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Financial Services Liberalisation in EU Preferential Trade Agreements

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After the US, the EU is the biggest trader of financial services worldwide. This sector represented around 11% of all EU services exports both in 2010 (59,5 billion euros) and in 2015 (87,4 billion euros). The EU has a standing trade surplus: 33,2 billion euros in 2010, 46,4 billion euros in 2016¹. International investment in financial services is essential to the EU economy: in 2014, outward FDI stock in this field amounted to 2,302 billion euros (38% of total outward EU FDI stock), while inward FDI stock amounted to 3,490 billion euros (73% of total inward EU FDI stock)².

These figures show that in this area the EU is both an active exporter and an attractive host market. The EU aims at confirming existing liberalisation and at obtaining enhanced market access. At the same time, the EU promotes high quality financial regulation to ensure market integrity and financial stability. To achieve these goals, the EU has an interest in going beyond WTO liberalisation. Besides the GATS and WTO Members' schedules of commitments, WTO obligations in force include those of the GATS Annex on Financial Services (hereinafter "GATS Annex") and of the Understanding on Commitments in Financial Services (hereinafter "WTO Understanding")³.

The EU strategy for financial services liberalisation is deployed through numerous preferential trade agreements (PTAs)⁴. Only some of them will be analysed in detail⁵: those that establish ordinary trade and investment relations with non-European countries (section I). The scope and coverage of financial services provisions classically tend to coordinate financial services liberalisation with other issues covered by PTAs and to avoid conflicts with other legitimate policy objectives (section II). The core objectives of the EU liberalisation strategy are pursued through market access and non-discrimination obligations and commitments, which partially go beyond WTO liberalisation (section III). EU PTAs also include obligations on the regulatory framework of each party, which are often inspired by WTO law but sometimes also aim at regulatory dialogue (section IV). Institutional provisions and dispute settlement contribute to the effectiveness of EU PTAs, sometimes with remarkable originality (section V).

¹ Eurostat, 'International trade in services' <<http://ec.europa.eu/eurostat/statistics-explained>> (all websites were last accessed on 31 May 2017).

² Eurostat, 'Foreign direct investment statistics' <<http://ec.europa.eu/eurostat/statistics-explained>>.

³ The WTO Understanding consists of a predetermined set of additional obligations, which WTO Members can accept, subject to exceptions and conditions. It has been used by around 40 WTO members, including the EU.

⁴ Preferential trade agreements are reciprocal bilateral or regional trade agreements not subject to the most-favoured-nation clause of GATS article II. They are lawful under the WTO law, subject to GATS article V.

⁵ For a more detailed analysis of these agreements, Andrew Lang and Caitlin Conyers, *Financial Services in EU Trade Agreements* (European Parliament, 2014) <www.europarl.eu>.

I. Categories of EU agreements covering trade in financial services

The EU is at the core of a dense network of economic integration agreements centred on the internal market. EU PTAs which foster financial services liberalisation with non-European countries are mainly concluded within the common commercial policy (B). Before focusing on these PTAs, they must be distinguished from other agreements, which equally qualify as regional trade agreements under WTO law but establish a closer relation with the EU internal market (A).

A. Agreements establishing a closer relation with the EU

These agreements include the European Economic Area (EEA) agreement, association agreements, and economic partnership agreements.

EEA agreement

The EEA agreement with Iceland, Liechtenstein, and Norway⁶ performs almost total integration to the EU financial services internal market, based on mutual recognition of the authorisation to provide financial services in the home country. Part III of the agreement (Free movement of persons, services and capitals) is similar to Title IV of part III of the TFEU. In particular, chapter 2 and annex VIII set the right to establishment. Chapter 3 deals with services: building on the freedom to provide services (article 36), annex IX contains specific provisions on insurance, banks and other credit institutions, stock exchange and securities, occupational retirement provisions, and provisions applying to all kinds of financial services. These provisions include an updated list of applicable EU secondary law acts (mainly regulations and directives) and clarify how they apply to non-EU parties⁷.

To a certain extent, the EEA agreement can inspire reflection on the future EU-UK agreement(s) after Brexit. Trade in financial services is a vital concern for UK–EU-27 trade and for London-based providers of financial services. In 2015, UK export of financial services to the EU-27 amounted to 25,7 billion euros (more than a quarter of total service export) and import amounted to 3,8 billion euros⁸. The legal framework of EU-UK trade in financial services should not be covered by the withdrawal agreement to be concluded under article 50 TEU (in principle by March 2019). Although this agreement could establish a provisional framework to avoid “cliff edge Brexit”, this issue should be covered in greater detail by a further EU-UK PTA, arguably based on original solutions.

Association agreements

Association agreements concluded under article 217 TFEU do not only cover trade and related matters, but also establish a framework for cooperation on wider political, social, cultural and security issues. Most of these agreements are a part of the EU neighbourhood policy and, for Western Balkans States, of the pre-accession strategy. Concerning financial services, they imply both PTA-like rules on service supply and establishment, and rules on financial regulatory cooperation often based on harmonisation⁹. These agreements are explicit vectors of the EU policy in the financial sector, not

⁶ Concluded in 1992, in force since 1994. Like these three countries, Switzerland is also a member of the European Free Trade Association. Switzerland is bound to the EU by numerous bilateral agreements, but trade in most (financial) services is not specifically covered by any of them.

⁷ For example, ESMA functions are performed by the EFTA surveillance authority. See Francesco Schurr and Johannes Gasser, ‘Financial Services Law’ in Carl Baudenbacher (ed), *The Handbook of EEA* (Springer 2016).

⁸ Dominic Webb, *Statistics on UK-EU trade* (House of Commons Briefing paper CBP-7851, 2017) <researchbriefings.parliament.uk>, p. 8.

⁹ Recent examples include agreements with Bosnia-Herzegovina (especially articles 52 and 54 and Annex VI, and article 89), Kosovo (especially articles 52 and 54 and Annex VI, and article 94), Ukraine (especially articles 125 ff. and 383 ff.), Moldova (especially articles 58 ff. and 241 ff.), and Georgia (especially articles 114 ff. and 320 ff.). Older examples include the agreements with Algeria (2005; especially articles 35 and 57) and Albania (2006; especially articles 51 and 53 and Annex IV, and articles 70 and 89).

only on liberalisation but also on regulation. Some agreements explicitly aim at regulatory approximation: the other party shall gradually make its legislation compatible with EU law¹⁰.

