

Vulcan Insight: EU Trade – Trade in Services Agreement (TiSA)

Friday 25th November 2016

Key Dates

28th Nov 2016	EU Foreign Affairs Council Meeting
5th Dec 2016	TiSA chief negotiators meeting
6th Dec 2016	TiSA chief negotiators meeting
12th Dec 2016	EU Foreign Affairs Council Meeting
3rd Jan 2017	First sitting of new US Congress
16th Jan 2017	EU Foreign Affairs Council Meeting
20th Jan 2017	Inauguration of Donald Trump as US President
6th Feb 2017	EU Foreign Affairs Council Meeting

Key Analysis

The Trade in Services Agreement (TiSA) is a trade agreement currently being negotiated by 23 members of the World Trade Organisation (WTO). The EU negotiates on behalf of all 28 EU member states.

The other twenty-two countries and territories outside the EU that are taking part are: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, Turkey and the United States of America. Together, these countries account for 70% of world trade in services.

At the EU Council for Foreign Affairs (EU Foreign Affairs Ministers) meeting on the 11th of November 2016, it was reported that the European Commission “*presented the state of play of negotiations on...the trade in services agreement (TiSA) andDevelopments....are still expected before the end of the year.*”¹

According to media reports however, on the 18th of November 2016, trade envoys from the 23 members involved in TiSA decided to cancel a Ministerial summit that had been scheduled to take place on the 5th

¹ http://www.consilium.europa.eu/en/meetings/fac/2016/11/st14266_en16_pdf/

and 6th of December 2016 to finalise the TiSA agreement.² This cancellation has been attributed to the election of Donald Trump. Despite the fact that the ministerial summit has been postponed, the meetings shall still take place but they will instead involve the chief negotiators rather than the politicians who were to attend to finalise the agreement.³

It is important to note, notwithstanding the election of Trump, in advance of the 18th November 2016 meeting France had expressed considerable opposition to aspects of TiSA “*of the implications of the "free flow of data" principle.*”⁴

The French Government, unusually, in the context of ongoing trade negotiations being conducted on its behalf by the EU, published “an in-depth report on the digital issues at stake in the negotiations on the multilateral Trade in Services Agreement (TiSA)”.⁵ The French position is that;

“there is a real difference in approach between the EU and the US. The US believes that personal data protection measures are trade barriers that should be removed, by recognising the concept of free data flow.

.....The movement of personal data is admittedly strictly legislated by European regulation, but remains free as shown by the existing derogation measures and the Privacy Shield data protection framework.”⁶

The report published by the French government concluded:

“The potential benefits of data storage and processing location are still difficult to assess at this stage, but the consequences of potential legal recognition of the free data flow principle in future agreements must be assessed on one hand against the backdrop of the power balance between the EU and the US in the current negotiations, and on the other hand in view of the need for the EU to be able to regulate its own data flows. **The power balance between the EU and the US looks unfavourable to the EU which, unlike its US counterpart, is embarking on negotiations without having a prior digital strategy.**”⁷

² <http://www.livemint.com/Opinion/gWxmZFXTyolG1tDMOtJXRL/TiSA-negotiations-fall-victim-to-the-Trump-tremor.html>

³ <https://insidetrade.com/daily-news/tisa-deal-halted-trumps-win-chief-negotiators-meet-next-month>

⁴ Official foreign policy statements posted on 15 November 2016: "European Union -- Digital Economy -- Economic Affairs and Finance Ministry Communiqué (Paris, 14 November 2016)"]

⁵ http://www.economie.gouv.fr/files/files/PDF/Executive_summary_digital_in_trade_agreements.pdf

⁶ http://www.economie.gouv.fr/files/files/PDF/Executive_summary_digital_in_trade_agreements.pdf

⁷ http://www.economie.gouv.fr/files/files/PDF/Executive_summary_digital_in_trade_agreements.pdf

It has been reported on the 15th of November 2016, by Trade Industry Media Borderlex, that “France is blocking everything” and that “a source close to the Trade in Services Agreement talks” said “I fear it is dead”.⁸

The European Commission published ‘Report of the 21st TiSA negotiation round’ on the 17th of November 2016, it was acknowledged by the European Commission that:

“Some provisions are already very advanced (spam, international cooperation) whereas others (in particular provisions on data flows and localisation of computing facilities) will continue to require in-depth discussions between Parties.”⁹

It has been confirmed that;

“The key remaining issues in TISA are over cross-border data flows, the level of ambition in market access offers, and a controversial carveout of new services that have not yet been classified.”¹⁰

It has been further detailed that;

“European sources have said that the new services issue is politically charged and the EU must secure that carveout for the deal to be palatable for the European Parliament. The U.S. has countered that the new services carveout is unnecessary, particularly if there have been no “new” services in the past 20 years.

Additionally, negotiators are still working through a controversial EU proposal for a dispute settlement mechanism that would allow parties to seek temporary compensation via unrelated services sectors or even sectors not covered by the agreement.”¹¹

The EU had reportedly promised to “table a data flows proposal by the end of November” but that timeline is now in doubt.¹²

⁸ <http://borderlex.eu/tisa-conclusion-in-balance-as-france-blocs-data-flow-language/>

⁹ <http://trade.ec.europa.eu/doclib/html/155095.htm>

¹⁰ <https://insidetrade.com/daily-news/tisa-deal-halted-trumps-win-chief-negotiators-meet-next-month>

¹¹ <https://insidetrade.com/daily-news/tisa-deal-halted-trumps-win-chief-negotiators-meet-next-month>

¹² <https://insidetrade.com/daily-news/tisa-deal-halted-trumps-win-chief-negotiators-meet-next-month>

If agreement can be found on TiSA, and that appears to be significantly in doubt, there are a number of ratification procedures that must take place for it to become operative in Europe.

1. Article 218 (6) (a) (v) of the Treaty of the European Union means that the ratification of TiSA requires the consent (through simple majority) of the 751 member European Parliament.¹³
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2. In a European Parliamentary resolution, already passed by the parliament on the 3rd of February 2016, it included a resolution that:
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 - *“ratification in certain Member States may require ratification by regional parliaments and/or parliamentary chambers representing the regional level;”*¹⁴

This reference to regional parliaments is particularly relevant, as two regional parliaments within Belgium voted against the CETA (EU – Canada Comprehensive Economic Trade Agreement) on the 24th of October 2016 which may ultimately act as Belgian veto to that agreement.¹⁵

Article 207 (4) of the Treaty of the European Union seems to make clear that as TiSA is an agreement on “trade in services”, it shall require unanimous support of the 28 EU Member States rather than a qualified majority.¹⁶

This means that TiSA, like CETA, shall be subjected to a potential veto by a single Member State.

3. Ultimately the final ratification of TiSA is given by the heads of state of the EU Member States, but some of those heads of states are restricted by their national law and national parliament, as has been evidenced in the case of Belgium.

Overall, even if the Trump administration do not oppose the ratification of TiSA, and an accommodation can be found for the French concerns, the final hurdle of ratification of TiSA amongst the 28 separate EU Member states is likely to prove the highest one to overcome. The substance of TiSA is likely to get lost in the anti-trade political zeitgeist that is sweeping its way through national politics right across the European Union.

¹³ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN>

¹⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0041+0+DOC+XML+V0//EN>

¹⁵ <http://blogs.ft.com/brusselsblog/2016/10/25/wallonia-shakes-the-world-or-canada-at-least/>

¹⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>