encourage relevant professional bodies to undertake work;
- seek to ensure that such arrangements are not entered into or applied in a discriminatory way; and/or
- provide a push towards the plurilateralisation of recognition arrangements, by requiring parties to provide one another the opportunity to negotiate accession to them, or to demonstrate that they should be treated equally, and by providing that recognition should be based on multilaterally agreed criteria where appropriate.

#### 4.6. New financial services

The dynamism of the financial sector is such that new financial products tend to emerge on a reasonably frequent basis. As a result, negotiators have sought assurances that **liberalisation commitments undertaken in trade agreements will apply to such new products as and when they appear**. This has been particularly important in respect of those countries – such as Korea – in which domestic regulatory authorities have historically given financial service suppliers authorisation to supply services in respect of a specified list of products only<sup>40</sup>.

The GATS Understanding contains a provision which, for those Members adopting it, requires parties to 'permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service'. This provision is replicated in all of the EU PTAs considered in this report, but with some qualifications:

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<sup>40</sup> TheCityUK, 2011.

- the Korea, CARIFORUM, Singapore, Colombia/Peru and CETA agreements limit the provisions to situations in which the importing country permits its own service suppliers to supply the new service in like circumstances;
- the Korea, CARIFORUM, Singapore, Central America, Colombia/Peru and CETA agreements, provide that parties may nevertheless require authorisation for new financial services, and specify the juridical form in which the new financial service may be supplied;
- the Korea and Singapore PTAs also clarify that the obligation applies only where the provision of the new financial service does not require a new law or the modification of an existing law;
- the EU-Central America PTA limits the obligation to services within the scope of the subsectors and financial services committed in its lists of commitments and subject to the terms, limitations, conditions and qualifications established in such lists of commitments.

The proposed CETA text also contains a further provision, extending the same obligation to the context of cross-border financial services.

#### 4.7. Data processing

EU trade agreements require each party to permit a foreign financial service supplier established in its territory to transfer information into and out of its territory for data processing, where such processing is required in the ordinary course of business of such financial service supplier. A provision to this effect was included in the GATS Understanding and has been replicated in some form in every trade agreement under consideration. As noted above, this obligation can be commercially very significant, given the prohibitive costs of establishing new data processing centres in foreign markets, and its inclusion was a central objective in the negotiations with Korea. This obligation is typically coupled with an obligation on each party to adopt adequate safeguards to the protection of privacy, in particular with regard to the transfer of personal data. Note that this obligation took the form of an **exception to the data transfer obligation** in the GATS Understanding, but has since been upgraded to an **independent obligation**.

#### 4.8. Senior management and boards

Unusually for EU PTAs, the EU-Korea PTA provides that parties may not require a foreign establishment to appoint to senior management positions natural persons of any particular nationality or having residency in its territory, unless otherwise provided in its schedule of commitments. CETA contains a similar but broader provision, covering not just senior management, but also boards of directors. Some TiSA proposals also include similar wording. It reflects a similar provision contained in NAFTA Article 1107, but has no equivalent in the GATS, nor in most other EU trade agreements. It is possible that the general national treatment obligation in those agreements has similar effect<sup>41</sup>.

#### 4.9. Payment and clearing systems

The GATS Understanding requires that each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing

<sup>41</sup> Note, for example, that requirements as to residency of the board is inscribed as an exception to their Mode 3 national treatment commitments by CARIFORUM states, with the implication that such measures would constitute a violation of those obligations, even without the specific language mentioned above.

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. This provision is repeated, in a similar form, in a number of the EU PTAs under consideration in this report, but not in the EC-CARIFORUM or EU–Central America PTAs, nor in NAFTA.

#### **4.10. Self-regulatory bodies**

In the financial services sector, 'self-regulatory bodies' include i.a. professional associations, securities exchanges, futures exchanges, national stock exchanges, clearing agencies. The provision on self-regulatory bodies in services trade agreements seeks to ensure that such bodies adhere to (some of) the obligations set out above, and does so by requiring the party itself to ensure such adherence. 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.