Economic partnership agreements

By contrast, financial services are rarely covered by Economic Partnership Agreements concluded with ACP (Africa, Caribbean, Pacific) countries or groups of countries. These agreements aim at gradually instilling liberalisation in a negotiation framework still based on the development cooperation perspective of the EU-ACP agreements from Lomé (1975) to Cotonou (2010). Most economic partnership agreements do not go further than WTO law: unlike trade in goods, trade in services and investment are not covered by specific commitments. They are only dealt with by a short chapter which generally recalls soft-law provisions of articles 41-43 of the Cotonou agreement and encourages further negotiations, without specifically mentioning financial services¹¹. The 2008 Economic Partnership Agreement with CARIFORUM States (EU-CARIFORUM EPA) is an exception: although also inspired by a strong development perspective, it can be considered as an ordinary PTA regarding financial services provisions.

B. PTAs within the EU common commercial policy

The EU general approach to financial services liberalisation follows the general evolution of the EU common commercial policy. Although constant adaptation and occasional variation, the EU standard PTA model remains based on the GATS.

General evolution

Following the stalemate of WTO Doha negotiations, since the European Commission's Global Europe strategy of 2006¹² the EU trade policy has adopted a clear trend in favour of PTAs. Like for US trade policy, PTAs have become a major vector of financial services liberalisation with the EU's trade partners. Before 2006, some EU PTAs (most notably the Free Trade Agreement included in the 2002 EU-Chile Association Agreement) already included provisions on financial services. Provisions on financial services have been systematically inserted in PTAs negotiated since 2006. A first wave of PTAs includes those with Korea (EUKFTA)¹³, Central America (EUCAA)¹⁴, and Colombia and Peru (EUCPTA)¹⁵. The EU-CARIFORUM EPA can also be included in this category¹⁶.

The Lisbon treaty (in force since 2009) broadened the scope of the common commercial policy (article 207 TFEU). Thereafter, a new generation of EU PTAs has been negotiated, including provisions on broader and various matters related to trade, such as investment, sustainable development, and intellectual property. Beyond WTO-plus provisions, this expansion in policy areas not covered by WTO law strengthens the WTO-extra dimension of EU PTAs. The broadening scope of the EU common commercial policy does not affect directly the liberalisation of financial services as such, but it has important indirect implications. Firstly, non-tariff behind-the-border barriers and regulatory issues, which are particularly important in this field, can be tackled within a wider framework. Recent PTAs seek to create an appropriate business environment beyond classic distinctions, such as the trade/investment divide. Similarly, non-trade implications of trade in

¹⁰ Recent examples include the agreements with Ukraine (article 133), Moldova (article 249) and Georgia (124 and 323).

¹¹ An example is the agreement signed on 10 October 2016 with the Southern African Development Community countries (article 72-74).

¹² European Commission, 'Global Europe: Competing in the world', COM(2006) 567 final, 4 October 2006, paras 3.2 and 4.2.

¹³ EU-South Korea Free Trade Agreement, signed in 2010, provisionally applied since 2011, entered into force in 2015.

¹⁴ Association Agreement with a strong trade component, signed in 2012, provisionally applied.

¹⁵ Trade Agreement, signed in 2012, provisionally applied since 2013; Ecuador acceded in 2016 (the accession protocol is provisionally applied since 1 January 2017).

¹⁶ See section I.A.

financial services can be better taken into account. Most importantly, investment protection has become a full-fledged and even essential element of these agreements: it now includes hard-law rules on investment treatment and Investor-State Dispute Settlement (ISDS).

The first of these new-generation PTAs was negotiated with Singapore (EUSFTA)¹⁷, followed by Canada (CETA)¹⁸ and Vietnam (EUVFTA)¹⁹. Negotiations for a EU-USA Transatlantic Trade and Investment Partnership (TTIP) have been on hold since Donald Trump's election²⁰. Future orientation of US trade and financial regulation policies are currently unpredictable. PTA negotiations are ongoing with some other ASEAN countries, Japan, India, Mercosur, and Mexico²¹. All EU PTAs are mixed agreements concluded by the EU and its Member States on the one hand and by a non-EU State on the other hand²². Concluding future PTAs as EU-only agreements (necessarily excluding issues beyond EU competence) is an option under consideration to avoid the need for cumbersome ratification processes in each Member State.

Standard model and variation

PTA provisions on trade in services generally follow either the GATS or the NAFTA model²³. EU standard PTAs are inspired by the GATS. Financial services are covered by a chapter or title on trade in services, establishment and electronic commerce. This structure is also maintained in more recent PTAs, where the term "Investment" replaced "Establishment" as the agreement also covers investment treatment²⁴. This chapter is organised in sections dealing respectively with the objective, scope and coverage of the chapter; cross-border supply of services; establishment; temporary presence of natural persons for business; regulatory framework; electronic commerce; and exceptions. Specific rules on financial services are contained in a section or sub-section on regulatory framework.

TTIP drafts and CETA differ from EU standard PTAs as they are inspired by NAFTA: financial services are covered by a specific chapter, containing most applicable provisions on financial services trade and investment²⁵. The choice of the NAFTA model seems based on the negotiating tradition of EU partners and on the fact that the NAFTA model favours broader liberalisation²⁶, but does not suggest a permanent shift from the EU standard PTA model. To avoid overlap with other chapters of NAFTA-inspired PTAs, carve-outs are inserted in general chapters on investment and cross-border trade in services: these chapters are not applicable to measures which fall within the scope of the financial services chapter²⁷. However, overlaps between the financial services chapter and other chapters of the agreement is not excluded. In particular, some rules on temporary entry and stay of

¹⁷ EU-Singapore Free Trade Agreement, initialled in 2014, not yet concluded.

¹⁸ EU-Canada Comprehensive Economic and Trade Agreement, signed on 30 October 2016. Pending the ratification process, most provisions are applied provisionally, including the chapter 13 on financial services (however, some provisions are not applied provisionally in so far as they some aspects of investment protection (EU Council decision 2017/38, 28 October 2016, article 1(b)).

¹⁹ EU-Vietnam Free Trade Agreement, negotiations concluded on 1 February 2016 (article numbers are not final).

²⁰ The latest round of TTIP negotiations took place in October 2016. The latest official proposal of the European Commission on financial services was issued in July 2016 (<<http://trade.ec.europa.eu>>).

²¹ European Commission, 'Overview of FTA and Other Trade Negotiations' <<http://trade.ec.europa.eu>>.

²² For details concerning the EUSFTA, see ECJ, *Opinion 2/15*, 16 May 2017, ECLI:EU:C:2017:376. The only exception is the Stabilisation and Association Agreement with Kosovo.

²³ Pierre Latrille, 'Services Rules in Regional Trade Agreements: how Diverse or Creative are the Compared to the Multilateral Rules?', in Rohini Acharya (ed), *Regional trade agreements and the multilateral trading system* (Cambridge University Press 2016) 429-432

²⁴ EUSFTA chapter 8; EUVFTA chapter 8.

²⁵ The EU-Chile FTA is also inspired by this model, even if the chapter on financial services (Part IV, Title III, Chapter II: articles 116 ff.) is within a broader title on trade in services including some general provisions.

