

TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

Update no. 4, July 2015

This Update joins others in a growing dossier aiming to keep the higher education sector informed of developments in EU trade negotiations.

It follows a Statement issued by EUA Board and Council at the end of January, which concluded that 'the EU should not make commitments in the categories of HE and AE' [higher and adult education] and that it 'should make absolutely clear to its negotiating partners that elected Member State governments reserve the right to determine the character of their HE and AE systems.'

All EUA documentation on TTIP and other trade negotiations is available at <http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/international-trade-agreements.aspx>

This **fourth Update** has been timed to report on the European Parliament's plenary vote on its recommendations to the Commission's negotiators. This was always going to be a significant political development. Both the procedure and the outcomes confirm that the fate of TTIP cannot be predicted. Commissioner Malmström has conceded that, however hard the EU and US push ahead, there will be no final deal in 2015.¹ EUA envisages a further Update in the autumn.

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¹ <http://www.vieuws.eu/eutradeinsights/ttip-will-not-be-ready-in-2015-trade-commissioner-admits/>

1 The political background to TTIP

1.1 The professed commitment of the EU and the US to TTIP remains as strong as ever.² The justifications are the same: to boost economic growth; to ease the access of SMEs to transatlantic trade; to put in place an agreement which, with other ongoing negotiations (the Trans-Pacific Partnership [TPP] and the Trade in Services Agreement [TiSA]), will determine the shape of future multilateral agreements in the WTO. Public opposition, particularly in Germany and in UK, shows no sign of weakening.

1.2 On the US side, President Obama has finally been granted the **trade promotion authority** (TPA) which he has long sought – this, in the face of opposition from his own party. The majority of Democrats oppose both TPP and TTIP, on the grounds that American jobs will be threatened. US Trade Representative Michael Froman attempted to reassure the domestic US audience:

‘Today, the U.S. Congress made clear that the United States intends to lead on trade, deliver more, good middle class jobs and unlock opportunity for American workers, farmers, ranchers and small businesses across the country. [...] the U.S. can speak with one voice as we move forward to final passage and with trade agreements such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP)’.³

European Commission

1.3 Despite its difficulties with TTIP and the delayed ratification of the Comprehensive Economic and Trade Agreement (CETA) with Canada, the EU is pushing ahead on other fronts. Commissioner Malmström hopes to accelerate the talks on the **EU-Japan** free trade agreement (FTA) and to conclude a swift update of the **EU-Mexico** agreement.⁴

1.4 She has worked hard to increase **transparency** in the TTIP negotiations (see section 9 below). Her success has not made TTIP any less controversial. The investor-state dispute mechanism (ISDS) remains a bone of contention. Public anxiety about the fate of public services has not been allayed.

1.5 In January DG Trade, in an unprecedented move, published the text of its **proposals** in eight areas of negotiation: competition, food safety, animal and plant health, customs issues, technical barriers to trade, SMEs, and government-to-government dispute settlement (GGDS, rather than ISDS). At the same time, it published new **position papers** (on engineering, vehicles, and sustainable development), which brought to 15 the total number of concessions to the public domain. The material is accompanied by a Reader’s Guide and various factsheets.⁵

1.5.1 The only mention of **education** comes in the Factsheet on Services,⁶ headed ‘Helping Europe’s services firms tap the US market’. The Commission restates its commitment to protecting ‘sensitive’ services such as public health and education, stating categorically that the ‘EU doesn’t take any commitments for publicly funded health, education or social services.’ The term ‘publicly funded’ presumably applies to all three sectors.

² See the joint statement made in the margins of the G20 summit in November 2014, at http://europa.eu/rapid/press-release_STATEMENT-14-1820_en.htm

³ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/june/statement-us-trade-representative-0>

⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1317>, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1305>

⁵ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231> and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

⁶ http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_152999.2%20Services.pdf

1.6 In February, following a leak, the Commission published texts on regulatory cooperation, which were subsequently updated in April, for the ninth round of negotiations. From the outset, the EU envisaged, not harmonisation, but a framework accommodating better communication between sectoral regulators, cooperation on impact assessments, elimination of redundant regulation, stakeholder consultation, and a joint watching brief for opportunities for closer collaboration.

1.6.1 In the services sector, the EU's aim is that TTIP should also create opportunity for individuals. That is why we want professionals to be able work freely on both sides of the Atlantic. The EU is proposing that TTIP establish ways for both sides to facilitate recognition for selected regulated professions.⁷ Bilateral discussions involving accountants and architects⁸ are now well under way.

