

The Consumer Voice in Europe

ANALYSIS OF THE TISA FINANCIAL SERVICES ANNEX & RECOMMENDATIONS TO THE NEGOTIATORS

TiSA leaks, September 2016



Contact: Léa Auffret – lea.auffret@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
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Disclaimer

This analysis is based on a TiSA leaked annex published on 19 September 2016 by Greenpeace. This leaked text is the consolidated version of the financial services annex dating back from 14 April 2016. In the meantime, the content might have evolved considerably. Nevertheless and as the current official version is not available to the public, the analysis of the leaked article is still relevant to better understand what was on the table a few months ago. Obviously this leaked annex is not a final version and might change during the negotiations. This analysis will explain the content of this leaked annex to the general public. It also contains BEUC's recommendations to better consider the consumer interest.

General comments

General comment #1: The absence of solutions for consumers facing post contractual problems

The greatest absent in this annex, and in general in TiSA, is redress. Redress is about **making sure consumers will have proper information about their rights and what they can do if something goes wrong after contracting a service**. Because increasing trade in services also means potentially increasing the number of consumer complaints. On an international scale, things will be very complicated for consumers who are victims for instance in case of fraudulent practices or in the case of bankruptcy of their financial services provider who is not established in their country. They must know what to do and be able to easily claim for enforceable solutions and compensation if something goes wrong. An unresolved dispute with a financial service provider can have very detrimental effects on a consumer.

General comment #2: The need to ensure that a consumer protection measure can be seen as a justified prudential measure

In this annex, Parties participating in TiSA have agreed that the authorisation to provide a financial service can only be refused for **prudential reason**: this does not cover consumer protection, only financial stability, and is a very restrictive provision. The EU and its Member States should be allowed to prevent a foreign provider from offering its services in the EU if there is a risk of harming consumers. In addition, a party adopting prudential measures will have to prove that they are legitimate and that used to bypass its commitments under TiSA. We urge Parties to cover consumer protection beyond the scope of the prudential reasons and make sure that the EU and its Member States will be not be challenged by another country if they adopt a necessary consumer protection.

General comment #3: The need to protect personal data in cross-border financial services

The EU, as well as other countries, is proposing¹ to allow the **transfer and processing of financial data, including personal data**. The EU added an additional safeguard to

¹ See the published [EU proposal for an annex on financial services in TiSA](#)

ensure the protection of personal data of its citizen. Even though we have been recently reassured on the solidity of this safeguard², it still needs to be accompanied by a horizontal exemption for EU data protection rules that would apply to all TiSA annexes and be legally binding. This is recommended by experts³ and the European Parliament⁴. This is key **to ensure the prevalence of fundamental rights over free trade**.

General comment #4: The danger of defining a regulatory check list in financial services

In this annex, like in the annex on domestic regulation, Parties are trying to establish a regulatory check list that will condition how they will be able to legislate in the future. Parties commit to administer financial services measures of general application in a **reasonable, objective and impartial manner**. Here the challenge is to avoid protectionism of course, but it must be clarified here that **consumer protection measures *per se* should not be seen as unreasonable or non-objective**.

Detailed analysis by articles

BEUC does not work on all the topics covered by the annex. This analysis only covers the most relevant articles for consumers. For further information we invite you to read previous analysis done by other public interest organisations⁵.

Article X.3 market access commitments

A text box below article X.3, 1.c) shows that parties are coming close to an agreement to commit to exclude the application of the ratchet clause from some services of the article when they will revise their offers. The ratchet clause prevents the Parties from going back on their commitments (ex: renationalising a service, adopt a regulation restricting directly or indirectly market access or favouring national providers over foreign ones), the only way forward is to further liberalise. The idea is to prevent the adoption of protectionist measures under false justification. The risk with this clause is that it binds certain services sectors to liberalisation with no going back possible. To exclude the application of this clause is positive but should be applied to more than a short list of services if Parties really intend to preserve their right to regulate.