²⁶ See in particular section III.A.

²⁷ CETA articles 8.3 and 9.2 respectively.

natural persons for business purposes also apply to providers of financial services²⁸. Moreover, the horizontal provisions of all PTAs are applicable to financial services²⁹.

II. Scope and coverage

Financial services provisions must be coordinated with other chapters of PTAs. Moreover, financial services liberalisation can be in conflict with other legitimate policy objectives, which tend to reduce its legal effects. The application of PTA provisions to financial services is limited by the definition of financial services (A), which implies the exclusion of services supplied in the exercise of governmental authority (B). It is also limited by exceptions and carve-outs³⁰ (C), in particular the prudential carve-out (D).

A. Definition of financial services and related concepts

A financial service is defined as a service of a financial nature offered by a financial service supplier of a party. Non-exhaustive lists mainly distinguish insurance and insurance-related services, and banking and other financial services³¹. PTA negotiations and commitments are based on definitions of modes of service supply pursuant to GATS article I:2: cross-border trade (mode 1), consumption abroad (mode 2), commercial presence (mode 3), presence of natural persons (mode 4). However, EU PTAs refer to mode 3 as to “establishment” and often use the expression “cross-border supply” to cover both mode 1 and mode 2³².

In standard EU PTAs, services chapters apply broadly to measures affecting the cross-border supply of services, affecting the establishment of service suppliers, or concerning the entry and temporary stay of natural persons for the supply of services. A financial service supplier is defined as “any natural person or juridical person of a Party that seeks to provide or provides financial services”. This broad definition implies that, in PTAs including investment protection, some financial services suppliers can also qualify as protected investors.

CETA is more elaborated in this respect. Article 13.1 (inspired by NAFTA articles 1401 and 1403) defines a “financial institution” as a “financial services supplier regulated or supervised as a financial institution under the law of the Party in whose territory it is located”, which implies establishment. Consequently, CETA chapter 13 applies to measures adopted or maintained by a party relating to a) financial institutions, b) investors and investments in financial institutions, or c) the cross-border supply of financial services³³. The definition of “financial institution” excludes financial information providers such as Reuters³⁴: they are not covered by mode 3 commitments of the financial services chapters, but they can qualify as investors if they meet the relevant definition of the investment chapter of the agreement³⁵. The CETA investment chapter also applies to measures relating to investors and investments in financial service suppliers that are not financial institutions, and to measures relating investors or investments in financial institutions, but unrelated to the supply of financial services³⁶.

²⁸ CETA article 10.6(3).

²⁹ See sections IV and V.

³⁰ The French version of legal texts refers to both exceptions and carve-outs as “*exceptions*”. Even if both imply that a measure is lawful under the PTA, exceptions and carve-outs do not operate in the same manner. A measure is excluded from the scope of the PTA by a carve-out. By contrast, an exception makes lawful a measure which falls within the scope of the PTA and which would be otherwise incompatible with it.

³¹ E.g., EUKFTA article 7.37.

³² E.g., CETA article 13.1.

³³ CETA article 13.2(1).

³⁴ Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 13.

³⁵ CETA article 8.1.

³⁶ CETA article 13.1(2).

B. Exclusion of services supplied in the exercise of governmental authority

The supply of financial services is only liberalised by PTAs insofar it is a private activity. The PTAs' general definition of "services" excludes "services supplied in the exercise of governmental authority"³⁷. Like under paragraph 1 of the GATS Annex, this category includes monetary or exchange rate policies, statutory systems of social security, and activities conducted by a public entity for the account of (or with financial resources of) the government. This is reflected by definitions of financial services and financial service suppliers³⁸, by specific exceptions³⁹ and by carve-outs⁴⁰ covering public entities and measures. These protections exclude entities principally engaged in supplying financial services on commercial terms, or in competition with public entities or private institutions. Additionally, some schedules of commitments establish specific protection for certain public service suppliers. For example, the EUKFTA lists specific operators that should not be considered as financial service suppliers, such as the Export-Import Bank of Korea⁴¹.

C. Exceptions and carve-outs

Lists of general exceptions are generally long and diverse. All EU PTAs incorporate general exceptions inspired by GATS article XIV, listed either in the service chapter⁴² or among the general provisions of the agreement's final chapters⁴³. The GATS list of general exceptions is slightly modified to delete legitimate policy objectives⁴⁴ or to add them⁴⁵, so that PTAs lists are not always identical⁴⁶. Final chapters of PTAs also include other exceptions based on balance of payments and external financial difficulties⁴⁷, national security⁴⁸, and taxation⁴⁹.

An exception for the protection of confidential information, whose wording is inspired by GATS article III bis⁵⁰, is included either as a general provision on the regulatory framework within the service chapter⁵¹ or as a specific exception for financial services⁵². In standard EU PTAs, the general provisions of services chapters also include carve-outs or exceptions in respect of subsidies⁵³, government procurement, measures affecting natural persons seeking access to the employment market, measures regarding citizenship, residence, employment on a permanent basis, and the entry of natural persons into a party's territory. These provisions also recall that each party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives "consistent with"

³⁷ E.g., EUSFTA article 8.1(2).

³⁸ E.g., EUKFTA article 7.37; CETA article 13.1.

³⁹ E.g., EUKFTA article 7.44; CETA article 13.17.

⁴⁰ CETA article 13.2(5).

⁴¹ EUKFTA, headnote 6 of specific commitments on financial services.

⁴² E.g., EUKFTA article 7.50.

⁴³ CETA article 28.3(2).

⁴⁴ Unlike Article XIV(e) GATS, EU PTAs lists never include avoidance of double taxation

⁴⁵ All EU PTAs include the conservation of exhaustible natural resources

⁴⁶ EUKFTA, EUCAAA, and EUSFTA exception lists are identical. For a comparison, Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 35.

⁴⁷ E.g., EUKFTA article 15.8; CETA article 28.5.

⁴⁸ E.g., EUKFTA article 15.9; CETA article 28.6.

⁴⁹ E.g., EUKFTA article 15.7; CETA article 28.7.

These provisions partially overlap with the general exception for the equitable or effective imposition or collection of direct taxes contained in most lists of general exceptions (except EUCPTA and CETA).

⁵⁰ The GATS Annex (para 2) also includes a differently worded exception for confidential information.

⁵¹ E.g., EUKFTA article 7.22(2).

⁵² CETA article 13.17(2).

⁵³ This provision applies to bail-outs (Laura Puccio, *TTIP and regulation of financial markets. Regulatory autonomy versus fragmentation* (European Parliamentary Research Service, 2015) <www.europarl.eu>, at 13).

the chapter⁵⁴. Sometimes, the service chapter makes it clear that it does not require the privatisation of any public undertaking⁵⁵.