1.6.2 Less clear is the issue of how 'sub-central' regulators will feature in the envisaged cooperation. By 'sub-central' is meant US state and EU Member State authorities, rather than the 'central' federal and EU institutions. Article 11 of the Commission's proposed text (published May 2015)⁹ reads as follows:

Article 11 – Information and Regulatory Exchanges on regulatory acts at non-central level

1. The Parties encourage regulatory exchanges on regulatory acts at non-central level in areas or sectors where there may be common interest.
2. Regulators and competent authorities of one Party will, upon request of another Party, provide information through its Focal Point on specific planned regulatory acts or planned changes to existing regulatory acts at non-central level, in order to allow identification of areas of common interest.
3. If one Party makes a request to engage in a regulatory exchange on specific planned or existing regulatory acts at non-central level, the requested Party will take steps to accommodate such a regulatory exchange. The regulators and competent authorities at non-central level concerned will determine their interest in entering into a regulatory exchange.
4. These exchanges will be led by the regulators and competent authorities responsible for the regulatory acts. The regulators and competent authorities at central level of both parties will facilitate the exchanges.
5. Paragraphs 1 to 4 shall be without prejudice to more detailed provisions on regulatory cooperation concerning regulatory acts at the non-central level in [specific or sectoral provisions¹⁰ – to be identified] of this Agreement.

1.6.3 In higher education in the EU, regulatory agencies and competent authorities are 'non-central', being national or regional; the competence of the EU institutions being – according to the Treaty – never more than complementary. As it stands, the proposed Article 11 suggests that, for example,

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http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.1.2%20TTIP%20and%20regulation%20overview.pdf, p.16

⁸ The Architects' Council of Europe (ACE) reported in February: 'In the margins of the TTIP negotiations, ACE is negotiating an MRA [mutual recognition agreement] with the US National Council of Architectural Registration Boards (NCARB), under the auspices of the European Commission and the US Trade Representative (USTR). On February 13 an ACE delegation met its NCARB and EC and USTR representatives to discuss the basic principles enshrined in the 2005 draft ACE-NCARB agreement and the key differences between the European and US systems (academic training, licensing examination, accreditation, requirement for traineeship, etc). These discussions will continue.' http://www.ace-cae.eu/uploads/tx_jidocumentsview/ACE_Info_February.pdf

⁹ http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf

¹⁰ The example given in footnote is the mutual recognition of professional qualifications.

the US authorities might wish to request a particular Member State to grant access to its HE market. In this case, the EU would act as honest broker and facilitator of dialogue.

1.6.4 The European HE sector needs to know far more about what Article 11 might mean in practice. Monique Goyens, director-general of the European Consumer Organisation (BEUC), speaking for a broad range of consumer interests, has observed that:

*'This Regulatory Cooperation proposal has very little to do with trade. It amounts in real life to a divorce of the fundamental principles of our legislative sovereignty – as in practice it allows for other jurisdictions to mingle among our decision making procedures. This might, in the context of the globalisation of our economies be a necessary step. But if so, its conditions should be discussed openly and democratically with all EU and national institutions and their stakeholders. It should not be left to this wide-reaching mandate of the Commission for a trade deal.'*¹¹

1.6.5 US negotiators were presented with the first draft of the Regulatory Cooperation proposal during the eighth round in February. DG Trade reported to the TTIP Advisory Group at that stage that 'further discussions will be needed within the EU with regards to scope and sub-central regulation, in particular for services sectors.'¹²

1.6.6 The April meeting of the Advisory Group¹³ went into greater detail:

- Would possible US involvement in central and sub-central regulatory practice in the EU introduce delay?

The Chair explained that the only potential change to normal processes on the EU side is that the US could provide extra input during the public stage of EU decision-making, but there is no obligation to delay or wait for this. In any case the US and many other interested parties already provide input on areas that matter to them. One member felt that there is potential for delay even before the Commission's intention to regulate is public, and another asked for more information about what exchanges of information already take place. The Chair took note. It was agreed that it would be useful to set out in writing what practical impact the EU proposal could have on the normal EU regulatory process.

- Who would decide whether the 'common interest' referred to in Article 11.2 actually exists?

