# Financial services in the planned EU-US trade agreement TTIP

The financial crisis has revealed the special quality, and, at the same time, potential danger of financial services. Some financial products have dragged major banks and then entire economies into the economic abyss. These included US financial products that could be sold without restriction, e.g. to German banks, and were then often passed on to foreign special-purpose entities. This proves how much the transatlantic market has been liberalised.

## TTIP as a financial lobbying project

Currently a number of important bilateral and multilateral negotiations are running for further liberalisation of trade with financial services, especially in the context of the planned new EU-US trade and investment agreement ("Transatlantic Trade and Investment Partnership", TTIP). In July 2013, the European Commission of the EU Member States received the mandate to start the TTIP negotiations. The European Parliament cannot co-decide on the negotiating mandate, but supported the negotiations by a large majority in May.

Due to aggressive lobbying by the financial sector in the EU and the USA, financial services have become a central interest of the head EU negotiators. This has occurred even though negotiations on this point are the main obstacle to sluggish negotiations between the EU and Canada and India.

The TTIP could potentially cover all types of financial services – or at least a leaked EU draft reveals a long and comprehensive list of institutions and activities: banks and the granting of credit of any kind, (re)insurance, including its sale, leasing, payment services of all kinds, including credit cards, guarantees or warranties, trading in securities, derivatives and financial transactions on all types of markets, foreign exchange transactions, fund management, clearing, provision and analysis of financial data and consultation of all kinds, such as that involved in corporate finance or company purchases.

## When the agreement really comes into effect

However, the effect will be highly dependent upon how precise the agreement is constructed. Commitments entered into by one of the partners play a crucial role in this process. In the EU draft, it will probably turn out that the central regulations only come into effect when a commitment exists.

Apparently, it is still being debated between the US and the EU as to whether all services with commitments should be listed individually ("positive list") – or merely the services in which no commitment occurs ("negative list"), whereby the rest would be covered by the liberalisation.

Where commitments have been entered into, regulations are likely to apply that are already defined in the World Trade Organization's General Agreement on Trade of Services (GATS). This includes the stipulation that no service provider should be treated less favourably than a national provider ("national treatment"). In addition, restrictions would be prohibited, e.g. on the number or value of market participants, transactions, foreign capital, exclusive rights, monopolies and other factors ("market access rules"). This could mean, for example, that existing proprietary rights, such as those for public savings banks, are no longer legitimate. Or restrictions on commodity traders on futures exchanges (position limits), as they are currently being planned in the EU, could be attacked by investors. The German banking industry has even shown that it intends to address US provisions against banks in the TTIP, intended to prevent a situation in which banks are too big to become insolvent.

It is very likely that some regulations will go beyond the GATS. That said, one problematic rule of the EU draft is that each side would allow a financial services provider to provide any new financial service to the other side. However, countries will first be able to require accreditation and other authorisations.

## Regulation as the exception

The measures listed above reflect the EU's officially proclaimed ambition to demand a high degree of "discipline" from governments as to which regulatory measures they prescribe. Since no customs duties are in place for services, as is common for goods, regulations are regarded as barriers to trade. For instance, European Commissioner for Internal Market and Services Michel Barnier stressed in July 2013 that he would not approve any agreement that does not eliminate "discrimination" against foreign institutions through US regulatory measures.

Since this imposed "discipline" undermines the possibility of regulation, the TTIP, like other agreements, will include an exemption clause for supervisory measures ("carve-out clause"). These would be permitted on reasonable grounds to ensure the stability of the financial system or to protect investors, for example. In contrast to the GATS and other service agreements, the EU draft does not contain any regulations that would apply a caveat to the provision of this carve-out clause. However, supervisory measures – both existing and future – could also come under pressure. The implementation of the necessary controls on capital movement, the appropriate level of taxation of the financial sector and the full implementation of anti-money laundering legislation could be at risk. As Michael S. Barr, a law professor at the University of Michigan explains, everything that has been achieved in recent years in the area of financial market regulation could be endangered by the inclusion of financial services in the agreement. This risk is all the more present, as according to the EU draft, regulatory measures should not be more burdensome than absolutely necessary. However, this contradicts the lessons learned from the crisis: not all problems can be predicted in advance, and therefore measures are always needed that take preventive action.

## Common regulatory framework

The EU aims to ensure that the agreement includes cooperation in the area of financial market regulation. It aspires to a "common regulatory framework" with a "Joint EU/U.S. Financial Regulatory Forum/Committee" and calls for "mutual trust" of the regulations of the partner. On one hand, this is designed to avoid a situation in which the financial sector must either follow two different laws or can exploit the weaker of the two. On the other hand, this objective must also be seen against the background of current transatlantic conflicts on financial market regulation. The EU has rejected resolutions of the USA stipulating the application of US regulations on derivatives outside of the United States. This would have affected the London branches of US banks that were responsible for the collapse of US banks in the financial crisis, for example. The EU insisted, however, that the United States recognise EU laws as sufficient. The dispute was initially settled by a compromise in July 2013, but postponed key decisions, only to be practically revoked in the end.

In any case, US officials appear to have rejected the EU's attempts to limit the regulatory power of the United States. As the US Trade Representative Michael Froman said in July 2013, the USA supports a market opening, but nothing resolved should undermine the ability of regulatory authorities to regulate in the public interest.

## Protection of payments and investments

The EU draft also demands that "each party shall permit all transfers relating to an investment

". This is followed by a long list of examples that cover nearly all imaginable payments or reasons for payment. However, this is followed by an almost equally long list of exceptions to the rule, e.g. in the case of supervisory actions or criminal matters. The question arises as to why these clauses are needed if they do not change the status quo. For instance, money laundering and taxation are missing from the list of exceptions. This could lead to conflicts, at least in some cases. Conversely, the list of allowed transfers contains some delicate issues. For example, the payment of interest revenues, charges or management fees would not be restricted. However, such payments play an important role in transnational corporations avoiding taxes, as they enable corporations to transfer their profits to subsidiaries in tax havens. Tax regulations designed to counteract this, e.g. by preventing payments to letterbox companies or at least not recognising these for tax purposes, thereby come under pressure.

Another controversial topic of the negotiations is the attempt to install far-reaching proprietary rights for (financial) investors. These stipulate compensation for investors in the case of expropriations or injuries to interest in a dispute settlement mechanism. This involves new regulations and even the frustrated "legitimate expectations" of an investor. The scope this could take can be seen in recent lawsuits from investors against the debt haircut in Greece.

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## Further Information:

Official Website of EU Commission

Fact sheet from Public Citizen

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