D. Prudential carve-out

The most important specific exception to obligations in the field of financial services is the so-called “prudential carve-out”. This is a key provision, especially when financial regulatory issues are important for the overall balance of the PTA, like in TTIP negotiations⁵⁶. Like the GATS Annex, all EU PTAs provide that the parties are not prevented from adopting or maintaining measures “for prudential reasons”⁵⁷. PTAs clarify this expression with some variations. Like in the GATS Annex, prudential reasons always include “the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier” and the protection of “the integrity and stability of the financial system”. Sometimes, PTAs add the maintenance of the safety, soundness, integrity, or financial responsibility of a financial institution or of a financial service supplier⁵⁸. The usual but ambiguous requirement that prudential measures “shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement” is also clarified⁵⁹: building on unsuccessful GATS negotiations⁶⁰, some PTAs feature a necessity test⁶¹. Moreover, under the EUKFTA, measures applied to financial service suppliers established in a party’s territory that are not regulated and supervised by the financial supervisory authority of that party are deemed to be prudential measures⁶². Under CETA, the non-discriminatory prohibition of particular financial services or activities for prudential reasons is explicitly allowed. However, “such a prohibition shall not apply to all financial services or to a complete financial services sub-sector, such as banking”⁶³. Overall, PTAs prudential carve-outs seek to improve legal certainty but leave a broad margin to domestic regulators both on macro- and micro-prudential issues. This shows that a high level of financial stability protection is an important goal of the financial services regime in EU PTAs. CETA has gone particularly far in this direction and could inspire further evolution. An understanding on the application of the prudential carve-out notably recalls each party’s right to determine its own appropriate level of prudential regulation and calls for the highest degree possible of deference to domestic prudential regulation⁶⁴. According to this understanding, a measure is covered by the prudential carve-out if it has a prudential objective, is not manifestly disproportionate and is not a disguised restriction on foreign investment or an arbitrary or unjustifiable discrimination between investors in like situations⁶⁵. In addition, CETA introduces a filter mechanism for ISDS to avoid frivolous claims concerning prudential regulations⁶⁶.

⁵⁴ EU-CARIFORUM EPA article 60.4; EUKFTA article 7.1.4; EUVFTA article 8.I.1(2).

⁵⁵ EU-CARIFORUM EPA article 60.2.

⁵⁶ Inu Barbee and Simon Lester, ‘Financial Services in TTIP: Making the Prudential Exception Work’ (2014) *Georgetown Journal of International Law* 45(4) 953-70.

⁵⁷ E.g., CETA article 13.16.

⁵⁸ CETA article 13.16(1)(b); EUKFTA article 7.38, footnote 40.

⁵⁹ This sentence is maintained in most EU PTAs, but deleted in CETA.

⁶⁰ Panagiotis Delimatsis and Pierre Sauvé, ‘Financial Services Trade after the Crisis: Policy and Legal Conjectures’ 2010 *Journal of International Economic Law* 13(3) 851-853.

⁶¹ Prudential measures “shall not be more burdensome than necessary to achieve their aim” (EUKFTA article 7.38(2); EUCPTA article 154(2)). EUSFTA article 8.50(2) adds that prudential measures “shall not constitute a means of arbitrary or unjustifiable discrimination against financial service suppliers of the other Party”.

⁶² EUKFTA article 7.38, footnote 39.

⁶³ CETA article 13.16(3). Given this broad definition of subsector, the prohibition of specific practices, such as short-selling, seems to be lawful (Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 18).

⁶⁴ CETA Annex 13-B, in particular para 8(c).

⁶⁵ *Id.*, para 8(d).

⁶⁶ See section V.B.

III. Market access and non-discrimination

PTAs contain general obligations and specific commitments (A) on market access (B) and non-discrimination (C). Some EU PTAs also contain provisions to lock-in existing or future levels of liberalisation (D). Beyond the drafting of PTAs provisions, the liberalisation of financial services largely depends on specific commitments contained in annexes (E).

A. Scheduling technique

General obligations, which apply to all measures covered by the agreement, are usually distinguished from specific commitments contained in detailed charts annexed to the agreements, regarding each subsector of financial services for each mode of supply. Concerning general obligations, standard EU PTAs include two separate (generally similar) clauses which apply respectively to cross-border supply and establishment, while GATS and CETA clauses apply to all modes of supply. Concerning the scheduling of specific commitments for trade in services, two approaches are possible. Under the “positive list” approach, commitments are only made on sectors explicitly listed in the schedule; under the “negative list” approach, all sectors that are not listed in the schedules are, by default, open to foreign service suppliers under the same conditions as for domestic service suppliers. Under both approaches, the EU often adopts specific commitments (or, more commonly, specific reservations) regarding each (or some) Member State(s).

Schedules in EU standard PTAs adopt the “positive list” approach used for GATS commitments, but also include a column for exceptions or conditions (“reservations”). This technique has been referred to as “hybrid”, as it is based on a two-step commitment inspired both by the “positive list” approach and by the “negative list” approach⁶⁷. By contrast, CETA follows the NAFTA model and adopts a “negative list” approach, which is more favourable to wider liberalisation. Existing measures which do not conform with the principles of the agreement (“non-conforming measures”, including both provincial and federal measures for Canada) are grandfathered and listed in annexes: they remain lawful, but they can be easily identified and they are bound, i.e. they can only be aggravated by mutual consent⁶⁸.

B. Market access obligations

Through the market access obligation, PTA parties open their financial services markets to foreign service suppliers in subsectors where they have undertaken specific commitments. Inspired by GATS article XVI, these clauses do not imply the removal of all restriction to market access, but only of specifically identified kinds of measures, including at least the number of financial suppliers, and the value and number of operations or assets⁶⁹. This means that, in all subsectors where PTA parties have undertaken specific commitments, they may not set numerical quotas (i. e., a maximum number of foreign service suppliers, or a maximum total quantity of service output), monopolies or exclusive service suppliers. It is also prohibited to condition market access upon the fulfilment of economic criteria (economic needs test), such as market conditions in a certain subsector at a given moment. Concerning establishment, the scope of the market access obligation also extends to the level of foreign ownership and to the number of natural persons that can be employed⁷⁰. Thus, market access cannot be conditioned upon a minimum participation of domestic capital or upon a maximum number of employees.

⁶⁷ See references in Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 16.

⁶⁸ CETA article 13.10.

⁶⁹ E.g., EUKFTA article 7.5; EUSFTA, article 8.5; CETA article 13.6..

⁷⁰ E.g., EUKFTA, article 7.11; EUSFTA, article 8.10; CETA article 13.6.

Moreover, CETA makes it clear that “(e)ach Party shall permit a person located in its territory, and a national wherever they are located, to purchase a financial service from a cross-border financial service supplier of the other Party located in the territory of that other Party”⁷¹. However, “(t)his obligation does not require a Party to permit such suppliers to do business or solicit in its territory”. In other words, although cross-border market access is widely granted, it depends on domestic rules on business and soliciting, which confine unlicensed financial service providers to a passive marketing approach⁷².