Article X.9 Financial services new to the territory of a Party

This article intends to ensure a non-discriminatory treatment for foreign suppliers of services among the TiSA parties. All Parties have agreed that authorisation to provide a financial service can only be refused for **prudential reason**: this does not cover consumer protection, only financial stability, and is a very restrictive provision. The EU and its Member States should be allowed to prevent a foreign provider from offering its services in the EU if there is a risk of harming consumers. In addition, a party adopting prudential measures will have to prove that they are legitimate and that used to bypass its commitments under TiSA. We urge Parties to cover consumer protection beyond the scope of the prudential reasons and make sure that the EU and its Member States

² See [study Trade and privacy, complicated bedfellows?](#) Kristina Irion, Svetlana Yakovleva, and Marija Bartl, Ivir Institute July 2016.

³ Idem.

⁴ European Parliament, [Resolution](#) of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI) para. (c).iii

⁵ See for instance the [analysis of Public Citizen](#) (2015) and the [memorandum](#) of Professor Jan Kelsey, University of Auckland (2014)

Moreover, some provisions on the ability of adopting a regulatory framework for new financial services seem contradictory. For legal clarity purposes, we recommend to insert footnote 5 in the text of the article and delete “without adopting a law or modifying an existing law”.

Article X.10 Transfer of information

Several Parties, including the EU, are proposing to allow the transfer and processing of financial data, including **personal data**. The EU added an additional safeguard to ensure the protection of personal data of its citizen. Even though we have been recently reassured on the solidity of this safeguard⁶, it still needs to be accompanied by a carve-out for EU data protection rules that would apply to all TiSA annexes and be legally binding. This is recommended by experts⁷ and the European Parliament⁸. This is key **to ensure the prevalence of fundamental rights over free trade**.

Article X.11 Payment and clearing systems

It is very concerning to see that none of the TiSA parties have thought about including **post-contractual conflict resolution provisions** in this article. In case a consumer placed money in a bank established in another TiSA country, which has no asset or office in his country, and this bank would go bankrupt or would resort to fraudulent practices, what can the consumer do? It is highly unlikely that he or she will find an easy solution and even less likely that he or she will be compensated for potential losses. How can an ambitious agreement of the 21st century miss this point? **It is urgent to fix this and include proper redress provisions** before closing the negotiations.

In addition, **security of online and offline payment transactions needs to be reinforced at the international level**. For instance, PIN code is still not required for card transactions in the US, while it has been fully implemented in the EU and contributed to making face-to-face card payments safer. As a consequence, consumer cards issued within the EU are by default blocked by their bank for transactions outside the EU in order to prevent fraudulent transactions. So, before travelling to a non-EU country, the consumer must request his bank to unblock the card. And because of lack of awareness about this procedure, **many consumers complain that their card gets blocked by the bank when making payments outside the EU**, sometimes without any prior notice. Getting the card unblocked is usually a huge inconvenience and has a cost for the consumer, not to mention the fact that the consumer may run out of money and his holiday or business trip may be put at risk. The EU will soon apply harmonised strong customer authentication rules to electronic payment transactions, both online and offline. Similar standards should be implemented by all TiSA countries.

Article X.15 Transparency – consolidated version

Among the leaked texts there are two versions of this article. The first one dates back from 8 April 2016 and had been published separately and the second one dates back from 14 April 2016 and has been leaked with the rest of the annex (analysed in this document). This article is very important and illustrates the tendencies of some Parties to **push for a notice and comment system** and the **risk of establishing stringent check list criteria for regulations**. The notice and comment system is notably used in the US and

⁶ See study Trade and privacy, complicated bedfellows? Kristina Irion, Svetlana Yakovleva, and Marija Bartl, Ivir Institute July 2016 (http://www.beuc.eu/publications/beuc-x-2016-070_trade_and_privacy-complicated_bedfellows_study.pdf)

⁷ Idem.

⁸ European Parliament, [Resolution](#) of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI) para. (c).iii

is problematic because it can paralyse the regulatory process by making it impossible for regulators to regulate. NGOs in the US have warned about this problem⁹.

Paragraph 1 and 3: The leaks show that the previous division among the Parties of early April to exclude financial services from the transparency annex is almost agreed by all and has been moved to paragraph 3. Only the proposal to exclude the financial services sector from some of the provisions of the domestic regulation annex remains in this paragraph. **We urge all TiSA parties to support such exclusion from both the transparency annex and the domestic regulation annex.** Indeed, imprudent cooperation and transparency (i.e. access for lobbyists) on financial services policy issues could lead to a regulatory chill effect and threaten all the efforts previously made to recover from the financial crisis.