The Chair explained that the intention of the EU's proposal was that regulators would need to decide on this and democratic oversight would be assured through existing procedures e.g. implementing or delegated acts in the EU system. Some members suggested that often cooperation would imply a political direction, and in these cases it would be important to be certain where the decision-making power lies and asked for the legal text of the regulatory cooperation chapter to spell out how this would be organised. The Chair took note and agreed that the line should be clear. [...] The Chair underlined that these provisions in TTIP would not affect the normal decision-making roles of the European Parliament and Member States in the regulatory process. If regulators decide they want to go so far as to develop similar regulatory acts, the only way these could be implemented is via normal domestic procedures. What's more, nothing in the cooperation process would prevent either the EU or US changing its regulation at some point in the future.

¹¹ <http://www.beuc.eu/blog/regulatory-cooperation-perhaps-boring-but-the-ttip-storm-on-the-horizon/>

¹² http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153133.pdf

¹³ See http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153332.pdf

1.6.7 Much remains to be resolved, if all stakeholders are to be satisfied. Given the absence of political consensus on how **implementing and delegated acts** operate in the new comitology, it would appear that clarity is a long way off.

1.7 In the face of continuing procedural uncertainty and hostile public opinion, the EU and US authorities decided to make a forthright on-the-record¹⁴ **declaration of principle**:

Joint Statement on Public Services, Brussels, 20 March 2015

Ambassador Froman and Commissioner Malmström discussed the important role public services play in the United States and the European Union.

They confirmed that U.S. and EU trade agreements do not prevent governments, at any level, from providing or supporting services in areas such as water, education, health, and social services.

Furthermore, no EU or U.S. trade agreement requires governments to privatise any service, or prevents governments from expanding the range of services they supply to the public.

Moreover, these agreements do not prevent governments from providing public services previously supplied by private service suppliers; contracting a public service to private providers does not mean that it becomes irreversibly part of the commercial sector.

Ambassador Froman and Commissioner Malmström also noted the important complementary role of the private sector in these areas. Private sector activities can improve the availability and diversity of services, to the benefit of people in the United States and the European Union. Defining the appropriate balance between public and private services is up to the discretion of each government.

Finally, Ambassador Froman and Commissioner Malmström also confirmed that EU and US trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the high quality of services and to protect important public interest objectives, such as the protection of health, safety, or the environment.

The United States and the European Union are following this same approach in TTIP and TiSA.

European Parliament

1.8 The EU-US joint declaration came half-way through the long series of deliberations in the European Parliament.¹⁵ Although no definitive TTIP text will exist until the negotiations are concluded, Parliament nevertheless wished to flex its muscle, setting down the red lines that it would

¹⁴ http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153264.pdf

¹⁵ An overview of Parliamentary researchers' work on TTIP is available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/544564/EXPO_BRI%282015%29544564_EN.pdf

refuse to cross. The chair of the International Trade Committee (INTA), German Socialist Bernd Lange, prepared a draft set of recommendations¹⁶ which was debated by 14 other committees.¹⁷

1.8.1 Parliament's Culture and Education committee (CULT) responded with an Opinion¹⁸ steered by the rapporteur, the German Green Helga Trüpel. It included a recommendation which took no position on market access by for-profit HE providers, but urged that the Commission

ensure with a general clause the right of EU Member States to adopt or maintain any measure with regard to the provision of all educational and cultural services which work on a non-profit-basis and/or receive public funding to any degree or state support in any form, and to ensure that privately funded foreign providers meet the same quality and accreditation requirements as domestic providers

1.8.2 In the event, INTA came out broadly in favour of TTIP. It applauded the priority given to SMEs, the opening up of procurement markets, and the commitment to regulatory coherence. It urged that more work be done on personal data protection, financial services, labour and environment, and stakeholder consultation. On the protection of public services, it had nothing to say. It voted on May 28,¹⁹ whereupon the text passed to the plenary session on June 10.