For mode 3 trade, several PTAs also prohibit measures which restrict or require specific types of legal entity or joint ventures to perform an economic activity⁷³: this allows service supply through the vehicle of the supplier’s choice. Other PTAs prohibit to require specific types of commercial presence (such as subsidiary, branch, or representative office), but recognise the parties’ rights to determine, in a non-discriminatory manner, the legal form that investors must adopt⁷⁴.

C. Non-discrimination obligations

Non-discrimination obligations are mainly contained in national treatment clauses and most-favoured-nation (MFN) clauses. A national treatment clause can be found in all EU PTAs. Like GATS article XVII, it only applies in sectors in which specific commitments are undertaken, under the conditions set in schedules. In principle, each party shall accord to services and service suppliers of the other party treatment no less favourable than that it accords to its own like services and service suppliers⁷⁵. These provisions are similar to GATS article XVII, but some add clarifications⁷⁶ or exceptions⁷⁷.

Under GATS article II, MFN treatment is a general obligation: in all sectors, each party shall accord to service suppliers of the other party treatment no less favourable than the treatment it accords in like situations, to service suppliers of a third country. MFN clauses are favourable to suppliers of financial services, which can benefit of other commitments undertaken by the importing or host State. However, these clauses also have drawbacks. Their effects can be unpredictable for the parties to the PTA, because they imply that the treatment to be accorded to a certain service supplier depends on a potentially wide array of commitments set in other PTAs concluded by the importing or host State. Moreover, as a matter of trade policy, MFN clauses also risk to jeopardise the conclusion of new PTAs with other trade partners: even when bargained on a bilateral basis as specific concessions within complex negotiations, new more favourable commitments must also be accorded to service suppliers protected under older PTAs that include an MFN clause. In the long run, this can create free-riding and partly deprive PTAs of their rationale.

As a consequence, not all EU PTAs contain a MFN clause applicable to financial services, especially for establishment⁷⁸. Moreover, PTAs clauses are far less straightforward than GATS article II: they always include conditions and limitations. For example, the EU-CARIFORUM EPA MFN clauses only apply to new agreements signed by CARIFORUM States “with a major trading economy”, excluding agreements concluded by CARIFORUM States entailing significant approximation of

⁷¹ CETA article 13.7(6).

⁷² Patrick Leblond, ‘CETA and Financial Services. What to Expect?’ (CIGI paper 91, 2016) <www.cigionline.org>, at 4-5. However, broad mode 3 commitments make it easier to benefit from the advantages of establishment (see section III.E).

⁷³ EUKFTA article 7.11(1)(e); EUSFTA 8.10(2)(e); CETA article 13.6.1(b); EUVFTA article 8.II.2(2)(e). However, specific commitments sometimes include reservations for some subsectors (see section III.E).

⁷⁴ EU-CARIFORUM EPA article 67(2)(e); EUCPTA article 122(2)(f).

⁷⁵ E.g., EUKFTA articles 7.6 and 7.12.

⁷⁶ Some PTAs makes it clear that the agreement does not require to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers (e.g., EU-CARIFORUM EPA article 68(4); EUKFTA article 7.6(4)).

⁷⁷ EUVFTA article 8.II.3.3, concerning investments.

⁷⁸ For a summary, Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 45.

domestic legislations⁷⁹. These clauses aim at granting EU service suppliers a level-playing field with major global competitors, while allowing CARIFORUM States to further develop South-South economic integration. The EUKFTA MFN clauses only apply to agreements signed after the entry into force of the PTA, and include exemptions and exceptions⁸⁰. Most MFN clauses on establishment do not apply to investment dispute settlement procedures⁸¹. This is particularly important for CETA⁸² and for the EU-Vietnam PTA⁸³, which include ISDS: these PTAs clearly aim at avoiding the complex application of MFN clauses to jurisdictional issues of investment arbitration⁸⁴.

D. Clauses aimed at locking-in liberalisation

To lock-in existing levels of liberalisation, some PTAs include standstill clauses, which prohibit the subsequent reduction of the liberalisation level existing at the time the conclusion of the agreement. Under CETA, some obligations are not applicable to existing non-conforming measures, but these are listed in schedules of commitments (except for measures taken at the local level) and bound⁸⁵. The EU-CARIFORUM EPA contains an explicit obligation to maintain the conditions of market access and national treatment at the time of the signature of the PTA, only applicable to CARIFORUM States in favour of EU service suppliers⁸⁶. The EUSFTA standstill exempts Singapore's new non-conforming measures adopted in the banking sector on a most-favoured nation treatment basis, upon compensation⁸⁷.

Ratchet clauses are potentially useful tool to lock-in future levels of liberalisation: they prohibit to step back from unilateral liberalisation measures. However, unlike NAFTA-inspired PTAs and EU proposals for TiSA, EU PTAs do not contain ratchet clauses applicable to financial services.

Nonetheless, all EU PTAs contain a provision on new financial services, aiming at applying liberalisation obligations to new products as they appear. These provisions are particularly useful in PTAs with countries whose domestic regulatory authorities historically authorise to supply services only in respect of a specified list of products, like Korea⁸⁸. Although inspired by paragraph B.7 of the WTO Understanding, these provisions allow the requirement of authorisations. Their scope is limited to situations in which domestic service suppliers are permitted to supply to service in like circumstances⁸⁹. Sometimes, situations that require additional legislative action are excluded from their scope⁹⁰.

E. Specific commitments

⁷⁹ EU-CARIFORUM EPA articles 70 and 79.

⁸⁰ For example, for some regional economic integration agreements, for advantages granted to adjacent countries, for recognition of qualifications, licences or prudential measures, and for taxation (EUKFTA articles 7.8 and 7.14).

⁸¹ EUKFTA article 7.14, footnote 21.

⁸² CETA article 8.7(4). Article 13.4 incorporates the relatively broad MFN clause of the investment chapter in the financial services chapter (concerning the treatment of financial institutions, and of investors and investments in financial institutions).

⁸³ EUVFTA article 8.II.4(6). The EUSFTA does not contain MFN clauses for trade in services.

⁸⁴ For an overview, International Law Commission, 'Final report of the Study Group on the Most-Favoured-Nation clause' (29 May 2015) UN doc. A/CN.4/L.852 at 25-33.

⁸⁵ CETA article 13.10.

⁸⁶ EU-CARIFORUM EPA annex IV.F, 9.

⁸⁷ EUSFTA appendix 8-B-2, B.1.

⁸⁸ Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 32.

⁸⁹ E.g., CETA article 13.14. EUCAAA article 197 links this obligation to specific commitments.