The obligations to which self-regulatory bodies are required to adhere vary considerably from agreement to agreement. The GATS Understanding requires parties to ensure self-regulatory bodies adhere to the national treatment obligation, as do the PTAs with Singapore and Colombia/Peru. The EU-Korea PTA refers to both national treatment and MFN. The relevant NAFTA and CETA provisions cover all obligations contained in their financial services chapters. TiSA proposals vary between those which refer only to national treatment, and those which also include MFN. There is no equivalent provision in the PTAs with CARIFORUM, and Central America.

## 5. ADDITIONAL GENERAL EXCEPTIONS

### 5.1. Overview

This chapter refers only to the general exceptions provisions contained in the trade agreements considered, and should be read with Section 2.5. (Carve-outs), as well as the provision-specific exceptions contained in the obligations referred to in Chapters 3 and 4.

### 5.2. General exceptions

All EU trade agreements contain a general exceptions provision of some kind. They are modelled broadly on GATS Article XIV (which is in turn modelled on GATT Article XX), but with some modifications, so that the precise list of exceptions varies from agreement to agreement.

**Table 5: General exceptions**

Exception	GATS	EU-CARI-FORUM	EU-Republic of Korea	EU-Central America	EU-Colombia/Peru	EU-Singapore	CETA	TiSA
Public morals and public order	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Human, animal plant life or health	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Relating to deceptive, fraudulent practices	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Relating to effects of default	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Protection of privacy	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Safety	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Customs enforcement	No	Yes	No	No	No	No	Yes	No
Intellectual Property Rights	No	Yes	No	No	No	No	Yes	No
Certain tax collection measures	Yes	Yes	Yes	Yes	No	Yes	No	Yes
Double taxation	Yes	No	No	No	No	No	No	Yes
Public security	No	No	Yes	Yes	Yes	Yes	No	No
Exhaustible natural resources	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Protection of national treasures	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Combat child labour	No	Yes	No	No	No	No	No	No
Trade in gold or silver	No	Yes	No	No	No	No	Yes	No
Products of prison labour	No	Yes	No	No	No	No	Yes	No

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.

### 5.3. Security exceptions

The general exceptions provision is supplemented by a further exception relating specifically to parties' security interests. Again, its precise contours vary from agreement to agreement in accordance with the following table:

**Table 6: Security exceptions**

Exception	GATS	EU-CARIFORUM	EU-Republic of Korea	EU-Central America	EU-Colombia/Peru	EU-Singapore	CETA	TiSA
Disclosure of essential security information	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Services for provisioning military establishment	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Services relating to fissionable or fusionable material	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Protection of essential security interests in time of war	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Actions pursuant to UN Charter	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Government procurement for security or defence	No	Yes	No	Yes	Yes	No	No	No
To protect critical infrastructure	No	No	No	No	No	Yes	No	No
Production or traffic of arms	No	No	No	Yes	Yes	Yes	Yes	No
Decisions on budgetary priorities	No	No	No	Yes	No	No	No	No

### 5.4. Balance of payments

Where a party is in serious balance of payments and external financial difficulties, it may adopt restrictions on trade in services which would otherwise be inconsistent with its liberalisation commitments. Such restrictions must be non-discriminatory, of limited duration, not go beyond what is necessary to remedy the balance-of-payments and external financial situation, and must also be in accordance with the Articles of Agreement of the International Monetary Fund.

## 6. CONCLUSIONS

European financial services firms are global leaders, and financial services are of significant export interest to a number of major European economies. A strategic focus of EU trade policy over the last 6-8 years has been the opening of foreign financial services markets, especially in growth economies in East Asia. It has been successful, with comprehensive new agreements negotiated with South Korea and Singapore, alongside further agreements with Canada, CARIFORUM states, Central America and Colombia/Peru, with more on the way.

For a variety of reasons, most attention has been given to opening up foreign markets for firms wishing to do business through a commercial presence in those markets. In most cases, the EU has successfully '*locked in*' the existing levels of market openness of its trading partners, as well as going some way towards reducing the most significant obstacles faced by its financial firms. In the Korean negotiations, for example, this meant new disciplines relating to the Korean government's treatment of certain public suppliers of financial services. In respect of Singapore, the most significant issue concerned limits on branches and ATMs in the retail banking sectors. While in Canada, the EU successfully bound and limited Canada's rule concerning '*widely held*' financial institutions.