1.8.3 At this point, the established procedure broke down. First, Parliament president Martin Schulz ruled that the plenary vote be postponed, ostensibly because 116 amendments had to be referred back to INTA for further consideration,²⁰ but in fact because the resolution was in danger of being defeated. The sticking point was ISDS. Although INTA had left the door open for its inclusion in TTIP, the centre-left S&D group – in line with the Greens – opted for exclusion. In the face of a threat from the centre-right EPP group to vote down the whole resolution, a compromise was reached but in the end proved too fragile to hold.²¹

1.8.4 In the wake of Schulz's decision, it was not obvious whether the TTIP debate would go ahead in plenary session, albeit without the vote. This issue was itself put to the vote, with Parliament deciding by a very thin margin to postpone the debate. Finally, on July 8, the vote was taken. It supported TTIP in principle and gave its backing to continued negotiations. It voted down a proposal to excise ISDS altogether and instead approved an amendment, in line with Commissioner Malmström's wishes, to move to a radically new model of dispute settlement (see para.4.4 below).²²

2 Market access by higher and adult education providers

2.1 Services were not discussed during the ninth round of negotiations in New York. The Commission's clearest statement on this topic is posted on its website, updated in January:²³

¹⁶ <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-549.135&format=PDF&language=EN&secondRef=01>

¹⁷ The full list, together with rapporteurs, is set out in the minutes of the May meeting of INTA, at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-557.272&format=PDF&language=EN&secondRef=01>

¹⁸ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-549.127%2b02%2bDOC%2bPDF%2bV0%2f%2fEN>

¹⁹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0227+0+DOC+PDF+V0//EN>

²⁰ At its meeting on June 29, INTA resolved to send all the amendments back to the plenary.

²¹ See VoteWatch Europe for an analysis, at <http://www.votewatch.eu/blog/ep-majority-still-favourable-to-ttip-reformed-isds-but-negotiations-will-take-longer-than-expected/>

²² For political group and Member State voting patterns, see

²³ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>

Text in EU trade agreements:

The EU reserves the right to adopt or maintain any measure with regard to:

- publicly funded education services
- the provision of all health and social services which receive public funding or state support in any form, and are therefore not considered to be privately funded.
- services relating to the collection, purification, distribution and management of water to all kinds of users.

Meaning in plain English:

EU governments can take measures with regards to certain services in whatever way they choose. This can include the way they:

- provide public funding or state support
- decide who can operate or invest in their market.

Governments can do so, even if it means they treat EU suppliers or investors differently from ones based in the country signing the trade deal with the EU. These services comprise:

- publicly-funded education:
 - primary and secondary schools
 - colleges and universities
- publicly-funded healthcare and social services:
 - hospitals
 - ambulances
 - residential health facilities
 - welfare services for: children, the elderly, other vulnerable groups
 - benefits for disabled people
- the supply of water.

The combined effect of this exposition and article 11 of the regulatory cooperation text is to shift the burden of the protection of publicly-funded services from the EU institutions to the 'non-central' Member State authorities.

2.2 However, uncertainty persists regarding the extent to which HE services fall within the scope of the Services Directive. As indicated above (para.1.6.3), the EU's legal competence in HE is complementary. In contrast, its legal competence in the internal market is exclusive. Once HE is regarded as a service – as is the case in trade negotiations – its status can change. In general, this is a grey area in which legal and political considerations fluctuate in importance according to circumstance. When, for example, a Member State government is deemed to have curtailed the freedom of establishment, the EU intervenes. On the whole, however, it lets Member States manage their HE systems as they think fit. Services of general economic interest lie in a similarly grey area. Some Member States protect them jealously; others, more prone to liberalisation, tend to disregard them. INTA coordinators, meeting in December, agreed to 'request an opinion from the Legal Service on the inclusion of provisions on services of general economic interest, other public services or

services supplied in the exercise of governmental authority in trade and investment agreements.²⁴ The outcomes have not been published.

2.3 In the area of public procurement, 'the EU continues to be concerned about "Buy American" restrictions [...] In particular, it will be crucial to secure better EU access to sub-federal procurement in the US.²⁵ The EU's posture is aggressive and implies reciprocity, which is why its proposals on regulatory cooperation (see paras.1.6 *et seq* above) have generated such anxiety.

2.4 In the light of continuing uncertainties – and given that the Commission is bound, by virtue of its mandate from Council, to negotiate and cannot, therefore, exclude any sector unilaterally – EUA has called for no commitments to be made in the area of HE.²⁶ EUA has repeatedly asserted that the public/private distinction is legally unsafe and that the definitions in GATS (and all other trade deals) must be re-aligned with reality on the basis of full stakeholder consultation.