⁹⁰ EUKFTA 7.42; EUSFTA 8.53; EUVFTA unnumbered article.

PTA negotiation strategies depend on existing commitments on trade in services within the WTO. EU PTAs go significantly beyond GATS commitments⁹¹, but only partially beyond other WTO commitments⁹². Improvements in market access and national treatment concentrate in mode 3, where the EU aims at confirming its openness to foreign investments and at securing broad rights of establishment for its financial services suppliers.

Mode 2 is not crucial in PTA negotiations because it is already largely unrestricted under WTO commitments. Regarding mode 4, when PTAs do not simply reaffirm GATS commitments, commitments are generally accessory to other commitments, especially in mode 3⁹³. Depending on PTAs, five or six categories of personnel are distinguished⁹⁴.

Mode 1 commitments on market access and national treatment are limited to some subsectors of financial services, which are essentially the same already covered under the WTO Understanding⁹⁵. Both the EU and its trade partners seem cautious about the implication of further liberalisation for consumer protection and prudential regulation⁹⁶. As a result, most direct insurance and banking services are not covered by mode 1 commitments. The EU has obtained slightly more extensive commitments by some of its partners (for example, Singapore and some CARIFORUM States on aspects of direct insurance)⁹⁷.

The main focus in EU PTAs is on Mode 3. In principle, EU commitments cover all subsectors, even if with several reservations, for example the requirement of at least a registered office in the EU to provide certain services, the requirement of permanent residence in the EU for some senior management, or the requirement to adopt specific legal forms⁹⁸. Reservations specific to each Member State are also common. EU commitments essentially correspond to wide commitments by its counterparts. This means that European financial services suppliers can provide an almost full range of financial services in foreign markets. Moreover, the EU has obtained some symbolically and economically noteworthy commitments. Korea has removed some competitive advantages accorded to certain public enterprises (such as Korea Post) over private suppliers. Singapore has increased caps on the number of branches and ATMs of EU banking services suppliers. Canada's cap on individual voting shares in some financial institutions is now listed as a non-conforming measure and thus bound. Moreover, EU investors can continue to control their investments in financial institutions in Canada in spite of the cap⁹⁹.

IV. Regulatory framework

The regulatory dimension of trade in financial services is particularly sensitive. TTIP negotiations and CETA show the EU's will to use PTAs to develop regulatory cooperation, especially with other industrialised countries (A). However, EU PTAs mainly tackle regulatory issues by focusing on the removal of behind-the-border barriers to trade, mainly on the basis of the GATS and the WTO Understanding. Apart from specific rules on financial services, this objective is also pursued through

⁹¹ The same conclusion can be reached for older non-EU (especially US) PTAs (Martin Roy, Juan Marchetti, and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?' (WTO Staff Working Paper ERSD-2006-07, 2006) < <https://www.wto.org>>, 33-35).

⁹² For the same conclusion concerning CETA, Patrick Leblond, *op. cit.* fn. 72, at 5.

⁹³ However, CETA contains a specific chapter on temporary entry and stay of natural persons for business purposes (chapter 10), whose commitments are not dependent on those of other chapters.

⁹⁴ For a summary, Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, 25-26.

⁹⁵ *Id.* at 27.

⁹⁶ Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 26.

⁹⁷ *Id.* at 27.

⁹⁸ *Id.* at 28.

⁹⁹ Annex III, Reservation IIIB-C-2. Under the "widely held" rule, no shareholder can own more than 20 percent of the outstanding voting shares or more than 30 percent of non-voting shares of a bank with more than CAD 12 billion in equity.

rules on the regulatory framework applicable to all services¹⁰⁰ or through other chapters of the PTA¹⁰¹. Relevant provisions are inevitably diverse, but they can be divided in two groups: some provisions focus on general issues that have an impact on the overall quality of domestic regulation in the financial sector (B), while other provisions deal with more specific issues (C).

A. Attempts to develop regulatory cooperation

Given the diversity of domestic regulations, it is not always easy to find the appropriate balance between trade liberalisation and high quality regulation, as well as between trade negotiators and financial regulators. Notwithstanding the prudential carve-out, liberalisation can be perceived as a threat to domestic regulation. The EU's quest for liberalisation is faced with resistance from different kinds of trade partners, ranging from ASEAN developing countries, particularly careful to financial regulation after the 1997 financial crisis¹⁰², to the US. Financial regulatory issues have been crucial in TTIP negotiations, also exacerbated by their global implications and by the relative bargaining power equality between the two parties¹⁰³. Under the Obama administration, the US expressed the fear that further financial services liberalisation may enhance regulatory arbitrage, cause a regulatory race to the bottom and dilute domestic regulatory reforms established after the financial crisis. On the other hand, the EU Commission points at transatlantic regulatory divergence, due especially to differences in domestic implementation of international standards¹⁰⁴ and to the extraterritorial reach of some US compliance requirements¹⁰⁵. Consequently, it aspires to a common regulatory framework to settle or limit transatlantic regulatory disputes in finance, and more broadly to enhance regulatory convergence through harmonisation and mutual recognition. In 2014, the Commission put forward four principles: timely adoption of international standards; mutual consultation before adopting new measures; joint examination of existing rules; assessment of possibilities for equivalence¹⁰⁶. However, the EU was unsuccessfully in significantly shifting negotiations towards financial regulation issues. Significantly, the regulatory cooperation framework considered in TTIP negotiations excluded financial services, even under EU proposals¹⁰⁷.

If applied, the Commission's ambitious principles can significantly complement liberalisation. CETA includes a chapter on regulatory cooperation based on similar principles¹⁰⁸. Financial regulation is not excluded from its scope, even if dialogue on the regulation of the financial services sector will mainly take place within the Financial Services Committee¹⁰⁹: practice will show how the parties use the potential of regulatory cooperation in this field. However, regulatory cooperation can only be extensively developed between countries with relatively homogeneous regulation, which makes it difficult to imagine similar provisions in all EU PTAs. For the time being, EU PTAs clearly

¹⁰⁰ E.g., EUKFTA article 7.22 and EUSFTA article 8.17 on transparency.

¹⁰¹ E.g., EUKFTA chapter 12 on transparency; CETA, chapter 12 on domestic regulation and chapter 27 on transparency.

¹⁰² Alfredo C. Robles, 'EU Trade in Financial Services with ASEAN, Policy Coherence for Development and Financial Crisis' (2014) *Journal of Common Market Studies* 52(6) 1324-1341.

¹⁰³ On this negotiation, Simon Johnson and Jeffrey Schott, 'Financial Services in the Transatlantic Trade and Investment Partnership' (PIIE policy brief 13-26, 2013) <<https://piie.com>>; Lucia Quaglia, 'The "Tug War" About the Inclusion of Financial Services in TTIP' (FEPS policy brief, 2016) <www.policy-network.net>; Laura Puccio, *op. cit.* fn. 53.