Less attention has been given to reduced barriers to cross-border supply of services, as well as supply through the temporary presence of natural persons. By and large, commitments in these areas mirror those undertaken by the most ambitious set of countries during and just after the WTO's Uruguay Round.

The elaboration of new regulatory disciplines in these trade agreements has given rise to some significant concern, especially as regards the question of policy space for prudential regulation, and other regulation to ensure the integrity, stability and efficiency of the financial sector. All of the agreements covered in this report contain a number of provisions designed to address such concerns, including a '*right to regulate*', standard form carve-outs and protections for prudential regulation, subsidies, government procurement, services supplied in the exercise of governmental authority, as well as a range of general and security exceptions. The CETA text contains a number of important innovations as regards prudential regulation, including Guidance notes on the interpretation of the prudential carve-out, as well as a new '*filter mechanism*' for investor-state proceedings relating to prudential regulation. Their precise effect will require further study to predict.

Nevertheless, there is a degree of ambiguity associated with a number of the obligations and exceptions contained in these agreements, which makes it difficult to predict their effects with certainty. New and enhanced obligations which have given rise to the most interrogation include:

- **prior comment provisions for proposed new financial regulations;** and
- the **application of investor protection provisions in the financial services sector**, coupled with their **enforcement through investor-state dispute settlement.**

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## ANNEX 1: FINANCIAL SERVICES IN EU TRADE AGREEMENTS, BACKGROUND AND CONTEXT

### International agreements in general

For those readers entirely new to international trade agreements, attention is directed to the following resources:

- The European Commission's webpage<sup>42</sup> on trade agreements, including:
  - a step by step guide<sup>43</sup> to trade negotiations; and
  - a list<sup>44</sup> of completed and ongoing negotiations
- The World Trade Organization's webpage<sup>45</sup>, specifically:
  - Understanding the WTO<sup>46</sup>;
  - the WTO's summary of the GATS<sup>47</sup>; and
  - the WTO page on regional trade agreements<sup>48</sup>.

### The strategic direction of EU trade policy

The origins of the EU's current trade policy orientation lie in the publication in 2006 of the *Global Europe* strategy<sup>49</sup> by the European Commission. For some years prior to this, the EU had primarily pursued a multilateral trade strategy, focussing its energies and attention on exercising a leadership role in the Doha Round of WTO trade negotiations. During this period, the EU did enter into some agreements at the bilateral and regional level, but most took the form of framework cooperation agreements,<sup>50</sup> which contained few significant disciplines on services trade.

The *Global Europe* strategy signalled a renewed emphasis on preferential trade agreements (PTAs) as a complement to ongoing multilateral negotiations. The EU would, according to this document, seek to engage PTA partners in deep and comprehensive integration agreements, which would include new issues such as services, competition, intellectual property and government procurement, new and enhanced rules on regulation and governance, and deeper market access commitments in key sectors. These new PTAs would, furthermore, be primarily economically oriented, rather than primarily serving 'neighbourhood and development objectives'. This strategic orientation was given a further boost in 2010 with the publication of a further European Commission report on *Trade, Growth and World Affairs*, as part of the Europe 2020 strategy<sup>51</sup>.

The new strategy represented a response to at least two main developments. One was the lack of progress in the Doha Round, and the lack of any real prospect of including the strategic 'Singapore issues' on the WTO agenda in the near future. A second was the push on the part of other major economies – notably the US and Japan – for preferential trading agreements (PTAs) with emerging economies, which gave rise to fears in Europe that competitor firms from those countries could gain first mover advantage in key growth markets (see Figure 1 below). Such concerns had arisen particularly intensely in relation to

<sup>42</sup> [http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index\\_en.htm](http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm).

<sup>43</sup> [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149616.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf).

<sup>44</sup> <http://trade.ec.europa.eu/doclib/html/150129.htm>.

<sup>45</sup> <http://www.wto.org/>.

<sup>46</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm).

<sup>47</sup> [http://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#mAgreement](http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#mAgreement).

<sup>48</sup> [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm).