2.5 In contrast, the European Students' Union (ESU) has called for exclusion, backed by a statement of willingness to take 'action at all levels'.²⁷ The European Civil Society Platform of Lifelong Learning (EUCIS-LLL) has echoed the demand for exclusion.²⁸

3 Copyright, data protection, e-commerce, intellectual property, etc

3.1 Earlier Updates have reported on EU reservations regarding the 'safe harbor' regime and on the ruling by the European Court of Justice (CJEU) that search engines must respect 'the right to be forgotten'. DG Competition, under Margrethe Vestager, is currently investigating Amazon, Apple, Google, Sky and others for various practices which demonstrate how far technology has outstripped legislation. The Commissioner has also ordered an inquiry into e-commerce, with a preliminary report anticipated in mid-2016.

3.2 Copyright, data protection, e-commerce, intellectual property – all complex fields in themselves – are collectively addressed in the EU's push to complete the digital single market (DSM).²⁹ So, too, are consumer protection, cybersecurity, data flows, digital infrastructure, parcel delivery services, research and innovation, and telecoms.

3.3 The Juncker Commission gives DSM the highest priority. It sees it as a powerful driver of growth and employment, as long as particular difficulties can be overcome: technical inter-operability, differential demographic access to digital services, restrictive practices such as geo-blocking, differential VAT regimes, etc. The DSM strategy is built around three pillars: (1) better access for consumers and businesses to digital goods and services across Europe; (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish; (3) maximising the growth potential of the digital economy. Responsibility for carrying it forward rests with DG CNECT, DG GROW and DG JUST. In Parliament, the lead committee has yet to be decided.

²⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-544.366&format=PDF&language=EN&secondRef=02>

²⁵ http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153259.pdf

²⁶ <http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/international-trade-agreements.aspx>

²⁷ <http://www.esu-online.org/news/article/6001/European-students-adopt-a-firm-position-on-TTIP/>

²⁸ http://www.eucis-lll.eu/eucis-lll/wp-content/uploads/2015/02/EUCIS-LLL_Position_Paper_TTIP.pdf

²⁹ Communication, staff working document and roadmap are available at <http://ec.europa.eu/priorities/digital-single-market/>

3.4 Of particular relevance to HE researchers is the focus on text- and data-mining for non-commercial purposes. The DSM Communication promises a legislative proposal, later this year, on 'greater legal certainty to enable researchers and educational institutions to make wider use of copyright-protected material, including across borders'. Since the enactment of Directive 2001/29/EC, the copyright landscape has been very fragmented, defying all attempts to harmonise it. Under current rules, universities are not allowed to use data-mining techniques in research.

3.4.1 MEP Julia Reda (Greens, Germany) is the JURI rapporteur responsible for reviewing the 2001 Directive. Her report is scheduled to reach plenary in July. How far will it reflect HE interests? As of February, fewer than 5% of the lobby requests she received³⁰ came from what she categorises as academic bodies. Only one, the University of Strasbourg's IPR studies centre (CEIPI), belongs to the HE sector.

3.4.2 At the same time, the Commission is undertaking its own research. DG EAC has commissioned from the Vilnius-based Public Policy and Management Institute (PPMI) a study of 'the impact of the European copyright framework on digitally-supported education and training practices'. It is due to report in July. At the time of writing, the survey of learners and educators is still open at http://surveys.ppmi.lt/s/learners_educators/

3.5 Inevitably, digital upskilling is a key feature of DSM:

Demand for digitally skilled employees is growing by around 4% a year. Shortages of ICT professionals in the EU could reach 825,000 unfilled vacancies by 2020 if no decisive action is taken. The EU has seen improvements in the basic digital skills of its citizens (increasing from 55% to 59% of the population), but still has a long way to go. Digital skill levels need also to be raised among employees in all economic sectors and among job seekers to improve their employability. *Change is needed in the way education and training systems adapt to the digital revolution.* [EUA emphasis] [...]

The responsibility for curricula lies with the Member States which need urgently to address the lack of essential digital skills. The Commission will support their efforts and will play its role in enhancing the recognition of digital skills and qualifications and increasing the level of ICT professionalism in Europe.³¹

This policy push is likely to require a sharper orientation of existing instruments, including the structural funds, as well as a coherent division of labour between DG EAC and DG EMPL. The roadmap contains no specific legislative proposals for 2015 or 2016.

3.6 The Staff Working Document provides more detail on digital illiteracy rates, skills mismatches, and the profile of ICT in primary and secondary education. It also notes that Europe lags behind in the development of MOOCs and that the graduation rate in ICT subjects has stagnated. It points to the opportunity to deploy more effectively the recognition of prior non-formal learning, given the extent to which such ICT skills as exist are acquired outside the formal educational process.