¹⁰⁴ See in particular Erik Jones and Huw Macartney 'TTIP and the 'Finance Exception': venue-shopping and the breakdown of financial regulatory coordination' (2016) *Journal of Banking Regulation* 17(1) 4-20.

¹⁰⁵ Laura Puccio, *op. cit.* fn. 53, at 14. See also Régis Bismuth, 'Pour une appréhension nuancée de l'extraterritorialité du droit américain' (2015) *AFDI* 785-807.

¹⁰⁶ European Commission, 'EU-US Transatlantic Trade and Investment Partnership (TTIP). Cooperation on financial services regulation', 27 January 2014 <<http://trade.ec.europa.eu>>, p. 3. These principles were confirmed in a leaked detailed proposal (European Commission, 'Regulatory Co-operation on Financial Regulation in TTIP. Text to be circulated to the US during TTIP negotiations on 10-14 March 2014' <<https://corporateurope.org>>).

¹⁰⁷ European Commission, 'Textual proposal on regulatory cooperation in TTIP', 10 February 2015 <<http://trade.ec.europa.eu>>, article x3.

¹⁰⁸ CETA chapter 21. Early consultation is encouraged without been made compulsory (article 21.4).

¹⁰⁹ CETA Annex 13-C.

concentrate on removing some behind-the-border barriers to trade through a more classic WTO approach.

B. Domestic regulation quality

The quality of domestic regulation is generally covered by two kinds of provisions based on GATS articles III and VI, dealing respectively with transparency and domestic regulatory requirements. Provisions on recognition, international standards, and self-regulatory organisations also contribute to improved regulation.

Transparency

Regulatory transparency rules applicable to financial regulation tend to ensure a predictable business environment, within the limits set by the protection of confidential information¹¹⁰. The core of these obligations is the same in all EU PTAs, even if their position in the PTA can vary: they can be specific to financial services, applicable to all services and investment, or set in horizontal chapters of the agreement. Some provisions specifically applicable to financial services only contain a general commitment “to promoting regulatory transparency in financial services”¹¹¹. Others are more detailed and set the obligation, “to the extent possible”, to “provide an interested person and the other Party, a reasonable opportunity to comment on proposed measures”¹¹² or obligations on the treatment of applications¹¹³. CETA provides the most complete set of transparency obligations specifically applicable to financial services. They include prior publication of measures of general application and aim at “reasonable, objective, and impartial” administration¹¹⁴.

Domestic regulatory requirements

Provisions on domestic regulatory requirement are based on GATS article VI¹¹⁵. These provisions are “GATS-minus”, as they do not recall that domestic requirements must not be “more burdensome than necessary to ensure the quality of the service”¹¹⁶. However, in most PTAs the “prudential carve-out” does include a necessity test (or similar)¹¹⁷, so that discrepancies with GATS are unlikely.

Recognition

Recognition is based on the acceptance of a measure as equivalent to corresponding measures of the recognising party. Even in more recent and advanced PTAs, relevant provisions do not go significantly beyond GATS article VII and paragraph 3 of the GATS Annex. Provisions on financial services, like general provisions on regulation, allow recognition of prudential measures but do not make it compulsory. PTAs simply create a framework for further recognition, whose forms can be varied, as it can be mutual or unilateral, achieved through harmonisation or otherwise, based upon an agreement or arrangement between the parties or accorded autonomously¹¹⁸. Some PTAs also have in view a plurilateralisation process: if recognition is unilaterally accorded to other States’ regulations, the recognising PTA party must provide the other party with adequate opportunity to

¹¹⁰ See section II.C.

¹¹¹ EUKFTA article 7.39. However, more detailed obligations are set by article 7.22.

¹¹² CETA article 13.11(2)(b). Language varies slightly in other PTAs (e.g. EU-CARIFORUM EPA article 105, EUKFTA article 12.3(2)(b)).

¹¹³ EUVFTA unnumbered article.

¹¹⁴ CETA article 13.11.

¹¹⁵ E.g., EUKFTA article 7.23. CETA does not contain a single provision of this kind, even if similar content can be found in other chapters of the agreement.

¹¹⁶ Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 31. Compare with GATS article VI:4 and VI:5.

¹¹⁷ See section II.D.

¹¹⁸ E.g., EUKFTA article 7.46. Several PTAs do not contain specific provisions on the recognition of prudential measures, but only other provisions on recognition, either general (e.g., EU-CARIFORUM EPA article 85) or regarding professional qualifications (e.g., EUSFTA article 8.16; EUVFTA article 8.V.II.1).

show that its regulations are also equivalent. Each PTA party shall also be provided adequate opportunity to accede to recognition agreements concluded by the other PTA party with other States, or to negotiate comparable bilateral agreements¹¹⁹.

International standards

Recognition of regulatory measures is facilitated when these are based on relevant international standards, which are expected to contribute to high-quality financial regulation. Compared to GATS, PTAs establish a more developed link with those standards, even if they fall short of incorporating them. Most PTAs contain a non-exhaustive list of relevant international standards¹²⁰, but each party simply “make(s) its best endeavours to the extent possible to ensure” their use¹²¹. CETA does not establish a list of relevant standards. However, the parties “shall cooperate in the development of international standards” and base their dialogue on financial regulation on “principles and prudential standards agreed at the multilateral level”¹²².

Self-regulatory organisations

Self-regulatory bodies, such as professional associations, stock exchanges, and clearing agencies, can play a crucial role in financial regulation. Consequently, PTAs aim at extending to those bodies some obligations applicable to the parties, when those bodies are provided privileges or advantages in supplying financial services, or when participation in those bodies is required to provide financial services on an equal basis to domestic financial service suppliers. Under these conditions, most PTAs require the parties to ensure that self-regulatory bodies respect the national treatment obligation¹²³, the national treatment and the MFN obligations¹²⁴ or all obligations specifically applicable to financial services¹²⁵.

C. Specific issues

Specific provisions deal with clearing and payment systems, data processing, performance requirements, the nationality and residence of senior management.

Clearing and payment systems

Like paragraph C.1 of the WTO Understanding, most PTAs extend the national treatment obligation to clearing and payment systems: financial institutions of one party must have access to such systems (excluding in any event lender of last resort facilities) on the same basis as the other party’s domestic institutions¹²⁶.

Data processing

EU PTAs require each party to permit foreign financial service suppliers established in its territory to “transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the ordinary course of business of such financial service

¹¹⁹ E.g., EUKFTA article 7.46(2); CETA article 13.5.

¹²⁰ Although most of the listed standards are specific to financial services, the list is often contained in general provisions on the regulatory framework of trade in services (e.g. EUKFTA article 7.24).