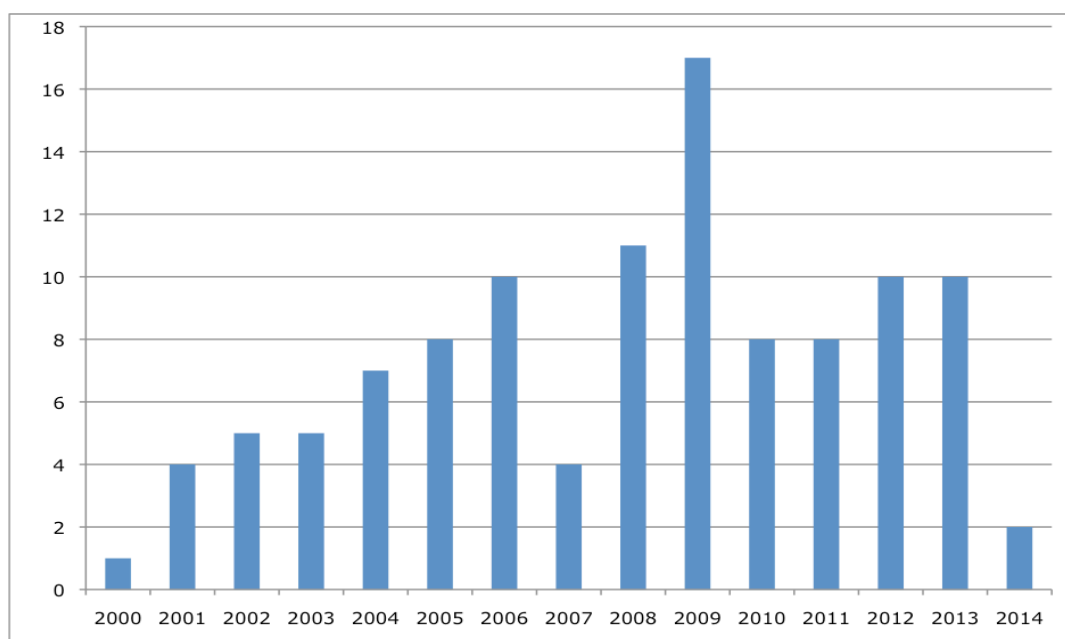
<sup>49</sup> European Commission Communication, *Global Europe: Competing in the World*, COM(2006)567 final.

<sup>50</sup> Some examples include the EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreements (Global Agreement) and subsequent EU-Mexico Free Trade Agreement, and the EU-South Africa Trade, Development and Co-operation Agreement. One exception to this trend, given its relatively extensive services chapter is the EU-Chile Association Agreement 2002.

<sup>51</sup> European Commission Communication, *Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy*, COM(2010)612 final.

markets across Asia, where a number of PTAs had already been signed or were in the process of negotiation<sup>52</sup>. A list of relevant agreements and ongoing negotiations is provided in Table 1 in this document (see p.11).

**Figure 1: All services PTAs entering into force since 2000**



**Source:** WTO RTA Database and Marchetti and Roy, 2013.

**Note:** On the basis of services PTAs notified under GATS Article V, as of September 2013.

India, the Association of Southeast Asian Nations (ASEAN) and South Korea were among those selected as strategic partners for new PTAs from the beginning, and negotiations with each of these partners began in 2007. Talks with ASEAN countries broke down after nine rounds, and a decision was taken to pursue PTAs with ASEAN countries on a country by country basis, starting with Singapore and Malaysia in 2009, with Vietnam added in 2012, and Thailand in 2013. Preparations have been underway since 2011 to begin negotiations with Indonesia.

The new strategy also gave new impetus – and a different orientation – to pre-existing partnerships which had been pursued in the context of the EU development priorities. The EU has, for example, long maintained close economic relations with Central and South America, in the context of broader political objectives in the region. In 2007, however, talks began in earnest about new Association Agreements with the Andean Community (CAN), and with a group of Central American countries. Ecuador and Bolivia withdrew from the former in 2009, but a PTA was signed with Colombia and Peru in June 2012. An Association Agreement between the EU and Central America was also approved in late 2012. Separately, the expiry of the WTO waiver for the EU's PTAs with African, Caribbean and Pacific (ACP) countries led to the initiation of Economic Partnership Agreement (EPA) negotiations with six different ACP negotiating regions. Of those, the most important is the concluded EU-CARIFORUM EPA, signed in 2008 with 15 Caribbean countries, and notably in particular because of its extensive disciplines on services and investment.