Paragraph 2: This paragraph aims at promoting transparency in the sector to facilitate the activities of suppliers. TiSA Parties commit to regulatory transparency in the sector. This can be acceptable as long as Parties are not obliged to exchange draft regulations prior to their internal adoption and as long as we are not talking about a cooperation on financial regulations. Indeed, while some degree of cross-border financial regulatory and supervisory cooperation is advisable to prevent regulatory arbitrage, such cooperation is already occurring in other international and bilateral fora. Should further cooperation be needed, it should take place in these fora, which should be reinforced for that purpose.

Paragraph 4: In this paragraph most of the Parties want to commit to administer financial services measures of general application in a ***reasonable, objective and impartial manner***. Although traditional trade jargon the problem is that it sets very stringent criteria for the Parties to determine their own laws. This set of criteria will be the basis for the interpretation of the judges/arbitrators in case of a dispute between TiSA Parties. From a consumer perspective this is problematic because consumer protection is not covered by the prudential carve-out, which allows Parties to deviate from their commitments if they want to ensure financial stability. Therefore if the EU would like to introduce a regulation enhancing consumer protection once TiSA is in place, another TiSA party could very well challenge this draft proposal on the basis that it would not be objective in its view. And it would then be up to the dispute settlement body to determine whether or not the regulation to protect consumers would comply with the EU's commitment in TiSA. Thus, while it is important to define criteria to avoid protectionism one should not forget to make sure that these criteria will not block Parties from enhancing their consumer protection. **TiSA is about facilitating trade in services but it should not be to the detriment of consumers of services.** Consumer protection measures per se should not be seen as unreasonable or non-objective.

This issue is also addressed in the annex on domestic regulation; therefore it is important to ensure consistency between the different annexes. **We urge negotiators to make sure that the criteria established to assess the compliance of domestic regulation with TiSA will not undermine the ability of the EU and its Members States to adopt positive measures for consumers in the future.**

Paragraph 6: This paragraph demonstrates the division among the TiSA Parties on the implementation of international standards for regulation and supervision of the financial services sector.

The version of 14 April 2016 is very different from the previous version of 8 April 2016. It can be explained by the fact that most of the Parties agreed to exclude this annex from some of the provisions of the transparency annex. Indeed, in the version of 8 April it was very preoccupying to see a coalition of 8 TiSA parties pushing for a **notice and comment**

⁹ See the analysis of Public Citizen: <https://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf>

system in the financial services annex. In the EU, when a regulation is proposed, a consultation is open to all interested persons (meaning anybody) but the difference is that there is **no obligation to reply to the comments received**. It is a positive element that must remain as it prevents delays in the regulatory process and the institutionalisation of lobbying. The text box below paragraph 5 shows the EU's request to be able to keep its system in place. We welcome the deletion of the previous paragraphs 4, 5 and 8 of the 8 April 2016 version. **We urge other TiSA parties to respect the EU position** on this matter in all annexes and to support its compromise proposal.

Article X.16 Prudential measures

Paragraph 1: A prudential measure in the context of financial services is a measure taken by a country to guarantee its financial stability. In the context of TiSA and this article, the idea is to allow Parties to adopt and maintain such measures even if it means that they will deviate from their commitments in TiSA. It is considered as being justified as it is meant to be a prudential measure and not a protectionist measure. This is positive but it could be further improved by adding "consumer protection" before prudential measure in the first sentence of the paragraph. Such an addition would clarify in case of a conflict between Parties that adopting or modifying a consumer protection measure is not a way for a Party to circumvent its commitment in TiSA but is justified.

Paragraph 2: Here again we are concerned about the interpretation in case of a dispute settlement. It is important to clarify that **consumer protection measures in financial services can be justified and necessary**.



For more information about BEUC
position on TiSA and trade:

- [Factsheet on TiSA](#)
- [Position Paper on TiSA](#)
- [Factsheet on consumers and modern trade](#)



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