¹²¹ EUVFTA unnumbered article (prudential carve-out), para 4. Other PTAs adopt similar formulation, while EUKFTA article 7.24 adopts slightly more binding language (“shall, to the extent practicable, ensure”).

¹²² CETA annex 13-C.

¹²³ E.g., EUSFTA article 8.51 and EUCPTA article 153, like the WTO Understanding (para C.2). However, this clause is not in the EU-CARIFORUM EPA and in the EUCAAA.

¹²⁴ EUKFTA article 7.40; EUVFTA unnumbered article.

¹²⁵ CETA article 13.12.

¹²⁶ EUKFTA article 7.41; EUCPTA 153; CETA article 13.13; EUVFTA unnumbered article. However, this clause is not in the EU-CARIFORUM EPA and in the EUCAAA.

supplier”¹²⁷. This provision can be very important for financial institutions: the domestic requirement to create data processing centres in the host country can be a deterrent to establishment, especially for smaller enterprises¹²⁸. Data transfer is also a good example of possible tensions between trade liberalisation and other legitimate policy objectives with important fundamental rights implications, like privacy and consumer or data protection. This is why this provision includes the obligation (which under paragraph B.8 of the WTO Understanding is simply a power) for each party to adopt or maintain adequate safeguards for the protection of privacy, in particular with regard to the transfer of personal data¹²⁹. This can encourage some regulatory convergence. Consequently, this issue is a sensitive one in some PTA negotiations, like the one with Korea, which finally resulted in a two-year transitional period¹³⁰.

NAFTA-inspired provisions

Some PTAs include two NAFTA-inspired provisions: the obligation to negotiate disciplines on performance requirements¹³¹ and the prohibition of nationality or even residency requirements for senior management¹³².

V. Institutional provisions and dispute settlement

Some of the recent evolutions of institutional provisions (A) and dispute settlement procedures (B) are specifically relevant for trade in financial services.

A. Committees and specialised committees

Each EU PTA establishes a committee and a series of specialised committees for the implementation and the application of the agreement, which comprises members of both parties. Even if these bodies adopt their own rules of procedure, their functioning is based on the mutual agreement of the parties. Main committees (irrespective of their denomination: Trade Committee, Joint Committee, etc.) have the power to adopt interpretations of the agreement, make recommendations and adopt binding decisions. More generally, they provide a forum for discussion between the parties and with the civil society. This is particularly important in CETA, which includes a developed regulatory cooperation dimension¹³³. Committees and specialised committees are also fora for non-judicial dispute settlement and have important oversight powers in relation to judicial dispute settlement. The structure of these bodies generally follows the general architecture of the agreement. Thus, specific issues on financial services, for example within dialogue on financial services regulation, are generally dealt within the Committee on Trade in Services (whatever its denomination), except for CETA, which establishes a Financial Services Committee¹³⁴.

B. Dispute settlement

All EU PTA establish party-to-party dispute settlement mechanisms broadly inspired by the WTO system. Disputes can be settled by panels of three arbitrators, generally chosen by the parties. Under EUKFTA and CETA, arbitrators for financial services disputes must be selected from a list of 15

¹²⁷ E.g. EUKFTA article 7.43.

¹²⁸ Andrew Lang and Caitlin Conyers, *op. cit.* fn. 5, at 29 and 33.

¹²⁹ E.g., CETA article 13.15.

¹³⁰ EUKFTA article 7.43.

¹³¹ CETA article 13.9. An example is the achievement of a given level or percentage of domestic content.

¹³² EUKFTA article 7.18, which also applies to residency requirements; CETA article 13.8, which also applies to boards of directors members.

¹³³ See section IV.A.

¹³⁴ CETA article 13.18.

individuals (five nationals of each party and five other individuals, who shall act as chairperson to the arbitration panel) chosen for their expertise in financial services law or practice (EUKFTA) or for their “objectivity, reliability, and sound judgement” (CETA)¹³⁵. Cross-sectoral retaliation is excluded unless the measure under dispute affects both the financial services sector and another sector¹³⁶.

The EUSFTA, CETA and the EUVFTA contain ISDS mechanisms, although in different forms (relatively classic ICSID, UNCITRAL or other investment arbitration in the EUSFTA, an innovative Investment Court System including an Appeal Tribunal in CETA and the EUVFTA). This new feature of EU PTAs has important implications for financial service suppliers, all the more as recent EU PTAs tend to exclude direct effect of their provisions before domestic courts¹³⁷.

Under the EUSFTA, only party-to-party dispute settlement is available for the settlement of services chapter disputes. However, some financial service suppliers can qualify as investors under article 9.1 and use ISDS (under section B of chapter 9) for alleged breaches of the provisions of Section A (most notably, national treatment, fair and equitable treatment, and protection against unlawful expropriation). The same applies for the EUVFTA, even if ISDS mechanisms and even some standards of protection differ from EUSFTA. Under CETA article 13.21, ISDS applies to investors in the financial services sector, not only for disputes arising from the investment chapter, but also for the national treatment and MFN obligations of the financial services chapter. However, an elaborated filter mechanism (inspired by NAFTA article 1415) applies to disputes allegedly relating to prudential regulation¹³⁸. If the Financial Services Committee or the CETA Trade Committee decides that the contested measure falls within the prudential carve-out, the investor is deemed to have withdrawn its claim, so that proceedings are discontinued.

Regarding financial services liberalisation, EU PTAs only partially innovates in comparison to WTO law. The GATS, its Annex on financial services, and the Understanding on Commitments in Financial Services generally provide the template and the baseline for further developments. This holds true for the scheduling technique, still generally based on a positive list approach, for the content of commitments, especially for cross-border supply, and for most rules on the regulatory framework. However, EU PTAs have also occasionally drawn inspiration from NAFTA, especially (but not exclusively) in CETA. Most importantly, the EU has adapted the drafting of several general obligations and set clear priorities on some issues, such as commitments on commercial presence. Remarkably, the overall classic structure of financial services provisions features significant variations or original improvements. In particular, as an up-to-date and ambitious PTA, CETA provides elaborated solutions on important topics, such as the prudential carve-out, regulatory cooperation, institutional bodies, and dispute settlement. Although some of these provisions can only be replicated with relatively similar trading partners, they can be adapted to future PTAs. As shown by TTIP negotiations, major challenges lay ahead for financial services liberalisation, especially concerning the link with regulatory issues. EU PTAs negotiation and application provide a broad stock of experience which will certainly prove useful for evolutions in the coming decades.

¹³⁵ EUKFTA article 7.45; CETA 13.20.

¹³⁶ E.g., EUKFTA article 7.45(4); CETA article 13.20(5).

¹³⁷ Alike Semertzi, ‘The preclusion of direct effect in the recently concluded EU free trade agreements’ (2014) *Common Market Law Review* 51(4) 1125–1158.

¹³⁸ CETA article 13.21 and annex 13-B.