A major development occurred in 2009 with the opening of negotiations with Canada over a new Comprehensive Economic and Trade Agreement (CETA). This was the first set of negotiations initiated by a trading partner, rather than the EU itself. More recently, negotiations with the United States over a Transatlantic Trade and Investment Partnership (TTIP) began in July 2013, and are ongoing at the time of writing.

<sup>52</sup> Siles-Brügge, 2010, 10-11; Pollet-Fort, 2011.

## ANNEX 2: OVERVIEW TABLE ON KEY FEATURES RELATING TO FINANCIAL SERVICES IN EU TRADE AGREEMENTS

Table 7: Overview - Key features relating to financial services in EU trade agreements

	GATS	GATS + Understanding	EU-CARIFORUM	EU-Republic of Korea	EU-Central America	EU-Colombia/Peru	EU-Singapore	EU-Canada (CETA)	TISA *
<b>Market Access (Establishment)</b>	Yes	Yes	Yes <sup>^</sup>	Yes	Yes <sup>^</sup>	Yes	Yes	Yes <sup>~</sup>	Yes
<b>Market Access (Cross-border Supply)</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>National Treatment (Establishment)</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>National Treatment (Cross-border Supply)</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Most-Favoured Nation (Establishment)</b>	Yes	Yes	No	Yes <sup>§</sup>	No	No	No	Yes <sup>#</sup>	Yes
<b>Most-Favoured Nation (Cross-border Supply)</b>	Yes	Yes	Yes <sup>∞</sup>	Yes <sup>§</sup>	No	No	No	Yes <sup>†</sup>	Yes
<b>Standstill</b>	No	Yes	Yes <sup>¥</sup>	No	No	No	Yes <sup>Δ</sup>	Yes	Yes
<b>Ratchet</b>	No	No	No	No	No	No	No	No	Yes <sup>‡</sup>
<b>Transparency</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Prior comment</b>	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Licensing and Qualification</b>	Strong <sup>+</sup>	Strong <sup>+</sup>	Weak <sup>+</sup>	Strong <sup>+</sup>	Weak <sup>+</sup>	Strong <sup>+</sup>	Strong <sup>+</sup>	Strong <sup>+</sup>	Unknown
<b>International Standards</b>	No	No	Yes	Yes	Yes	Yes	Yes	No	Yes
<b>Recognition of Prudential Measures</b>	No	No	No	Yes	No	Yes	No	Yes	Yes
<b>New Financial Services</b>	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Data Processing</b>	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Restriction on Senior Management &amp; Boards</b>	No	No	No	Yes <sup>~</sup>	No	No	No	Yes	No
<b>Payment and Clearing Systems</b>	No	Yes	No	Yes	No	Yes	Yes	Yes	Yes
<b>Self-Regulatory Organisations</b>	No	Yes	No	Yes	No	No	Yes	Yes	Yes
<b>Investment Protection</b>	No	No	No	No	No	No	Yes <sup>^^</sup>	Yes	No

### Notes

\* This table refers only to the EU proposed TISA text.

<sup>^</sup> Does not include a prohibition of limitations on the total number of natural persons that may be employed.

<sup>§</sup> Not for measures relating to recognition or taxation.

<sup>#</sup> Not for measures relating to recognition, investor state dispute settlement procedures, economic integration or taxation.

<sup>∞</sup> Only applies to CARIFORUM agreements with "major trading economies" and does not apply to regional economic integration agreements creating an internal market, which includes pre-accession EEA and CARICOM agreements.

<sup>†</sup> Not for measures relating to recognition.

<sup>¥</sup> Only applicable to CARIFORUM signatories pursuant to paragraph 9 in CARIFORUM's list of commitments.

<sup>Δ</sup> With exception for new non-conforming measures in banking sub-sector on MFN basis.

<sup>‡</sup> Only for National Treatment.

<sup>~</sup> Only applies to senior management.

<sup>^^</sup> Negotiations ongoing.

<sup>+</sup> 'Strong' includes a necessity test, 'weak' does not.

All obligations are subject to the carve-outs and exceptions referred to in the text.



## **NOTES**