3.7 The appearance of the DSM strategy raises the question of how it might affect TTIP – and/or, depending on the speed of development of each – how the TTIP negotiations might impinge on the DSM. DSM, after all, is presented by the Commission as a 'living document', designed to evolve as perspectives change. One report suggests that the EU will not discuss data flows in TTIP until its own

³⁰ See her blog at <https://juliareda.eu/2015/01/report-eu-copyright-rules-maladapted-to-the-web/>

³¹ COM(2015)192, Communication, A Digital Single Market for Europe, p.16, at <http://ec.europa.eu/priorities/digital-single-market/>

data protection regulation is agreed.³² Still, there is no concerted public answer to the question and it is not clear when, or whether, the negotiators will decide to include a separate digital economy chapter. More will become apparent when the Commission publishes a 'new Trade and Investment Strategy in autumn 2015 which will address key issues for the digital trade agenda'.

3.8 As far as IPR is concerned, the EU's principal preoccupation is with geographical indications on foods and drinks. The ninth round of TTIP negotiations considered two proposals³³ tabled by the Commission: a list of international Treaties to which the two sides would adhere; measures to combat trade in counterfeit goods by ensuring appropriate enforcement at the borders.

4 Investor-state dispute settlement (ISDS)

4.1 ISDS remains by far the most controversial element of TTIP. It gives foreign companies the right to sue national and regional governments for compensation, whenever their access to markets is 'unfairly' impeded by local legislation and whenever their 'legitimate' expectations – as inward foreign investors – are frustrated. Previous Updates have rehearsed the arguments for and against.

4.2 As indicated above (para.1.8 *et seq*), positions in the European Parliament have been largely negative. In the run-up to the INTA resolution, six of the fourteen committees voted against ISDS, seven refrained from comment, while one (AGRI, Agriculture and Rural Development) proposed the reform of ISDS. This is precisely the line that the Commission has chosen to follow. In a concerted attempt to defuse the situation, it now advocates that the current model of ISDS be scrapped. According to Commissioner Malmström, it is 'not fit for purpose'.³⁴

4.3 In May, the Commissioner published a 'concept paper'.³⁵ It begins by listing the breakthroughs enshrined in the Comprehensive Economic and Trade Agreement (CETA) with Canada:

- the right to regulate in areas of public policy is protected
- key concepts, previously open to interpretation, have been tightly defined
- corporates will not be allowed to shop around for the most favourable jurisdiction
- all hearings and documentation are to be public
- a code of conduct guarantees the impartiality of arbitrators
- the principle of 'loser pays' is introduced, as is an appeals mechanism
- parallel proceedings in national courts (risking conflicting judgements and double jeopardy) is outlawed

The paper then proposes further measures in four areas: 'i) the protection of the right to regulate; ii) the establishment and functioning of arbitral tribunals; iii) the review of ISDS decisions through an appellate mechanism; and iv) the relationship between domestic judicial systems and ISDS.' The measures are intended not only to raise the quality and reliability of ISDS in bilateral agreements, but also to move towards the 'establishment of an international investment court and appellate mechanism with tenured judges'.

³² http://www.euractiv.com/sections/trade-society/brussels-makes-overture-data-flow-agreement-ttip-313080?utm_source=EurActiv+Newsletter&utm_campaign=dd238fc6a0-newsletter_weekly_update&utm_medium=email&utm_term=0_bab5f0ea4e-dd238fc6a0-245356445

³³ See http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153437.pdf

³⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1303>

³⁵ http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

4.4 The paper aims both to move the TTIP argument on and to secure the survival of the CETA, which Parliament has yet to ratify. In its vote on TTIP on July 8, the **EP plenary** approved amendment 117, bringing its position into line with that of the Commission:

(xv) to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and to replace the ISDS-system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives;

5 Transparency in the TTIP negotiations

5.1 Previous Updates have reported on Commissioner Malmström's efforts to bring more EU documentation into the public domain – including the TiSA negotiating mandate (see the next section) – despite a marked reluctance on the US side. European Ombudsman Emily O'Reilly held a public consultation which applied pressure in the same direction.³⁶

5.2 In Parliament, the INTA chair reported that 'all Members of the Parliament are entitled to have access to all "limited" and "EU restricted" negotiating documents (the latter in the Parliament's or Commission's reading room). The necessary technical measures are being put in place.'³⁷

5.3 Stakeholder bodies remain unhappy. EurActiv reported in February that the Commission would face a legal challenge, on the grounds that its conduct infringed the Aarhus Convention, which gives the public the right to access environmental information.³⁸

6 The Trade in Services Agreement (TiSA)

6.1 Update no.3 set out the background. This section reviews significant developments since December 2014.

6.2 During the 11th round of talks in February Uruguay joined the group of 23 participating countries.

6.3 At the request of Commissioner Malmström, the Latvian presidency agreed in March that the Council mandate be published. The mandate is consistent with the Commission's declarations on TTIP, to the extent that it provides for the TiSA to 'confirm the right of the EU and its Member States to regulate and to introduce new regulations on the supply of services within their territories in order

³⁶ See her report at <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58643/html.bookmark>

³⁷ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-546.686%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>

³⁸ http://www.euractiv.com/sections/trade-society/commission-faces-maladministration-probe-over-ttip-secrecy-311749?utm_source=EurActiv+Newsletter&utm_campaign=5f9807b7f2-newsletter_eu_priorities_2020&utm_medium=email&utm_term=0_bab5f0ea4e-5f9807b7f2-245356445

to meet public policy objectives.³⁹ At the same time, even as it adopts as its basis the principles of GATS, it includes elements of 'standstill' and 'ratchet' – mechanisms which have alarmed public sector stakeholders because of the perceived irreversibility of privatisations.

6.4 Parliament is to be kept informed of TiSA as it is of TTIP and will formulate its view of the negotiations as they progress. The rapporteur, Viviane Reding, is quoted as follows:

"TiSA is a chance to make Europe both more competitive and protective," Reding said, stressing that the EU intends to break new grounds in both market access commitments and international rules, while defending its standards and interest. This is why the agreement excludes sensitive areas like intellectual property rights and ISDS. "We want to avoid an ACTA *bis* and TTIP *bis*," she explained. Audio-visual sector and public services like water, health and education are also excluded. "These are not for sale," she insisted.⁴⁰

6.5 Like TTIP, TiSA is vulnerable to leaks. In February, the Associated Whistleblowing Press released a classified proposal tabled by Turkey. It recommended liberalising healthcare services via the portability of health insurance. Along with the text was posted a critical analysis by Jane Kelsey of the University of Auckland.⁴¹ The leak drew a vehement and rapid response from the Commission⁴²:

The EU has never made commitments regarding publicly-funded health services or insurance portability in any of its FTAs and does not intend to do so in the future, be it in TiSA, TTIP or any other trade agreement. The European Commission would like to recall that in its trade agreements, the EU always underlines its commitment to protecting public services at all levels of government, including the local level. Any decision to deregulate, privatise or bring to the public sphere such services is entirely up to national governments and local authorities. The EU's trade agreements will not change that; TiSA will not change that. Nor will TiSA require EU governments or public health services to put anything out to private contract.

Quote by EU Trade Commissioner Malmström:

"Recently there have been reports on an alleged leaked document from Turkey on health care services within the TiSA negotiations. I want to stress in unequivocal terms that under no circumstances, I would ever propose a trade agreement that contained provisions on portability of health insurance. I do not consider this to be a trade issue and the Commission will not compromise the high level of quality of our public health services in a trade agreement."

³⁹ <http://data.consilium.europa.eu/doc/document/ST-6891-2013-ADD-1-DCL-1/en/pdf>

⁴⁰ http://www.euractiv.com/sections/trade-society/european-parliament-gearing-tisa-311342?utm_source=EurActiv+Newsletter&utm_campaign=b810beb371-newsletter_weekly_update&utm_medium=email&utm_term=0_bab5f0ea4e-b810beb371-245356445

⁴¹ Both documents are available at <https://data.awp.is/international/2015/02/04/22.html>

⁴² <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1254>

7 Future negotiating rounds

7.1 The tenth round of TTIP and the twelfth round of EU-Japan talks are due in Brussels in July.

7.2 The twelfth round of TiSA talks is expected to take place in July, in Geneva, chaired by Australia. The focus will be on stocktaking. The Australian government's summary of all preceding rounds is available on its website at <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/Pages/trade-in-services-agreement.aspx>

This Update is posted at

<http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/international-trade-agreements.aspx>

Corrections and comments are very welcome – howard.davies@eua.be